On the Formulation and Enforcement of Competition Law in Emerging Economies: The Case of Egypt

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Abstract

This paper attempts to explain the rationale for competition policy in an emerging economy. It reviews the theoretical debate on the issue, highlighting the claims for and against the adoption of competition policy. The paper then discusses the difficulties facing an emerging economy in formulating competition policy and explores the reasons for the reluctance in implementing competition policy in Egypt. Besides, it sheds light on the recent economic changes that entail the inclusion of competition policy in the economic reform programme. Finally, the paper provides a review of the Egyptian competition policy and concludes with remarks on the prospects of its implementation.

ملخص

تهدف هذه الدراسة إلى بيان الدوافع وراء سن قوانين لتنظيم المنافسة في الاقتصاديات الناشئة، وتتعرض للخلاف النظري حول أساس قانون المنافسة والجدل المثار حول جدوى هذا القانون بالنسبة للاقتصاديات الناشئة. كما تناقش الدراسة الصعوبات التي تواجه الاقتصاديات الناشئة في وضع قوانين لتنظيم المنافسة مع إلقاء الضوء على الأسباب التي دعت إلى تأخر سن قانون للمنافسة في مصر والمستجدات الاقتصادية التي تستلزم أن يشتمل برنامج الإصلاح الاقتصادي على سياسة للمنافسة. وأخيرا، تقدم الورقة عرضا موجزا لسياسة المنافسة في مصر وتنتهي ببعض الملاحظات الختامية عن مستقبلها.

"Only through the principle of competition has political economy any pretension to the character of a science." John S. Mill (1848)[1]

I. Introduction

The inter-relationship between law and economic policy is clearly apparent. Laws in any given state, for whatever economic policy, do not function in isolation; they are inter-related with, and at the same time reflect, the state's economic policy and political ideology. As law is the principal instrument used by governments to translate policies into binding rules, governments resort to legislation whenever they wish to influence behaviour, conditions, or events. Given the inter-relationship between law and economic policy, it is only natural that the role of law in a market economy should differ fundamentally from its role in planned and command economies. In the latter systems, economic activities are run almost exclusively, either directly or indirectly, by the state. These activities occur within a framework that treats relationships between state-owned or otherwise state-dominated entities on the basis of organizational subordination or co-ordination. The participation of private firms or individuals in economic life is either prohibited or at best very limited.

Accordingly, the legal infrastructure is shaped in such a way as to suit these economic realities.[2] In a market economy, private legal entities interact and contract freely in pursuit of their own interests. Therefore, the legal infrastructure in a market economy has, minimally, four basic economic functions: (i) defining the universe of property rights in the system; (ii) setting a framework for exchanging those rights; (iii) setting the rules for the entry and exit of actors into and out of productive activities; and (iv) overseeing market structure and behaviour and promoting competition.[3]

The development of a legal infrastructure in emerging economies, both supportive of and compatible with the development of a market economy, is a complex task. The lack of an

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1 Cited in Eatwell, Milgate and Newman (1987), p. 537.

2 One commentator notes that "legal systems were based on socialist and communist goals. In this sense, such systems were used as political instruments of the government. The law was not used to provide predictable rules of behaviour, but instead to function as an agent in promoting the goals of communism and socialism", Doty, (1999), p. 194.

3 Gray, (1993), p. 1. The economic functions of law also include: (i) ensuring the peaceful interaction of contracting parties; (ii) encouraging entrepreneurship and long term investment; and (iii) harmonising the pursuit of private gain with social needs and objectives in the most economically rational way, EC/IS Report, p. 13. Finally, it has been suggested that law in a market economy plays several roles: it defines the rules of the game and gives individuals the rights and tools to enforce them. Law in a market economy is applied fairly and transparently, enabling individuals to assert and defend their rights, World Bank, (1996), p. 87.

adequate body of knowledge from which policy makers can draw guidance makes it all the more difficult. It involves, *inter alia,* re-conceptualising the entire legislative framework, re-training legal personnel and reforming or building institutions capable of implementing the new policies.

The adoption of a market-oriented economic policy entails the withdrawal of the state from the industrial and service sectors, so as to make way for private initiative. But the customary efficiency of private capital does not necessarily translate into a healthier economy, as a market made up of private actors will not necessarily be competitive.

It is well established that even if all other structures are in place to support a market-oriented system, it cannot be assumed that these actors will act independently of each other in the market place, or that the interaction of market forces will automatically maximize consumer welfare.[4] Hence, the need is paramount for governmental intervention to protect competition by prohibiting agreements and activities that undermine it. This intervention takes the form of competition policy.[5]

A competition law represents a code of conduct in the economic arena. It mainly proscribes anti-competitive practices and structures in the economy, with a view to maximizing the benefits of competition. Introducing competition legislation in an emerging economy is a complex task. Indeed the concept of regulating competition itself is likely to be novel in an emerging economy. The transitional nature of its development creates its own difficulties. Such markets usually suffer structural deficiencies and its regulatory, technical and financial capabilities are seldom equivalent to the challenge.

Unlike most emerging economies which adopted competition legislation in the wave of the early 1990s, Egypt's is still in the making. Egypt has never had comprehensive competition legislation, although various provisions in different items of legislation address basic anti-competitive behaviour. However, recently, the Egyptian economy has been experiencing major challenges at both the national and international levels, necessitating the introduction of a competition law. The private sector has been growing rapidly to occupy a dominant position

4 Estrin, S. (1994), p. 1.

5 Laws governing the activities of firms in any given market are labelled under different headings in different countries. The United States uses the term 'antitrust' and has been so doing for the last century; the United Kingdom uses 'fair trading and restrictive trade practices'. The European Economic Community uses the term 'competition', while Japan uses 'prohibition of private monopolies and maintenance of fair trade'. Finally, Spain uses 'restraints to competition'. The diversity of titles used reflects the legal, economic and historical culture and heritage of each country; moreover, it reflects the different objectives of the law. A table giving the different titles of legislation of more than 20 jurisdictions, is given in Gray, C. (1991), pp. 407–9. See also UNCTAD TD/B/RBP/81/Rev.3, p. 14, which gives an overview of titles adopted by different countries. This paper makes use of the term "competition law" as competition is always the subject matter of the law and for its ease of reference.

in the market, its development unhindered by appropriate regulation. Not surprisingly, there have been allegations of anticompetitive practices conducted by many market participants in various sectors. There are also many cases of mergers and acquisitions that have been undertaken without proper investigation with regard to their implications on 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 their possible anticompetitive practices and to cope with the implications of international and cross-border mergers and acquisitions. Finally, there is the recent threat of international private cartels, which impose a real challenge on fair competition.

This paper starts with an explanation for the rationale behind competition policy. Then it reviews the theoretical debate relating to the issue, highlighting the claims for and against the adoption of competition policy. The paper then proceeds to a discussion of the difficulties facing an emerging economy in formulating competition policy, then provides an outline of the experience of three emerging economies. From this point there is a discussion of the Egyptian experience, including an explanation of the case for the introduction of competition policy in Egypt and the reasons for the reluctance to implement it. Next, the paper explores the main features of Egyptian competition policy, which includes a competition law (though still in draft form) and the proposed establishment of a Competition Commission. The paper concludes with some remarks on the prospects for competition policy.

II. The theoretical foundations and debate relating to competition policy

Competition is the cornerstone of a free market economy. Its significance is assumed: "Perhaps no law is more important to any market-based economy than the law that will protect and assure the success of the competitive process."[6] The United States Supreme Court put it thus in 1972: "Antitrust laws… are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to our fundamental freedoms."[7]

Nevertheless, the concept of competition has a variety of definitions and despite being pervasive and fundamental, it has not been satisfactorily developed.[8] In reality, competition in

6 American Bar Association, (1991), p. 245.

7 US v. Topco Associates Inc. (1972), as cited by Borrie, G. (1995), p. 225.

8 McNulty (1994), p. 3.

different markets cannot be described as being perfect, as neoclassical theory and standard models, e.g. Arrow-Debreu, would seem to suggest. Though incapable of capturing what happens in reality, the concept of perfect competition is useful however for two reasons: as a benchmark and as an institutional characterisation of some markets, e.g. primary commodities.[9]

Moreover, there are very few markets with a single firm, i.e. a monopoly. Most markets can be characterised by imperfect competition, which may take different forms, according to the relative imperfection of competition: duopoly, oligopoly, monopolistic competition, Schumpeterian competition that emphasises the role of innovation and R&D,..etc.[10] For the purposes of this paper, however, competition is defined in the context of a free market economy as a condition in which buyers are free to choose the best suppliers.[11] Thus, freedom of choice is the disciplinary mechanism in the market.

Indeed, if the world we live in were to function in accordance with the perfect competition paradigm, there would be no need for competition policy or other regulatory efforts. Since there is widespread diversion from the ideal paradigm, there is a necessity for corrective intervention by the government. This intervention can take two forms, first, the imposition of taxes on certain activities and specific products to influence economic behaviour through the mechanism of price incentives. Second, as an alternative to taxes, government can take an explicit action to control economic behaviour directly, by attempting to prevent anti-competitive practices, through efficient implementation of competition policy.[12]

Although competition policy, in terms of content and direction, is conditioned by the domestic structure and international relations of the economy concerned, its objective should be the promotion of economic efficiency. By that we mean the maximisation of the sum of the discounted present value of the surpluses of consumers and producers. This definition of economic efficiency, based on partial equilibrium welfare economics, assumes static and dynamic efficiency in the sense that current welfare losses may be tolerated if the same factors behind the losses in the market structure and/or conduct, also generate efficiency gains in the long run.[13]

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9 Williamson (1993), p. 39.

10 Stiglitz (1995), p. 111.

11 ibid., p. 40.

12 Viscusi, Vernon and Harrington (1995), pp. 2-4.

13 For further analysis of this issue see Hay (1993), p. 2.

However, economic efficiency is not the only consideration behind competition policy, as other issues may be grouped under the concept of "public interest" to constitute its stated objective. Examples of these issues are: effective competition between suppliers; long run competition through new entry to the market and new products; maintaining balanced regional distribution of industry and employment in the country; and the promotion of the interests of consumers and purchasers of goods and services through better quality and variety.[14] It is worth emphasising that it may not be appropriate or viable for competition policy to embrace a wide variety of objectives that could be catered for by adopting other measures and policies, assuming adequate coordination, e.g. regional policy and R&D policy.

The scope of competition policy has changed over time. Nowadays, it goes beyond 'traditional' concerns regarding monopoly, which became less pressing as a result of, *inter alia*, the pressure of foreign competition in an increasingly globalised business environment. Being big in the market is not necessarily undesirable or inimical to competition. At the same time, being small does not rule out the possibility of committing anti-competitive practices. Thus, concerns of competition policy have moved from monopolies to issues such as mergers and acquisitions; financial transactions, e.g. leveraged buyouts, that may restructure firms in a way that influences market behaviour. Moreover, the emphasis of competition policy is now becoming more concerned with the conduct of the firm rather than its size.[15]

The rationale for competition policy has been challenged on theoretical grounds. Three main arguments against the adoption of competition policy have been put forward. First, as argued by Harberger (1954),[16] economic inefficiency, resulting from monopoly, is much smaller than had been thought. Based on an attempt to quantify the welfare loss from monopoly, Harberger found that the deadweight loss is no more than a few percent of GNP. The policy implication is obvious: there is no need for a policy.

The second argument, coming from the contestable markets school,[17] goes even further by arguing that Harberger overestimated monopoly losses. This school argues that not only does competition, both actual and potential, ensure that profits are driven to zero even if there is only one firm in the market. If a monopolist attempts to increase profits by raising the price above the competitive level, he may not be able to do so, as other firms would enter to take

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[14] ibid., pp. 3-6.

[15] Khemani and Dutz (1995), p. 31 and Viscusi, Vernon and Harrington, op. cit., pp. 4-5.

[16] See Stiglitz (1995), pp. 116-7.

[17] See for example the seminal paper of Baumol (1982).

the profits. If markets were contestable, the threat of potential entrants into the market would discipline the behaviour of those already there. Hence, again, the implication is that competition policy is not necessary.[18]

The third theoretical claim against competition policy goes back to Bhagwati (1965).[19] He presented a model in which a domestic monopolist loses all its market power when barriers to trade are relaxed and the economy trades with a perfectly competitive world market.[20] Even if imports constitute a small, or zero, share of the domestic market, potential imports, in addition to actual imports, discipline the behaviour of the existing single firm. Thus, international competition and trade policy can act as substitutes for competition policy.

However, during the past ten years, the argument for competition policy has been revived, due to the development of critiques for each of the three claims against it. First, it has been demonstrated that the economic welfare losses associated with monopoly and imperfections of competition may be greater than Harberger's estimates, who focused his attention on the increase in prices. Firms may endeavour to raise rivals' costs; deter other firms from entering the market; engage in rent seeking and spend resources to induce the government to impose quotas; alter the degree of competition in the market by colluding with other firms. All these activities have welfare losses and distort the market mechanism and should be included in the analysis of the welfare implications of divergence from competition.[21]

Second, the arguments and conclusions of the contestability doctrine have been attacked by several economists, e.g. Dasgupta and Stiglitz (1988), who noted that this doctrine received strong support, mainly from those who would like to be free from antitrust laws.[22] The advocates of this view argue that not only was Adam Smith correct in his concern that when people of the same trade meet together, "the conversation ends in conspiracy against the public or in some contrivance to raise price"[23], but go further. They emphasise that these anticompetitive practices have real effects, which are not simply undone by competition being actual or potential. Even in recessions, prices are likely to be significantly higher than marginal costs, which would not be the case under perfect competition. The existence of natural monopolies, product differentiation and imperfect information, strengthens the argument for competition policy. Further, limitations on potential competition, because of

18 Stiglitz, op. cit., p. 117.

19 See Kühn, Seabright and Smith (1992), pp. 26-7.

20 See Langenfeld, J. and Blitzer, M. (1991), pp. 358–360.

21 Stiglitz, op. cit., p. 128

22 ibid., pp, 120-6.

23 Cited above.

different barriers to entry, frustrate the claimed disciplinary role of contestability. Barriers to entry, according to Bain (1956)[24], are to the advantage of incumbent firms over entrant firms. These barriers can take different forms, such as sunk costs; absolute cost advantages; product differentiation; e.g. brands and patents and strategic barriers to entry, e.g. predatory pricing.

Third, it has been shown that trade policy cannot be considered a perfect substitute for competition policy. Trade policy focuses on the removal of barriers to international trade, through actions to reduce tariff levels and agreements to lower the effects of non-tariff barriers. Competition policy aims at ensuring the efficient functioning of markets by removing or controlling restrictive business practices.[25] Competition policy is more effective than trade policy in domestic markets, which are not strongly influenced by international trade. In other words, it does not constrain the exercise of market power due to: the use of restrictive trade measures; excessive use of antidumping and countervailing duties; high transportation costs; economies of scale of domestic firms; cultural barriers to trade; significance of nontradables, technical standards,..etc.

Danger to competition may come from international trade itself; international cartels may divide up markets through price fixing and on the basis of geographic market-sharing. Further, in some sectors, normally characterised by heavy concentration and a small number of players, even at the international level, e.g. telecommunications and pharmaceuticals, foreign firms may find it more profitable to collude rather than compete.[26]

Thus, increasing bilateral and multilateral trade agreements have demonstrated the need to reconcile national competition policies, especially during and after the Uruguay Round negotiations (1986-94). Hoekman and Kostecki (1995) claim that "for GATT's traditional public choice dynamics to work, anti-trust-related market access barriers affecting a country's exporters must be large enough to offset the gains accruing to industries benefiting from national competition-policy exemptions"[27]. Since structural and other differences among nations increase transaction costs and may impede access to markets, harmonisation of competition policy would increase economic efficiency at the international level.[28]

We argue that the four 'pragmatic' principles put forward by Bhagwati (1991) against broadening the international agenda of international trade agreements should be considered in the formulation of competition policy in the context of negotiating bilateral and multilateral

[24] See Martin (1993), pp. 172-3.
[25] Lloyd and Sampson (1995), p. 692.
[26] Khemani and Dutz (1995), p. 29.
[27] Hoekman and Kostecki (1995), p. 257.
[28] ..Khemani and Dutz (1995), p. 30.

free trade agreements. First, *proportionality*, i.e. small effects should be ignored in international negotiations. Second, *intentionality*, i.e. policies that are not deliberately adopted to favour home firms, should be excluded. Third, *selectivity*, i.e. policies that are not targeted to particular sectors or projects are allowable. This principle, particularly, is of great importance in dealing with the issue of state aid, referred to EU agreements with Mediterranean countries. Fourth, *proximity*, i.e. measures that only indirectly affect international competitiveness, e.g. farm income support, should also be excluded from negotiations.[29]

The rationale behind these four principles, which make a distinction between what should be addressed at the international level and what should be considered as the preserve of national competition policy, is quite straightforward: international negotiations not uncommonly result in increased scope for international dispersion and conflict. Hence, unimportant issues should not be raised initially. Even under the notions of cooperation and mutual benefit, if countries should interfere with the policies of other countries, they may only do so when there is good reason.

III. Difficulties facing an emerging economy in formulating competition law

Policy makers in emerging economies face several difficulties, which might be seen as common among them with respect to 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 safe,[30] would also encourage American investment, being attracted

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29 See Kühn, Seabright and Smith (1992), p. 28.

30 The suitability of US law for the needs of Eastern European countries was advocated by several commentators, including an argument to the effect that "certainly, 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

by the familiarity of the legal framework.[31] It has therefore been argued that decisions about which competition law model to adopt is to a large degree predetermined by a country's international economic policy.[32]

The general approach of the law: per se v. rule of reason[33]

A country's formulation of its competition legislation will further be affected by 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.[34]

The unconditional prohibition at the heart of the *per se* approach has the advantage of being relatively cheap to enforce. It also provides clear guidance to the business community. It is more efficient, since no time is wasted before the legality of a given mode of conduct is established. True, the *per se* approach may condemn acts which the rule of reason approach might not sanction. However, the certainty is that the *per se* approach offsets the loss of the benefits derived from the rule of reason approach.[35]

Drafting *per se* competition legislation, however, is no easy task: the legislation must define, clearly and in detail, those practices which are prohibited;[36] it must also clearly define

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both producers' and consumers' prices and thereby increase the gains from the use of the markets.", Feinberg, R. and Meurs, M. (1994), p. 798.

31 Mastalir, R. (1993) p. 62. He further states that "the 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.

32 Estrin, S. and Cave, M. (1993), p. 5.

33 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 certain practices should be prohibited or not (using EC terminology as to whether a prohibition should be exempted or not).

34 Langenfeld, J. and Blitzer, M. (1991), p. 366.

35 Langenfeld, J. and Blitzer, M. (1991), pp. 368–370.

36 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 competition agencies and the courts. Indeed, an instrument like the Sherman Act has survived for over a century now, because its general wording allowed the courts to draw different conclusions from it over the years.

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.[37]

Objectives of the law

Setting clear objectives for any proposed legislation is obviously important. Axiomatic though this may be, it has been noted that UK law (and to a lesser extent EEC law) has developed without any overall conception of the function of either competition or competition law. This has produced many of the difficulties that presently exist.[38]

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. In this regard, advanced competition laws 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 agreements[39] and mergers and acquisitions, instead of trying to include vertical agreements[40] 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 this type of agreement.[41] 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

37 Fingleton, F., Fox, E., Neven, D. and Seabright, P. (1996), p. 63.

38 Whish, R. (1993),. p. 16.

39 Horizontal agreements are those agreements that can negatively affect competition undertaken by firms at the same level of the market, e.g. producers.

40 Vertical agreements are those agreements that can affect competition undertaken by firms at different levels of the market, e.g. producer and distributor.

41 This argument was referred to in Stevens, D. (1995), p. 955.

of this approach resides in its imposition of the lightest short-term analytical and administrative burdens, and, at the same time, its focus on the most prejudicial practices.[42]

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 also discourage monopolistic practices. It must therefore entrust the competition agency with an active role in the government's de-monopolisation schemes. These would include the implementation of trade policies and schemes aimed at increasing consumer awareness, as well as 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 has failed 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.[43]

Enforcing competition law

Establishing a competition agency is an integral part of introducing competition law.[44] 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.[45] 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 this, a competition agency must have (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 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

42 Kovacic, W. (1992), p. 264.

43 American Bar Association, Section of Antitrust law; Comments on Draft Bulgarian Antitrust Law, Fox, E. (1991), p. 246.

44 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.

45 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.

staff and to ward off corruption.[46] The above represents some of the prerequisites for the establishment of a competition agency.

If one analyses prevailing conditions in emerging economies, one recognises the difficulty of the task at hand, even if one assumes that adequate finance may 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, which could exceed a hundred members, would neither be well trained nor acquainted with complicated regulations and with the legal and economic issues pertaining to competition law.[47]

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.[48] However, 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.[49]

It has been cogently argued that emerging economies, which have no real experience of competition regulation and face all sorts of difficulties in obtaining accurate data and records, should start off with *per se* rules rather than a complex rule of reason analysis. Only when the competition agency has acquired the necessary expertise should it consider converting to a rule of reason regulatory approach.[50] Modest regulatory capabilities favour the simple

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46 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 an apartment and a car. He then estimates that the entire operation of the antimonopoly office would be around $200,000 a year and compares this with the US enforcement authorities budget, which is in excess of $140 million. Kovacic, W. (1996), p. 442.

47 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 is entrusted to enforce.

48 It has been argued that "establishing 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.

49 Ibid., p. 408.

50 Langenfeld, J. and Blitzer, M. (1991), p. 366.

approach to competition, if serious market-wide problems are to be deterred and remedied by the competent agencies.[51]

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 hybridised skill combining elements of both law and economics."[52]

This type of lawyer is rare in most emerging economies, whose educational programmes and professional practices tend to separate 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 by 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 competition legislation not to have courts decide the finer points of economic analysis, as the adoption of a rule of reason approach would entail. It should instead be kept as simple and as straightforward as possible.[53] Hence, the preference for a *per se* approach, whose rules should suit the current state of the development of the judiciary, the courts having been 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:

(a) 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 would appear essential, in the light of the lack of expertise of competition agencies.

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51 Fingleton, J., et al. (1996), p. 64.

52 Whish, R. (1993), p. 46.

53 Coate, M., Bustamante, R and Rodriguez, A. (1992), p. 54.

(b) 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."[54] 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 with one another 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 exists a lowest common denominator of protection against anti-competitive practices. It is this minimum which emerging economies should endeavour to establish.

(c) Formulating a simple *per se* law contradicts the need for establishing rules that penalize 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.

(d) 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.

(e) 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.[55]

(f) Legislation must generally take into account a country's economic, historical, political and social conditions. Competition legislation is no exception.[56] The "trading partners" argument overlooks this legislative axiom. [57]

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54 Fingleton, J., et al. (1996), p. 15.

55 For details see: Waverman, Comanor and Goto, (1997).

56 Kovacic, W. (1996), , p. 466.

57 Several commentators confirm the suitability of advanced law to emerging economies; it has been 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 benefit consumers

IV. Competition law in emerging economies

This section gives a brief account of the experiences of several emerging economies in introducing competition legislation, followed by an evaluation. The aim is to review how these countries have dealt with the difficulties referred to above, and what regulatory approaches they have adopted.

East European experiences

Until economic reform swept through East European countries in the 1990s, the very concept of competition there was both little known and illegal.[58]

The Polish law

Poland, with its Law on "Countering Monopolistic Practices" of 24 February ,1990, was the first East European country to introduce competition legislation.[59] Competition experts from both the United States and Europe helped formulate Poland's legislation. The law, therefore, contains provisions, which are identical to Articles 81 and 82 (previously Articles 85 and 86) of the Treaty of Rome (prohibiting agreements in restraint of trade and abuse of dominant positions in the market). Following the example of advanced competition laws, Polish law recognises a 30 per cent market share as a dominant position. It imposes fines of up to one per cent of net profits and requires that monopolistic practices be investigated at the request of competitors, or at the enforcement agency's own initiative.[60]

It divides companies into three categories: those with no competitors; those with a 30 per cent or higher market share; and those that have used their power to distort competition. Each category is scrutinised for anti-competitive practices. The law addresses many of the anti-competitive practices traditionally targeted by Western laws.

These practices are divided into *per se* and rule of reason violations. Articles 4 and 5 of the law enumerate several practices that are subject to a rule of reason analysis. Article 4(1) lists monopolistic practices, including (i) the imposition of onerous contract terms; and (ii) the tying or acquisition of shares or assets of companies in a manner which might significantly decrease

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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.

58 An account of competition laws introduced in East European countries is given in Stockmann, K. (1992) pp. 469–477.

59 A commentary on the law and the text of the law can be found in, UNCTAD, Handbook on Restrictive Trade Practices Legislation, UN Doc. TD/RBP/Conf.3/5, pp. 7–9 and 47–58.

60 Mastalir, R. (1993), p. 74.

competition. Article 4(2) enumerates five classes of horizontal and vertical agreements.[61] Article 5 deals with the abuse of a dominant position. Article 7 enumerates *per se* violations, including limiting the production of goods, refraining from the sale of commodities with a view to driving prices up, and charging exorbitant prices. If a firm is found guilty of conspiracy in restraint of trade, or of obstructing the emergence of a competitive environment, it may be fined, or even dissolved. If it is a monopoly, it could be broken up.

The Hungarian law

The Hungarian law on the "Prohibition of Unfair Market Practices" was enacted in November 1990.[62] The objective of the law is to protect public interest in the area of competition, the interests of competitors and the interests of consumers. It lays down a general prohibition on agreements restricting or excluding competition, but exempts from prosecution those who aim at stopping the abuse of a dominant position, or those whose concomitant advantages outweigh their disadvantages. Countervailing advantages include more favourable prices, quality improvements, improved distribution and delivery terms, and technical progress. None of this would exonerate a party from liability under an agreement if the resulting participants' joint share exceeds 30 per cent of the relevant market.[63]

The Hungarian law was modelled primarily on EC competition law,[64] following which it proscribes vertical non-price restraints "per se", and judges horizontal restraints (such as price fixing) according to a rule of reason approach.[65] It also excepts from the prohibition restrictive agreements, whose advantages outweigh their disadvantages, provided always that the restriction of competition does not exceed the extent necessary to attain economically justified common goals. Consistent with advanced competition laws, the Hungarian law does not prohibit a dominant position, only its abuse. Only mergers and acquisitions which increase market concentration must seek authorisation from the Hungarian Competition Office.

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61 An analysis of the law can be found in: Nabarro Nathanson Firm (1993), *Legal Aspects of Doing Business in Poland*, pp. 91–7.

62 It entered into force in January 1991. It is interesting to note that preparations to organise a Competition Office and to draft a Competition Law were initiated in 1987 and continued for three years. This law has replaced an earlier one, enacted in 1984, and proved to be inadequate in dealing with restrictive business practices.

63 Pogacsas, P. and Stadler, J. (1993), pp. 86–7.

64 Details of the Hungarian competition law and how it was affected by the EC model can be found in: Wessman, P. (1992), pp. 17–25.

65 This is contrary to the approach of the United States.

Latin American experience

Several Latin American countries have supposedly only amended (rather than newly introduced) competition laws recently. The reality is that, although several countries did have competition laws prior to privatisation,[66] they were either basic or undeveloped, and were rarely enforced.[67] While Latin American countries may claim some experience of competition law prior to the commencement of the privatisation process, they were hardly much better off than East European countries in the early 1990s. Both faced the same sort of difficulties reviewed above.

The Mexican experience with competition is probably the best known in Latin America, where it has been well received. It has served as a model for several other emerging economies.[68]

The Mexican law

Mexico enacted its "Federal Act Governing Economic Competition" in December 1992. The law entered into force in July 1993, replacing the outdated 1934 legislation with a comprehensive competition regime.[69] This new law came in answer to both domestic and international concerns. Article 1501 of the North American Free Trade Agreement (NAFTA), concluded in the fall of 1992, stipulates that "each government shall adopt or maintain measures to proscribe anti-competitive business conduct and shall take appropriate action with respect thereto …"[70]

The Mexican law deals with the following issues:[71]

Anti-competitive practices: The law draws a distinction between "absolute" and "relative" anti-competitive practices. A roughly similar distinction exists under American law. Absolute anti-competitive practices include price-fixing agreements between competitors, market

66 For instance, Argentina, Brazil, Chile, Colombia and Mexico had competition laws prior to the privatisation process. In 1923, Argentina enacted the region's first official competition law; in 1934, Mexico enacted its Antimonopoly Law and Chile imposed its law in 1959.

67 An UNCTAD report notes that competition laws in several Latin American countries have never been enforced or had at best been tentatively applied. These competition laws have in no way affected government policy. The report concludes that competition laws in these countries had been used mainly to protect consumers. UNCTAD Secretariat (1976), p.140, cited in Stevens, D. (1995), p. 935; see also Coate, M., Bustamante, R and Rodriguez, A. (1992), pp. 44–5.

68 Stevens, D. (1995), op. cit., p. 962. The Brazilian competition law of 1994 was inspired, in part, by the Mexican law.

69 The 1934 law was rarely enforced and its content was basic.

70 For more details regarding the Agreement and its effect on competition policy, see: Glossop, P. (1994), pp. 191–3.

71 The following overview relies on Newberg, J. (1994), pp. 587–609; OECD (1996), pp. 127–133. A detailed commentary on the law, made by the Mexican government, can be found in: UNCTAD (1994), pp. 12–39.

allocation, bid-rigging or collective reduction of output. Consistent with American doctrine, an absolute anti-competitive practice is proscribed without inquiry into market power, possible efficiencies, or pro-competitive factors that might justify it.

The treatment of relative anti-competitive practices reflects the recognition that some restraints may be competitively benign, or even pro-competitive. The market power enquiry is two-tier: the relevant product and geographic markets are first defined; then follows the enquiry into whether substantial power exists in the relevant market. The Mexican law's definition of "relevant market" is similar to that employed by US antitrust authorities in standard market definition analysis, under US antitrust law.

Mergers and acquisitions: All mergers and acquisitions meeting one or more of the law's three threshold tests are subject to a pre-merger notification. The three tests relate to the "size of the transaction", the "size of the target" or the "size of the party" and bear a substantial similarity to the reporting threshold tests applied under the Hart-Scott-Rodino pre-merger notification regime in the US. A merger may be prohibited if its effect would foster anti-competitive behaviour. The evaluation of mergers involves, among other things, defining the relevant market.

Sanctions: While violations result in significant financial penalties,[72] they are not criminally penalized. Rather than adopt the criminal antitrust liability integral to US law, the Mexican legislature has opted to follow the lead of the EC (and certain European countries) in choosing not to criminalise competition law violations. For a law substantially influenced by US antitrust legislation, the Mexican legislation's omission of criminal antitrust liability is perhaps its most striking departure from the US model.[73]

The law exempts government monopolies in specific "strategic" areas from the scope of the law on competition. These areas include mail, telegraph, radio-telegraphy, satellite communications, hydrocarbons, petrochemicals, electricity, nuclear energy, and the issuance of currency.

Consistent with US antitrust law, it defines neither monopolies nor oligopolies, and provides no guidance as to the circumstances under which either may be challenged. This has to be determined by the competition agency. The structure of the law and statements of government officials suggest that monopolies may be challenged for behaving anti-

72 Fines of up to $900,000 in certain cases. Failure to file requested pre-merger notification may result in fines of up to $400,000. Finally, individuals who, while acting on behalf of a corporation, engage in anti-competitive practices, may be subjected to fines of up to $30,000.

73 Newberg, J. (1994), p. 599.

competitively but not for simply possessing monopoly power. The challenge is, therefore, conduct, not size.

An evaluation of the international experience

The various national experiences reviewed above have the following in common. First, the three competition laws were formulated along the lines of those of future trading partners:[74] Poland and Hungary adopted the EC model,[75] some say as the price for being seriously considered for admission to the EU;[76] and Mexico adopted that of the US. Each has nevertheless introduced several procedural and substantive changes to its chosen model.[77]

Second, all three countries reviewed above, though emerging economies, have adopted a rule of reason approach in formulating their competition legislation.[78] This can be attributed to their adoption of advanced competition laws, but it may also simply indicate that policy makers in these countries took the view that competition law based on illegality *per se* does not provide the legal framework needed in an emerging market. The literature does not indicate which of these considerations – assuming that the second played a part – prevailed. One finds advocates for the adoption of a *per se* approach, but finds no explanation why this plausible view was almost unanimously ignored in practice.

It seems that the formulation of laws consistent with future trading partners was the main area of concern for policy makers. Given that advanced laws rely mainly on a rule of reason approach, there was no point in thinking about formulating a law on a *per se* approach. The fact that the *per se* argument did not win the day cannot, it is argued, be attributed to finding the rule of reason approach more suitable for emerging economies, or that the *per se* approach would have caused any drawbacks; the contrary is true. The rule of reason approach prevailed

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74 It has been noted that some form of competition between the Sherman Act and EC law existed to win the hearts and minds of Eastern Europe. The former chairman of the Federal Trade Commission in the US recommended the adoption of the Sherman Act in Eastern Europe and cautioned against the adoption of provisions modelled after EC law. Waller, S. (1994), p. 570.

75 It has been noted that the law of the Czech Republic was also formulated on the lines of EC law, Mastalir, R. (1993), p. 81. The same author notes that Eastern Europe has extensively transplanted policies and regulations from Western competition laws, p. 84. The provisions of the Polish and Hungarian laws were critically analysed by Pittman, R. (1992), pp. 485–503. It is interesting to note that some criticisms were made on the basis of US Antitrust law and practice.

76 Fingleton, J., et. al. (1996), p. 64.

77 For instance, Hungary and Poland have chosen the US standard for market concentration indicative of monopolist activity, which is 30 per cent rather than the EC standard of 40 per cent.

78 Several emerging economies have adopted the rule of reason approach. For instance, under the laws of Brazil and Argentina, for a behaviour to be anticompetitive, there must be a demonstrable threat to a nation's economic interest, while in Venezuela, a rule of reason analysis is applied to vertical agreements
For details regarding competition laws in Latin America, see: Singham, S. (1998), pp. 380–3 and 389–439.

for one simple reason, namely that it was the approach implemented by future trading partners.

This leads us to an interesting point: why were laws formulated on the lines of that of future trading partners, despite the fact that advanced laws might not suit emerging economies?[79] There are two possible answers: first, that the chosen approach was imposed by the trading partners (i.e. set as a condition precedent for future dealings). This finds support in the official policy of both NAFTA (see Article 1501 quoted above) and the EC, both of which believe that future trade and economic integration rest, *inter alia*, upon the adoption of sophisticated competition laws. Second, that policy makers in all three countries considered the chosen approach both responsive to their needs and essential for a fuller integration in regional and international trade.

It is hard to state with any degree of certainty, whether the first or the second possibility, or a hybrid of both, led to the adoption of competition laws consistent with future trading partners. It does seem, however, that competition laws, as introduced in several emerging economies, are the result of pressure imposed by their trading partners. This can be supported by the fact that the introduction of complex and sophisticated laws cannot be seen, in the writers' view, as an alternative opted for by policy makers in emerging economies, who are aware of the fact that advanced laws can neither provide solutions that suit their economies, nor be appropriately enforced.

The question that naturally follows is: what is the wisdom behind the attitude of the EC and the US? A White Paper published by the European Commission provides some explanation.[80] It defines approximation as the transplanting of EC competition law into East European countries. It supports approximation as (i) necessary to ready East European countries for membership; (ii) necessary to ensure a level playing field for Western European business; (iii) beneficial for East European countries, whose economies, being small, would be substantially affected by trade with the EU; and (iv) as imperative, since it would be impossible, considering that these East European countries had agreed to apply EC rules in the free trade area, to maintain two sets of competition rules in tandem.

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79 It has been noted that "American antitrust law remains tied to specific social and historical events that other countries may never experience, or at least never experience in synchronization with the events that propel antitrust law and policy.", Waller, S. (1994), p. 581.

80 White Paper, Preparation of the Associated Countries of Central and Eastern Europe for the Integration into the International Market of the Union, COM(95) 163, cited in Fox, E. (1997), Brooklyn Journal of International Law, 23(2), p. 354. Information relating to the White Paper is derived from this article.

This rationale for "forced harmonisation" is theoretically unconvincing,[81] because it (i) assumes the technical supremacy of EC competition rules; (ii) assumes the suitability of EC rules for emerging economies;[82] and (iii) overlooks the above mentioned difficulties, relating to structure and enforcement potential, which face emerging economies when competition legislation is first introduced.

Moreover, issues relating to the means of enforcing these sophisticated laws in emerging economies in the light of their institutional capabilities, have been overlooked. The reason behind this is that trading partners "often treat passing a new statute as the chief benchmark of progress in law reform, and commonly view implementation as an afterthought, … many competition systems have been dead or are gasping at arrival."[83] Whatever the reasons for the adoption by Poland, Hungary and Mexico of a rule of reason, they do not indicate that this approach is the most suitable for emerging economies, or that a *per se* approach would have been unworkable. It may be said in conclusion that the *per se* approach, although more suitable for emerging economies, tends, largely for political considerations, not to be employed. Furthermore, the scope of the three laws reviewed above extend to most, if not all, areas which a competition law may conceivably regulate. This goes against the view that competition legislation in emerging economies ought to focus on certain areas.

Although it may be bold to conclude from this that policy makers of the three countries surveyed have introduced laws that are not totally in harmony with their needs, it is permissible to question the wisdom of their choices. Whether these laws will prove nonetheless successful in the long term is yet to be seen.

V. The case of Egypt

Recent national and international developments support the case for 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. Hence competition policy was not required.

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81 Ibid., p. 363.

82 Ibid., 355. The author argues that it might be the case that the underlying objective of approximation is the fear that East European firms might out-compete West European ones in the latter's markets, if trade barriers go down without East European countries replicating EC Competition law.

83 Kovacic, W. (1997), p. 404.

Unlike most emerging economies which adopted competition legislation in the early 1990s,[84] Egypt's is still in the making. Egypt has never had comprehensive competition legislation, although various provisions in different legislation address basic anti-competitive behaviour.[85] 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 those 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,[86] 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 might have led 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 but were present for a long period, being masked by the remarkable increase in external resources and capital inflows. These resources enabled the government to expand its expenditure, finance investment programmes and fund 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

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84 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).

85 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, Egyptian commercial law prohibits acts that constitute unfair competition, e.g. negative advertising. On the whole, the implementation of these scattered provisions was lax, given that there was no competitive environment in the light of the economic policy adopted by the state.

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

encouraged by a free, competitive, and stable environment with autonomy from government intervention."[87]

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

Moreover, as shown in table (1), there are cases, growing 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 nor the possible abuse of market dominance

Table 1. Recent Cases of Acquisition in Egypt by Number and Value

Year	Number of Acquisitions	Foreign Buyer	Total Value in LE million
1996	1	1	N.A.
1997	6	2	369.41
1998	3	1	668.60
1999	44	21	8126.03
2000	29	12	14,250.04
2001	8	4	1,075.78*
Total	**91**	**41**	**22,660.08**

Source: Compiled by Concord International Investments, May 2001.

* Figure as of February 2001.

At the international level, attempts to promote and coordinate national competition policies that involve LDCs can be traced back to 1979,[88] when UNCTAD circulated a draft law as a model for consideration by these countries. The United Nations, in 1980, approved a

[87] See IMF (1991), p. 8.

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

document entitled "The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices," sponsored by UNCTAD.[89] In addition to these multilateral efforts, a 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 also signed an association agreement with the EU a few months ago.

The EC considers competition as "the best stimulant of economic activity" and recognises competition policy as essential means for satisfying individual and collective needs".[90] 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 deal with collusive behaviour, abuse of dominant position and competition distorting state aid.[91] This has been the case in the already signed EMAs, of Tunisia and Morocco[92] and is very likely to be the case with Egypt as well. If we assume that Egypt's EMA will follow the Tunisian and Moroccan models on "Competition and Other Economic Provisions"[93], Egypt will implement, within five years, the rules of the Treaty of Rome.[94]

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 will not be required, which may be an advantage to Egypt. There is

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

90 McGowan (1994), p. 188.

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

92 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.

93 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.

94 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.

also a provision for protecting intellectual, commercial and industrial property rights, which may not necessarily be an advantage to it.[95]

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 does not make sense to assume that Egypt could or should replicate 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 such 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.[96] This suggestion is optimistic. One economist has rightly described its prospects as the same as those of establishing "an effective international standing army".[97]

Within Europe itself there remains a tension between a 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.[98] Likewise, one anticipates similar tension, obviously from the Egyptian side, if the Association Council,[99] 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 for entry into the developing host countries by some multinationals; second, it is required by the developing countries themselves to counter the national impact of international mergers and acquisitions undertaken by multinationals.

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95 ibid., p. 19.

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

97 ibid.

98 McGowan, op. cit., p. 188.

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

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 has increased the incentive for firms to participate in cartels. Indeed, it has been said that "worldwide cartels are looming as a major enforcement concern…It's almost as if private arrangements are replacing governmentally imposed market barriers".[100] International cartels are engaged in price fixing, division of market at the international level, establishing price ceilings, or floors, for new entrants and providing 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 worth of goods from suppliers that were involved in price – fixing conspiracies 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 overcharged for their imports in a range from 20% to 45%, during the last decade. In order to deal effectively with such private cartels, there is a need for international co-ordination, which is not going to be beneficial to Egypt 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 was for a very long time, as the major producer and distributor. However, 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 for a competition law. However, the issuance of a competition law has been facing some resistance, this time not from the state but from the private sector, that has various concerns regarding this law, such as:[101]

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 cover only registered firms, leaving informal activities and smuggling intact.

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[100] ..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.

[101] For further discussion see Mohieldin (1996), pp. 12-13.

4. Those who will be responsible for implementing the law may not have sufficient knowledge of the idiosyncrasies and peculiarities of particular segments of the market.

5. Just implementation of the law may be hindered 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 even more likely, and hence would result in greater welfare losses compared to the *status quo*. The protection of competition necessitates the establishment of an adequate and 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.

VI. Towards an Egyptian competition policy

Effective competition policy involves the restructuring of the 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 both 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,[102] but there is a draft law under discussion:[103]

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 owned or operated by the state and have as their function the provision of water, gas, electricity and petroleum or are 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 entry and exit to these entities

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[102] This does not mean, however, that there are no 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, with regard to the monopolistic behaviour of an owner of four mills.

[103] This draft is prepared by the Ministry of Economy and Foreign Trade.

is voluntary. The latter exemption is deemed unconventional and it would appear that there should be some debate regarding its appropriateness and its wording. Exemptions are of utmost importance in any competition law, as they are uncompetitive practices that the law leaves unpenalized, because of an overriding benefit. However, they must be carefully drafted, otherwise they could well frustrate the purpose of the law.

Anticompetitive practices

The draft law sets out in Article 4 absolute prohibitions with respect to 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 with regard to the market power of those undertaking anticompetitive activities and provide the regulator with clear (as far as is 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 with respect to a relevant market as per Article 7, and must have as their object the restriction of competition or the jeopardizing of the interest of consumers.

The law then dedicates 4 Articles, setting out the parameters of dominance and defining 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 to this issue. The rules apply with respect to 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 they 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 reconsidered with a view to ascertaining its appropriateness.

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

Sanctions

The draft law stipulates that sanctions apply with respect to all prohibited activities that have an effect on Egypt, even if committed abroad. Applying the "effects doctrine" in Egypt could 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, plus compensation not exceeding 10% of the wrongdoer's commercial activities in the preceding financial year. Non-adherence to the orders of the competition commission would result 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 would be conducted in a fashion similar to that of the Tax Authority. Thus, payment of special fines may be accepted by the Commission and the effect of such a settlement would be to annul any court case or have the charges dropped.

Whether the draft law has benefited from the advantage of starting late is debatable. On the one hand, it can be seen as benefiting from a late start, as it benefits from the experience of other countries with regard to competition laws and their successive amendments. The draft law deals with structure, market share, and conduct and specific practices designed for, or could have, the effect of reducing competition, the emphasis being on the latter. Thus, the draft law follows recent recommendations in the field. On the other hand, the draft law is not clear on the issue of divestiture and the privatisation process and its exemptions are far too broad. Also, the draft law exempts, subject to the recommendation of the competition commission and the approval of the concerned minister, cooperation agreements for R&D that could 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 on the part of the government, after consultation with 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 for undertaking collusive activities, it is difficult to grasp the justification for exempting De Minimis agreements, which may be repeated and accumulated to form a serious case of anticompetitive practice. Further, one should tie government action to fixing the prices of essential goods with exceptional cases, such as wars, natural disasters,..etc.

The Competition Commission

The establishment of an impartial and independent Competition Commission has been viewed as the best watchdog of fair competition.[104] The main features of an effective Competition Commission have been identified as: "independent, insulated from political interference,.. transparent,.. subject to checks and balances,..."[105]

The draft law[106] has a provision for the establishment of a Competition Commission and describes its structure, staff requirements and authority. It also outlines the rights and proceedings of the Competition Commission in applying the law, including penalties and legal sanctions. However, the role of the Competition Commission appears in the draft as reactive rather than proactive.

It could be the case that in the early years of its practice, the Commission might indulge in the implementation of a policy towards competition rather than competition policy. In other words, there may not be anti-competitive practice but the Commission would have a proactive role in strengthening the opening up of the market. However, the danger of this approach is that the Commission may stretch its mandate beyond its capacity. The experience of other countries[107] suggests that a more focused orientation may be more appropriate, for the sake of legal conviction and transparency.

VII. Concluding remarks

We have argued in this paper that 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 other objectives. However, we must emphasize that much more than unfettered competition, using Stiglitz's (1995) words, is required to ensure that the market in Egypt functions effectively. 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 importantly, the commitment of the government itself and its agents to competition and a refusal to erect artificial barriers.

It must be mentioned that competition policy may have adverse effects. In some cases competition policy can be used to hinder competition by lowering prices of one efficient firm, viewed by a rival as predatory in its pricing strategy and would then press charges against it.

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104 Khemani (1994), p. 3.

105 Ibid., p. 4.

106 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.

107 See, for example, Neven and Ungem-Sternberg (1996), pp. 44-46.

Competition policy may also limit cooperative efforts in the field of R&D, and if exempted by law, R&D could be used as a façade for anticompetitive practices.[108] Competition policy may put Egyptian firms at a disadvantage when dealing with foreign firms based in countries with a relatively lenient competition policy. Moreover, the enforcement of competition law is a costly exercise. This leads us to a crucial question: is the Egyptian legal system ready and equipped for dealing with and enforcing a sophisticated law such as the competition law?

What this paper has shown is that recent national and international developments are supporting the case for introducing a competition law in Egypt as a necessary, but not sufficient step for an Egyptian competition policy. At the national level, when the state had the right to use direct price controls 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 also actual cases and proposals of mergers and acquisitions, which require analysis of their impact on the market structure and fair competition, to see whether they should be approved or opposed.

At the international level, the advanced countries have been requiring the formal inclusion of competition policy in 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 competition policy, concern with the application of cross-sanctions,[109] and the view that there is no need to add new agreements before assessing the impact of the 'old' ones that were established by 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 multinationals.

Moreover, there is very serious concern about the operation and behaviour of international cartels. Increasing liberalisation of trade has increased the incentive for firms to participate in private cartels, which are looming as a major enforcement and regulatory concern for

[108] ..Stiglitz, op. cit., pp. 132-4.

[109] This implies that a violation in one area may be penalised in another by complaining countries, if the complaint is held to be justified. See Singh, Sing and Weisse (2001), p. 22.

competition agencies. International cartels are engaged in price fixing; division of the market at the international level; establishing price ceilings, or floors for new entrants; and creating mechanisms for incumbent firms to prevent market entry. They are considered the most stark challenge to national competition agencies. As the agreement among the members of such cartels is an international one, there is no single national agency capable of dealing with them, necessitating international co-operation in this field.

Indeed, Egypt as a developing country, is in need of a competition policy. But the challenging question is what kind of competition policy?

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