

Competition Law in Practice¹

A well attended panel discussion on June 17th, 2009 was organized by the Industry Core Committee in cooperation with the Egyptian Competition Authority on “Competition Law in Practice”.² The aim of the panel was to give clear guidance to middle management on the application of the Egyptian competition law and the role of the Authority therein.

At the outset Mrs. Mona Yassine, the head of the Authority stressed that in a free market economy the goal of the ECA is to foster more economic efficiency, more consumer welfare and more freedom of choice and creativity. She explained the day to day work of the Authority and their handling of a case. A case is initiated either by a company that registers a complaint or upon the prerogative of the Authority itself, which can initiate investigations of its own accord (Article 11 of the Egyptian Competition Law - ECL). Sometimes the Authority may receive a request from the minister of trade and industry, as the competent minister, asking it to investigate a sector and the extent of its compliance with the law. The time between submitting a complaint and finalizing the necessary documentation should not exceed the period of 4 months, unless the inspection otherwise requires.

For filing a complaint, it is compulsory to complete first the requirements indicated in the ECA format, which is available on the web site. The first three requirements are obligatory and consist of the full title of the complainant, its sphere of activities, and its capacity. The two other elements of the form-- the justification for filing a complaint and supporting documentation to indicate the damage incurred if available -- are optional, though can be helpful to the investigation process.

It is also a necessary condition that the complaint is signed by the competent person in charge at the complaining firm. After making sure that the complaint is under the jurisdiction of the competition law, the executive director of the competition authority

¹ In February 2005, the People's Assembly ratified the Competition Law, after which the Egyptian Competition Authority (ECA) was established to ensure its sound enforcement. Events on competition held in AmCham can be found on AmCham website and are as follows:

1. On 23 March 2006, AmCham's Industry and Legal Affairs committees hosted Mona Yassine, chairwoman of the Egyptian Competition Authority (ECA), and ECA executive director Khaled Attia to speak about "Egyptian law on the protection and prohibition of monopolistic practices."
2. On 13 September 2006, the AmCham/Trade-related Assistance Center (TRAC) organized a panel discussion on “Abuse of Dominance and Competition” (Article 8)
3. On 10 October 2006, The Legal Affairs Committee held a meeting with guest speaker Bill Batchelor, partner, Baker & McKenzie LLP, United Kingdom, who addressed the topic of "The Egyptian Competition and Anti-Monopoly Law: Potential issues in light of European practices."
4. On 3 December 2006, the AmCham/TRAC held a seminar on “Competition Law and Policy in Egypt”.
5. On 28 January 2008, AmCham/TRAC organized its yearly conference on “Competition and Privatization in Egypt”.

² In preparing this panel discussion, the Industry Committee worked in close cooperation with the Legal Committee as well as the American Chamber's Trade-Related Assistance Centre (TRAC).

selects a team that could range from 2 to 5 persons, including an economist and a lawyer. A work plan is then designed, starting with the data collection through different venues, notably corresponding with the relevant firms inquiring about sales volumes, product details, etc. Data collection is done with the highest degree of confidentiality, as the authority staff is bound to secrecy and are obliged to pay fines or may be fired if any information is leaked. The company under investigation need not know about the case filed against it, unless the minister himself requests the investigation of a sector and publicizes this request for political reasons.

After the data collection, the next step is determining the “relevant market” that according to the Egyptian law consists of two elements, namely the relevant product, which is decided against the availability of ‘like products’ that can work as substitutes and the geographic area. After determining these two major elements, the team then starts investigating the type of violation according to the behavior of the company. The ECL has stated three cases of violations: horizontal, vertical agreements and abuse of dominance on the basis of the three relevant articles, 6, 7 and 8, which are all of a criminal nature. It was also explained that identifying these problems is not as simple as it might first appear. Violations are not clear-cut and in many cases fall into gray areas. The final judgment in many cases must rest on thorough investigations that include market research. As criminal offenses, these violations are handled by the public prosecutor’s office. It is important to note, however, that a company cannot file a case independently or go directly to the prosecutor’s office. It is only the minister who has the sole right to file a case and he does so only on the basis of reports referred to him by the Authority.

Once the report is completed, it goes through three separate layers to ascertain whether or not there is effectively a breach of the law before it is presented to the Minister of Trade and Industry. The report is first reviewed by the executive director; it is then circulated to both lawyers and economists within ECA; and finally it is reviewed by the board of the competition authority. Once a breach is decided, the report is submitted to the minister to carry out the procedures for filing a criminal case. At this stage, the ECA would have collected all the necessary evidence and proof of infringement. The defendant has the right at all times to request a settlement outside the court and the minister has the final decision to accept or reject such a settlement, which has to undergo a penalty of twice as much the minimum and should not exceed at any time twice the maximum fine to be paid.

MARKET DEFINITION

Deciding whether there is a violation of the law is not done in absolute terms but hinges on two basic and decisive factors: (a) identification of the relevant products and (b) the geographic area in which the investigation is taking place. These two factors constitute the concept of “market definition”.

(A) DEFINITION OF RELEVANT PRODUCT

The Egyptian competition law defines “relevant products” as including all products that are considered to be ‘practical’ and ‘objective’ substitutes to each other as assessed from the consumer’s perspective. Article 6 in the executive regulations of the Egyptian competition law identifies certain criteria that have to be met in order to decide whether products are

practical and objective substitutes. The first criterion is to have the same characteristics and usage. This, however, constitutes only a necessary though not a sufficient condition for products to be practical and objective substitutes. It has to be complemented by other criteria. The second criterion is that products have to be considered as viable alternatives to one another, that is the consumer is willing and able to shift from one product to another. For example, although a Jaguar and a Toyota resemble each other in their characteristics and usage, they are not substitutes as consumers will not shift from one car to the other as a result of the relative change in price. Both types of product target different market segments. The third criterion that has to be taken into account is the element of availability of the product in the market because even if the two first considerations are met, i.e. products have the same characteristics and usage and prices are close so that consumers are willing to shift, the non-availability of a substitute product in the market renders the first two criteria void. If any of these three criteria are not met, the product is then not relevant and is excluded from the product definition as it is not potentially competitive and does not pose any threat.

(B) DEFINITION OF GEOGRAPHIC AREA

The geographic area in the framework of market definition is the area in which similar competition conditions for the product in question prevail. The Law speaks of competition circumstances that are 'homogenous'. Comparable to product definition, the executive regulations have set a number of criteria that generate potential competition³ from a different geographic area threatening the relevant product. Among the criteria set are the following:

1. The ease of the market players to move from one geographic area to the other, as well as the ease of entrance of new market players into other competitive geographic areas to sell like products
2. The ease of consumers to move from one geographic area to the other as a result of the relative changes in prices or any other competitive factors
3. Though there is no clear-cut period, in practice a time span of 1 to 2 years is considered realistic, within which one can envisage the surfacing of real or potential future threat. New entrants would pose less of a threat if a longer period of time is taken into account.
4. Different domestic laws, legal barriers, such as tariffs and non-tariff barriers, as well as transportation costs between geographic areas can also affect potential competition between them

For additional clarification, the tobacco case was referred to. As explained, there were three main players in the cigarette market in Egypt. Two worked in international tobacco brands, Philip Morris and British American Tobacco, whereas Eastern worked on the local brand. One of the two companies operating in international brands filed a complaint against the other for exclusive dealing with wholesalers in the market to sell and distribute only their products and not the other company's products. The deal was made with 185 wholesalers in the market, which accounted for over 80% of the entire market sales of cigarettes.

³ By potential competition it is meant that competitors can access the market timely and effectively, i.e. be able to compete on par with the other producers.

The case was built on the premise that such a deal made it difficult for the other international companies to operate and compete in the market. The specialized team in the ECA was first interested in identifying the relevant product, i.e. the substitutive products as well as the geographic area in which the alleged violation had taken place. Such data collection was essential to clarify the number of market players based on the different products selected as potential and viable substitutes, which would decide whether a violation of the law had occurred.

The difference in perspectives between the ECA viewing a case and the complainant company or the industry in general was emphasized. Whereas the latter had based its complaint on potential competition existing solely between the two international tobacco brands, the ECA perspective was broader as it defined the relevant products as including local and international brands of cigarettes as they constituted practical and objective substitutes on the basis of characteristics and usage as well as readiness of consumers to shift from international to local brands as a result of a price shift.

Through conducted market studies, it was evident that the complainant and defendant company had both experienced considerable market losses to local brands, effectively more than what was previously expected to the extent that it affected the profitability of the companies operating in the international brands. The result was clearly that local brands pose a material threat and are potential competitors disciplining the effective behavior of companies specified in international brand cigarettes in the local market. Local brand companies were then considered as an integral part of the relevant market definition of the tobacco case. Something which was clearly omitted by the complainant company having defined the soaring market shares just in terms of international brands. Unlike the complainant and through expanding the calculations by adding competitors in local brands, the ECA from its own perspective concluded that there was no violation case.

Furthermore, the Authority defined the geographic area as solely pertaining to the Egyptian market due to the price difference between imported and locally produced cigarettes that prevented consumers to shift from local to foreign cigarettes. Thus, other countries were not potential competitors so as to include them in the definition of the geographic area, as the price difference was considered a practical barrier. Differences in the market definition, however, may occur when the time period changes. Prices of foreign cigarettes may experience a setback in the future due to the prohibition of smoking and hence become potential competitors for locally-produced cigarettes. This might well cause the widening of the geographic area to include foreign countries as potential competitors in the definition of the market.

TYPES OF VIOLATIONS

After addressing the market definition with its two components; product and market relevance, the designated team assesses the type of violation that has occurred under the ECL. There are, as said, 3 types of violations. The first two types require two or more parties to be incriminated in violating the law, whereas the third type of violation confines itself to one person. The three cases of violation are the following:

1. HORIZONTAL AGREEMENTS:

These are agreements between competitors at the same stage of production or at the same level of the supply chain who decide to take a cooperative approach to the market as covered in Article 6 of the Law. Horizontal agreements most frequently give rise to the clearest violations of competition law. If, for example, all medical practitioners in Cairo were to agree on certain prices for their services and refused to offer these services for anything less, it would be a blatant breach of the law.

Horizontal agreements between actual or potential competitors are, contrary to the vertical agreements, violations in their own right, meaning that we have only to prove that there has been a horizontal agreement in order to determine a violation of the Law. In the case of horizontal agreements that basically constitute hard core cartels, it is not necessary to conduct further investigation to prove harm to consumers or other additional conditions to prove violation.

Article 6 of the Law clearly prohibits any type of agreements (verbal or written, implicit or explicit) between competing Persons in any relevant market if they lead to price fixing,⁴ orderly market arrangement, including market allocation and/or market segmentation,⁵ collusive tendering that is basically restricting competition in tenders and government procurement,⁶ or limiting production, distribution or marketing of a product.⁷ In all types of

⁴ PRICE FIXING is not just about fixing the price, as there are different types of price fixing. Increase, decrease or fix the prices is a violation to the Law. Although reducing the price level maybe considered beneficial to the consumer, it is still considered a violation to the law because it is a barrier to entry to this market. Hence, it shields the producer from competition and restricts the consumer's freedom of choice. But also agreeing to keep the price within a certain margin or agreeing on certain returns or on the after sale services or installments, these are all considered as price fixing and prohibited by Article 6. Price fixing can be also within a season or a certain time frame.

⁵ ORDERLY MARKET ARRANGEMENT is a common practice among competing companies. This is usually done by allotting themselves each an exclusive geographic area to sell the product. This restricts the consumer's choice. Although we might have in principle a number of market players but they have agreed among themselves not to compete against one another but to divide the market accordingly. This is known as market allocation and can be applied equally at the national as well as international market levels. An indirect way of allocating markets can also be done through exclusive distribution chains. Market segmentation amounts to the division of the market between the market players, so that no competition occurs as each market player is targeting its own market segment. Markets can also be divided by percentage according to each player's capacity to produce.

⁶ COLLUSIVE TENDERING is a common practice in government procurements. It could either occur in an agreement among competing companies to win the government tenders on rotational basis. So instead of competing against one another, thus allowing the government to pick the lowest price, they agree among themselves on the price level for each tender in advance, so that every company gets its share over a period of time. Another way of violating free competition is in submitting an offer that is fictitious, where the submitting company does not even produce the product tendered by the government. This could be done as a favor in agreement with another company to make it win the tender. Such a fraud is, however, easily detected by the investigations. Another way of circumventing free competition in a government tender is through agreeing on subdividing the project and being subcontracted thereafter by the company, which wins the tender.

market arrangements, the consumer is the one targeted and negatively affected as she/he is being deprived from the freedom of choice. If, however, the agreement leads to none of these prohibited activities under Article 6 of the Law, then there is no violation. For example, producers can agree on lowering the export prices to be able to compete in the international market or to agree together to ask the government to reduce the import tariffs on a raw material to allow them to compete internally against the imported good. Although such examples may be considered as horizontal agreements between domestic competitors, they do not constitute a violation of the law as they do not fall in any of the prohibited actions designated by the ECL.

As a criminal offense, horizontal agreements though constituting a violation per se have still to undergo the strictest process to prove to the court beyond any reasonable doubt that a violation of the ECL has occurred. In other words, the standard of proof is set at the highest level. In case of lacking evidence, the ECA as the sole body responsible to prove the case can decide to not submit it to court. In the context of criminal prosecution, all types of evidence are presented to the criminal judge to prove the case ranging from admission of guilt to witnesses and hard documentation as well as the technical report produced by the ECA. As the Egyptian law in general lacks any valid program for leniency, there is no temptation or any enticement for the defendant company to admit guilt or help the ECA in detecting the violation. However, if a company decides to admit guilt and ask for a just settlement, the ECA has the prerogative to take such an action into serious account prior to going to court.

The cement case was brought up as an actual case investigated by the ECA, which is still in front of the appeal court. Covering the period from 2002-2006, there were 9 market players at the time of the investigation. The violation itself took place in 2005/2006 after the ECL entered into force. To decide on the market definition, the ECA considered solely one type as the relevant product, Portland cement, which constituted 96% of the production of the companies operating in the cement industry in Egypt. As for the geographic area, it decided to confine it to the Egyptian market because practical as well as price barriers⁸ barred imports from entering the market throughout the investigation period. At its face value, the ECA was able to identify violations of the Law under sub-paragraphs (a) and (d) of Article 6,⁹ that deal with price fixing and limiting marketing of the product respectively.

ECA divided the cement case in two parts. It first undertook the exercise of proving that factors facilitating cartels existed on the basis of internationally agreed factors. The second

⁷ LIMITING PRODUCTION, DISTRIBUTION OR MARKETING OF A PRODUCT, which is also done in concurrence with other competing companies. That is a concerted action among several producers to limit production at the same time, thus reducing the quantity available in the market with a view to driving the prices up. Although companies are free to reduce or stop production at any time, doing this in harmony with one another makes the agreement a flagrant violation to the Law.

⁸ International prices were at least 20% higher than the locally produced cement in addition to the lengthy period needed to finalize the procedures in the customs (over 30 days) and the non availability of storage facilities.

⁹ Subparagraph (a) reads: "Increasing, decreasing or fixing prices of sale or purchase of products subject matter of dealings." Subparagraph (d) reads: "Restricting the production, distribution or marketing, etc."

part was an effective study of market with a view to revealing the different actions of the market players indicating clear violation of the Law.

First: EXISTENCE OF A CARTEL:

To prove the existence of a cartel as a horizontal agreement among the 9 market players, the ECA went into studying the general and internationally-agreed upon factors facilitating in principle the formation of cartels. These range from product homogeneity, relatively limited number of market players, and transparency of the market structure. The latter element was provided for by the monthly report presented by the ministry of investment, which made public all kind of information in regard to the level of production, the prices, and other relevant data that gave the market players an open picture of the market structure of cement in Egypt. This allowed each producer to monitor his competitors' practices and behavior in the market, which at a later stage was the underlying reason for them to unite and coordinate their action to maximize profit. Finally, there was the lack of demand elasticity in the market, meaning clients (distributors and agents) were unable to shift from one product to the other.

Second: VIOLATING ACTIONS BY THE EXISTING CARTEL

As there were basically no records of formal meetings at the chamber of cement though such records were requested by law, the ECA built its case primarily on the basis of the testimony of distributors, which asserted that prices were fluctuating rapidly and with no specific reasons in their view except as a result of the coordinated action undertaken by the market players. It seems that upon questioning, a chairperson of one of the cement producing companies admitted that discussions about prices were done informally and in closed meetings. Though the court in the first instance depended heavily on such a testimony, this was later denied in the prosecution report.

ECA then conducted studies and was able to prove the following:

- i- During the study period, where the violation occurred (2005-2006), prices were moving together within a margin of less than 2-3% difference. This was a clear proof that prices were collectively decided upon with no effective competition between the market players.
- ii- There was no correlation between the prices and the average cost. Whereas prices increased by about 14%, the average costs decreased in the same period by at least 3%.
- iii- The stabilization of the market shares between the 9 market players throughout the study period. These shares were not reflective of the companies' real capacity to produce. In other words a clear coordination for market share distribution was taking place in spite its prohibition in line with subparagraphs (b) and (d) of Article 6.¹⁰

2. VERTICAL AGREEMENTS:

The panel first explained that vertical agreements were normal business practices and need not all the time restrict competition and be in breach of the law. A violation of the law

¹⁰ Article 6 (b) reads: "Dividing product markets or allocating them on grounds of geographic areas, distribution centers, customer base, goods, seasons or time periods."

occurs only if vertical agreements¹¹ effectively limit competition by raising barriers to entry for other suppliers or purchasers or reduction of inter-brand competition¹² or intra-brand competition.¹³ Such an exploitation of a vertical agreement as indicated in Article 7 of the Law has to be read, however, in conjunction with Article 12 of the executive regulations. The latter contains a list of valid justifications that negate violation of the law if the consequence is only restricting potential competition. On the one hand, an exclusive deal with a sole distributor may on the contrary be more efficient in terms of better distribution at a lower price range that would result in benefiting the consumer as an end user. On the other hand, in food industry, for example, it may be incumbent upon the producer to envisage exclusive dealings with one supplier of raw material to ensure additional considerations of preserving the quality of the product, its reputation, safety, and security requirements.

Such justifications for warranting vertical agreements are then juxtaposed by the Authority to the amount of real harm done to competition. It is up to ECA based on the rule of reason to assess the balance on a case by case basis, unlike with cartels, which are clear-cut violations. This distinction was then illustrated through comparison with the previously discussed tobacco case. The ECA had to verify if the vertical agreement with the wholesalers, as explained earlier, constituted a restriction to competition, i.e. the competitive environment in the defined market and not a specific damage or harm inflicted upon a single firm. Having decided on the geographic area and defined the relevant products, the conclusion was reached accordingly that competition in the market was not restricted, as the local brand was able to compete and increase its market share. Thus the agreement with the wholesalers and one of the international producing tobacco brand cigarettes was not in violation of Article 7 of the Law.

3. ABUSE OF DOMINANCE:

This is a unilateral act of violation, where just one Person is violating the law and this Person has to be in a dominant position as covered in ECL Article 8. A dominant position per se as explained in Article 4 of the Law does not constitute a violation.¹⁴ A dominant position has to contain 3 basic elements: first, a substantive market share, which according to ECL is the Person having more than 25% of the market share.¹⁵ Second, this has to be accompanied with market power, i.e. having the ability to influence prices and quantities in the market for a substantial period of time without enduring a significant loss of sales, and lastly, the inability of any other potential competitor to stop ones practice.

To a question raised by the audience whether it constitutes a breach of the law if a major supplier makes a deal with a supermarket chain to exhibit and sell solely its product for a

¹¹ Vertical agreements are upstream or downstream the chain of production. A Person may have a vertical agreement with his supplier on the upstream or with his client on the downstream.

¹² Competition between different brands

¹³ Competition among sellers of the same brand

¹⁴ Article 4: “Dominance in a relevant market, in the application of the provisions of this Law, means the ability of a Person, holding a market share exceeding 25% of the aforementioned market, to have an effective impact on prices or the quantities supplied, without his competitors having the ability to limit it”.

¹⁵ In other jurisdictions, such as the US, a market share under 65% is not a sufficient basis for a presumption of substantial market power.

limited period of time and remove all other relevant substitutes in return for a generous bonus, it was explained that first ‘major’ had to be defined in terms of market dominance, i.e. owning 25% of the market share of the said product. This has then to be addressed against his market power and the ability to affect the prices or the volume of the product without any resistance or ability of other producers to compete on par with the so-called major supplier. It is different if the major supplier is acting in good faith for the purpose of serving better the end consumer through asking the distributor not to deal with competing products and to leave other clients, such as smaller grocery stores to handle them more effectively. There is nothing in the law that prohibits a corporate to direct the distributor and its practice in the market.

The issue is here, the major supplier may have 25% but has no market power, hence, cannot cause damage and handicap competitors from entrance. The reverse is not true; a case cannot be looked at if the major supplier has market power though not owning 25% of the market. If a major supplier does not possess 25% of the market, then the case cannot be handled under the third type of violation, abuse of dominance (Article 8), but could then be dealt with as a case of vertical agreement (Article 7). Being a dominant corporate with market power and reaching an exclusive agreement with the distributor to the detriment of the consumer constitutes a breach of the law. The dominant firm is, thus, penalized under Article 8 of ECL.

Again, Article 8 as stipulated in its last provision has to be read in conjunction with Article 13 of the executive regulations, as the latter states clearly 9 practices that are explicitly prohibited to a Person of a dominant position to undertake in a relevant market.¹⁶

¹⁶ As stipulated in Article 8 of the Law, a Person holding a dominant position in a relevant market is prohibited from carrying out any of the following:

- a) Restricting competition in the market for a certain period of time by prohibiting manufacturing or distribution of a certain product
- b) Refraining from dealing with a Person in a manner that results in restricting that Person’s freedom in the market
- c) Limiting distribution of a specific product based on vertical relationships
- d) Tie-in agreements imposing conditions for the sale or purchase of a product unrelated by its nature or by commercial custom to the original transaction, e.g. refusing to sell a laptop unless the operation system is bought as well. There are two different products, hardware and software
- e) Discriminating between sellers or buyers having similar commercial positions by giving bonuses to one at the expense of the other, which would then weaken the ability of the discriminated against to compete or be driven out of the market
- f) Refusing to produce or provide a needed product in the market though it is economically possible
- g) Dictating on a Person not to provide its services and utilities to any other competitor
- h) Selling products below their marginal cost or average variable cost. This, however, has to be considered against 4 ifs:
 - if the sale will drive out competitors from the market
 - if the sale will prevent competitors from entering the market
 - if the dominant Person will be able to increase prices
 - if the period of time of the sale of a product below the average cost will result in any of the aforementioned
- i) Imposing an obligation on a supplier not to deal with a competitor

It was made clear that 25% is considered as a low percentage for market dominance and need to be changed within the Law, as this more often than not does not come with market power. This becomes cumbersome to the Authority with its limited capacity to investigate a case at length to prove at the end that the dominant firm is lacking market power. In comparison, countries like the US or Europe consider a market share of at least 65% or 40% respectively to prove dominance. There is no problem in having a high market share, provided there is no abuse of dominance. Wal-Mart holds 70% of market shares; it has been investigated several times with no violation proven. Likewise Microsoft has almost 94% as well as ability to control prices and volume; yet, it does not stop other competitors from entering the market. Dominance does not equate with violence.

In conclusion the following can be stressed:

1. Throughout their presentations the experts stressed that prevalence of a healthy competition environment is of essence. As long as competition prevails the decisive factor is economic efficiency. Companies can grow and enter the market according to their efficiency, which is in turn in the best interest of the consumers, as end users.
2. Cases are dealt with on a case-by-case basis. In order to analyze the specific circumstances that prompt any alleged violation, the Competition Authority undertakes a thorough investigation with a view to reaching a clear-cut market definition, in terms of the relevant products and the geographic area.
3. The Law is dynamic and cases change over time. In some markets violations are looked at as cases per se, in others they are considered relative to the harm done to competition environment or to consumers, where the rule of reason becomes the decisive factor and competition authorities use discretion in their judgments.
4. Whereas the ECA has to consider the rule of reason in vertical agreements to decide on the right balance between restricting competition and the harm done to consumers, and has to prove abuse in the case of dominance, horizontal agreements are more of violation cases in their own right. Nevertheless, as criminal cases hard core evidence must be established to convince the court.
5. The positive role of market players in complying with competition Law is equally important to the role of the ECA in effectively implementing the law. Both roles would lead to a better business environment which reflects positively on the performance of market players in all economic sectors.