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ON THE FORMULATION AND ENFORCEMENT OF COMPETITION LAW IN EMERGING ECONOMIES: THE CASE OF EGYPT¹

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Introduction

Unlike most emerging economies which adopted competition legislation in the wave the early 1990s, Egypt's is still in the making. Egypt has never had a comprehensive competition legislation, although various provisions in different legislation address basic anti-competitive behaviour. Recently, the Egyptian economy has been experiencing major challenges at both the national and international levels that necessitate the introduction of a competition law. The private sector has been growing rapidly to dominate the market without adequate regulation, there are allegations of anticompetitive practices conducted by many market participants in various sectors. There are many cases of mergers and acquisitions that have been undertaken without proper investigation regarding their implications on the market conditions and fair competition.

At the international level, there are debates and negotiations regarding the inclusion of competition policy in bilateral and multilateral trade agreements, in which Egypt is involved. Dealing with multinationals also requires the capacity to deal with possible anticompetitive practices committed by them and to cope with the implications of international and cross-border mergers and acquisitions. Finally, there is that recent threat of international private cartels which impose a real challenge to fair competition.

The paper starts by discussing the difficulties facing an emerging economy in formulating competition policy. The paper then turns to discuss the Egyptian experience, explaining the case for the introduction of competition policy in Egypt and the reasons for the reluctance in implementing it. Then the paper explores the main features of the Egyptian competition policy, which includes a competition law, still a draft law, and the proposed establishment of a Competition Commission. The paper ends with concluding remarks on the prospects of competition policy.

Difficulties facing an emerging economy in formulating competition law

Policy makers in emerging economies face several difficulties which might be seen as common between them in respect of formulating a competition policy and introducing a competition law. These difficulties are summarised below.

The influence of trading partners

The logical starting point in formulating a new economic law is to review the country's economic needs and legal traditions and shape the law accordingly. Competition law, some suggest, is different in this respect: a state should formulate its competition legislation along the lines already adopted by its existing or potential trading partners.

According to this view, the adoption of an advanced competition model can have beneficial effects on future trade, and consequently on the economy as a whole. An EC-based competition law, for

instance, would encourage Western European investors attracted by the familiar legal environment. Similarly, competition legislation based on the United States' model, in addition to being a safe bet,³ would also encourage American investment attracted by the familiarity of the legal framework.⁴ It has been argued that decisions about which competition law model to adopt is to a large degree predetermined by the country's international economic policy.⁵

The general approach of the law: per se v. rule of reason⁶

A country's formulation of its competition legislation will further be affected by the regulatory considerations. Emerging economies with either little or no experience of administering a complex regulatory framework may at first opt for a competition law that can be easily enforced. This may be a good reason to reject a rule of reason type legislation (which would require complex case-by-case analyses), and opt for the more straightforward per se approach, at least until its competition agencies develop the expertise necessary to administer the former approach. The unconditional prohibition at the heart of the per se approach has the advantage of being relatively cheaper to enforce. It also provides clear guidance to the business community. It is more efficient, since no time is wasted until the legality of a given conduct is established. True, the per se approach may condemn acts which the rule of reason approach might not sanction. However, the certainty that the per se approach offers offsets the loss of the benefits derived from the rule of reason approach.⁷

Drafting per se competition legislation, however, is no easy task: the legislation must define, clearly and in detail, those practices which are prohibited;⁸ it must clearly define competition as well those acts which are sanctioned. Competition legislation may be fashioned in one of several styles. It may adopt rules against cartels and market-blocking acts by dominant firms as in the United States; or it may take a more interventionist attitude that allows for the introduction of case-specific answers more responsive to a country's special needs and norms; or it may adopt a sui generis combination of the foregoing approaches.⁹

Objectives of the law

Setting clear objectives for any proposed legislation is obviously important. Axiomatic though this may be, it has been noted that, the UK law (and to a lesser extent EEC law) has developed without any overall conception of the function either of competition or competition law, and that this has produced many of the difficulties that exist.¹⁰

Competition legislation in emerging economies must aim to achieve two objectives: to maintain and, where absent, to create competition. Only the first of these objectives forms part of the function of competition legislation in developed economies. The second task, the creation of competition, results from the economic status of emerging economies. And in this regard, advanced competition laws can offer no assistance to emerging economies, as they are based on the assumption of the existence of freedom of voluntary exchange in a generally competitive environment.

Scope of the law

It has been argued that considering the difficulties which an emerging economy faces in fashioning a sophisticated competition law, it should focus initially on regulating horizontal agreements¹¹ and mergers and acquisitions, as opposed to trying to include vertical agreements¹² and abuse of market power as well. Horizontal agreements are given precedence because the market structure of an emerging economy, characterised as it is by the involvement of a small number of firms, lends itself easily to these types of agreements.¹³ By way of refinement, one commentator has argued that the initial roster of

forbidden practices might be limited to horizontal price-fixing, collusive tendering and market allocation schemes. The attractiveness of this approach resides in its imposition of the lightest short-term analytical and administrative burdens and, at the same time, its tackling of the most prejudicial practices.¹⁴

The fact that there are at present, and will be for some time to come, several state-owned firms which will be subject to competition laws in emerging economies is not only novel, but actually runs counter to prevailing tradition. The law must therefore discourage monopolistic practices. It must also entrust the competition agency with an active role in the government's de-monopolisation schemes, in the implementation of trade policies and schemes aimed at increasing consumer awareness, as well as in the creation of conditions facilitating access to markets.

The difficulty is that if a competition law does not adequately protect the competitive process, the country's overall economic development suffers as a result of those distortions which the law fails to remedy; if the competition legislation is overzealous, it ends up restricting the freedom of businesses to adopt beneficial practices and organisational forms, and thus cripples the economy.¹⁵

Enforcing competition law

Establishing a competition agency is an integral part of introducing competition law.¹⁶ It is this agency which conducts investigations into suspected competition violations (proprio motu or at the behest of the injured party), issues rulings, assesses penalties, monitors the market and studies prevailing conditions in the search for price irregularities. It also advises the government on the sale of state-owned enterprises, and on the overall soundness of the competition environment.¹⁷ Given its pivotal role, the establishment of an efficient agency is imperative if competition law is to be introduced, as it is the enforcement policy that will determine the practical impact of the legislation.

To do all of this, a competition agency must enjoy (i) a transparent, independent and impartial administrative structure; (ii) qualified staff; here the difficulty does not concern those who will preside over the agency, rather it is the economists, lawyers and others who will be engaged in the daily activities of the agency, given that a properly functioning agency would require a substantial number of these professionals; and (iii) adequate resources to attract qualified staff and to ward off corruption.¹⁸ The above represents some of the prerequisites for the establishment of a competition agency.

If one turns to analyse the prevailing conditions in emerging economies, one recognises the difficulty of the task at hand, even if one assumes that adequate finance can be made available. Establishing an independent, impartial and transparent body entrusted with the administration of competition law will be difficult for several reasons, including the novelty of the institution. Moreover, the staff of an agency can exceed hundred members would neither be well trained nor acquainted with complicated regulations and with the legal and economical issues pertaining to competition law.¹⁹

Enforcement issues represent the main difficulty in introducing competition law. Available enforcement capabilities must dictate the substantive approach of the law. It is counterproductive to introduce a sophisticated piece of legislation that is difficult or impossible to implement by the existing competition agency.²⁰ Establishing an efficient enforcement agency capable of implementing sophisticated competition legislation can only be seen as a long-term objective. Those who overlook how long it has taken Western regulatory agencies to reach their present level of sophistication tend to have unrealistically high expectations of nascent agencies in emerging economies.²¹

It has been cogently argued that emerging economies, which have no real experience of competition regulation, and all sorts of difficulties in obtaining accurate data and records, should start off

with per se rules rather than complex rule of reason analysis. Only when the competition agency has acquired the necessary expertise should they consider converting to a rule of reason regulatory approach.²² Modest regulatory capabilities favour the simple approach to competition if serious market-wide problems are to be deterred and remedied by the competent agencies.²³

Lack of expertise

Economic analysis forms an integral part of any competition legislation. Competition laws are about the way in which markets work. Drafting and implementing such legislation mainly requires the involvement of economists and lawyers. Only lawyers who have had training in the field of competition will do: “Any lawyer involved in competition law should acquire basic understanding of how markets work and of pricing theory; the competition lawyer of the future will need to possess a hybridized skill combining elements of both law and economics.”²⁴

This type of lawyer is rare in most emerging economies, whose educational programmes and professional practices tend to dissociate law and economics. The absence of this special breed of lawyers makes it all the more necessary to formulate competition legislation which can initially be managed relying on local talent. This need not result in less effective legislation.

There is also, of course, the problem of the judges in emerging economies who often lack the necessary training to enforce sophisticated laws that require economic analysis. This makes it all the more important for the competition legislation not to have courts decide fine points of economic analysis such as the adopting of a rule of reason approach would entail. It should be kept as simple and as straightforward as possible.²⁵ Hence, the preference for a per se approach, whose rules might suit the current state of the development of the judiciary, as the courts are trained to apply rules sanctioning specific actions.

The above issues facing policy makers in emerging economies illustrate the difficulties involved in introducing competition laws. Some of these issues are self-contradictory and difficult to implement for the following reasons:

1. Modelling competition legislation along the lines of that adopted by a state’s future trading partners (who may have a highly sophisticated approach) conflicts with the need for simplicity (i.e. a per se regulatory approach) which seems essential, in the light of the lack of expertise of competition agencies.

Advanced competition laws might not suit the needs of emerging economies: “it would be unwise to presume that the law and policy appropriate to an already established and fully functioning market economy are also suited to an economy still in transition.”²⁶ This view is based on the substantial difference in economic conditions prevailing in both emerging economies and advanced market economies.

Adopting a competition law on the lines of future trading partners assumes, wrongly, that trading partners must have similar competition laws. This is difficult to reconcile with the fact that firms belonging to countries with diverse competition philosophies are constantly trading in the international market. The diversity between competition laws of major trading nations has not affected the flow of trade between them. Germany and the US, for instance, have a long-standing trade relationship despite widely differing competition regulations. The point that should be made here is that between major trading nations, there exist a lowest common

denominator of protection against anti-competitive practices. It is this minimum which emerging economies should endeavour to establish.

2. Formulating a simple per se law contradicts the need for establishing rules that sanction monopolistic practices. As explained above, market structures in emerging economies suggest that monopolies (and oligopolies) are the most urgent concerns for any competition legislation. Monopolistic practices cannot by their very nature be subjected to per se rules; they require a complex analysis of market structure, review of individual practices, and cost-benefit analysis.
3. Formulating legislation along the same lines adopted by future trading partners contradicts the need for a law which maintains as well as creates competition. Advanced competition laws do not aim to create competition; they merely promote it
4. Formulating a law along the same lines adopted by a trading partner assumes that one has a single major trading partner; this assumption runs counter to the trend of trade globalisation.²⁷

Legislation must generally take into account a country's economic, historical, political and social conditions. Competition legislation is no exception.²⁸ The "trading partners" argument overlooks this legislative axiom.²⁹

The case of Egypt

Recent national and international developments are supporting the case of introducing a competition law in Egypt as a necessary step for a competition policy. At the national level, when the state had the right to use direct price control and allocate resources through administrative intervention, it managed to restrain monopoly power when necessary and hence competition policy was not required.

Unlike most emerging economies which adopted competition legislation in the wave the early 1990s,³⁰ Egypt's is still in the making. Egypt has never had a comprehensive competition legislation, although various provisions in different legislation address basic anti-competitive behavior.³¹ One does not argue that the reason behind the delay in implementing competition policy in Egypt was due to the adherence of policy makers to the theoretical claims against it which we discussed above. Rather, it was the heavy state intervention in the economy, through the state owned enterprises (SOEs) and its control of economic activities. With the presence of financial repression,³² price controls and subsidies, import bans and quotas, exchange rate control, the Egyptian government was a source of monopoly power. In this environment one cannot expect that a government, any government, would adopt a competition policy to discipline its activities. Moreover, competition was seen as a social burden and a political liability, as it may lead to the ultimate exit of uncompetitive firms and hence the possibility of increasing unemployment.

However, after its adoption for decades in Egypt, the state-led-inward looking strategy failed to achieve its targets. Towards the end of the 1980s, the economy suffered from several structural weaknesses and distortions. Such distortions did not appear suddenly in the economy, they were present for a long period but masked by the remarkable increase in external resources and capital inflows. These resources enabled the government to expand its expenditure, financed investment programmes and funded rising imports. With the sudden and steep shortage of external resources in 1986, it became harder to cover these distortions. At this stage a critical need for stabilisation measures and adjustment efforts became apparent.

Thus a comprehensive Economic Reform and Structural Adjustment Programme (ERSAP) was adopted in 1991. This reform programme has been supported by a stand-by arrangement from the IMF and

a structural adjustment loan from the World Bank, in addition to the bilateral debt forgiveness/debt service relief of the Paris Club. The primary objective of ERSAP is summarised by the IMF (1991) as: "to create, over the medium term, a decentralized market based, outward-oriented economy where private sector activity will be encouraged by a free, competitive, and stable environment with autonomy from government intervention."³³

Indeed the private sector, through privatisation, and other means, has been gaining ground in Egypt. It has become responsible for 66% of total investment and 72% of the GDP. Meanwhile the regulatory framework did not improve in a way to cope with the requirements of the new market conditions where private enterprises are replacing public ones in their domination of the production and distribution of most of the goods and services. Allegations of anticompetitive practices are numerous, especially in retail distribution, cement, steel and food products. Recently, these allegations reached other sectors, such as audio-visual products and health services, with heavy involvement of the media in the subject calling for government corrective intervention to protect public interest.

Moreover, there are growing cases, both in value and number, of mergers and acquisitions which are not effectively monitored or investigated from the perspective of their implications on market structure, the state of fair competition or the possible abuse of market dominance

At the international level, attempts to promote and coordinate national competition policies that involve LDCs can be traced back to 1979,³⁴ when the UNCTAD circulated a draft law as model for consideration by these countries. The United Nations, in 1980, approved a document entitled "The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices" sponsored by the UNCTAD.³⁵ In addition to these multilateral efforts, few bilateral agreements have been reached between the European Commission (EC) and developed countries: EFTA countries, in the early 1970s; as well as economies in transition, such as Hungary and Poland in 1991 and more recently with developing Mediterranean countries, Tunisia and Morocco (1995). Egypt has also signed an association agreement with the EU few months ago.

The EC considers competition as "the best stimulant of economic activity" and recognises competition policy as "an essential means for satisfying the essential needs for satisfying the individual and collective needs".³⁶ These ideals have been reflected in the declared policies of the EC within Europe and outside it. The proposed Euro-Mediterranean Agreement (EMA) requires the adoption of particular competition rules of the EU as far as they affect trade between the EU and its partner countries.

These competition rules deals with collusive behaviour, abuse of dominant position and competition distorting state-aid.³⁷ This has been the case, in the already signed EMAs, of Tunisia and Morocco,³⁸ and it is very likely to be the case with Egypt as well. If we assume that Egypt's EMA will follow, the Tunisian and the Moroccan models, on "Competition and Other Economic Provisions"³⁹, Egypt will implement, within five years, the rules of the Treaty of Rome.⁴⁰

During these five years, GATT rules regarding state aid will be applied and Egypt will be treated as a disadvantaged region, according to the Treaty of Rome, article 92 (3)(a), which means that state aid can be applied within its boundaries during this period. Liberalisation of government procurement is not required, which may be an advantage to Egypt. And there is a provision for protecting intellectual, commercial and industrial property rights which may not be necessarily an advantage to it.⁴¹

At face value, there may not be a significant disparity between the competition rules, as stated in the European partnership agreements and those stated in the draft of the Egyptian competition law, apart from the issue of exemptions and exceptions, e.g. export associations and the allowance for the government to fix the prices of essential goods. However, it is not sensible to assume that Egypt could or

should duplicate the stringent and extensive system of competition enforcement currently in place in Europe. Moreover, the articles of the EMA on competition policy are too general which may cause some trouble in the process of dispute resolution.

Some economists see the solution of the likely disputes, and the answer to the need for harmonisation of national competition policies, in the establishment and gradual empowerment of an international antitrust enforcement agency within the World Trade Organisation.⁴² This suggestion is optimistic, one economist even, rightly, describes its prospects as the same as those of establishing "an effective international standing army".⁴³

Within Europe itself there remains a tension between traditional national outlook in European countries concerned with their sovereignties and the commission's frequent intervention. This tension increases when the commission attempts to extend the scope of competition policy or constrain the conduct of national governments, especially when the actions of the commission are not supported by rigorous analysis.⁴⁴ Likewise, one anticipates similar tensions, obviously from the Egyptian side, if the Association Council,⁴⁵ that oversees the association agreement between Egypt and Europe, emulates the conduct of the European Commission in this respect.

Dealing with multinational companies is another concern that pushes Egypt to pursue competition policy, for two reasons: first, it has been considered as a prerequisite of entry into the developing host countries by some multinationals, second, it is required by the developing countries to counter the national impact of international mergers and acquisitions undertaken by multinationals.

In the context of the international environment, there is a serious concern in Egypt with the operations and behaviour of international cartels. Increasing liberalisation of trade increased the incentive for firms to participate in cartels in a way that was described as "worldwide cartels are looming as a major enforcement concern...It's almost as if private arrangements are replacing governmentally imposed market barriers".⁴⁶ International cartels are engaged in price fixing, division of market at the international level, establishing price ceilings, or floors, for new entrants and provide mechanisms for the incumbent firms to prevent market entry. It is estimated that in the year 1997 alone developing countries imported more than \$81 billion of goods from suppliers that were involved in price-fixing conspiracy in the 1990s. Levenstein and Suslow (2001) have shown that in particular international private cartels cases, such as Bromine, Citric Acid and Graphite Electrodes, developing countries were over charged for their imports by a range from 20% to 45% during the last decade. In order to effectively deal with such private cartels, there is a need for international coordination which is not going to be possible for Egypt to benefit from without having its own national competition policy.

Thus, in Egypt, as in many other LDCs undertaking economic reform, the market is gradually replacing the state that remained, for a very long time, the major producer and distributor. But it has been realised that markets can be manipulated, to the extent that few economic agents can acquire economic power in a way that would distort competition and impair efficiency. In addition there are many international factors contributing to the urgent need of a competition law. However, The issuance of a competition law, has been facing some resistance but this time is not coming from the state but from the private sector that has various concerns regarding this law such as:⁴⁷

1. Fear of government intervention in a new form under the notion of protection of competition.
2. Possible abuse of the law by particular firms that may use it, unjustifiably, to charge competitors with unfair trade practices.

3. The law will not cover but the registered firms, leaving informal activities and smuggling intact.
4. Those who will be responsible for implementing the law may not have sufficient knowledge of the idiosyncrasy and peculiarity of particular segments of the market.
5. Just implementation of the law may be confronted by corruption and profiteering.

While some of these concerns may be justified, the absence of an adequate regulatory framework would make the manipulation of the market more likely, and hence would result in greater welfare losses compared with the status quo. The protection of competition necessitates the establishment of an adequate and a competent regulatory framework with an aim to promote economic efficiency, ensure fair competition and prevent any exploitation of consumers, through the deterrence and prohibition of anti-competitive practices.

Towards an Egyptian competition policy

Effective competition policy involves the restructuring of economic environment in Egypt in a way that restricts the exercise of market power by firms, promotes the allocation of resources in accordance with most efficient utilisation and enhances efficiency, in static and dynamic terms. This requires, inter alia, effective enforcement of competition law and the establishment of an independent competition authority that functions proactively against anti-competitive practices.

The Competition Law

Until now, Egypt has not enacted a competition law,⁴⁸ but there is a draft available under discussion:⁴⁹

The scope of the Law

The law applies to all persons and entities engaged in financial and economic activities including trade, industry and services. However, Article 3 of the law explicitly states that “strategic entities” will not be subject to the law. It defines these entities by stating that they are entities owned or operated by the state having its purpose as providing water, gas, electricity and petroleum and other entities established by a Presidential Decree.

While intellectual property rights and the non-commercial activities of syndicates are not subject to the law, entities established for the purpose of exportation or encouraging exports of goods and services are not subject to the law provided that the entry and exit to these entities is voluntary. The latter exemption can be deemed as unconventional and it seems that some debate is needed in terms of its appropriateness and its wording. Exemptions are of utmost importance in any competition law as they are uncompetitive practices that the law leaves unsanctioned in search for an overriding benefit. However, they must be carefully drafted otherwise they might frustrate the purpose of the law.

Anticompetitive practices

The draft law sets out in Article 4 absolute prohibitions in respect of four forms of agreements that it deems anticompetitive per se, they are: the decrease, increase or control in the price of the purchase or sale of goods and services; restrictions on the production, distribution or marketing of goods and services; market sharing; and arrangements in the tendering process. It is worth noting that Article 6 of the draft law stipulates that arrangements set out in Article 4 are prohibited if one of the entities involved therein enjoys a dominant position in the relevant market as per Article 7.

If the objective of per se rules is to avoid any investigations in respect of the market power of those undertaking anticompetitive activities and provide the regulator with a clear (as far as feasible) rules that can be implemented with relative ease then the above mentioned approach is questionable.

The draft law provides for relative prohibitions in Article 5, these arrangements must be undertaken in respect of a relevant market as per Article 7 and must have as its object the restrictions of competition or jeopardizing the interest of the consumers.

The law then dedicates 4 Articles to set out the parameters of defining dominance and the relevant market. In so doing the law provides definitions that are not dissimilar to those found in advanced market economies. The challenge here is whether the newly established regulator would be capable of implementing such rules.

Mergers

The draft law dedicates a chapter on this issue. The rules apply in respect of mergers and acquisitions that are made by entities having a capital or turnover of 50 million Egyptian pounds. Article 19 stipulates that mergers are prohibited if it will have anticompetitive effects, these were defined as: enabling the merged entity to unilaterally set the price of the goods or services; affecting the entry or exit to or from the market; and facilitating the undertaking of prohibited activities as set out in the law. The 50 million pounds figure needs to be considered with a view of ascertaining its appropriateness.

An interesting point here is that Article 21 stipulates that the completion of the merger procedures cannot take place without a written approval from the competition commission. Mergers and acquisitions procedures will be null and void without such approval.

Sanctions

The draft law stipulates that sanctions apply in respect of all prohibited activities that have an effect in Egypt even if committed abroad. Applying the "effects doctrine" in Egypt might complicate the task of the regulatory body or the courts.

The sanctions are imprisonment and fines not less than 50 thousand pounds and not exceeding 300 thousand pounds and a compensation not exceeding 10% of the wrongdoer's activities in the preceding financial year. Non-adherence to the orders of the competition commission results in sanctions, both in the form of imprisonment and fines.

A point worth noting here is that Article 41 grants the commission the power to settle with the wrongdoer. Settlement is set out in a fashion similar to that of the Tax Authority, hence payment of special

finances can be accepted by the Commission and the effect of such a settlement would be to for any court case to cease and be dropped.

Whether the draft law has benefited from the 'advantage of starting late' is a debatable matter. It can be seen as benefiting from such a late start, as it benefits from the experience of other countries with competition laws and their successive amendments. The draft law deals with both structure, market share, and conduct, specific practices designed for, or may have, the effect of reducing competition, with emphasis on the latter. Thus, the draft law follows recent recommendations in the field. However, the draft law is not clear on the issue of divestiture and privatisation process and includes too broad exemptions. On the other hand, the draft law exempts, subject to the recommendation of the competition commission and the approval of the concerned minister, cooperation agreements for R&D, agreements that contribute to the improvement of the production and distribution of products. De Minimis agreements can also be exempted from this law.

Finally, price fixing for essential products, is allowed for the government, after consulting the Competition Commission. While we do not disagree with the importance of exemptions granted for R&D activities, under careful supervision to prevent their use as a guise to undertake collusive activities, one does not grasp the pretence to exempt De Minimis agreements, which may be repeated and accumulated to form a serious case of anticompetitive practice. Further, one should tie government action to fix the prices of essential goods with the exceptional cases of wars, natural disasters.etc.

The Competition Commission

The establishment of an impartial and independent Competition Commission has been viewed as a best watchdog of fair competition.⁵⁰ The main features of an effective Competition Commission were specified as: "Independent, insulated from political interference,.. transparent,.. subject to checks and balances,..."⁵¹

The draft law⁵² has a provision for the establishment of Competition Commission and specifies its structure, staff requirements and authority. It also outlines the rights and proceedings of the Competition Commission to apply the law, including penalties and legal sanctions. But, the role of the Competition Commission appears, in the draft, as reactive rather than proactive.

It might be the case that in the early years of its practice, the commission may indulge in the implementation of a policy towards competition rather than competition policy. By that we mean that there may not be an anti-competitive practice but still the commission will have a proactive role of the commission to strengthen the opening of the market. However, the danger of this approach is that the commission may stretch its mandate beyond its capacity. The experience of other countries⁵³ suggest that a more focused orientation may be more appropriate for the sake of legal conviction and transparency.

Concluding Remarks:

Competition policy, effectively designed and enforced, is an integral part of reform policy and cannot be substituted for other policies such as trade policy that serves different objectives. However, we emphasize that much more than unfettered competition, using Stiglitz (1995) words, is required to get the market in Egypt work in an effective manner. The viability of competition requires other measures such as, the awareness of the public, disclosure of information, enforceability of contracts, implementation of bankruptcy laws, and equally, if not more important, the commitment of the government itself and its agents to competition and refraining from creating artificial barriers.

It is worth mentioning that competition policy may have adverse effects. In some cases competition policy can be used to hinder competition, lower prices of one efficient firm can be viewed by a rival firm as predatory pricing and hence press charges against it. Competition policy may also limit cooperative efforts in the field of R&D, and if the law exempts them they can be used as a façade for anticompetitive practices.⁵⁴ Competition policy may put Egyptian firms at a disadvantage when dealing with foreign firms based in countries with relatively lenient competition policy. Moreover, the enforcement of competition law is a costly exercise, This leads us to ask the following question: Is the Egyptian legal system ready and equipped for dealing with and enforcing of a sophisticated law such as the competition law?

However, this paper has shown that recent national and international developments are supporting the case of introducing a competition law in Egypt as a necessary, but not a sufficient, step for an Egyptian competition policy. At the national level, when the state had the right to use direct price control and allocate resources through administrative intervention, it managed to restrain monopoly power when necessary and hence competition policy was not required. Today, with the growing role of the private sector, there are allegations of anti-competitive practices, which are worthy of investigation, there are actual cases, and proposals of, mergers and acquisitions which require analysis of their impact on the market structure and fair competition, and hence their approval or disapproval.

At the international level, the advanced countries have been requiring the formal inclusion of competition policy in the WTO agreements claiming the benefits of 'fair play' and 'level playing fields'. However, there are many reasons for developing countries to reject this proposal, e.g. unfamiliarity with the details of such a highly technical issue as the competition policy, concern with the application of cross-sanctions⁵⁵ and the view that there is no need to add new agreements before the assessment of the impact of the 'old' ones that established the WTO.

Dealing with multinational companies is another concern that pushes developing countries to pursue competition policy, for two reasons: first, it has been considered as a prerequisite of entry into the developing host countries by some multinationals, second, it is required by the developing countries to counter the national impact of international mergers and acquisitions undertaken by the multinationals.

Moreover, there is a very serious concern with the operations and behaviour of international cartels. Increasing liberalisation of trade increased the incentive for firms to participate in private cartels which are looming as a major enforcement and regulatory concern for competition agencies. International cartels are engaged in price fixing, division of market at the international level, establishing price ceilings, or floors, for new entrants and provide mechanisms for the incumbent firms to prevent market entry. They are considered the most stark challenge of national competition agencies, as the agreement between the members of the such cartels is an international one, there is no single national agency capable of dealing with it, which necessitates international cooperation in this field.

NOTES

- 1 The paper is prepared for “The Global Forum on Competition” organised by the OECD in Paris, 14-15 February 2002. The paper is based on a longer version by the same author and Bahaa Ali El Dean, published in The September 2001 issue of International Business Law Journal.
- 2 Associate Professor in Economics, Faculty of Economics and Political Science, Cairo University and Senior Advisor to the Egyptian Minister of Foreign Trade. The views expressed in the paper are strictly those of the authors and should not be attributed to the institutions that they are affiliated with. (moic@idsc.net.eg)
- 3 The suitability of US law for the needs of Eastern European countries was advocated by several commentators, including an argument to the effect that “[c]ertainly, the enactment of legislation similar to the U.S antitrust laws, along with the creation of the appropriate enforcement agencies, will help reduce distortions in both producers’ and consumers’ prices and thereby increase the gains from the use of the markets.”, Feinberg, R. and Meurs, M. (1994), p. 798.
- 4 Mastalir, R. (1993) p. 62. He further states that “[t]he desire to develop trade and investment relations with the United States made the U.S antitrust laws a logical model for Eastern European states.”; a similar argument can be found in, Langenfeld, J. and Blitzer, M. (1991), pp. 353–4. The former Chairman of the Federal Trade Commission in the United States has said that US-style competition laws in emerging markets will “enhance the competitiveness of American industry by helping to open new markets and investment opportunities.”, Justice Department (1991), FTC Receive Funds to Support Competition Counselling Aid, International Trade Report, p. 871, as cited by Waller, S. (1994), p. 571.
- 5 Estrin, S. and Cave, M. (1993), p. 5.
- 6 Whish, R. (1993), p. 19, notes that these two terms “have tended to become part of the competition law generally.” Rule of reason is used here to mean an approach requiring a case-by-case analysis to reach the conclusion whether as to certain practices should be prohibited or not (using EC terminology as to whether a prohibition should be exempted or not).
- 7 Langenfeld, J. and Blitzer, M. (1991), pp. 368–370.
- 8 Given the existence of a long standing competition tradition, experienced competition agencies and courts, the rule of reason prevails. Hence, the law only provides general guidelines, leaving the details of implementation to the competition agencies and the courts. Indeed, an instrument like the Sherman Act has survived for over a century now, for its general wording allowed the courts to draw different conclusions from it over the years.
- 9 Fingleton, F., Fox, E., Neven, D. and Seabright, P. (1996), p. 63.
- 10 Whish, R. (1993), p. 16.
- 11 Horizontal agreements are those agreements that can negatively affect competition undertaken by firms at the same level of the market, e.g. producers.
- 12 Vertical agreements are those agreements that can affect competition undertaken by firms at different levels of the market, e.g. a producer and a distributor.
- 13 This argument was referred to in Stevens, D. (1995), p. 955.
- 14 Kovacic, W. (1992), p. 264.

- 15 American Bar Association, Section of Antitrust law; Comments on Draft Bulgarian Antitrust Law, Fox, E. (1991), p. 246.
- 16 Different countries use different terms when referring to the body entrusted with the implementation of competition law. Competition commission and antimonopoly office are frequently used.
- 17 Some authors argue that competition advocacy is one of the most important tasks of a competition agency, see: Rodriguez, A. and Coate, M. (1997), pp. 367–401.
- 18 One commentator notes that in the Ukraine Antimonopoly Committee, a professional employee receives a monthly wage of \$20–40, while the chairman gets roughly \$100 along with the use of a apartment and a car. He then estimates that the entire operation of the antimonopoly office would be around \$200,000 a year, compared this with the US enforcement authorities budget which are in excess of \$140 million. Kovacic, W. (1996), p. 442.
- 19 For details regarding the obstacles facing emerging economies in creating an enforcement agency, see: Kovacic, W. (1997), pp. 417–429. The author addresses several areas including: frail academic infrastructure, weak professional associations and consumer groups, inadequate limits on administrative discretion, strong political opposition to economic reform, unrealistic expectations of competition policy and weak access to antitrust-relevant business data. All these aspects affect the performance of a competition agency and hence the substantive law it should be entrusted to enforce.
- 20 It has been argued that “[e]stablishing unenforceable or erratically applied laws increases uncertainty and risk for private entrepreneurs operating in what already are precarious and unpredictable conditions. For the public, empty legal reforms feed cynicism about the rule of law and the value of economic and political decentralization.”, Ibid., p. 404.
- 21 Ibid., p. 408.
- 22 Langenfeld, J. and Blitzer, M. (1991), p. 366.
- 23 Fingleton, J., et al. (1996), p. 64.
- 24 Whish, R. (1993), p. 46.
- 25 Coate, M., Bustamante, R and Rodriguez, A. (1992), p. 54.
- 26 Fingleton, J., et al. (1996), p. 15.
- 27 For details see: Waverman, Comanor and Goto, (1997).
- 28 Kovacic, W. (1996), , p. 466.
- 29 Several commentators confirm the suitability of advanced law to emerging economies; it was argued “we believe that the United States model is very well suited for Eastern and Central Europe. It offers a more explicit weighing of anti-competitive effects and efficiencies that will encourage growth and benefits consumers in the long run.”, Langenfeld, J. and Blitzer, M. (1991), p. 353. This view can reflect either a different understanding of the needs of emerging economies or that some commentators are promoting trade interests and other commercial influences via their proposals for competition policy in emerging economies.
- 30 Introduction of competition laws was at its peak during this period. Countries include: Poland (1990), Hungary (1990), Russia (1991), Czech Republic (1991), Tunisia (1991), Venezuela (1991), Peru (1991), Belarus (1992), Mexico (1992), Bulgaria (1992), Lithuania (1992), Jamaica (1993), Slovenia (1993),

Estonia (1993), Mongolia (1993), Ivory Coast (1993), Zambia (1994), Slovak Republic (1994), Turkey (1994) and Brazil (1994).

31 The current Penal Code of 1937 stipulates in Article 345 that raising or lowering prices to achieve illegal benefits is prohibited. Moreover, law 241 for 1959 stipulates that it is prohibited for any distributor to have a monopoly in distributing any domestically produced good that is subject to an import ban. There are other examples in different laws. Finally, the Egyptian commercial law prohibits acts that constitute unfair competition, e.g. negative advertising. On the whole, the implementation of these scattered provisions are lax, given that there was no competitive environment in the light of the economic policy adopted by the state.

32 On the causes and impact of state intervention in the financial sector in Egypt, see Mohieldin (1995).

33 See IMF (1991), p. 8.

34 Lloyd and Sampson (1995), p. 686, mention that earlier multilateral efforts can be traced back to the 1940s as the draft Havana Charter for an International Trade Organisation devoted a chapter for discussing restrictive business practices.

35 Gray and Davis (1993), p. 428.

36 McGowan (1994), p. 188.

37 Hoekman and Djankov (1996), p. 13.

38 Same rules were inserted in the agreements between the EU and, respectively, Hungary, Poland, the Czech Republic and Slovak Republic, signed in December 1991. See Rouam (1993), p. 31.

39 Under article 36 of the Moroccan, and the Tunisian, Agreement, it is written, " 1. The following are incompatible with the proper functioning of the Agreement, in so far as they may affect trade between the Community and Morocco [Tunisia]:

- (a) all agreements between undertakings,..., which have as their object or effect the prevention, restriction, or distortion of competition;
- (b) abuse,..., of dominant position,..
- (c) any state aid which distorts or threatens to distort competition.. "

Commission of the European Communities (1995), p. 17.

40 For a discussion of the implications of these rules, see McGowan (1994), pp. 180-187 and Fishwick (1993), pp. 92-136 and Nemitz (1996), pp. 4-10.

41 Ibid., p. 19.

42 See the review of Owen (1995), of F. Scherer's book on "Competition Policies for an Integrated World".

43 *ibid.*

44 McGowan, *op. cit.*, p. 188.

45 On the role of the Association Council, see Inama (1996), pp. 10-11.

- 46 From a speech by the Former assistant Attorney General for the Antitrust Division of the U.S. Department of Justice, cited in Levenstein and Suslow (2001), p. 7.
- 47 For further discussion see Mohieldin (1996), pp. 12-13.
- 48 This does not deny, however, that there are articles in the "Criminal Law", that deal with monopoly and anticompetitive behaviour, e.g. articles 345 and 346. There was even a case that dates back to 5/3/1910, on a monopolistic behaviour of an owner of four mills. .
- 49 This draft is prepared by the Ministry of Economy and Foreign Trade
- 50 Khemani (1994), p. 3.
- 51 Ibid., p. 4.
- 52 The draft law provided by the Alexandria Business Association (1995) puts more emphasis on the structure and role of the Competition Commission and the authority of its chairman than the draft law discussed in this paper.
- 53 See for example Neven and Ungem-Sternberg (1996), pp. 44-46.
- 54.. Stiglitz, op. cit., pp. 132-4.
- 55 This implies that the violation in one area may be penalised in an another by the complaining countries, if the complaint is held to be justified, see Singh, Sing and Weisse (2001), p. 22.

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