GLOBAL LEGAL INSIGHTS

Cartels

Enforcement, Appeals & Damages Actions

First Edition
Contributing Editors: Nigel Parr & Catherine Hammon
Published by Global Legal Group

CONTENTS

Egypt

Dr Khaled Attia
Sarie-Eldin & Partners

Introduction

In 1991, Egypt adopted an Economic Reform and Structural Adjustment Programme aimed at creating a decentralised, market-based economy where private sector activity is encouraged by a free, competitive and stable environment with autonomy from government intervention[1]. However, competition policy and law were not introduced until the promulgation of Law No. 3 of 2005 on the Protection of Competition and Prohibition of Monopolistic Practices (the Egyptian Competition Law). This law is considered the first comprehensive competition legislation introduced in Egypt[2].

After the changes that took place in Egypt since January 2011, people started to realise the importance of competition law to protect the market from anti-competitive practices. Several suggestions to amend the law were introduced and discussed in parliament. However, the law can't be amended until further discussions take place between all stakeholders after a clear economic vision of the country is adopted.

The following piece is intended to shed light on the law, the enforcement agency and the cartel cases handled, and suggested reform for better performance.

The Egyptian Competition Law

Overview of the Law Relating to Cartels

The Egyptian Competition Law (ECL) applies to all economic activities undertaken by persons operating in the market. Article (1) of the law provides that *"Economic activities shall be undertaken in a manner that does not prevent, restrict or harm the freedom of competition in accordance with the provisions of the law"*.

The law defines persons in Article (2) to include natural and juristic persons, economic entities, unions, financial associations and groupings, groups of persons, whatever their means of incorporation, and related parties by way of majority ownership or control of management. Accordingly, anti-competitive practices, including cartels, may be detected between any persons operating in the market no matter the type of their economic activity.

The law empowers the Egyptian Competition Authority (ECA) to initiate any cartel inspection and receive complaints in this regard. The complaint may be submitted by any person or firm on the form prepared by the ECA[3].

The law in Article (6) contains an exhaustive list of hardcore cartels which are *per se* prohibited. According to this article "*Agreements or contracts between competing persons in any relevant market are prohibited if they are intended to cause any of the following:*

(a) Increasing, decreasing or fixing prices of sale or purchase of products or subject matter of dealings.
(b) Dividing product markets or allocating them on grounds of geographic areas, distribution centres, type of customers, goods, market shares, seasons or time periods.
(c) Coordinating with regard to proceeding or refraining from participating in tenders, auctions, negotiations and other calls for procurement.
(d) Restricting the production, distribution or marketing operations of goods or services, this

comprises restricting the product kind or volume or availability".

The Article does not raise much concern for the definition of the relevant market (relevant product and geographical area) or the types of agreements that are considered prohibited cartels; price fixing, market allocation, collusive tendering or bid rigging, and limitation of production or distribution. In this the law follows the international norms that are not different from any other jurisdiction. However, the Article raises certain questions about what is meant by *"Agreements and contracts", "Competing Persons"* and *"intended to cause"* perception.

The first requirement of the Article is that there should be an "agreement" or a "contract" between competitors in order to consider it as a breach to the law. Article (10) of the Executive Regulations[4] of the law widened the scope of agreements and contracts to include "verbal and written agreements and contracts". However, it should be clear in any case that this requirement excludes the notion of concerted practices, as is the case under the EU regulations and practice[5]. Therefore, if an agreement or a contract between competitors is not proven by the ECA, it is not possible to establish the existence of a cartel.

On the other hand, the term *"Competing Persons"* leaves room for many interpretations, notwithstanding the definition stipulated by Article (9) of the Executive Regulations which defines the competing persons as meaning: *"any of the persons who have the ability to carry out the same activity in the relevant market at the present time or in the future"*. This definition makes it difficult to understand what is considered as *"same activity"* and the period of time one has to consider *"in the future"* to include such persons as potential competitors, especially in the absence of any clear criteria or guidelines adopted by the ECA in this regard.

As for the *"intended to cause"* perception, this term has raised an ongoing debate on whether the article requires the execution of the agreement or it is sufficient to only have the agreement in place in order to establish the violation. According to the wording of the article, it is sufficient to have the agreement in place regardless of its execution or its effect on the market[6]. In the *Cement Case*[7], the court expressed clearly that it considered the execution of the agreement as evidence of the existence of the agreement. This means that the execution of the agreement is not an element in the infringement itself but is rather considered as evidence or a proof confirming the existence of the agreement.

This interpretation goes in line with international practice where conspiracy in itself is considered a violation with no requirement for execution[8]. However, in practice it is still an issue of concern even for ECA officials. A clear guideline therefore needs to be in place by the ECA to avoid any conflict on whether execution of the agreement is part of the violation or just evidence on its existence.

Cross-border issues

The ECL in Article (5) adopted an extra territorial jurisdiction whereby the jurisdiction of the law extends to cover acts that were committed abroad provided that two conditions are met: 1) the acts committed abroad result into the prevention, restriction or harm of the freedom of competition in Egypt; and 2) the acts committed abroad constitute violations under Egyptian law.

In light of this Article, any cartel that exists in other countries shall be subject to the ECL if such cartel affects the Egyptian market, even if the cartel members have no physical existence in Egypt. The ECA is mandated to coordinate with its counterparts in other countries on matters of common interest. Therefore several bilateral cooperation agreements in the competition field were signed between Egypt and other countries: Jordan, Morocco and Tunisia. To date, however, there is no tangible cooperation between the ECA and other competition authorities concerning the investigation of cross-border, anti-competitive practices.

Criminal sanctions

All anti-competitive practices provided for under ECL are of a criminal nature. They are considered as misdemeanours, subject to a criminal fine ranging between EGP 100,000 (US$20,000) to EGP 300,000,000 (US$50,000,000). The case is to be referred to the Specialized Economic Court, established in 2008 by Law No. 120 of 2008, as the competent court to review competition cases.

Therefore, in any cartel case the ECA has to prove beyond reasonable doubt all the elements of the crime; one of the prohibited agreements or contracts, between competitors, in the relevant market. The

ECA is entitled to use all types of evidence (direct and circumstantial evidence) including legal and economic analysis, which are all accepted before courts.

Article (21) of the ECL, however, provides that *"Criminal lawsuits or any procedure taken therein shall not be initiated in relation to acts violating the provisions of this Law, unless a request of the Competent Minister or the person delegated by him is presented"*.

The referral of the cartel case to prosecution or to court by the competent minister is of great concern, since it opens the door for government interference in deciding which cartel cases should be prosecuted and which not, hence favouring some sectors over the others. This was raised for example in the *Milk Case*[9] where there were ministerial decrees by the Minister of Trade and Industry and Minister of Agriculture calling on the milk farm producers and the packed milk manufacturers to sit together and agree on prices to maintain low prices for consumers.

Overview of Cartel Enforcement Activity

Over the last seven years, since the establishment of the ECA in 2005 and the start of its functions in 2006, many cartel cases have been handled. Some cases were brought to the ECA's attention by a request from the government; some were based on complaints received from persons operating in the market; and the rest were initiated by the ECA.

There is no exact figure on the number of cartel cases handled by the ECA but based on its annual report they range between 6-8 cases. The *Cement Case*[10] was the only case referred to court in 2007 and the court decision was in favour of the ECA report sentencing the cartel members with the maximum fine. The *Milk Case* and the *Cinema Case* are still pending investigation by the prosecution office. The rest of the cases were closed based on non-infringement or non-competence of the ECA, except one case, *Hema Plast Case*[11], where the cartel is proven and the two cartel members complied with the measure taken by the ECA.

It is clear from the limited number of cartel cases that competition culture is still absent in the market place. Cooperation rather than competition was the norm in the market until the adoption of Competition Law in 2005. Still, government bodies and firms operating in the market are not familiar with the provisions of the law and the importance of avoiding the negative effects of cartels on the market place and the economy at large, notwithstanding the efforts of the ECA to disseminate competition culture.

Another important point that is considered a key issue in enforcement is the lack of an accurate database about the market. This was reported repeatedly by the ECA on different occasions. Even government bodies sometimes have discrepancies in the numbers and figures they provide. A large number of the firms in the market are classified as family business and do not hold regular books. Other firms are reluctant to cooperate with the ECA, fearing any government interference in an indirect way. In addition, there is a large informal sector that makes it difficult to measure the exact size of the market and the number of players therein.

Key issues in relation to investigation and decision-making procedures

The ECA is empowered by the ECL and its Executive Regulations to conduct studies and initiate inspections concerning any suspicious sector or practice in the market. In addition, any person may submit a complaint to the ECA regarding any anti-competitive practice. ECA officers have the law enforcement power to enter any workplace – governmental and nongovernmental – during office hours, inspect and seize all the documents they find necessary to examine the case.[12]

Decisions and measures taken by the ECA have to be respected and enforced. Any person who does not comply with such decisions or measures may be subject to a fine ranging between EGP 20,000 (US$3,500) to EGP 500,000 (US$90,000). However, there is no mechanism adopted by the ECA to monitor the compliance of persons with its decisions and measures. Moreover, no case was reported against any person for noncompliance.

Leniency/amnesty regime

When first introduced in February 2005, the ECL did not contain a leniency/amnesty programme whereby a whistle blower does not benefit from informing the ECA of any existing cartel. In June 2008, the law was amended to introduce a leniency programme which allows a member of a cartel to

benefit from informing the ECA of any breach by being subject to half the fine.

The newly introduced Article (26) of the ECL stipulates that *"in case of committing any of the crimes mentioned in Articles (6) and (7) of this Law, the court may exempt, up to half of the sanction decided thereby, whomever of the violators takes the initiative to inform the Authority of the crime and submit the supporting evidence, or whomever the Court considers that he has contributed to disclosing and establishing the elements of the crime at any stage of inquiry, search, inspection, investigation or trial"*.

However, this partial leniency was not productive and was not reported by the ECA to be used in any case. The reason for that may be attributed in part to the culture of Egyptian society, but the main reason was that the leniency programme adopted did not create a real incentive for anyone to use. Moreover, the use of the leniency programme rests with the court and not with the ECA, hence allowing for more discretion to the court and more uncertainty to whistle blowers that they will be acquitted.

Settlement of cases

The ECL provides in Article (21) for a settlement mechanism by the competent minister. According to this mechanism, the Competent Minister or the person delegated by him may settle with regard to any violation, before a final judgment is rendered, in return for the payment of an amount not less than double the minimum fine and not exceeding double its maximum.

The settlement shall be considered a waiver of the criminal lawsuit filing request and shall result in the lapse of the criminal lawsuit relevant to the same case subject of suing. To date, however, no cartel case has been reported to be settled under this mechanism.

Developments in Private Enforcement of Antitrust Law

Any firm or individual that has suffered damage due to the existence of a cartel can seek compensation before the court trying the competition case. Compensations awarded by the court are different from fines imposed on members of the cartel. While action for damages before the court also acts as a deterrent, its main purpose is to compensate victims of anti-competitive behaviour or to secure compensation for damage suffered.

In all cases handled by the ECA where a cartel was proven and referred to prosecution or to court, no individual or firm applied to seek damage except in the *Milk Case* which is still under investigation at the prosecution office. It is therefore important to raise the awareness of persons about the importance of seeking damage to recover their losses, which will work in turn as a deterrent of cartel practices in the market.

Reform Proposals

Cartels and collusive practices either by multinational firms or by domestic firms are common in Egypt, as is the case with other developing countries. They can develop in a wide diversity of sectors: basic staples, services, construction and the industrial sector. They impose a large cost on developing countries, both for consumers and for the economy at large.

However, prosecuting cartels may be the most difficult of the tasks assigned to competition authorities, as cartels are conceived and carried out in secret. Moreover, cartel operators, knowing that their conduct is unlawful, do not willingly cooperate with competition officials in the course of investigations. Thus obtaining evidence to prove the existence of cartel agreements requires adequate legal provisions, special investigative tools and skills.

Therefore, affirmative steps shall be taken to detect price fixing, bid rigging and market allocation cartels. Dependence on circumstantial evidence, especially economic analysis, becomes a must and shall be widely accepted by courts. In addition, many cartels have used trade association meetings as an effective "cover" for their secret cartel meetings. It is important to scrutinise trade association meetings, which typically bring together the most significant producers/sellers of a particular product.

Amendments to the ECL may be suggested to strengthen the role of the ECA in cartel detection. First, the leniency programme provided for under Article (26) of ECL needs to be amended to allow full exemption to whistleblowers. The ECA shall have the power to grant the cartel member who reports

the cartel full or partial exemption without being subject to prosecution and trial as is the case with the present scheme that proved inefficient.

Second, the ECA shall be granted the power to directly refer the case to prosecution and trial in order to avoid any government interference with cartel cases, as may be the case with the existing provision which leaves it to the competent minister. This shall be complemented with the power of the ECA to reach a settlement in any cartel case.

Third, international best practice shows that the competition authority shall not be burdened with minor cases that do not have a tangible effect on consumers or on the economy[13]. Accordingly, the Law may introduce an exemption for *De Minimus*. The ECA may also be empowered to grant exemptions for any cooperation agreement aiming at improving the production or distribution of goods or promoting technical or economic progress, as is the case with the EU competition regime under Article 81 of the EU Treaty.

Finally, although there is a compliance kit prepared by the ECA as a model to be used by firms, it is still insufficient. The ECA has the responsibility and the duty to set the required guidelines to be followed by firms operating in the market, business associations, sector regulators and other governmental bodies.

* * *

Endnotes

1. Ali El Dean and Mohieldin, "On the Formulation and Enforcement of Competition Law in Egypt", ECES WP60, September 2001.
2. Law No. 3 of 2005 on the Protection of Competition and Prohibition of Monopolistic Practices adopted by the Parliament on February 15th, 2005 and entered into force on May 16th, 2005.
3. Form is available at ECA premises or on website: www.eca.org.eg.
4. The Executive Regulations to the Competition Law adopted by Prime Ministerial Decree No. 1316 of 2005.
5. The EU Competition law, Rules applicable to Antitrust Enforcement – General rules, Situation as at 1st December 2011, http://ec.europa.eu/competition/antitrust/legislation/handbook_vol_1.pdf.
6. ECA Annual Report 2006-2007.
7. ECA Annual Report, 2008.
8. In the EU, Article (1) of COUNCIL REGULATION (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty provides that "Agreements, decisions and concerted practices caught by Article 81(1) of the Treaty which do not satisfy the conditions of Article 81(3) of the Treaty shall be prohibited". In the United States, the court confirmed in the Lysine Case http://www.justice.gov/atr/cases/f0900/0965.htm that the agreement to fix and maintain prices and to coordinate price increases for the sale of lysine in the United States and elsewhere; and to allocate the volumes of sales of lysine among the corporate conspirators constitute a violation to section (1) of Sherman Act.
9. ECA Annual Report 2010-2011.
10. ECA Annual Report 2010-2011.
11. ECA Annual Report 2006-2007.
12. Minister of Justice Decree No. 8483 of 2006 granting the law enforcement power to the ECA officers.
13. EU Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community *(de minimis)*, 2001/C 368/07.

Dr Khaled Attia
Tel: +202 353 52 445 / Email: kattia@sarieldin.com

Dr Khaled Attia has 17 years of experience in the legal field. Dr Attia was the Executive Director of the Egyptian Competition Authority (2006-2010). During that period, he handled over 40 competition cases and introduced over 10 research papers explaining the terms and provisions provided for under competition law. Dr Attia was also a Commissioner in the COMESA Competition Commission (2007-2010).

Dr Attia represented Egypt in several international occasions, including the meetings of the Common Market for Eastern and Southern Africa (COMESA) concerning the drafting and adoption of regional competition rules and regulations, the Euro-Med meetings on Competition Law and Policy. Dr Attia is also amongst the founders and a board member in the Egyptian Association for the Protection of Competition.

Before joining the ECA, from the year 2000 throughout 2006, Dr Attia had worked as a Chief Prosecutor in the Office of the Prosecutor General of Egypt, Office for International Cooperation. During that time he worked as a part time legal advisor to the Minister of Trade (2000-2004) and then to the Minister of Finance (2004-2006).

Dr Attia obtained his PhD in international law in 2005 from Ain Shams University and an LLM in international human rights law in 1999 from University of Essex, UK. He has many publications and working papers in the academic field, such as "The Law-Making process of Economic Laws in Egypt", "Towards a Regional Competition Policy: The COMESA Experience", "Capacity Building for Effective Implementation of Competition Policy". He is also a lecturer at Law School (English Section) Ain Shams University and in Helwan University.

Sarie-Eldin & Partners

Smart Village – Building B 19 (P.O. Box 121 Smart Village), KM 28 Cairo/Alex Desert Road, 6th of October, Egypt
Tel: +202 353 52 445 / Fax: +202 353 52 425 / URL: http://www.sarieldin.com

Strategic partners:

www.globallegalinsights.com