Journal of African Law, 64, 1 (2020), 107–125 © SOAS, University of London, 2020.
doi:10.1017/S0021855319000342 First published online 9 January 2020

Modernization of Competition Law and Policy in Egypt: Past, Present and Future

Dong-Hwan Kim*
Hankuk University of Foreign Studies
hamidkim@hufs.ac.kr

Yo Sop Choi**
Hankuk University of Foreign Studies
yosopchoi@hufs.ac.kr

Abstract

Competition laws and policies play an important role in developing countries. More than 130 countries have adopted either a competition law or a similar framework of anti-monopoly laws that aims to improve social welfare. Most African countries have already started developing their competition regimes, and regional trade organizations in Africa have provided competition sections in their free trade agreements to enhance enforcement cooperation. For fledgling competition regimes in Africa, the improvement of effective public enforcement and competition law culture has become an essential driver of competition law development. In particular, Egypt has demonstrated its efforts towards the modernization of competition law and the enhancement of fair and free competition, which is an example of the development of the competition regime in a developing African country. This article discusses the development of the Egyptian competition regime from a comparative perspective and suggests proposals for its further modernization.

Keywords

Egypt, competition law and policy, modernization, convergence, economic democracy

INTRODUCTION: COMPETITION LAW AND POLICY IN DEVELOPING COUNTRIES

Competition law is the body of law that prohibits anti-competitive agreements, abuses of market dominance or monopolization, as well as mergers that impede competition. Its ultimate goal is to protect a competitive process in the market and ensure the welfare of society as a whole. The increasing

* Assistant professor, Department of Arabic, Hankuk University of Foreign Studies, South Korea.
** Associate professor of law, Graduate School of International and Area Studies, Hankuk University of Foreign Studies, South Korea.
This work was supported by the Hankuk University of Foreign Studies Research Fund.

number of competition regimes over the last 30 years has demonstrated the importance of effective competition law and policy, particularly in developing countries, and the globalization of competition regimes can be observed through the adoption of foreign approaches, such as economic analysis or principles. This has resulted in a significant level of global competition law convergence.[1]

In addition, the development of competition regimes in developing countries indicates a move towards the achievement of diverse socio-political goals. In particular, the various purposes of competition law and policy often lead to the assertion of economic democracy, implying the protection of individual economic freedom by prohibiting anti-competitive practices.[2] Therefore, the lexicons of globalization of the market and competition regime, and the convergence of competition laws and socio-political objectives in the developing world comprehensively illustrate the stages of competition law development. In other words, developing countries have applied general competition norms from the western world, mixed with their own localized socio-economic aims.

First, the appropriate implementation of competition law is one of the central elements in the globalization of national economies. For example, boycott cartels or refusals to deal by domestic firms holding a market-dominant position can be used as barriers to market entry that impede the introduction of competition from foreign companies. Therefore, vigorous competition law enforcement is often understood as a prerequisite for free international trade.[3] When a country accommodates free trade, more discussion about the implementation of competition law is therefore necessary.[4]

Secondly, demonstrating the importance of competition law, more than 130 countries have adopted competition laws or similar regulatory frameworks.[5] Despite the different cultural, economic and legal backgrounds across regions,[6] it appears that competition regimes around the world have become increasingly more harmonized than in the past, thus avoiding conflict as a result of dissimilar approaches. In particular, the convergence of competition laws helps to prevent discriminatory enforcement against multinational

1 See, for example, DJ Gerber "Economic development and global competition law convergence" in DD Sokol, TK Cheng and I Lianos (eds) *Competition Law and Development* (2013, Stanford University Press) 13.

2 See, for example, R Van den Bergh *Comparative Competition Law and Economics* (2017, Edward Elgar) at 115.

3 See, for example, M Matsushita, TJ Schoenbaum and PC Mavroidis *The World Trade Organization: Law, Practice, and Policy* (2nd ed, 2006, Oxford University Press) at 855–56.

4 See, for example, GD Both "Drivers of international cooperation in competition law enforcement" (2015) 38/2 *World Competition* 301.

5 See, for example, R Whish and D Bailey *Competition Law* (8th ed, 2015, Oxford University Press) at 1.

6 TK Cheng "How culture may change assumptions in antitrust policy" in I Lianos and DD Sokol (eds) *The Global Limits of Competition Law* (2012, Stanford University Press) 205 at 206. The existence of various cultural backgrounds often undermines the possibility for the convergence or globalization of competition law.

undertakings. Moreover, learning foreign legal techniques and approaches in public enforcement has enhanced the progress of localized harmonization.

Thirdly, despite the increasing importance of the convergence of competition laws, there is notable divergence between competition regimes due to countries' distinctive social norms and different historical backgrounds. Critically, a large number of developing countries have experienced economic concentration by private entities, which often makes people demand the dispersal of private economic powers. For example, the negative reaction among Egyptians to economic power in certain sectors like the steel industry has revealed their concerns about the threat economic power poses to the country's democratic process.[7] This was also related to the issue of the independence of the competition authority.[8] The idea of improving individual economic freedom by prohibiting abuse or misuse by a monopolist thus appears to be important in developing countries. Moreover, demands for economic reform often accompany the process of overall democratic reform. Therefore, the development of competition law involves a certain vocabulary, including the globalization of markets and competition regimes, the convergence of substantive rules and the emergence of socio-political objectives regarding economic freedom for democracy.[9]

Given the importance of socio-political goals in competition law, it is necessary to discuss the development of competition policy from a comparative perspective. The early concepts of modern competition law and policy were developed in western competition regimes, such as those of the USA and the European Union (EU).[10] In recent years, there has also been notable progress in developing countries, which has been modelled on the substantive competition provisions of the aforementioned western regimes. The fledgling competition regimes have established competition policies that can fit into their backgrounds by mixing their own legal and social systems with the competition frameworks of other countries.[11] Therefore, the historical

7 M Schwartz "The Egyptian uprising: The mass strike in the time of neoliberal globalization" (2011) 20 *New Labor Forum* 33 at 35.

8 Y Afifi "Independence of the Egyptian Competition Authority: Assessment and recommendation" (2010) 3 *Global Antitrust Review* 1 at 28 and following.

9 The idea of economic freedom is often emphasized by European competition critics discussing the ordoliberalism of the Freiburg School. See, for example, A Ayal *Fairness in Antitrust: Protecting the Strong from the Weak* (2014, Hart Publishing) at 22; YS Choi "Competition policies and laws of India and China: The cases of developing countries with large economies" (2016) 19/3 *Inha Law Review* 53 at 54–57.

10 The trend in competition legislation in recent years has leaned towards the dominance of the two leading models: the US and the EU competition frameworks. See M Dabbah "Competition law and policy in developing countries: A critical assessment of the challenges to establishing an effective competition law regime" (2010) 33/3 *World Competition* 457 at 461.

11 YS Choi "Convergence of competition laws in northeast Asia, and the role of the EU competition regime" (2016) *Global Legal Issues, Korean Legislation Research Institute* 7 at 8–9.

development of each competition regime has taken a unique shape that is often different from that of other regimes.

For example, a number of competition regimes in Asia, such as those in Korea and Japan, have highlighted their own socio-economic-political goals, which are related to the idea of *fairness* in competition,[12] mainly to resolve the problem of economic concentration.[13] In these countries, people often believe that the dissolution of private economic power is vital to achieving the objective of economic democracy, therefore protecting individual economic freedom. Similarly, competition laws and policies in Islamic countries, especially in Africa, have revealed their own characteristics that are different from those of other systems.[14] In particular, private economic power often involves political power, prompting concern regarding harm to economic and democratic progress, as shown in Egypt's steel industry.[15]

In particular, Egypt was one of Africa's early adopters of competition policy and has recently shown its enthusiasm for the vigorous enforcement of competition law.[16] Its socio-political and economic developments are also testament to the possibilities for dramatic transformation relating to competition policy.[17] In addition to the adoption of foreign ideas, the issue of socio-economic aims has also become central to the Egyptian competition regime, possibly as a result of public demand or political reasoning. Moreover, the democratization movement in Egypt made the government determined to protect a competitive process that improves social and economic welfare,

12 A Bhattacharjea "Who needs antitrust? Or, is developing-country antitrust different? A historical-comparative analysis" in Sokol, Cheng and Lianos (eds) *Competition Law*, above at note 1, 52 at 58; YS Choi and K Fuchikawa "Competitive analysis of competition laws on buyer power in Korea and Japan" (2010) 33/3 *World Competition* 499; DJ Gerber "Asia and global competition law convergence" in MW Dowdle et al (eds) *Asian Capitalism and the Regulation of Competition: Towards a Regulatory Geography of Global Competition Law* (2013, Cambridge University Press) 36 at 38; J Lee "Korea" in M Williams (ed) *The Political Economy of Competition Law in Asia* (2013, Edward Elgar) 47. The influence of fairness in competition law can also be found in Taiwan, Thailand and Indonesia.

13 YS Choi "The rule of law in a market economy: Globalisation of competition law in Korea" (2014) 15 *European Business Organization Law Review* 419 at 421–23; M Matsushita *International Trade and Competition Law in Japan* (1993, Oxford University Press) at 77.

14 See, for example, YS Choi "The choice of competition law and the development of enforcement in Asia: A road map towards convergence" (2014) 22/1 *Asia Pacific Law Review* 131 at 137–40.

15 See, for example, AM Lesch "Egypt's Spring: Causes of the revolution" (2011) 18 *Middle East Policy* 35 at 41–42; DI Waked "Law, society and the market: Living with Egypt's competition law 2005–2015" (September 2016) at 5–8, available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3091552> (last accessed 17 November 2019).

16 Egypt adopted its first comprehensive competition act in 2005: Law No 3 of 2005 on the Protection of Competition and the Prohibition of Monopolistic Practices.

17 M Dabbah *Competition Law and Policy in the Middle East* (2011, Cambridge University Press) at 237.

reflecting modern ideas of allocative efficiency, while admitting the influence of some traditional thoughts on competition culture.

In the developing world, public enforcement of competition law has been regarded as an important means through which to protect the democratic process by protecting consumers and weaker trading parties.[18] In particular, competition law reforms often reflect government policy as they aim to promote economic democracy.[19] For instance, Egypt produced a comprehensive policy on economic reform in 1991, which included market structure reforms. The purpose of this policy was to transform the state economy into a more market-based one to attract direct foreign investment. The government attempted not to intervene in the price mechanisms of the market, and Egyptian economic policy had emphasized the role of the private sector since the 1990s.[20] Because such liberalization could lead to potential abuse by large companies, Egypt enacted competition laws in an effort to improve a liberalized market economy without distorting competition by monopolies.[21] Therefore, protecting small businesses and consumers from economic concentration in a liberalized market became one of the tasks of the Egyptian competition regime.[22]

Overall, the increasing number of competition cases since 2015 demonstrates constant improvement in the Egyptian competition regime;[23] the context of the decisions by the Egyptian Competition Authority (ECA) explains the shift from simple cartel cases to cases of complex abuse of market dominance in certain sectors, such as telecommunications and broadcasting.[24] This improvement highlights Egypt's modernization efforts because it explains

18 Ayal *Fairness in Antitrust*, above at note 9 at 31.

19 The concept of economic democratization often refers to the dispersion of private economic power. See, for example, Matsushita *International Trade*, above at note 13.

20 See Egyptian Competition Authority "Free market", available at: <http://www.eca.org.eg/ECA/StaticContent/View.aspx?ID=13> (last accessed 17 November 2019).

21 Dabbah *Competition Law and Policy*, above at note 17 at 243; Waked "Law, society and the market", above at note 15 at 8–11.

22 Traditionally, economic concentration is seen as a powerful form of pressure that harms the democratic process, and there have been a number of cases of deconcentration through constitutional amendments, for example in Japan and Germany. See, for example, EM Hadley *Antitrust in Japan* (1970, Princeton University Press) at 4.

23 There have been approximately ten competition cases each year. For further detail, see Egyptian Competition Authority "Annual reports", available at: <http://www.eca.org.eg/ECA/Publication/List.aspx?CategoryID=2> (last accessed 17 November 2019). However, the number of cases seems to be increasing as there were 23 investigations in 2013. See generally Organisation for Economic Co-operation and Development *Annual Report on Competition Policy Developments in Egypt in 2013* (2014), available at: <http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=daf/comp/ar(2014)46&doclanguage=en> (last accessed 17 November 2019).

24 For example, "COMESA Competition Commission investigates football broadcasting rights" (28 February 2017) *Africanantitrust.com*, available at: <https://africanantitrust.com/2017/02/28/comesa-competition-commission-investigates-anti-competitive-restrictive-practices/> (last accessed 17 November 2019).

https://doi.org/10.1017/S0021855319000342 Published online by Cambridge University Press

that the ECA is investigating various anti-competitive practices and vigorously enforcing competition law. In addition, the publication of ECA decisions on competition law violations has helped to improve a competition culture in society by educating the public on the consequences of infringing the law.

Features of the Egyptian competition regime can be observed elsewhere in the developing world because many competition regimes have had a similar experience. The recent enforcement of Egyptian competition law may also offer inspiration for other African countries that have had analogous issues relating to the development of competition law. By considering various issues in fledgling competition regimes, this article aims to discuss the development of competition law and policy in Egypt and stresses its modernization after the Arab Spring; competition law appears critical to accomplishing the goals of democratic and economic reform in Egypt.

This article is in two main substantive sections. The first describes the initial position of Egyptian competition law and reforms through effective public enforcement. This section explains the foundation of Egyptian competition policy, focusing on the objectives of the law from both a traditional and cultural perspective. The second section discusses reforms to the Egyptian competition regime and further amendments that have yet to be made. This section explores the development of notable case law and suggests a proposal for modernizing the law's substantive provisions.

FOUNDATION OF COMPETITION LAW AND POLICY IN EGYPT

Objectives and values of competition law from a cultural perspective

Historical background to competition culture in the Middle Eastern region

Several African countries, including Egypt, have an Islamic legal system[25] that centres on traditional values, and this has led them to adopt unique approaches to competition culture. In other words, a characteristic Islamic tradition has established a particular legal culture throughout north-eastern Africa. One of the most significant problems in Africa, including Egypt, is the disparity of wealth and the accompanying poverty. Hence, the inequality of wealth and distinctive socio-political demands have affected the foundation of state-led economic and competition policy in this region. Consequently, like other African countries, Egypt has confronted how to balance ensuring efficient market competition (or the free market)[26] and protecting the disadvantaged in transactions,[27] which is not an easy task. In reality, the influence of religious traditions relating to competition has gradually reduced; however, it is necessary to discuss the general features of a number of Islamic concepts

25 See, for example, M Lawan "Islamic law and legal hybridity in Nigeria" (2014) 58/2 *Journal of African Law* 303.

26 The ECA often emphasizes the concept of the free market. See ECA "Free market", above at note 20.

27 For example, Dabbah *Competition Law and Policy*, above at note 17 at 6.

https://doi.org/10.1017/S0021855319000342 Published online by Cambridge University Press

because certain characteristics or values in a society may have a substantial effect on the development of its competition culture.

It is first necessary to discuss several sources that influence Islamic culture, such as the Quran. The Quran requires both states and the public to establish economic justice and fairness by prohibiting the economic exploitation of private entities. Islamic regimes, therefore, favour bans on the abuse of economic power, implying a priority for social justice.[28] In the context of competition and market regulation, the principle of *Hisbah*[29] may have contributed to the concept of market intervention as a cultural foundation. The *Hisbah* principle refers to "accountability" from a religious perspective; it often means that a Muslim should intervene in private matters and bring action against an individual who has committed a wrongful act, including involving commercial activity. It seems that Egypt has limited the scope of the *Hisbah* principle[30] and the idea has narrowed in modern Egyptian society. The *Hisbah* structure has continued in the wider Islamic region, but was abolished in Egypt in 1819.[31] Although its substantive features were repealed, this tradition has been the foundation of the cultivation of traditional approaches to anti-competitive practices, especially relating to the abuse of market dominance.

It appears that *Hisbah* has influenced not only ideas regarding the prevention of unfair commercial practices but also the founding principles of social equality and anti-discrimination,[32] which are often crucial in the early stages of competition regimes. The *Hisbah* ideology was formerly implemented to monitor the fairness of businesses, focusing on downstream levels or the distribution of goods.[33] One may argue that *Hisbah* does not accommodate modern competition law and policy; however, it may have affected the enhancement of social welfare by preventing private monopolization, which is a distinctive feature of the competition regime.

Modern competition law in Egypt: A focus on market economy

The foundation of the Egyptian competition regime is the Egyptian Constitution of 2012. Article 27 of the amended constitution, added in 2014, sets out the basic principles that must underlie the economic system. This

28 Id at 21–22.

29 Many commentators seem to agree that *Hisbah* has a long history and that it prohibited fraudulent acts (*ghishsh*) following the words of the prophet, Muhammad: "Whoever cheats, he is not one of us". See, for example, *Hadith* vol 3, book 12 at 1315, available at: <https://sunnah.com/tirmidhi/14/118> and *Hadith*, book 1 at 183, available at: <https://sunnah.com/muslim/1/190> (each last accessed 17 November 2019).

30 Dabbah *Competition Law and Policy*, above at note 17 at 27–28.

31 Ṣ Ṭaʿīmah *Dirasāt fi al-Niẓām al-Islāmī* [Studies on Islamic systems] (1986, Dār al-Jīl) at 36; see also D-H Kim "The meaning of fair trade law in the Hisbah system: A comparative perspective" (2019) 18/1 *Journal of Middle Eastern Affairs* 75.

32 Ṭaʿīmah, id at 28.

33 N Salāmah ʿAqlah *Al-tarīkh al-iqtiṣādī li al-daulah al-islāmiyyah* [Economic history of Islamic state] (2009, ʿImād al-dīn li al-Nashr wa al-tauzīʿ) at 136.

https://doi.org/10.1017/S0021855319000342 Published online by Cambridge University Press

article states that "[t]he 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". The provision further emphasizes the value of balanced growth by stating that "[t]he economic system is socially committed to ensuring equal opportunities and a fair distribution", which confirms its aim of redistributing wealth.

In light of this founding guidance, the ECA also published a paper regarding its general competition policy. This paper reflects the ECA's views about the ultimate goal of competition law. The ECA emphasizes that the Egyptian competition regime aims to ensure economic freedom and to promote the competitive process through the effective enforcement of the Egyptian Competition Law that was formally adopted in 2005 (the Act)[34] and improvements in Egypt's competition culture.[35] Moreover, the ECA explained that government policy had shifted towards liberalization and a free market economy, requiring competition legislation. Accordingly, article 1 of the Act articulates that economic or business practices should not prevent, restrict, or harm "the freedom of competition", which is the ultimate objective of the Egyptian competition regime. The ECA's policy guidance also aims to achieve the goal of free competition by implementing general competition law approaches, as set out below.[36]

First, the ECA primarily focuses on market studies and the vigorous enforcement of its three substantive provisions regarding anti-competitive agreements at both horizontal and vertical levels, as well as tackling abuses of a market-dominant position through ex officio investigations and complaints. It also aims to establish a system to collect comprehensive information about economic activities in the various sectors and industries.[37] Secondly, the ECA considers the importance of a competition culture and cooperation with other government authorities for meaningful coordination.[38] Thirdly, it scrutinizes the quality of the agencies, such as their training, enforcement systems and the transparency of their enforcement.[39] Fourthly, it acknowledges the significance of cooperating with competition authorities in other countries and considers effective extraterritorial applications of the Act,[40] including coordination with international organizations.[41]

34 Law No 3, above at note 16.

35 See ECA "General policy of the ECA" (in Arabic) at 4, available at: <http://www.eca.org.eg/ECA/Upload/StaticContent/Attachment_A/3/ECA%20General%20policy.pdf> (last accessed 27 November 2019).

36 Ibid.

37 Id at 6–7.

38 Id at 6 and 9.

39 Id at 10.

40 Art 5 of the Act articulates its extraterritorial application to undertakings whose acts result in "the prevention, restriction, [of] or harm [to] the freedom of competition" in the Egyptian market, which constitutes a crime under the Act.

41 ECA "General policy", above at note 35 at 9–12.

https://doi.org/10.1017/S0021855319000342 Published online by Cambridge University Press

According to the ECA's policy paper, the ECA's priority is to generate a competitive environment that is the foundation of a free market. In addition, the paper clarifies the ECA's policy of cooperating closely with other governmental bodies that deal with policies relating to consumer protection. Furthermore, it announced that the ECA's competition policy will develop according to the demands of current and future policy in Egypt. Therefore, it considers each stage of the state's policy for economic development on an annual basis.[42] The ECA policy paper indicates its adoption of general principles for competition law advocacy; one of the ECA's main concerns is to establish a competition culture that improves the public's awareness of competition law enforcement and its coordination with other authorities.[43]

In the initial stage of Egyptian competition law development, the ECA focused on the implementation of its substantive provisions and the improvement of competition culture, rather than on other political issues. Interestingly, competition culture lies at the heart of competition policy in Egypt, which is very similar to the approach in other African countries.[44] The successful development of competition policy depends on whether it can be embedded in a vibrant competition culture in an individual jurisdiction. Therefore, Egyptian competition policymakers have given the impression that they are focusing on the progress of the culture, advancing beyond the old *Hisbah* principle towards a competition culture in the context of a market economy.

Important matters for development: Convergence and modernization

The substantive provisions of Egyptian competition law: A comparative perspective

The increasing process of integrating into the global economy, largely stemming from outside pressures from the International Monetary Fund and the World Bank,[45] has expedited the liberalization of Egypt's market and improved competition to attract direct foreign investment.[46] This may mean that the Egyptian competition regime has moved closer to western competition law systems.[47] Remarkably, similar to the position in many developing

42 Id at 14.

43 A Fels and W Ng "Rethinking competition advocacy in developing countries" in DD Sokol, TK Cheng and I Lianos (eds) *Competition Law and Development* (2013, Stanford University Press) 182 at 183.

44 See, for example, R Muddida, SW Ndiritu and TW Ross "Kenya's new competition policy regime" (2015) 38/3 *World Competition* 437 at 441.

45 P Speelman "Competition law in the Middle East and North Africa: The experiences of Tunisia, Jordan, and Egypt" (2016) 48 *New York University Journal of International Law and Politics* 1227 at 1245.

46 AF Ghoneim "Competition law and competition policy: What does Egypt really need?" (ERF working paper 0239), available at: <https://erf.org.eg/wp-content/uploads/2017/05/0239Ghoneim.pdf> (last accessed 17 November 2019).

47 Dabbah *Competition Law and Policy*, above at note 17 at 237–38.

https://doi.org/10.1017/S0021855319000342 Published online by Cambridge University Press

Asian countries, Egyptian competition law and policy appear to have strong connections to those in Europe. This is shown through Egypt's intimate cooperation with the European authorities[48] following the EU–Egypt Association Agreement, which created an EU-style competition framework.[49]

The substantive provisions of the Egyptian competition law are as follows. Articles 6 and 7 of the Act prohibit anti-competitive agreements between competitors, and between suppliers and distributers, respectively;[50] and article 8 proscribes abuse of a market-dominant position. Together, these three articles provide a non-exhaustive list of prohibited practices.[51] Article 3 determines how relevant markets must be defined; and article 4 describes when firms in a market will be presumed to have market dominance. Therefore, article 4 provides an unambiguous test of the market share-based presumption of market dominance, establishing a threshold of 25 per cent, which is similar to, but not exactly the same as, that in the competition law provisions of many Asian countries. According to article 4, an undertaking that holds a market share exceeding 25 per cent can be presumed to affect prices and supply in the market, and must thus bear more responsibility than smaller firms do. Article 19 also provides for merger control.[52]

In effect, provisions that contain presumptions of market dominance are popular in developing competition regimes, particularly in Asia. For instance, most Asian countries, including Korea and China, provide crystal clear presumption thresholds, which are often crucial to the predictability of effective enforcement. If there is a presumption of market dominance based on market share and an undertaking's market share exceeds this threshold, it must be careful in executing its business strategy to avoid violating competition

48 Id at 238–39; M Furse *Antitrust Law in China, Korea and Vietnam* (2009, Oxford University Press) at 24.

49 LM Abdellatif and AF Ghoneim "Competition, competition policy and economic efficiency in the MENA region: The case of Egypt" part I (January 2005), available at: <https://www.researchgate.net/publication/277102642_Competition_competition_policy_and_economic_efficiency_in_the_MENA_region_the_case_of_Egypt> (last accessed 17 November 2019). In particular, the Europeanization of competition law through cooperation provisions has been evident in other developing countries. See, for example, Q Wu *Competition Laws, Globalization and Legal Pluralism: China's Experience* (2013, Hart Publishing) at 44. However, some argue that the Act does not reflect an accurate transplantation of foreign laws because of some missing foreign concepts or wording. See, for example, HM El-Kassas "The political determinants of the Egyptian competition law" (LLM thesis, 2006) at 41, available at: <http://dar.aucegypt.edu/handle/10526/4717> (last accessed 17 November 2019).

50 A vertical agreement that impedes competition is often considered to be a hardcore restriction with regard to trade between countries because it forecloses the market.

51 KH Attia "Developing effective relations with public prosecutors: The case of Egypt" *The ICN Workshop*, available at: <http://old.internationalcompetitionnetwork.org/uploads/library/doc716.pdf> (last accessed 27 November 2019).

52 This article does not deal with issues of merger control in Egypt. For further detail about Egyptian merger control, see M El Far "Lessons from the backyard of the EUMR: The Hyma plastic case in Egypt" (2012) 33/10 *European Competition Law Review* 445.

laws. Unlike the regimes in the US and the EU, newly adopted competition regimes do not normally have a long history of case law to provide guidance regarding the market dominance presumption. Therefore, these statutory provisions enhance the predictability of the rule regarding the abuse of market dominance. Clear guidance is also critical when avoiding enforcement agencies' discretion, which may be biased due to politics or corruption.[53] To conclude, Egypt, like many other jurisdictions, makes use of a strong presumption method and indicates its acceptance of a general competition law framework that is widely used in other developing countries.

Globalization efforts and cooperation strategies

To improve overall competition policy, the ECA also stresses cooperation with agencies in other countries as well as international organizations. It currently co-operates with regional trade organizations such as the Common Market for Eastern and Southern Africa (COMESA).[54] In particular, unlike the US and the EU, most developing countries lack experience of extraterritorial applications. However, recent ECA efforts illustrate its interest in coordinating with international regimes to ensure effective extraterritorial application of the law against the anti-competitive practices of multinational enterprises, as shown in a recent case involving the media sector.[55] For example, the ECA decision against the Confederation of African Football, regarding its abuse of market dominance relating to exclusive broadcasting rights, prompted the COMESA Competition Commission to investigate the case in cooperation with the ECA.[56]

In particular, the global convergence of competition laws influences the degree of effective cooperation between competition authorities. For instance, the transplantation of substantive competition provisions is not new in Africa.

---

53 See, for example, EM Fox "World competition law: Conflicts, convergence, cooperation" in V Dhall (ed) *Competition Law Today: Concepts, Issues, and the Law in Practice* (2007, Oxford University Press) 224 at 241.

54 See "The exclusive broadcasting contract in the case between Confederation of African Football and Jazeera Sports Channel" (ECA press release in Arabic), available at: <http://www.eca.org.eg/ECA/upload/Publication/Attachment_E/125/%d8%b9%d8%b1%d8%b6%20%d8%a7%d9%84%d8%aa%d9%82%d8%b1%d9%8a%d8%b1.pdf> (last accessed 27 November 2019).

55 For further detail about the ECA's decision on beIN and CNE in 2017, see E Solyman "Egyptian Competition Authority watchdog says beIN Sports agreement with CNE legally invalid" (12 July 2017) *Daily News Egypt*, available at: <https://wwww.dailynewssegypt.com/2017/07/12/egyptian-competition-authority-watchdog-says-bein-sports-agreement-cne-legally-invalid/> (last accessed 27 November 2019). A number of court decisions relating to beIN Sports were made, including decisions of the Economic Criminal Court of Appeal in Cairo nos 2017-280 and 2017-1507. For further discussion of the trend towards regional cooperation regarding competition enforcement, see Fox "World competition law", above at note 53 at 237.

56 M El Far and MA Momtaz "Egyptian competition enforcement: Putting COMESA and LAS cooperation into practice" (2017) 8 *Journal of European Competition Law and Practice* 586 at 590.

https://doi.org/10.1017/S0021855319000342 Published online by Cambridge University Press

Egypt is a member of COMESA, whose treaty includes a competition section. Article 55 of the treaty, which contains language inspired by the EU, addresses the competition issues of anti-competitive agreements. Article 55(1) states the aim of the competition section, which is to prevent "any practice which negates the objective of free and liberalised trade". It further proscribes anti-competitive practices, such as agreements between undertakings, decisions by business associations, and concerted practices that have, as their object or effect, the prevention of competition. Furthermore, article 55(2) provides individual exemptions where the undertakings satisfy some conditions (such as production and distribution improvements, or technical or economic promotions to ensure fairness for consumers), unless the practice in question imposes restrictions that are inconsistent with the treaty's objectives or have the effect of eliminating competition.

The overall structure of COMESA's competition provision seems to be modelled on the European competition provision on anti-competitive agreements: article 101 of the Treaty on the Functioning of the European Union.[57] Foreign regimes have therefore affected the design of the competition regulatory framework. This enables the ECA to adopt approaches that are often similar to those in article 101, which may affect the convergence process.

EGYPTIAN COMPETITION LAW AND POLICY AFTER THE ARAB SPRING

The role of competition policy in the market economy

Political economy of competition law: The role of political and public support

The objectives of competition law play an important role in the development of a competition regime. Competition laws in many developing countries provide a wide range of goals, thereby ensuring the broad discretion of the competition authority. One of the major reasons for the popularity of socio-political goals in fledgling competition regimes is public support for the protection of public interests.[58] In some countries, the redistribution of wealth, rather than efficiency, is often the crucial purpose behind protecting the public interest. This approach is often linked with democratization, which implies strengthening the rule of law in economic activities. This seems inevitable in countries where the disparity of wealth is significant. Some have argued that one of the main aims of competition law is to support the progress of "democratic transition and stability" by addressing private

57 The full text is available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E101:EN:HTML> (last accessed 17 November 2019). The influence of the substantive EU provisions on free trade agreements in Asia is evident. See also Choi "Convergence of competition laws", above at note 11 at 25–27.

58 For example, one of the distinctive objectives of the competition regime in South Africa is public interest. See L Kelley et al *Principles of Competition Law in South Africa* (2016, Oxford University Press) at 3.

https://doi.org/10.1017/S0021855319000342 Published online by Cambridge University Press

concentrations with low import penetrations.[59] This is the current situation in Egypt following the Arab Spring.

Some commentators have argued that there are several factors influencing the development of competition regimes around the globe through evolutionary amendments, such as political and economic changes. These changes may also include various elements, such as changes in global and domestic markets and political leadership.[60] Egypt has experienced radical socio-political and economic changes, including in its political leadership after the Arab Spring, which have required a further evolution of its competition regime. Moreover, as discussed above, efficiency is important for developing economies, as developing countries with small economies often cannot sacrifice economic efficiency in favour of broader economic policy goals.[61] Therefore, the Egyptian competition regime that has experienced democratization must consider an appropriate balance of various objectives and economic efficiency.

Case law that reflects recent decisions

The recent development of Egyptian cases, especially after the Arab Spring, indicates possible future progress.[62] In particular, there were a substantial number of cartel investigations in the early 2000s, such as those in the meat, glucose, corn starch and mobile telecommunications markets,[63] which were later determined to violate article 6 of the Act. Following these cartel cases, especially after early 2013, the ECA began to focus on the abuse of market dominance. Although it later dropped most of the cases, the ECA initiated numerous important investigations into the abuse of a market-dominant position. For example, it examined several industries and sectors, including airlines and internet services.[64]

Based on its experience in these investigations, the ECA has recently made decisions regarding abuses of market dominance in areas of the new

59 T Ma "Antitrust and democracy: Perspectives from efficiency and equity" (2016) 12/2 *Journal of Competition Law and Economics* 233; Speelman "Competition law in the Middle East", above at note 45 at 1231.

60 V Ghosal and S Mitra "Adoption and reform of competition laws and their enforcement: A cross-country perspective" in PS Mehta (ed) *Evolution of Competition Laws and Their Enforcement: A Political Economy Perspective* (2015, Routledge) 1 at 9.

61 MS Gal *Competition Policy for Small Market Economies* (2003, Harvard University Press) at 48.

62 See, for example, MA Momtaz "Egypt: Competition authority" (14 August 2017) *Global Competition Review*, available at: <https://globalcompetitionreview.com/insight/the-european-middle-eastern-and-african-antitrust-review-2018/1145575/egypt-competition-authority> (last accessed 17 November 2019).

63 See ECA decisions (in Arabic), available at: <http://www.eca.org.eg/ECA/upload/Publication/Attachment_E/122/عرض%20التقرير.pdf>, <http://www.eca.org.eg/ECA/upload/Publication/Attachment_E/123/عرض%20التقرير.pdf>, <http://www.eca.org.eg/ECA/upload/Publication/Attachment_A/113/عرض%20التقرير.pdf> and <http://www.eca.org.eg/ECA/upload/Publication/Attachment_A/114/عرض%20التقرير.pdf> (all last accessed 28 November 2019).

64 Ibid.

https://doi.org/10.1017/S0021855319000342 Published online by Cambridge University Press

economy, such as telecommunications and broadcasting. It received complaints about the abusive practices of Telecom Egypt in 2014 and decided that the company had infringed article 8 of the Act through its discriminatory treatment and anti-competitive tying conduct, which had harmed its rivals at the downstream level; the ECA concluded that this conduct had impeded competition in the market. Furthermore, the ECA provided a decision paper exceeding 50 pages that revealed its thorough investigation of the case relating to telecommunications and networks. The ECA confirmed that discrimination against the firm's rivals was in breach of article 8 of the Act, and so it notified the Prosecutor's Office and subsequently issued administrative orders.[65] This experience of investigations led to more vigorous enforcement against foreign companies.

In 2017, the ECA also announced that it had issued a decision regarding two administrative orders against a large undertaking, Qatar's beIN Sports (beIN). The ECA asserted that beIN, a sports channel company with exclusive broadcasting rights for football championships, had infringed the competition rule regarding abuse of market dominance. One interesting aspect of the language used in the announcement was that a market-dominant undertaking has a duty of "special responsibility", which may originate from European competition law.[66] In this case, the ECA affirmed that the administrative orders aimed to ensure wider choice for consumers. The ECA further stated that it would continue to ensure the company's full compliance with the Act, thereby eliminating its abuse of market dominance by participating in the prosecutors' investigations and providing technical support to the authorities of neighbouring countries upon request.[67]

In January 2018, the Economic Criminal Court of Cairo issued a judgment imposing a fine of EGP 400 million (equivalent to USD 22 million) on beIN for violating article 8(d) and (g) of the Act. This decision upheld the ECA's sanctions on a foreign undertaking.[68] With regard to the case, the ECA asserted that beIN's abuses of market dominance not only impeded competition in the market but also harmed consumer welfare.[69] Several approaches to abuses of market dominance in Egypt can be seen by looking at these recent cases.

First, the ECA focused on imposing the concept of special responsibility on a market-dominant undertaking. The notion of special responsibility is often

65 See "Decision on Telecom Egypt" (ECA press release, in Arabic), available at: <http://www.eca.org.eg/ECA/upload/Publication/Attachment_E/123/التقرير%20عرض.pdf> (last accessed 28 November 2019).

66 For example, case 85/76, *Hoffman-La Roche v Commission*, ECLI:EU:1979:36.

67 See ECA "2017 annual report" (in Arabic) at 13–15, available at: <http://www.eca.org.eg/ECA/upload/Announcement/Attachment_A/86/Annual%20Report%202017-Final.pdf> (last accessed 28 November 2019).

68 Case nos 2017-280 and 2017-1507, above at note 55.

69 "Egypt fines Qatar's beIN Sports CEO Nasser Al-Khelaidfi $22 million" (30 January 2018) *Al Arabiya English*, available at: <http://english.alarabiya.net/en/sports/2018/01/30/Egypt-fines-Qatari-Nasser-Al-Khelaifi-400-million-pounds-in-corruption-case.html> (last accessed 17 November 2019).

https://doi.org/10.1017/S0021855319000342 Published online by Cambridge University Press

related to fairness, meaning that social values may be more important than economic efficiency. Secondly, the ECA appears to have emphasized the importance of coordinating with prosecutors and competition authorities in other jurisdictions. Effective cooperation with the Prosecutor's Office is imperative to preventing hardcore practices, and it may improve the competition culture through announcements about cases in the daily newspapers. In addition, when an undertaking's abusive conduct affects multiple competition jurisdictions, it is necessary to coordinate with the authorities concerned with the harm stemming from the practices. Thirdly, the beIN case confirmed that the ECA does indeed apply the Act to foreign companies under the principle of extraterritorial application.[70] This can help the ECA to improve public enforcement against violators from other countries.

To conclude, the early development of competition enforcement in Egypt demonstrates its focus on the implementation of basic substantive provisions such as the cartel rule. For example, the ECA provided a variety of economic evidence to prove the existence of a hardcore cartel in the cement market, relating to price-fixing and output restrictions by using its leniency programme.[71] Thereafter, it became concerned with more complex cases involving telecommunications and the media, which require economic studies and the examination of foreign examples.

Modernization of competition law: Not one-size-fits-all, but a tailored framework

Some discussions for competition law development

The formulation of competition law and policy is crucial to economic development. Although each country has a different background, most competition regimes have displayed converging views on the value of the competitive process. Therefore, although Egyptian competition policymakers adopted globally standardized frameworks, they had to adapt them to suit local circumstances.[72] In other words, the existing substantive provisions of the Act indicated the acceptance of globally popular general frameworks, while the implementation of special responsibility in the beIN case highlights its localized competition norm within a foreign example.

There are some issues that most competition regimes in developing countries, including Egypt, should address. Most of all, improving the competition culture is the foundation of effective enforcement. Thus, the role of the competition authorities regarding public enforcement is critical when improving the competition culture. The example of Korea may give some ideas for the

70 El Far and Momtaz "Egyptian competition enforcement", above note at 56 at 588–89.

71 SA Alam "Proving a cartel without leniency programme: The Egyptian experience" *The ICN Workshop*, available at: <http://old.internationalcompetitionnetwork.org/uploads/library/doc724.pdf> (last accessed 27 November 2019).

72 See, for example, RH Lande "Creating competition policy for transition economies" (1997) 23 *Brooklyn Journal of International Law* 339 at 342.

https://doi.org/10.1017/S0021855319000342 Published online by Cambridge University Press

progress of the competition culture in developing countries.[73] One of the major themes in Korea relating to the concept of economic democratization is the elimination of a high degree of economic concentration by a few large conglomerates, which has often triggered debate about rigorous economic control over private economic entities. It also stimulates public demand for active public enforcement, which results in a heavy volume of cases and effective extraterritorial application of the law. This background has enhanced the competition culture in Korea; in short, vigorous public enforcement is one of the essential elements facilitating effective implementation of the law.[74] At the centre of Korea's modern and vigorous competition law lies a provision against unfair business practices. Interestingly, this provision bears more than a passing resemblance to the old rules on fair trade under *Hisbah*.[75] This indicates that many countries share the common goal of fair trade and free competition that influences a competition culture. Therefore, Egyptian competition policymakers need to consider improving the competition culture through vigorous public enforcement. Recent cases in Egypt demonstrate rapid development; however, to improve public enforcement and transparency in investigation,[76] the ECA needs to employ more staff. The current number of staff is insufficient for effective enforcement, considering the size of the Egyptian market.

Proposals for further modernization

There is no global standard of competition law that is applicable to all jurisdictions. It is impossible to have a one-size-fits-all competition law framework because of the diversity among countries. Therefore, every country should adapt its competition rules to its local circumstances and background. In other words, a tailored competition law framework may improve the situation of a specific regime. This may eventually require amendments to the legislative framework. Once the competition regime has improved its enforcement and competition culture, it may require further amendments; proposals for development are suggested below.

---

73 Competition cases in Korea, China and Japan are often mentioned as useful citations. See, for example, Muddida et al "Kenya's new competition policy regime", above at note 44. Vigorous enforcement can be supported by improving the competition culture. See also Choi "The choice of competition law", above at note 14 at 146–49.

74 Furse *Antitrust Law*, above at note 48 at 259. Korean competition law includes a unique provision regarding unfair business practices that covers all types of commercial acts, the so-called catch-all provision.

75 See, for example, D-H Kim "Classification of Islamic unfair transactions upon the view of modern competition law in South Korea" (2018) 22 *Arabic Language & Literature* 121; Kim "The meaning of fair trade law", above at note 31.

76 Several discussions have taken place regarding the transparency of the ECA's investigative powers. See M Greiss "Investigative powers of the Egyptian Competition Authority: A guide for companies in the Egyptian market" (2010) 31 *European Competition Law Review* 456 at 465.

First, it is necessary to consider an amendment to the presumption threshold of 25 per cent in article 4 of the Act. This threshold is very low and may hamper competition and innovation in situations in which the ECA imposes onerous responsibilities on undertakings. Some have argued that the ECA has often been unwilling to determine a market-dominant position based on this threshold.[77] Nevertheless, this standard may yet impose burdens on undertakings. When a firm's market share reaches 25 per cent, it should consider a possible violation of the Act. Rebuttable presumption standards of 50 per cent for a single undertaking can easily be found in the EU and Asia, although they usually include other supplementary concentration ratio provisions.[78] There is no universal guidance regarding the market dominance presumption, but EU and Asian countries have established 40–50 per cent thresholds for market dominance, which may be relevant for the Egyptian competition regime.[79] In effect, there were concerns about the low market share threshold when the Act was being drafted.[80] It is, therefore, time to consider amending the existing presumption; the 25 per cent threshold may generate problematic false positives or Type I errors, which refer to over-enforcement against harmless conduct,[81] because the threshold is the essential screen for abuse of market dominance, which gives an impression of possible enforcement against a large number of companies.

Secondly, unlike Egyptian competition law, most competition regimes do not include a separate rule for vertical agreements.[82] Recently, the distinction between horizontal and vertical agreements has become blurred after mixed

77 For example, M Greiss "Abuse of dominance under the Egyptian competition law: Investigating peculiarities that may have special effects in the economy" (2010) *Mediterranean Competition Bulletin* 22 at 23, available at: <http://ec.europa.eu/competition/publications/mediterranean/mcb_2.pdf> (last accessed 17 November 2019).

78 For example, the Korean Competition Act provides a presumption of market dominance when an undertaking's market share exceeds 50%, or when the total market share of three undertakings is above 75%. The Chinese Competition Act also provides a similar framework. For further detail, see HS Harris et al *Anti-Monopoly Law and Practice in China* (2011, Oxford University Press) at 96.

79 For further comparison, see Choi "The choice of competition law", above at note 14 at 142–44.

80 AF Ghoneim "Competition law and competition policy: What does Egypt really need?" (2003) 17 *Boletin Latinoamericano de Competencia / Boletim Latinoamericano de Concorrncia* 46 at 53; M El Far "The Egyptian state of competition: The steel market case study" (October 2014) at 22–26, available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2515698> (last accessed 17 November 2019).

81 A Jones, B Sufrin and N Dunne *EU Competition Law: Text, Cases, and Materials* (7th ed, 2019, Oxford University Press) at 55–56.

82 There are few countries in southeast Asia that have a separate provision for vertical restraints. See, for example, C Chew "Diversity of national competition laws in the ASEAN region and the resulting challenges for businesses operating in the region" in B Ong (ed) *The Regionalisation of Competition Law and Policy within the ASEAN Economic Community* (2018, Cambridge University Press) 58 at 84.

agreements rose in popularity. Therefore, Egyptian policymakers should examine whether the existing regulatory framework generates confusion for undertakings. In particular, US case law has accepted the efficiency rationale that treats vertical agreements differently from horizontal ones, considering the benefits of improving inter-brand competition by sacrificing intra-brand competition.[83] It seems that most competition regimes have embraced the arguments for inter-brand competition without providing a separate rule for vertical agreements. Although the ECA recognizes the economic considerations of vertical restraints,[84] it does not seem to consider efficiency and inter-brand competition in vertical cases. Therefore, the Egyptian competition regime should consider the development of case law categorizing hardcore and non-hardcore agreements, rather than maintaining articles 6 and 7 of the Act for their classification.

Over the last decade, the Egyptian competition regime has experienced the first stage of development: that is, the general design of its competition policy and a focus on basic cases, such as hardcore price-fixing cartels and abuses of market dominance. It is now time for Egypt to move forward to global standards that provide a reasonable threshold of market dominance and a single provision to encompass both horizontal and vertical agreements.

CONCLUDING REMARKS

In our modern society, the functioning of competition law mechanisms has become one of the essential features of a democratic state; protecting individual economic freedoms from the abuses or misuses of large conglomerates improves economic democracy. This notion has influenced the modernization of Egyptian competition law and policy on the dispersions of economic power, as shown in certain cases, such as the steel[85] and media sectors.[86] Furthermore, there has been a notable improvement in the ECA's use of its powers in light of its independence and sanctions on violators.[87] In particular, Egypt has experienced many changes that indicate its transformation towards liberalization. One of the crucial demands of the Egyptian public is a fair society for economic activities. Therefore, Egypt needs to identify economic

83 For example, *Leegin Creative Leather Prods, Inc v PSKS, Inc* 551 US 877 (2007), overruling the old per se rule on minimum resale price maintenance.

84 M El Far "Enforcement policy of the Egyptian competition law: Vertical relations" (2014) 35/5 *European Competition Law Review* 214.

85 Id "The Egyptian state of competition", above at note 80 at 44 and following. Even before the adoption of Egyptian competition law, several governmental decisions were taken to prohibit the abusive practices of monopolists within the steel industry; see TH Selim "Monopoly: The case of Egyptian steel" (2006) 2/3 *Journal of Business Case Studies* 85.

86 "COMESA Competition Commission", above at note 24.

87 There were critical issues surrounding the ECA's independence and its powers relating to sanctions. See, for example, Waked "Law, society and the market", above at note 15 at 13.

democratization based on both internal and external factors,[88] mixed with Egypt's own cultural elements.[89] Consequently, ensuring economic order through improving competition law enforcement and the competition culture in Egyptian society can lead to the development of a competitive process.

The Arab Spring in Egypt also played an important role in this development, and it is now necessary to identify the roles and objectives of the Egyptian competition regime. In particular, the transition of the state economy is closely related to the development of competition policy. Moreover, in Islamic countries, the concentration of economic power and wealth seems to be regarded as a phenomenon that undermines public interests.[90] Therefore, the tailored approach, which adapts popular global standards while simultaneously incorporating its own circumstances, may improve the competitive environment in Egypt.

Lastly, both convergence and localization are significant from a global competition law perspective. Convergence is crucial to avoid possible competition law conflicts, such as discriminatory enforcement against foreign undertakings, and localization is important to satisfy public demands in certain circumstances, for example when there are strong socio-political factors in the market. In effect, it is not easy to create a one-size-fits-all standard for developing competition regimes in practice, although each regime is reluctant to create a unique framework ill-suited to global convergence.[91] Therefore, localized harmonization should be the focal point for Egypt's development; an appropriate balance between convergence and localization is thus crucial. To conclude, the development of competition law in Egypt should be in line with democratization, and improving the competition culture needs to be part of Egypt's democratic revolution.

CONFLICTS OF INTEREST

None

88 There has been external pressure by the US in pursuit of a democratization agenda in Islamic countries. See, for example, Dabbah *Competition Law and Policy*, above at note 17 at 237.

89 AN Ibrahim and M El Far "Constitutionalising the Egyptian competition policy in the post revolutionary reforms" (2011) 3 *Mediterranean Competition Bulletin* at 4, available at: <http://ec.europa.eu/competition/publications/mediterranean/mcb_3_1.pdf> (last accessed 17 November 2019).

90 Dabbah *Competition Law and Policy*, above at note 17 at 24.

91 For example, K McMahon "Competition law and developing economies: Between 'informed divergence' and international convergence" in A Ezrachi (ed) *Research Handbook on International Competition Law* (2012, Edward Elgar) 209 at 215.