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Judicial Perspective on Competition Law

-- Egypt --

1. The Egyptian Competition Law (ECL) was issued in 2005 as an economic and criminal law that falls within the jurisdiction of the criminal court. Therefore, when ECA finds it necessary to incriminate a certain practice¹, it has to refer its decisions to the public prosecutor who does a second examination and refers the case to the competent courts for decision making and sanctioning. The Egyptian judicial system is based on the bifurcated model where both parties present the facts and all available evidence to the competent judge for a final ruling as opposed to the integrated model found in several countries where the Competition Authority is the decision maker. However, ECA is still a decision maker when it comes to issuing cease and desist orders, leniency and settlement decisions, although all these decisions are challengeable before the administrative courts.
2. Therefore, we will examine in this paper the extent of specialization and expertise of the public prosecutor (I) and the competent courts' (II) on matters related to Competition Law.

1. The public prosecutor's perspective on Competition Law:

3. The prosecutor of financial and commercial affairs is the competent body to investigate ECL violations. However, it is not exclusively competent on competition law matters and prosecutors are appointed based on a rotational system, similar to the one of the judges, which prevents the development of expertise. Therefore, they are not always aware of the economic nature of the ECL and, due to their criminal law enforcement background, they require a higher evidentiary threshold than what the ECA faces before the judges. ECA always finds difficulties to convince the public prosecutor of violations based on economic evidence. Such difficulties occurred in 2007 in the *molasses* case where the prosecutor defined the market based on the supplier's standpoint and not the one of the consumer as stated by law, and consequently blocked the case for absence of market power. Afterwards, ECA organized a workshop where both parties, ECA and the Prosecutor, presented their point of views regarding the ECL. Since then, the prosecutor became more comprehensive of the economic nature of the law, but nonetheless, it is still very difficult and risky for ECA to base a violation solely on economic data and finds many of its cases blocked by the prosecutor.

4. However, lately, the prosecutor – when faced with a case that requires data analysis expertise or further research and data collection – appoints an expert committee from ECA to assist him. This expert committee is independent (The ECA board of Directors is not permitted to interfere in its final decision) and is endowed with the

¹ ECL incriminates the hard-core cartels, anti-competitive vertical agreements and abuse of dominance. However, the ECL does not include any ex-ante merger control, only a post-merger notification is obligatory on any entity whose annual turnover of the last balance sheet has exceeded 100 million EGP. ECA is currently in the final stages of preparation of a draft law adopting an ex-ante merger control regime.

prosecutor investigative powers, which are higher than the powers endowed to the ECA's staff.

5. Consequently, specialization is needed at the prosecutor level as much as the judicial level, to prevent the blocking of ECA's cases.

2. The Competent Courts' perspective on Competition law:

6. Until 2008, the prosecutor used to refer the cases to the ordinary courts (with general specialization) as they were the competent courts to examine all ECL's violations. Afterwards, specialized economic courts were established to review all matters related to the ECL violations among other economic laws, these economic courts encompasses a criminal recourse path through the prosecutor and private civil recourse through private enforcement in relation to competition law. On the other hand, ECA is an independent administrative authority and all its decisions are administrative, therefore these decisions are challengeable before the administrative court.

7. Therefore, in this section, we will tackle the extent of specialization and expertise of the criminal courts (a) and of the administrative courts (b) when reviewing ECA's decisions.

2.1. The Egyptian judicial criminal system in relation to competition law cases: a partially specialized court.

8. In 2008, Law No.120/2008 establishing the economic courts includes provisions, which state the rules of a specialized judicial system. A system that provides a speed of adjudication of disputes by qualified judges who understand the accuracy of the economic matters while ensuring full defense rights.

9. Consequently, according to the law establishing the economic courts, the economic court shall be competent in reviewing all violations and private enforcement cases related to the ECL among other economic laws.²

10. The jurisdiction of economic courts of the disputes that arise from violations to the competition law were indicative of the legislator's recognition of the special nature of the competition law.

11. However, the competition law is only one of the laws that fall within the jurisdiction of the economic courts, only five competition law cases were referred to the economic courts since 2008, which is a very small number to allow judges to achieve a level of expertise in competition law. Furthermore, there is no specialized circuit within the economic court with an exclusive competence in competition law and there are no specialized judges with an exclusive competence in this matter. Although, judges in Egypt work according to a rotational system which results in changing their expertise occasionally. One can conclude that the judicial system in Egypt in matters related to ECL is no longer generalist but still not fully specialized, it is only partially specialized.

² The economic laws that fall within the economic courts jurisdiction are: Bankruptcy crimes stated in the Criminal Law, Supervision and Control of Insurance Law, Capital Market Law, Investments Guarantees and Incentives Law, Leasing Law, Securities law, Real Estate Lending Law, Intellectual Property Law, Central Bank Law, Consumer Law, Communication Law, Electronic Signature Law, and Competition Law.

12. Whether the transfer of jurisdiction from general courts to an economic court leads to the essential objective, which is the specialization of judges, is a question that still has no answer.

13. On the one hand, and as referred to above, the judicial system in Egypt requires a second investigation to the one carried out by ECA. This second examination is conducted by the prosecutor who reviews all evidence and data presented by ECA and conducts investigations with ECA employees who examined the case referred to him and with all related parties to the case. The prosecutor can even go to the extent of appointing an independent committee, whether composed of members from ECA or members from the ministry of justice, with the objective of carrying out further investigations in the case.

14. In addition, the judicial system in Egypt is based on the bifurcated model, where the parties of the dispute are the ones presenting all evidence to the judge. The plaintiff here will be the prosecutor who reexamined the case. The ruling is based on the discretionary conviction of the judge (The judge's intimate conviction).

15. Therefore, the judge has several means, which he can use to assess the evidence before him. The evidence includes the witnesses and the ability to appoint experts to re-review any case. These means, especially the experts, are very useful when the judge finds himself facing indirect evidence, or an evidence, which is beyond his capacity to assess. Thus, one potential violation can face several investigations (minimum of two investigations: ECA, the prosecutor; then, the potential appointment of an expert by the court) before any court decision. This can only lead to file a case before a judge with an evidentiary threshold sufficient to help the judge in building his conviction. Afterwards, the judge decides on the matter based on his own discretionary conviction established based on the evidence presented to him.

16. When comparing between the sole ruling made by the ordinary court (cement case, 2008) and the rulings made by the economic court in the following years, we found that both courts accepted all types of evidence presented by ECA and the prosecutor, whether it was direct evidence or indirect evidence. The Cement ruling was a cartel case that was mostly based on indirect evidence and economic analysis. The court expressly stated in the first instance ruling that the court has the right to base its own conviction on indirect evidence and therefore refused the defendant request to appoint an expert. That statement was also acknowledged by the cassation court. However, in a recent cartel case that is still in the reviewing process before the economic court, ECA faces challenges to convince the judge that such practice is per se illegal. The differences between these two cases is that the first case (the cement case), the cartel was executed and resulted in the stagnation of market players' market share in the Egyptian market. Such stability was very unlikely to occur when the cement prices and the production cost were unstable, also most of the market players increased their production capacity utilization during the investigation period, but their market shares were stable. Yet, their market shares in the export market varied from a year to the other. The judge stated in his ruling that this group of evidence together were sufficient to establish the court's conviction and there is no requirement to analyze each evidence on its own. As for the current case held before the economic court, the cartel was apparent and written in meeting of minutes, which constitutes a direct evidence. However, it was not executed which forced the judge to doubt the presence of negative impact resulting from the cartel on the relative market and so he appointed an expert to review such concern. The economic court has ruled before on other cases related to the competition law with much higher economic analysis than the cement case as several of them were abuse of dominant position cases, and most

rulings were in favor to the ECA's opinion accepting its economic analysis as proof of market dominance or as proof of violation. Nevertheless, the ruling's motives were not much different when it comes to the analytical prowess then what was awarded by the ordinary court.

17. On the other hand, having specialized courts still have many advantages other than expertise. Even though expertise is the most important advantage, a timely ruling is still considered as much important when dealing with economic and commercial matters. Most of the competition cases filed before the economic courts were over within one to two years. Moreover, the economic courts are the competent body in regard with private enforcement against ECL violations. Even though there was only one case of private enforcement (Flat glass), yet the specialization of judges can be very beneficial when it comes to guarantying the unification and consistence of the jurisprudence.

18. Additionally, having a specialized court facilitated the interactions between ECA and the competent judges. ECA interacted with these judges in relation to two matters: 1- ECA organized several trainings for the judges with the aim to balance out the lack of long term expertise in competition matters due to the continuous re-appointment of new judges based on the rotational system, 2- ECA consulted with the aforementioned judges while conducting a draft law aiming to amend most of ECL's provisions, this same consultation occurred at the final stages of the draft law. The absence of the economic court would have deemed such interactions inefficient and impractical. Other form of interactions occurring between the economic courts' judges and ECA was during a private enforcement case before the economic courts where the judge assigned an economic expert from ECA to assess the facts presented by the parties before him.

19. Therefore, whether the creation of economic courts was successful or not regarding the application of the law, it has certainly facilitated the interactions between both bodies. Maybe, in the future, if the rotational system for appointing the judges ceases to exist when it comes to specialized courts, then, the economic court might be considered a fully specialized court.

2.2. The Administrative system in relation to competition law cases:

20. Administrative courts in Egypt have jurisdictions over all administrative decisions occurring in the country. It is competent in reviewing the decisions made by an administrative entity and it has the prerogative to annul it in case of any of the following:

1. The administrative decision falls outside of the jurisdiction of the decision maker.
2. The administrative decision contains a vice of form
3. The administrative decision violating the provisions of the law.
4. The administrative decision was issued with a misuse of power.

21. As ECA is an independent administrative authority, therefore, all its decisions fall under the auspice of an administrative decision. This includes the following decision:

- A decision proving a violation and refers it to the prosecutor.
- A decision to close the investigation for absence of a violation to the ECL
- The decision to temporary cease and desist a certain practice or contract (while ECA's investigation is still ongoing) adopted by an undertaken that, from the appearing evidences, violates any of the provisions of the ECL, whenever the result of this practice could result in a serious damage that cannot be remedied after the conclusion of ECA's investigations.

- The decision to cease and desist a certain practice proved to violate the ECL.
- The decision to grant or not to grant a leniency.
- The decision to settle or not to settle with a violator to the ECL.

22. Those decisions are considered administrative decisions. Therefore, any claims to stop the execution or to annul a decision issued by the ECA falls under the jurisdiction of administrative courts, more specifically the Public Rights and Investment circuit. ECA faced such claims before the Administrative Courts in several situations, such as: a request for the annulment of a decision to refer certain companies to the prosecutor, as well as a request to annul ECA's decision to close the investigations. It is apparent that the Administrative Court examination is limited to reviewing the legitimacy of ECA's due process in executing the law, i.e. the Court assesses that ECA defined a market definition, but the Court never examined the economic and legal analysis undertaken by ECA i.e. the accuracy of the economic analysis in defining the market. This means that the Administrative courts role is more limited to reviewing the proper application of ECL in its process and the application of its substantive provisions as described by ECL than exploring ECA's arguments to reach its conclusion. In addition, reviewing the timeline of competition cases filed before the administrative courts, we find that the average duration taken by the administrative judge to issue a ruling is close to 4 years, which is much longer than the judge of the economic courts.

23. ECA also faced a claim related to its jurisdiction in the telecommunication sector. The Administrative Courts based its decision on a previous ruling issued by the Economic Courts rejecting the claimant's request, and acknowledging that ECA is the competent body to review all competition violations in the telecommunication sector.

24. It should be noted that the telecommunication sector is partially regulated and falls under the supervision of the National Telecommunication Regulatory Authority (NTRA) who has its own competition policies.³

25. Recently, with the intention of introducing the pre-control review of the merger and acquisition to the ECL, the decisions regarding the merger and acquisition operations will be considered as administrative decisions issued by an administrative entity. Therefore, if one of the merging parties or a third party would like to challenge ECA's decision, the administrative courts will be competent to review those decisions, unless it was stated otherwise in the draft of law. This leads us to a question: will the administrative courts' role be limited to the procedural matters only? If the administrative courts will examine the substance in those decisions, will it have the required expertise to do it in a timely manner?

³ The economic court stated that these competition rules are general rules and in relation to the licenses that NTRA approves and grants to the telecommunication sector, and considered the ECL a special legislation relative to the application of the competition rules that prevails over the general rules of NTRA.

<http://www.tra.gov.eg/en/regulation/Pages/Framework-of-Competition-Policy.aspx>.