COMPETITION LAW

The impact of Egyptian Competition Law on price fixing agreements and consumer welfare in Egypt

Shams Elmallah*

Introduction and background

The economic power and cartels, especially the monopoly, was initiated since ancient times. Then, *The Wealth Of Nations* was published in 1776 by Adam Smith, who stated that "People of the same trade seldom meet, even for merriment and diversion, but the conversation ends in a conspiracy against the public or some contrivance to raise prices."[1] Competition Law was adopted later, firstly by the developed countries then the developing countries following. By 1947, competition laws were considered in both ITO (International Trade Organization) and the Havana Charter.[2] Since the Second World War, it was perceived that the lack of competition law is detrimental to countries and nations, as a result of the free trade which removes the public barriers such as custom duties, and increasing the cartels and abuse of dominance chances.[3] One of the main reasons behind adopting competition law is attracting Foreign Direct Investment (FDI) in developing countries, as foreign investors prefer to invest in countries who have competition law and have a competition culture. Attracting foreign direct investors was one of the main pressures imposed on Egypt to adopt its competition law.

The negotiations of the Egyptian Competition Law started by the middle of the 1990s and ended by issuing the Egyptian Competition Law and regulations, which were introduced in 2005. One of the main goals of Egyptian Competition Law is consumer welfare, free trade and improving the competition culture. Although Egypt is considered to be an early adopter of competition law as one of the developing countries, its Competition Law has weaknesses, which affected and harmed the consumers by the lack of excessive pricing prohibition as a kind of abuse of dominance.

The main aim of this article is to analyse the impact of the price fixing agreement exemption and the non-prohibition of the excessive pricing provisions on the consumer welfare goal under Egyptian Competition Law. This article commences at the scheme of the competition law and the anti-competitive provisions. The article also discusses the Egyptian Competition Law regime, authorities, and goals. Then, there will be an analysis of the price fixing agreement exemption under the Egyptian competition Law, followed by the abuse of dominance and the non -prohibition of the excessive pricing under Egyptian Competition Law. Finally, the article ends by reflecting on the effect of both the price fixing agreement exemption and the lack of excessive pricing on the consumer welfare goal.

Scheme of competition law and anti-competitive provisions

The main purpose of the application of EU Competition Law is to achieve consumer welfare, through protecting the competition market and prohibiting any conduct which might distort competition law goals.:

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* LLM Coventry University

[1] Jonathan Faull and Ali Nikpay, *The Economics of Competition: The EC Law on Competition* (2nd ed, OUP 2007).

[2] Damien Geradin, 'The Perils of Antitrust Proliferation – The Process of 'Decentralized Globalization' and the Risks of Over- Regulation of Competitive Behavior' (2009) Chicago Journal of International Law <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1327688>, last accessed 05 Dec 2020.

[3] Damien Geradin and Nicolas Petit, 'Competition Rules in the Euromed Countries with a Special Emphasis on Network Industries' (2004) < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=489691 >, last accessed 05 Dec 2020.

> Consumer welfare is now well established as the standard the Commission applies when assessing mergers and infringements of the Treaty rules on cartels and monopolies. Our aim is simple: to protect competition in the market as a means of enhancing consumer welfare and ensuring an efficient allocation of resource.[4]

The consumer welfare goal is clearly mentioned in EU competition law and in order to analyse the consumer welfare goal, it would be better firstly to clarify the consumer concept in the sphere of competition law, then explaining the consumer welfare concept and then analysing the consumer welfare as a goal under EU competition Law.

Firstly, the consumer concept is defined differently under t competition law from its definition under consumer protection law. Competition Law focused on the consumer's economic interest, while consumer protection law aims to protect much broader interests of consumers: such as the right to receive information, health and security.[5]The consumer concept in the sphere of competition law refers to any natural persons covered by the agreement directly or indirectly:

> The concept of 'consumers' encompasses all direct or indirect users of the products covered by the agreement, including producers that use the products as an input, wholesalers, retailers and final consumers, i.e. natural persons who are acting for purposes which can be regarded as outside their trade or profession.[6]

Secondly, the consumer welfare approach is the currently dominant approach in EU Competition Law. It has been advocated by the Commission and it is obvious in many cases, such as *Greening Washing Machines.*[7]

Thirdly, the consumer welfare goal is a priority under the EU competition law. The main aim of the anti-competitive agreements' prohibition is to prevent any agreements that might harm or affect the trade between member states or the competition which would consequently harm society and consumers' welfare. "All agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States, and which have as their object and effect the prevention, restriction or distortion of competition within the common market…".[8] Article 101(1) TFEU is considered to be an early recognition from the EU that consumers can be indirectly harmed by actions that harm the competitive structure of the market.[9] Also, this recognition is continued these days, as mentioned recently in *GlaxoSmithKline Services Unlimited v Commission*.[10]

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[4] Neelie Kroes, Former European Commissioner for Competition Policy, (Speech in London, October 2005), <www.ec/europa/eu/competition>, Last accessed, Dec 07-2020.

[5] Katie Cseres, 'The Controversies of Consumer Welfare Standard' (2007) 3(2) Competition Law Review 121, 173.

[6] Law Commission, *Communication from the Commission Notice Guidelines on the Application of article 8 (3) of the Treaty* (101, 2004) p97.

[7] Greening washing Machines (CECEDI) Commission Decision 2000/475/EC [1999] OJL 187/47.

[8] The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:(a) directly or indirectly fix purchase or selling prices or any other trading conditions;(b) limit or control production, markets, technical development, or investment;(c) share markets or sources of supply;(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

[9] *Europemballage and Continental Can v Commission* [1973] Case 6/72, ECR 215, CMLR.

[10] The provisions of paragraph 1 may, however, be declared inapplicable in the case of:- any agreement or category of agreements between undertakings,- any decision or category of decisions by associations of undertakings,- any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:(a) impose on the undertakings concerned restrictions

In addition, the TFEU prevention of any agreements that might distort competition within the market could reflect another EU competition goal which is seeking to perfect competition in the market. "…So, the commission is mindful that what really matters is protecting an effective competitive process…".[11] The perfect competition could be achieved through lower prices, better products quality, which lead to higher economic efficiency. According to the neo-classical economic theory, social welfare including the customer welfare is maximized in the perfect competition condition.[12] Also, in order to achieve social welfare as one of the competition laws goals, both allocative and productive efficiency are required to reach the maximization of society's' welfare. The allocative efficiency means that all the goods and services are allocated between consumers according to the price they are prepared to pay, and on the long run, the price will equal the marginal cost. Also, allocative efficiency is better achieved under perfect competition as both the producers and consumers will benefit in such conditions. The producer will be able to expand production if it will be profitable to him/her. For example, if the producer could earn more through the production of extra units of the product, he will produce more in case the profit is more than the cost. On the opposed hand, the producer will cease to expand the production in cases where producing extra unit costs him more than the profit. Under perfect competition economy, such a reduction in the item's productivity is not going to affect the market price and the producer will increase the output in order to reach the equation of concurring the marginal cost and marginal avenue. Added to that, the consumer will be able to obtain the goods and services at the price they are ready and able to pay. In contrast, if there is no perfect competition, a monopolist producer could increase the marginal revenue and restrict the output, which is against the social and consumer welfare goal. The productive efficiency is achieved when the producer could not be able to raise the price of the product item; if he charged above the cost and under perfect competition, other competitors would move into the market to gain profitable activities. In addition, producers will improve the products to be more efficient to get more profit, which is a benefit to the consumers, as they will gain better product quality with lower prices.

The anti-competitive agreement

There are two types of agreements: vertical and the horizontal agreements. The vertical agreement is an agreement between two or more undertakings on different levels, such as agreements between distributor and supplier of raw materials. "Vertical agreement means an agreement or concerted practice entered into between two or more undertakings each of which operates, for the purposes of the agreement or the concerted practice, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services".[13] The horizontal agreement is an agreement between two competitors on the same level, such as two manufacturers of the same product. For example, Nokia and Samsung.

Also, the agreements could be anti-competitive by object or by effect and both are prohibited under EU Competition Law. "The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market".[14] The more important part of this discussion is the anti-competitive agreements by object, as the price-fixing agreements are a by object constraint. The anti-competitive by object agreement is recognised through the content of the provisions

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which are not indispensable to the attainment of these objectives;(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

[11] Law Commission, *Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings* (OJ 45, 2007), 7.

[12] FM Scherer and David Roses, *Industrial Market Structure and Economic Performance* (3rd ed, Boston Houghton Mifflin 1990).

[13] Commission regulation (EU) 330/2010, Art 1(a).

[14] TFEU, Art 101(1).

of the agreement and the intention is not considered to be one of the determinative factors. "Objective is determined objectively and not subjectively".[15]

The price fixing agreements are strictly prohibited under art.101(1) TFEU as a by object constraint.[16] Also, the price fixing agreement has an effect on the competitive structure of the market, which is one of the two criteria that have been determined by CJEU. The CJEU, in the *Consten and Grundig v. Commission* case and *T Mobile* case,[17] clarified that the prohibited activity in the agreement should affect the trade between the member states such as changing the competitive structure of the market, and the price fixing agreement restricts the competition obviously with no need for more analysis as it is anti-competitive agreement by object. "Where an agreement has as its object the restriction of competition it is not necessary to prove actual anticompetitive effects".[18]

Further, there are some legal exceptions where provisions of paragraph one would not be applicable. The exceptions were stated in Art. 101(3), Such as, if the anti-competitive agreement could lead to economic and technical enhancing. "The provisions of paragraph (1) may, however, be declared inapplicable in the case of: any agreement or category of agreements between undertakings, which contributes to improving the production or distribution of goods or to promoting technical or economic progress".[19] This exception could be applied to the anti-competitive agreements by object, as occurred in *CECED* case.[20] The agreement between producers of washing machines to promote the production of energy efficiency was considered an anti-competitive agreement by object. However, it was accepted that the agreement leads to benefits for both the consumers and the environment and was justified under Article 101(3) TFEU. The EU commission, the national competition authorities and the national courts have the power to apply Art. 101(3) if there is a need.[21] Also, the party who seeks exemption, carries the burden of proof.

Abuse of dominance

Abuse of dominance is prohibited under Art. (102) TFEU where the abuse of dominance aspects is stated clearly. One of these aspects is excessive pricing, which is strictly prohibited under art. 102(a).[22] In addition, existing case law is considered as a guideline of how excessive pricing is treated under the EU Competition Law. For instance, in the *British Leyland case*, the Commission found that the vehicle manufacturer had charged excessive prices for certificates for left and right-handed cars; despite the fact that the costs of inspections were the same.[23]

Added to that, there are five elements of abuse of dominance conduct. The first element is the conduct must be between one or more undertakings. Secondly, a dominant position (in the relevant market). Thirdly, this dominant position must be held within the internal market or a substantial part of it. Fourthly, an abuse must occur. Fifthly, an effect on interstate trade must happen as a result of the

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[15] *Commission v Beef Industry Development Society* [BIDS] [2018] Case C 209/07.
[16] TFEU , Art 101 (1), stated that: "The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:(a) directly or indirectly fix purchase or selling prices or any other trading conditions".
[17] *Grundig v. Commission* [1996] ECR 301, 342 Case C-8/08
And *T- Mobile* [2009] ECR 1-04529.
[18] Richard Whish and David Bailey, *Competition Law* (8th ed, University Press 2015) para 30.
[19] TFEU, art 101 (3).
[20] *CECED* [1999] Case IV.F.1.
[21] EU Regulation 1/2003, Art 3(1).
[22] TFEU , Art 102 stated that: "An abuse by one or more undertakings of a dominant position within the internal market or its substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between member states."
[23] *Commission V British Leyland* [1984] Case 226/84.

abuse.[24] The undertaking "encompasses every entity engaged in an economic activity."[25] Also, the dominant position is related to the power of the undertaking in a specific market, and this dominance must be within the internal market or a substantial part of it. The CJEU determined the substantial part of the market as "'the pattern and volume of the production and consumption of the product as well as the habits and economic opportunities of vendors and purchasers must be considered".[26] In addition, the market is defined under competition law from two sides: the demand and supply sides. The demand substitution is a qualitative criterion based on a measure for determining substitutability through the SSNIP test.[27] The CJEU held that "In finding a dominant position, it is unnecessary that products be completely interchangeable ..."[28] The other side of the market definition is the supply substitution. The supply substitution is relevant when the supplier possesses the ability to switch the products in a short term without incurring any significant costs or risk.[29]

Egyptian Competition Law regime, authorities, and goals.

Egyptian Competition Law was enacted in 2005, Law No. 3 of 2005 Promulgating the Law on the Protection of Competition and the Prohibition of Monopolistic Practices. Egypt faced both external and internal pressure to enact its competition law. Firstly, the external pressure was a result of the economic reform in the middle of the 1990s. This reform led to the economy privatization, rather than state economy and the Egyptian economic policy had emphasized the role of the private sector.[30] The main reason behind the privatization is attracting foreign direct investments (FDI). In fact, the trade between Egypt and EU increased, which led to signing the General Cooperation Agreement with Egypt in 1997 for preferential trade relation between Egypt and EU.[31] However, this agreement did not include any competition rules. Then, the Barcelona process had started by 1995, and took five years to be signed and ratified by both parties.[32] The main aim of the Barcelona process was to adopt free trade between EU and Mediterranean neighbours by 2010. In addition, serious negotiations were held through the Barcelona process resulting in many agreements, which Egypt was one of; for instance, EMAA "European Mediterranean Association Agreement". The EMAA agreement was signed and came into force, and one of its main provisions is a five-year requirement of Egypt to implement its obligations: one of the obligations is to enact its competition law; and based on this obligatory provision, Egypt published its own Competition Law.

Second, Egypt faced other internal pressures. One was based on Article two of the Egyptian constitution, which stated that "Islam is one of the legislation sources and the principles of the Islamic sharia are the major source of legislation".[33] It was argued that the Egyptian Government faced internal religious pressure, as the monopoly is strictly prohibited under the Islamic Shariaa. However, this is considered as a weak argument, as this religious pressure is found since the 1923 Egyptian Constitution:

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[24] TFEU , Art 102 stated that: "An abuse by one or more undertakings of a dominant position within the internal market or its substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between member states."

[25] *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] Case C-67/96.

[26] *Suiker Unie v Commission* [1975] C 40/73.

[27] A hypothetical monopolist test, which is known as "SSNIP test". The test examines the percentage of customers who would switch their purchases to other products or supplier after a price increase. The SSNIP test takes the 5-10 per cent range of switching customers to indicates the significance required with the test.

[28] *NV Nederlandsche Banden Industrie Michelin V Commission* [1983] Case 332/81.

[29] Law Commission, *Commission Notice on market Definition* (1997) Paras 20-23.

[30] See Egyptian Competition Authority "Free market", available at: http://www.eca.org.eg/ECA/StaticContent/View.aspx?ID=13 (last accessed 07-12-2020).

[31] At this particular stage, only a few numbers of agreements contained competition provisions in a manner that simply promotes fair competition practices. See for example, the Association Agreement between the European Economic Community [now EU] and Cyprus, 19th December 1972, O.J. L133/2, 21st May 1973.

[32] Ratification by EU parliament on 29th of Nov 2001 and on the 7th of April 2003 by Egyptian Parliament.

[33] The Egyptian Constitution, Art 2, amended according to the result of the plebiscite on the constitutional amendment that was conducted on May 22, 1980.

"Islam is the religious of the state".[34] Another internal pressure was the domestic economic conditions after privatization. The privatization was the main aim of the economic reforms and structural adjustment program, which was led by both the International Monetary Fund (IMF) and the World Bank.[35] The Economic privatisation was a challenge faced by Egypt, as the regulatory structure during the state control era does not match with the privatization stage. This led to transferring the monopoly from state monopoly to private monopoly and resulted in increasing the number of the Anti-competitive allegations with a lack of competition law.[36]

The ECL "Egyptian Competition Law" is applied on "natural and juristic persons, economic entities, unions, financial associations and groupings, groups of persons, whatever their means of incorporation..."[37] Also, it is applied internally and externally on the committed acts that might harm the freedom of competition in Egypt.[38] Any Competition Law case starts through the ECA, "the Egyptian Competition authority". ECA is the authority for the protection of competition and the prohibition of monopolistic practices and is established according to the ECL.[39] The ECL is located in Cairo, Egypt with no physical location and it has public juristic personality. "The Authority shall be located in Cairo and shall have the public juristic personality".[40] It is managed by a board of directors.[41] The ECL is an autonomous body and is affiliated to the prime minister and his delegator, the minister of trade and industry.[42] The main reason of the affiliation to the minster is based on the notion of minister responsibility before the parliament, which was stated in Art. 124 of the Egyptian Constitution.[43] Further, ECA should report its annual report to the minister and communicate it to the parliament and Shura council.[44]However, the minister does not acquire the right to amend or ask for the annual report amendment before the submission to parliament or the Shura Council, and the ECA does not need a minister prior approval to the annual report.

The ECA substantive powers are stated clearly under Art.11 of the ECL. Such as, setting up data, organizing trainings and educational programs.[45] The ECA regulates the protection of competition and the prohibition of monopolistic practices and this could occur through initiating the cases with or without complaint.[46] Without receiving complaint it has the right to start procedures of inquiry, inspections and fact findings on its own initiative.[47] If the information or the documents required to be submitted under competition law were incomplete, the ECA has the right to decline reviewing the complaint. However, if the ECA considers that the complaint is complete, it has to review it and conduct

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[34] The Egyptian Constitution 1923, Art 149.
[35] Over the medium term, a decentralized market based outward-oriented economy where private sector activity will be encouraged by a free, competitive, and stable environment with autonomy from government intervention. International Monetary Fund, (1991) "*Arab Republic of Egypt-Recent Economic Developments*" as cited by El-Dean and Mohieldin (2001), *op.cit.*, p.22-23)
[36] A.F Ghoneim, Competition Law and Competition Policy: What does Egypt really Need? (2002) Submitted for the ERF 9th Annual Conference < http://www.erf.org.eg/9th%20annual%20conf/9th%20PDF%20Background/Trade/T-B%20Ahmed%20Ghoneim.pdf) accessed 23-01-2008 >.
[37] The Egyptian Competition Law, Art 2.
[38] The Egyptian Competition Law, Art 5.
[39] The Egyptian Competition Law, Art 2(3) stated that: "ECL The Authority for the Protection of Competition and the Prohibition of Monopolistic Practices established in accordance with the provisions of this Law."
[40] The Egyptian Competition Law, Art 11.
[41] The Egyptian Competition Law, Art 12, which stated that: "The Authority shall be managed by a Board of Directors the composition of which shall be formulated by virtue of a decree of the Competent Minister".
[42] The Preamble of The Egyptian Competition Law, Art 2 which stated that: "The Prime Minister is the minister competent to give effect to the provisions of this Law."
[43] The Egyptian Constitution 1923, Art 124, which stated that: "only the prime minister, his deputies, the minsters, their deputies are responsible before the parliament".
[44] The Egyptian Competition Law, Art 11(9).
[45] The Egyptian Competition Law, Art 11
[46] The Egyptian Competition Law, Art 11.
[47] The Executive Regulation of the Egyptian Competition Law, Art 33.

the necessary inspection, inquiry and fact-finding related thereto.[48] The ECA has the right, with the majority of its board members, to issue administrative decisions that determine that a competition law violation incurred. The ECA has that right independently from the government. Further, the ECA's decisions are binding and cannot be repealed by the government and decisions can only be appealed before the administrative court. If the ECA issued an administrative decision, it refers it to the prosecutor's office and an investigation will be initiated. Then, if a violation is proved, the prosecution procedures initiate before the Economic Criminal Court. The Economic Criminal Courts were established in May 2008 through the Egyptian parliament agreement to introduce the Law no. 120 of 2008. They are responsible for settling any disputes resulting from the protection of competition law and any other monopolistic practices.[49] The economic courts can impose the criminal penalties on competition law violators, and not the ECA, as the penalties can only be imposed through the final decision of the economic court.[50] The economic criminal courts have the exclusive jurisdiction to penalize and fine the violators.[51]

The main goal of the ECL is consumer welfare. The current dominant approach in Egypt is protecting the consumer which, was stated clearly in the Egyptian Constitution amendments as one of the main Competition Law goals. "The economic system is committed to the criteria of transparency and governance, supporting competitiveness … achieving balanced growth; preventing monopolistic practices …; and achieving balance between the interests of different parties … to protect consumers".[52] In addition, consumer welfare is a priority under the ECL, as Art (1) of the law No 3 of 2005 stated that the economic activities should not be an obstacle to the freedom of competition that might harm the consumer and society welfare. "Economic activities shall be undertaken in a manner that does not prevent, restrict or harm the freedom of competition in accordance with the provisions of the Law".[53] Also, the ECA in its annual report 2006-2007 stated that "Competition is not a goal in itself but rather a means for making markets work better for consumers".[54]

The price fixing agreement under Egyptian competition law

Price fixing agreements are strictly prohibited under Egyptian Competition law. As Article Art 6 of the law No.3 ,2005 stated that: "Agreements or contracts between competing persons in any relevant market are prohibited if they are intended to cause any of the following: (a) Increasing, decreasing or fixing prices of sale or purchase of products subject matter of dealings".[55] In addition, It was mentioned in the COMESA" Common Market for Eastern and Southern Africa".[56] The COMESA treaty stated that: "the Member States agree to prohibit any agreement between undertakings or concerted practice which has as its objective or effect the prevention, restriction or distortion of competition within the Common Market.".[57] Although, there is no doubt that the price fixing agreement is prohibited under the Egyptian competition Law, the Egyptian legislator specified some legal exceptions to price fixing agreements. The first exemption is related to the society and consumer welfare and the second exemption is a state or government exemption.

First, in 2014, the ECL (Egyptian Competition Law) was amended to introduce a pre-exemption mechanism to cartel agreements in case an agreement leads to achieving economic efficiency, provided that the benefits to the consumer outweigh the restriction of competition. Article 9 of the Law No.3,

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[48] The Executive Regulation of the Egyptian Competition Law, Art 37.
[49] The Egyptian Law Establishing the Economic Courts Law no. 120, 2008, Art 4.
[50] IBID.
[51] OECD, Competition Committee, 16-18 June 2015, Para 19.
[52] The Amended Egyptian Constitution 2014, Art 27.
[53] The Egyptian Constitution Law, Art 1.
[54] The Egyptian Competition Authority Annual Report, 2006-2007.
[55] The Egyptian Competition Law, Art 6.
[56] Egypt is a member of the COMESA; it is regional body and the activities in Egypt should be conducted with COMESA. Also, both COMESA and ECA engage regularly on variable transactions and investigations).
[57] COMESA, Art 55(1).

2005 also exempted price fixing agreements if they lead to consumer welfare and if the benefits to the consumers are more than the competition restrictions "…. Where this is in the public interest or for attaining benefits to the consumers that exceed the effects of restricting the freedom of competition…"[58] This exemption is based on the concerned parties' request and has to be ratified by the ECA. Also, this exemption is related to the public utilities managed by private companies who are subject to the private law. "The Authority may, upon the request of the concerned parties, exempt some or all the acts provided for in articles 6, 7 and 8 regarding public utilities that are managed by companies subject to the Private Law…"[59] Added to that, the price fixing agreement exemption procedures should be applied in accordance with the executive regulation of this law. "… This shall be done in accordance with the regulations and procedures set out by the Executive Regulation of this Law".[60]

Further, if the economic activity in the agreement seeks to improve production and distribution of goods, enabling the consumer for share of benefits, or promoting technical or economic progress, this price agreement will be exempted from being an Anti-competitive agreement. As stated in Art 55(2) of the COMESA treaty, "The provisions of paragraph 1 of this Article is inapplicable in the case of: (a) any agreement or category thereof between undertakings; (b) any decision by association of undertakings; (c) any concerted practice or category thereof; which improves production or distribution of goods or promotes technical or economic progress and has the effect of enabling consumers a fair share of the benefits."[61] However, this exemption has a condition to be applicable, which is the agreement should not impose any restrictions against achieving the COMESA treaty objectives or affect the competition negatively. "Provided that the agreement, decision or practice does not impose on the undertaking restrictions inconsistent with the attainment of the objectives of this Treaty or has the effect of eliminating competition".[62] Further, it is mentioned that, the authorised entity with the price fixing agreement exemption is the council. Article 55(2) of the COMESA clarified that: "The Council may declare the provisions of paragraph 1 of this Article inapplicable".[63]

Secondly, public utilities managed by the state are totally exempted from the application of Article 6 of Law No. 3, 2005, which prohibits anti-competitive agreements. It might be argued that this exemption is considered to be against ECA independence, as the ECA has no authority on the state agreements related to the public utilities and also the competition law is not applied on the public utilities managed by the state. "The provisions of this Law shall not apply to public utilities managed by the State".[64] Further, the Law gives the Cabinet of Ministers the right to fix the prices of essential products for a period of time without any powers of the ECA to reject the Cabinet of Ministers decree to do so; and the only condition imposed on the cabinet of minister is to take the opinion of the ECA before issuing the decree and not the ECA permission. "The Cabinet of Ministers may, after taking the opinion of the Authority, issue a decree determining the selling price for one or more essential products for a specific period of time".[65]

The law gave the government uncontrolled permission for the price fixing agreements related to the essential products, because the government is allowed to execute any agreement to implement the essential products price fixing without any interference or control from the ECA, or any other authorities. Further, these agreements by the government are not considered to be anti-competitive agreements. "Any agreement concluded by the government for the purpose of the implementation of these prices shall not be considered anti-competitive practice."[66] This is despite the fact that the price of two essential products in Egypt increased in the period between 2006-2009, which are the meat and

[58] The Egyptian Competition Law, Art 9.
[59] Ibid.
[60] Ibid.
[61] COMESA, art 55(2).
[62] Ibid.
[63] Ibid.
[64] The Egyptian Competition Law, Art 9.
[65] The Egyptian Competition Law, Art 10.
[66] Ibid.

the cement. Although, the council of minister of cabinet did not use the price fixing exception under Art (10), it might be argued that the reason behind not using Art (10) is that, it is incompatible with Art (10) of the Law No. 8/1997 for investment guarantees and incentives. Art (10) prohibited any authority from interfering in the pricing of the company's products or profits. "No administrative authority shall interfere in respect to the pricing of a company's or establishment's products, nor in determining their profit".[67]

In comparison with EU competition Law, there are some similarities between both EU and Egyptian competition Law provisions that are concerned with the exceptions of the price fixing agreements. Firstly, the EU exempt the price fixing agreement if the agreement aims at social welfare through allowing consumers a fair share of resulting benefits of the agreement, or the agreement lead to goods or distribution of goods improving, or if the agreement aims at promoting technical or economic progress. "The provisions of paragraph 1 may, however, be declared inapplicable in the case of: any agreement or category of agreements between undertakings, any decision or category of decisions by associations of undertakings or any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit .."[68] Secondly, the TFEU inserted a condition to apply the exception of price fixing agreement. The exempted price fixing agreement should not impose any restrictions against the treaty objectives or impact competition. "…and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question".[69] Finally, it is obvious that the COMESA competition provision structure is modelled on the European competition provision related to the anti-competitive agreements.

The excessive pricing and the abuse of dominance under the Egyptian Competition Law

Excessive pricing is considered to be one of the major obstacles to market efficiency. The ECA former chairperson in her annual report 2006-2007 stated that "the increase in prices has become a major problem in the marketplace".[70] The excessive pricing is one of the abuses of dominance aspects, and in order to analyse whether it is prohibited under the ECL, we will discuss the dominance determination, the abuse of dominance, and finally, the main differences between excessive pricing and abuse of dominance.

Firstly, the dominant positions in Egypt is not prohibited in itself. However, the dominant firms are prohibited from certain conduct, which is considered as an abuse of dominance. Also, the Egyptian legislator defined the dominance clearly as : "Dominance in a relevant market is the ability of a person, holding a market share exceeding 25 per cent of the aforementioned market, to have an effective impact on prices or on the volume of supply on it, without his competitors having the ability to limit it".[71] There are specific criteria to classify a firm as a dominant firm under Egyptian competition Law. "Dominance provides the existence of three elements. First, the person must hold a market share of more than 25 per cent of the relevant market for a certain period of time. Second, the person should have the ability to influence prices or volume of products supplied in that market, and third, the inability of competitors to restrict his or her influence on prices or volume of these products".[72] It was stated in Art 4 of the ECL that more procedures would be added through the executive regulation of this law regarding dominance determination. "The Authority shall determine the situations of dominance according to the procedures provided for in the Executive Regulations of this Law.[73] For example, Art 8 of the executive

[67] The Law No. 8/1997 for Investment Guarantees and incentives, Art 10.
[68] TFEU, Art 101 (3).
[69] Ibid.
[70] The Egyptian Competition Authority Annual report, 2006-2007.
[71] The Egyptian Competition Law, Art 4.
[72] The Executive Regulation of the Egyptian Competition Law, Art 7.
[73] The Egyptian Competition Law, Art 4.

regulation added to the ability of the person in a relevant market to influence the product's price or volume. "The person shall have effective impact on the prices of the products or the quantity supplied in the relevant market if this person has the ability, through his/her individual acts, to determine the prices of these products or the quantity supplied in that market where his/her competitors do not have the ability to prevent these acts".[74] In order to consider the firm as dominant under Egyptian Competition Law, all the pre-requisites have to be satisfied. For instance, in the steel study, Ezz group hold over 25 per cent of the relevant market. However, it did not reach a dominance finding except after the analysis of all other perquisites.

Second, in contrast with Article 102 TFEU, the list of abuses stipulated under Article 8 of the ECL are exhaustive.[75] The Egyptian legislator prohibited the dominant firms from specific conduct which is considered as abuse of dominance. These conducts are stated clearly as nine conducts under Art 8 of the ECL. Firstly, any undertaking leads to a product non-manufacturing, non-production or non-distribution for a specific period of time. Secondly, refraining or dealing with a person in a manner restricting his freedom from entering or existing the market at any time. Thirdly, any act limiting the distribution of a product. Fourthly, to impose any obligations or products not related to the original transaction or agreement. Fifthly, price discrimination between sellers or buyers. Sixthly, refusing the production or providing of a scare product. Seventhly, dictating restrictions on the utilities or services. Eighthly, selling a product under their marginal cost. Ninthly, restricting a supplier from dealing with a competitor.[76] This means that any other abuse of dominance practice not stated clearly in this article is not prohibited. However, it might be argued that excessive pricing is caught under art 8(e), which prohibits any transaction which has any price discrimination between sellers or buyers. "Discriminating between sellers or buyers having similar commercial positions in respect of sale or purchase prices or in the terms of the transaction".[77] However, this practice refers to the firm which charge different prices to its customers, which is different from the excessive pricing abuse that means selling the products with high prices to all customers due to an abusive practice. In 2014, the ECA received a complaint about *Telecom Egypt* for its abusive practices. *Telecom Egypt* is one of the telecommunications dominant companies in the Egyptian market. *Telecom Egypt* breached Art 8(e) of the Law No 3, 2005 through the discriminatory treatment which harmed its competitors at the downstream level. This ended by issuing administrative orders. In addition to that, there are other cases related to abuse of dominance but not related to the excessive pricing, which is evidence that it is not prohibited under the Egyptian

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[74] The Executive Regulation of the Egyptian Competition Law, Art 8.

[75] Interview with Dr Khaled Attia, Former Executive Director, Egyptian Competition Authority (Egypt, 29 April 2010).

[76] The Egyptian Competition Law, Art 8 stated that: "A Person holding a dominant position in a relevant market is prohibited from carrying out any of the following:
a) Undertaking an act that leads to the non-manufacturing, or non-production or the non-distribution of a product for a certain period or certain periods of time.
b) Refraining to enter into sale or purchase transactions regarding a product with any Person or totally ceasing to deal with him in a manner that results in restricting that Person's freedom to access or exit the market at any time.
c) Undertaking an act that limits distribution of a specific product, on the basis of geographic areas, distribution centres, clients, seasons or periods of time among Persons with vertical relationships.
d) To impose as a condition, for the conclusion of a sale or purchase contract or agreement of a product, the acceptance of obligations or products unrelated by their very nature or by commercial custom to the original transaction or agreement.
e) Discriminating between sellers or buyers having similar commercial positions in respect of sale or purchase prices or in the terms of the transaction.
f) Refusing to produce or provide a product that is circumstantially scarce when its production or provision is economically possible.
g) Dictating on Persons dealing with him not to permit a competing person to have access to their utilities or services, despite this being economically viable.
h) Selling products below their marginal cost or average variable cost.
I) obliging a supplier not to deal with a competitor".

[77] The Egyptian Competition Law, Art 8(e).

Competition Law. For instance, in January 2018, the economic criminal court of Cairo imposed a 4000 EGP million fine on *BeIn sports* as a result of infringing article 8 (d) and (g).

Another argument is that excessive pricing is prohibited under Art 13 (b) which prohibited from entry into a sale or purchase of a product with any other person or restricting dealing with him in a manner lead to restricting that person freedom. "Refraining from entry into sale or purchase transaction regarding a product with any person or totally ceasing to deal with it in a manner that results in restricting that person's freedom to access or exit the market at any time, which includes imposing financial conditions or obligations or abusive contractual conditions or conditions that are unusual in the activity subject matter of dealings".[78] However, the prohibition under article 13(b) is limited with the upper stream market such as, the producers, suppliers and distributors and is not related to the customer. In addition, the prohibition is related to refraining from the entry into the agreement, which means that there is no agreement yet. On the other hand, excessive pricing conduct is dealing with high prices already offered and imposed on the customers. Finally, if the excessive pricing is prohibited under Egyptian competition law, the Egyptian legislator would add the excessive pricing as one of conducts which are considered as an abuse of dominance under the Law, or refer to it in the executive regulations. However, such prohibition was not mentioned in any of them.

In contrast with the Egyptian Competition Law, excessive pricing is prohibited under EU competition law. The excessive pricing prohibition was stated clearly in the TFEU: Art 102 (a) prohibited the dominant firm from selling with unfair high prices. "Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in: (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions".[79] In addition, excessive pricing is also prohibited under the case Law, although, there are only a few cases of excessive pricing abuse at the EU. However, clear guidance of how the excessive pricing was treated are found. For example, the *United Brand Case,* which is considered the leading case of the excessive pricing. The *United Brands* is a well- established bananas firm, and the Commission found that *United Brands* abused its dominant position through excessive pricing.[80]

Where the price fixing exemption did not affect the consumer welfare goal

Egypt has achieved one of its main competition goals, which is the improvement of the Egyptian competition cultural goal as Egypt has shifted from simple cartels to complex abuse of market dominance. For example, in the telecommunications and broadcasting sector.[81]Further, the publication of the ECA decisions on any violation or breach of the competition Law has improved the competition culture.

One of the biggest cartels related to the price fixing is the *Cement* case.[82] The ECA examined the Cement producer's practices between 2002-2006 based on price fixing conduct. During the price war (1999- 2003), the cement price went very low and the companies agreed to retain the price level to the 1999 price under the government supervision and before issuing the Egyptian Competition Law. However, the government role in the cement case was just supervisory and ended by 2005. The ECA found that the producers breached Article 6 (a) of the Egyptian Competition Law. The cement case is the first judicial precedent, and the violators were fined 200 million EGP. A further example is the

[78] The Executive Regulation of the Egyptian Competition Law, Art 13(6).
[79] TFEU, Art 102(a).
[80] *United Brands Company V Commission* [1978] ECR 207, Case 27/76.
[81] For example, "COMESA Competition Commission investigates football broadcasting rights" (28 February 2017), available at: <https://africanantitrust.com/2017/02/28/comesa-competition-commission-investigates-anti-competitive-restrictive-practices.>, Last accessed 07-Dec 2020.
[82] *Public Prosecution v National Cement Co & Others,* Court of First Instance [2008], Nasr City Case 2900/2008.

glucose case cartel as price fixing agreement and breaching of Art 6 (a), the cartel occurred between 2008- 2012 is one of the biggest cartels investigated by the ECA.[83]

In addition, the price fixing exemption did not harm the achieving of the consumer welfare goal in Egypt, even though the price fixing agreement is an anticompetitive agreement and prohibited under Art (6) (a) of the Egyptian Competition Law.[84] There is an exception related to the essential products pricing, and the Cabinet of Ministers, after considering the ECA's opinion, may issue a decree determining the selling price for one or more essential products for a specific period of time.[85] Further, the ECA shall assist the Cabinet of Ministers in determining the sale price of the essential products by conducting the necessary studies.[86] The legislator failed to identify what are the essential products, which gives the government wider authority and power than the ECA, as the ECA role related to determining the essential products' price is recommendatory only. The prices of some essential products such as cement and red meat have increased from 2006-2009. However, all the studies conducted by the ECA about these products' prices, mentioned that the minister's cabinet did not use the exception of article 10. Thus, the price fixing exception did not harm the consumer welfare as one of the main Egyptian Competition Law goals.

The non-prohibition of the excessive pricing harmed the consumer welfare goal

As mentioned above, the ECL did not prohibit excessive pricing which caused a negative impact on achieving the consumer welfare goal because the non-prohibition of the excessive pricing under the ECL resulted in giving the dominant firms more opportunities to set the prices excessively. We will now discuss the impact of the excessive pricing in both primary and secondary markets, the relation between market structure and excessive pricing, and the dominant firms' welfare as a result of excessive pricing instead of consumer welfare through analysing the steel industry in Egypt as an example.

First, excessive pricing might have two aspects, the excessive pricing in the primary market and the excessive pricing in the secondary market. The excessive pricing in the primary market, where the prices of the main products are high. The products of the primary market are complementary to the secondary market's products, which means that any increase in the prices of the primary market would affect the prices of the secondary market, such as concrete and raw materials. If the concrete is excessively priced, the construction firms might be affected, and the small and medium sized firms would be harmed. Also, excessive pricing in the primary market not only harms the firms, it also harms the consumer which will face higher prices in the secondary market products, as final products they purchase. In addition, excessive pricing in the secondary market refers to the aftermarkets that includes services and goods directly offered to the consumer, such as cars, so the excessive pricing in the secondary market products directly harm the consumers and are considered to be against the consumer welfare as a competition goal. In conclusion, the pricing over competitive level in both primary and secondary markets cause detriment to the consumer welfare,[87]which could be seen in the Egyptian market. For example, the red meat prices, which is an essential product and its excessive pricing harmed the consumers which is a clear violation of the consumer welfare goal.

Secondly, it was argued that there is a relation between the market structure and excessive pricing. If the market is highly concentrated it increases the excessive pricing chances. As per Harvard schools' proponents, there is a relation between the market concentration and high prices. This study approach is called (SCP), the structure, conduct and performance. They argued that the structure of the market

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[83] OECD, Directorate for financial and enterprises affairs competition committee, p3.
[84] The Egyptian Competition Law, Art 6 (a).
[85] The Egyptian Competition Law, Art 10.
[86] The Egyptian Competition Law, Art 13.
[87] Damien Geradin, 'The Perils of Antitrust Proliferation – The Process of 'Decentralized Globalization' and the Risks of Over- Regulation of Competitive Behavior' (2009) Chicago Journal of International Law <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1327688>, last accessed 05 Dec 2020.

refers to its players' conduct which identifies the performance.[88] Also, they mentioned that high market concertation and high entry barriers harm consumer welfare directly, as the consumers welfare is achieved through low-priced and quality products. As mentioned earlier, the Egyptian market is highly concentrated. For example, few firms have a 70 per cent market share of the Egyptian fabric production market. The non-prohibition of the excessive pricing allows these dominant firms to excessively increase the prices, which lead to dominant firm's welfare instead of consumer welfare, discussed in the following paragraph.

Thirdly, excessive pricing deters consumer welfare and might lead to dominant firms' welfare instead of consumer welfare. The objective of the competition law is to protect consumer from the anti-competitive practices by the dominant firms and that could not happen through excessive pricing. As a result of the non-prohibition of excessive pricing in Egypt, consumer welfare was harmed and a very popular example is the steel industry in Egypt.

By the beginning of the economy privatization in the 1990s, the governmental control over the steel industry ended and it is now controlled by Ezz Steel Rebars (ESR), who has 28 per cent share of Alexandria National Iron and Steel Company in Dikhela (ANSDK), which is a government controlled company. Both companies are operating under the name "Ezz Dekhela" steel (EZDK), and its chairman is Ahmed Ezz. EZDK now hold 54 per cent of the steel market share, which evidences that it is dominant firm. The rest of the steel market industry is divided between public sector companies such as, Helwan Steel, which holds 7 per cent of the market, and private sector firms such as Suez Steel and others with about 26 per cent of the steel market share.

There are some factors facilitating excessive pricing in the steel industry by EZDK. First, the billet monopoly by Ahmed Ezz. Egyptian steel relies mainly on the rebars and these rebars require billet in order to be produced. As a result, all the EZDK competitors import raw materials, however, EZDK does not have to, as they run fully integrated plants. Also, the government imposed high tariffs on importing steel as a form of protection and encouraging the domestic steel industry, which increased the EZDK market power and after media pressure the tariff declined to 5 per cent. In addition, the high level of entry barriers in the steel industry in Egypt increased the chances of excessive pricing, mainly since 2000. As the production level increased the consumption level caused weak demand. The production in 2002 was 6.4 million tons in comparison with 5.6 million tons in 2001. The main reason behind the low demand is the downturn of the real estate market, which relies and is based on rebar (the Egyptian construction is different from that in the UK as they use mainly rebar, steel, iron).[89] Steel is an essential product in Egypt as many industries are based on steel, for example car manufacturing and the construction industry. The excessive pricing of steel in Egypt harmed the society and consumer welfare on all levels, starting from the medium sized firms and ending by the labour working in a construction industry.

Conclusion

Egypt is one of the early adopters of Competition Law in the developing countries. Also, Egypt faced both internal and external pressures to issue its Competition Law, a result of the economic reform and the privatization in 1991, and the external pressure was based on the trade relation between Egypt and EU. Egyptian Competition Law was influenced by EU Competition Law in many respects. However, the Egyptian legislator stated an exemption related to the price fixing agreement that allows the Cabinet of Ministers to fix the price of the essential product for a specific period, while considering the ECA's opinion. Although Egypt faced high prices related to some essential products such as red meat, there was no evidence that it is based on the price fixing agreement exemption under Art (10) of the Law No. 3, 2005, and this exemption has never been used. Thus, the price fixing agreement exemption did not

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[88] Jonathan Faull and Ali Nikpay, *The Economics of Competition: The EC Law on Competition* (2nd ed, OUP 2007).

[89] Available at https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DSTI/SC (2020)1/FINAL&docLanguage=En. Last accessed 05 Dec 2020.

harm the consumer and it is not considered as an obstacle to achieve its consumer welfare goal. In addition, the Egyptian legislator did not prohibit excessive pricing under the ECL, which gives the dominant firms the right to price the products excessively. As a result, non-prohibition of the excessive pricing harmed the consumer welfare goal and lead to dominant firm welfare instead of the consumer welfare.