جهاز حماية المنافسة
EGYPTIAN COMPETITION AUTHORITY

Share Without Breaching: A Due Diligence Compliance Kit under the Egyptian Competition Law



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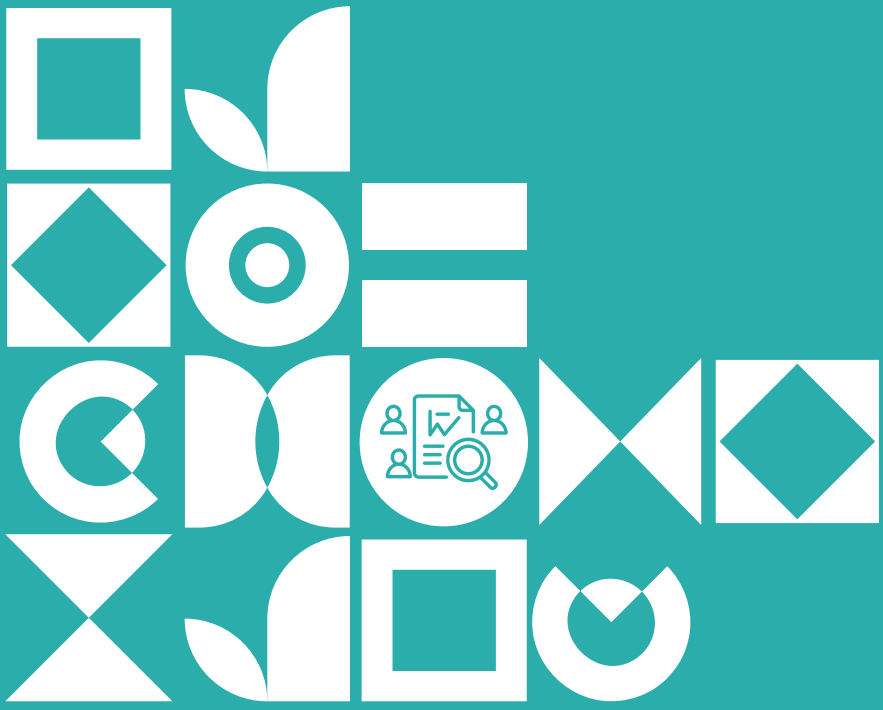

Introduction

Law No. 3 of 2005 on the Protection of Competition and the Prohibition of Monopolistic Practices (hereinafter referred to as the "Egyptian Competition Law" or "ECL") and its Executive Regulations (hereinafter referred to as the "Executive Regulations" or "ER") aim to promote competition at all stages of the supply and sale of products of all kinds.

Competitors that are parties to a prospective economic concentration may need to exchange information during the due diligence phase, before the concentration is implemented. Where that information is competitively sensitive, the exchange may limit, restrict or harm competition, and may amount to a horizontal agreement in breach of Article 6 of ECL.

Article 6 of ECL prohibits horizontal agreements that restrict competition. It provides:
"Agreements or contracts between competitors in any relevant market shall be prohibited if they are intended to result in any of the following:

a. *Increasing, decreasing or fixing prices of products subject matter of dealings.*
b. *Dividing markets or allocating them on geographic area, distribution channels, type of customers, type of products, market shares, seasons or time periods.*
c. *Coordinating to participate or refrain from participating in tenders, auctions, negotiations and other procurement processes.*
d. *Restricting the process of manufacturing, production, distribution or marketing for products, including restricting the type, size, or availability of the product.*

Each person is expected to independently determine its pricing, marketing, distribution, sales, purchasing and other policies without being influenced by, or coordinating with, others. This is consistent with the principles of a free-market economy, under which competition should rest solely on supply and demand, and should not be restricted through agreements, collusions and any form of cooperation between competitors that would have the effect of restricting competition, including the exchange of sensitive information.

The direct or indirect exchange of sensitive information between actual or potential competitors may therefore constitute a violation of Article 6 of ECL. It increases market transparency, allows a competitor to identify and anticipate its rivals' strategies, and removes the uncertainty about their business strategies. The exchange must also not amount to implementing the concentration before the Egyptian Competition Authority (hereinafter referred to as "ECA")'s approval.

These Guidelines illustrate ECA's policy on how it assesses whether the exchange of sensitive information during the due diligence phase constitutes a breach of ECL and explain the application of Article 6 of ECL in such cases. They are issued as part of ECA's role in raising awareness and its commitment to transparency. The objective is to provide market participants with guidance on the application of ECL by explaining the rules and principles for analyzing such practices in the context of the exercise of ECA's powers under ECL.

These Guidelines provide only general guidance and illustrative examples. They do not cover all aspects of the application of the relevant principles and are not binding on ECA.

The Guidelines address, in turn: **First,** the definition of sensitive information; **Second,** the exchange of sensitive information; **Third,** the safeguards for exchanging sensitive information; and **Fourth,** the final provisions.

First: Definition of sensitive information

Sensitive information is defined in ECA's Guidelines on the Exchange of Sensitive Information in Light of the Provisions of the Competition Law No. 3 of 2005 (hereinafter referred to as the "General Guidelines") as any information that would eliminate uncertainties relating to competition in the market. The scope of the definition of such information varies depending on the market in which the persons concerned operate.

ECA relies on a number of objective elements to assess whether an information is sensitive, namely:

a. The type of information exchanged.
b. The availability of the information in the market, including whether the information exchanged is published and publicly available.
c. The degree of accuracy and specificity of the information exchanged.
d. Whether the information exchanged relates to future plans, plans that have been implemented in the past, or current plans.
e. The frequency of the exchange of information.

Table (1) of the General Guidelines applies equally to information exchanged during due diligence, and Table (2) illustrates how the concerned persons could self-assess whether the exchange of information during the due diligence phase is in compliance with ECL or not.

Table (1): Summary of information likely and unlikely to fall within the scope of sensitive information

Information likely to fall within the definition of sensitive information	Information unlikely to fall within the definition of sensitive information
- Confidential information - Individualized information - Information relating to current or future business plans, including, for example: • Pricing policy • Discount policy • Cost information • Profit margin information • Marketing policy • Information on actual production and production capacities • Customer or supplier lists	- Publicly available information - Aggregated information - Historical information - General policy of regulatory authorities in regulated sector - General industry trends and public data

Table (2): Sensitivity of information commonly exchanged during the due Diligence phase and recommended safeguards

Information requested	Sensitivity	Typical safeguard
Audited financial statements, public documents	Unlikely	None needed
Current prices, discounts and rebates by customer	Likely	Disclose only if essential, and only to a clean team
Customer and supplier contracts	Likely	Access to redacted version only if essential, and only to a clean team
Future pricing and expansion plans	Likely	Disclose only if essential, and only to a clean team
Aggregated historical cost data	Depends on the age of the data and the nature of the market	Case-by-case assessment

Information requested during due diligence is not exempt from these rules. The legitimate commercial reasons for the exchange, such as valuing the target, do not make sensitive information non-sensitive. They affect only whether the exchange is necessary and which safeguards apply, as explained in the following sections.

Second: Exchange of sensitive information

In the context of economic concentrations, and particularly prior to the implementation of the contemplated transaction, the persons concerned may exchange certain information about their economic activities, during the due diligence phase, for legitimate commercial reasons, such as assessing the value of the target person and its strategic suitability, which is essential for completing the economic concentration. Such an exchange is often a necessary step before the concerned persons decide whether to complete the economic concentration. However, where the persons are actual or potential competitors, such an exchange remains subject to Article 6 of ECL.

The information exchanged during this phase generally consists of information relating to the target person in the economic concentration, such as the acquired person in case of acquisitions. Therefore, normally the target firm is the "disclosing party" while the acquirer is the "receiving party". The acquiring person (buyer) may also disclose certain information relating to its economic activities in order to assess potential areas of cooperation between the persons to achieve joint synergies. In that case the roles are reversed for that information.

The persons concerned must exercise caution during this phase when exchanging sensitive information, as they remain independent economic entities. Accordingly, they must continue to operate in the relevant market as separate entities, to not increase market transparency in a manner that enables the receiving party to predict the future business strategies of the disclosing party. This could eliminate uncertainties relating to competition in the market in the short term.

Furthermore, entering into an agreement between the persons concerned with an economic concentration does not mean that the economic concentration has been implemented, as the persons concerned with the economic concentration may ultimately decide not to complete the transaction. Accordingly, the exchange of sensitive information during the due diligence phase may also restrict competition in the market in the long term.



Third: Safeguards for exchanging sensitive information

Article 6 of ECL prohibits horizontal agreements, in their various forms, between competitors operating in the same relevant market where such agreements restrict competition.

In this context, and given that the persons concerned with an economic concentration need to obtain certain information from one another during the due diligence phase, information may be exchanged, provided that appropriate safeguards are followed to ensure that the exchange of information does not adversely affect competition in the market in violation of ECL. These safeguards include the following:

1- Common safeguards to be followed by the disclosing and receiving persons:

a. Due diligence should be conducted through a "clean team", which alone has the right to access the information and data and subsequently disclose to the receiving party non-competitively sensitive conclusions. The clean team should satisfy the following conditions:

1. Members of the team must not have the ability to influence the conduct of the receiving party in the market. Team members may be employees of the receiving party, provided that they do not have the ability to influence the entity's competitive conduct in the market. It is preferable for the persons concerned with the economic concentration to appoint an independent third party specialized in conducting the due diligence. In all cases, team members must not be responsible for the entity's day-to-day economic decision-making, planning, pricing, strategy-setting, or strategic decision-making.

2- The number of team members should be limited.

3- All team members must maintain confidentiality, and each member must separately sign a confidentiality and non-disclosure agreement specifically tailored to the requirements of ECL.

4- A clear protocol should be established for the team, setting out restrictions on the use of information and the manner and scope of its disclosure.

5- Reports prepared by the team and provided to the receiving party should be aggregated and non-confidential (blinded aggregate reports).

b. Restricted data rooms should be established where information is exchanged exclusively. Such rooms should be dedicated to the exchange of information, with the objective of preventing the circulation of information throughout the company and maintaining confidentiality.

2. Safeguards to be followed by the disclosing person:

a. Share the minimum amount of information necessary to ensure the effectiveness of the due diligence. The information disclosed must be related to the due diligence or necessary for planning the economic concentration.

b. Redact information relating to customer identities and any other sensitive information contained in documents.

c. Establish instructions for the disposal of documents immediately upon completion of the due diligence and ensure that such instructions are clear and that penalties are imposed for non-compliance.

d. Limit the ability of persons who have access to the data rooms to download information or send it by email from within the rooms.

3. Safeguards to be followed by the receiving person:

a. Ensure that all employees who may have access to sensitive information have sufficient awareness of the obligations imposed on them under confidentiality and non-disclosure agreements.

b. Ensure that members of the employee clean team do not store sensitive information in locations shared with other employees.

c. Where it is necessary for the clean team to share certain information with other persons within the company, ensure that such information is aggregated and non-confidential.

Table (3): Summary of the safeguards to be followed during the due diligence phase

Common safeguards to be followed by the disclosing and receiving persons	Safeguards to be followed by the disclosing person	Safeguards to be followed by the receiving person
Conduct due diligence through a "clean team", which alone has the right to access the information and data.	Share the minimum amount of information.	Ensure that all employees who may have access to sensitive information have sufficient awareness of the obligations imposed on them under confidentiality and non-disclosure agreements
Establish restricted data rooms in which information is exchanged exclusively	Redact information relating to customer identities and any other sensitive information contained in documents	Ensure that clean-team members do not store sensitive information in locations shared with other employees
Where it is necessary for the clean team to share certain information with persons within the company, ensure that such information is aggregated and non-confidential	Establish instructions for the destruction of documents immediately upon completion of the due diligence, ensure that the instructions are clear, and impose penalties for non-compliance	
	Limit the ability of persons with access to the data rooms to download information or send it by email from within the rooms	

Fourth: Final provisions

There is no doubt that the exchange of information during the due diligence phase is necessary in economic concentration transactions. However, the exchange of sensitive information between actual or potential competitors involved in an economic concentration during this phase may constitute a violation of Article 6 of ECL. Accordingly, as part of its role in promoting a competition culture, ECA has issued these Guidelines to explain how it assesses the exchange of sensitive information during due diligence, so that the persons concerned can avoid violating ECL.

Before, during and after due diligence, the concerned persons are encouraged to follow these practices:

Do

- √ Share only information that is necessary to value the target or assess the economic concentration.
- √ Use a clean team to share any sensitive information.
- √ Sign a confidentiality agreement that limits use of the information to the transaction.
- √ Share aggregated, historical or redacted data where it serves the purpose of the transaction.
- √ Exchange information only through a restricted data room.
- √ Limit downloading and emailing from the data room.
- √ Keep a record of what was shared, with whom and why.
- √ Make sure everyone who may see sensitive information understands their confidentiality and non-disclosure obligations.
- √ Set clear instructions for destroying documents when due diligence ends, and enforce them.

Don’t

- ✗ Don’t exchange sensitive information without safeguards.
- ✗ Don’t disclose more than the purpose requires.
- ✗ Don’t upload unredacted data.
- ✗ Don’t leave download and email functions open to users.
- ✗ Don’t let key employees who compete with the other party access sensitive information.
- ✗ Don’t discuss how the concerned persons will behave towards each other in the market before the transaction is approved and implemented.
- ✗ Don’t implement any part of the economic concentration, or act as one entity, before ECA has approved it where approval is required.

If you believe a breach has occurred:

1. Stop the exchange immediately and secure the information already received.
2. Record what was exchanged, when and between whom.
3. Consider contacting ECA promptly. Under article 26 of ECL, a person that participated in an article 6 violation and reports it may be eligible for exemption, subject to the conditions set by the Law. For more on how ECA applies leniency, ECA published the following:

- Leniency Guidelines

- Leniency Application Form

- The Compliance Toolkit

- Q&As on the Egyptian Competition Law and its Executive Regulations

- The General Guidelines on exchange of sensitive information



For inquiries



Please contact ECA using the following

Hotline: 15157
Fax: 02-35370436
E-mail: info@eca.org.eg
Address: B19, Smart Village, Kilo 28 Alex Desert Road

For more information on ECA and for more publications, please visit ECA's website
https://eca.org.eg


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