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# Draft amendments to the Egyptian Competition Law: populism or sound policy?

**E**gyptian Competition Law No 3 of 2005 is likely to be amended very shortly. The contemplated amendments, now in a late stage of discussion and expected to be imminently issued as law by the ruling military council, are aimed at:

- increasing the government's intervention prerogatives with respect to fixing the prices of basic commodities;
- increasing the upper limit of the pecuniary fine related to the breach of articles 6, 7 and 8 of the Law (dealing with cartels, vertical agreements and abuse of dominance respectively); and
- extending the scope of Egyptian version of the 'corporate leniency programme' to allow those who cooperate with the investigations to benefit from up to the full immunity against penal sanctions instead of partial immunity provided for under the current regime.

In normal circumstances, it would have been more important, and probably more useful, to examine and comment on the legal and practical consequences of such amendments. In the context of a post-revolution Egypt, the importance shifts, in my opinion, towards understanding the underlying factors, the drives and the motives behind said amendments rather than their direct practical implications. In the words of Richard Whish: 'Competition Law/Policy does not exist in a vacuum: it is an expression of the current values and aims of society and is susceptible to change as political thinking generally'.<sup>1</sup> By analysing the probable reasons behind the draft proposal in the current socio-economic/political context, this article attempts to extract and predict the possible general trends and directions likely to drive and influence policy making in Egypt for the upcoming period.

For the purpose of my analysis, I will briefly introduce the socio-economic/political context of the new proposed legislation, then I will critically examine each of the three proposed amendments before finally presenting my conclusions.

## Introduction

The draft amendments to the Egyptian Competition Law come to the spotlight nearly six months after a popular uprising overthrew former President Hosni Mubarak who had ruled Egypt for the last three decades. The reign of Mr Mubarak has been characterised, especially during the last two decades or so, by a gradual switch from government controlled socialism to free market capitalism associated with a reasonably steady economic growth,<sup>2</sup> which ultimately resulted in the Egyptian middle class growing in numbers, income level<sup>3</sup> and aspirations.<sup>4</sup> This noticeable economic growth, however, was not, unfortunately, accompanied by any noticeable improvement in terms of political freedom and civic rights. During his reign, Mr Mubarak used his security apparatus to quash and quell any kind of political dissent under the umbrella of a 30-year-old emergency law. Furthermore, the entourage of Mr Mubarak appeared in the public eye as the primary beneficiaries of the economic growth, reaping benefits and privileges through corruption and favouritism.

It was, therefore, understandable that a great portion of the public anger following the revolution was directed indiscriminately against the business community at large and against every successful business, on the assumption that such success was, inevitably, associated with privileged and/or questionable ties with Mr Mubarak and his powerful entourage. Riding on a tide of socialist and nationalistic rhetoric, tabloid press and post-revolution politicians waged a legal and public opinion war on almost every entrepreneurial business in the country. As a result, the tabloid press was thriving on the publishing of speculative and often unfounded reports and the Public Prosecutor's office was swamped with tens of thousands of mostly unsubstantiated claims.

At a time when it should be rallying itself to face the turbulence caused by the uncertainties of a highly volatile political reality and of a

consequently faltering economy and to play its crucial role in driving the country forward to safer shores, the business community has found itself the subject of a relentless battering at the hands of the bureaucrats,<sup>5</sup> the courts,<sup>6</sup> the public opinion and potentially the legislators and the policy makers, as may possibly be seen through the analysis of the three proposed amendments to the Egyptian Competition Law in the three following sections respectively.

### **Increasing the government's intervention prerogatives with respect to fixing the prices of basic commodities**

The intervention of the government in fixing the prices of commodities was already provided for under Article 10 of the Competition Law. The new proposed amendment to the law goes a step further however. According to the suggested wording, the government would be able to determine, not only the prices of said commodities but also their respective 'pricing policies'. Though it is not clear what is intended by the term 'pricing policies' in this particular context, this would lay the foundation for further important government interventionism.

The concept of government interventionism in itself is not in question here as it is normal practice from a comparative law perspective. Many countries have actually opted to substitute in various degrees, '... the invisible hand of the market with the much more visible hand of (government)'<sup>7</sup> in contrast with the trend prevailing at the beginning of the 20th century all across the Western world as inspired by the liberal economy theorists of that era, such as Adam Smith, among others. In Egypt's case, economic interventionism is much more rooted in Egyptian culture across history and has been further entrenched in the collective mentality of governors and governed alike after the introduction of socialism following the revolution of 1952.

In any case, being good and indispensable, or sometimes harmful to the economy in certain degrees and under certain circumstances,<sup>8</sup> is not why economic interventionism is evoked in this article. Economic interventionism, as furthered and emphasised in the proposed amendment to the Competition Law, constitutes, in the opinion of the author, a shifting trend in the policy-making process in Egypt, presenting a break, so far, however, limited and/or justifiable, with the previous regime's policy of privatisation and economic liberalisation. The business community must take note.

### **Increasing the upper limit of the pecuniary fine related to the breach of Articles 6, 7 and 8 of the Law (dealing with cartels, vertical agreements and abuse of dominance respectively)**

Article 22 of the Egyptian Competition Law provides sanctions for breaches of its Articles 6, 7 and 8 in the form of a fine which ranges between EGP 100,000 (approx US\$ 17,000) and EGP 300m (approx US\$ 50m). The new proposed amendment provides for a potential substantial increase in the fine amount to reach ten per cent of 'the sales value of the product in question' if such value is higher than the current upper limit.

Although the scope and the extent of the sanctions are not excessive from a comparative law perspective,<sup>9</sup> the introduction of this substantial additional exposure during these difficult times and in the current circumstances cannot but be worrying for the business people in Egypt.

Accused of being greedy and corrupt, irrespective of the soundness or the validity of such an accusation, and faced with an ultimately hostile public opinion, the business community now has to face the difficult economic challenges of the current transition period with the sword of a crippling fine hanging above their heads. Furthermore, there are concerns that the courts in charge would be subject to threat or influence by the currently fashionable rhetoric of popular anger and prejudice.

The worrying aspect of the proposed amendment is not that it is increasing the sanction against a particular crime, it is the fact that this increase of exposure comes against the good sense of 'reducing anti-trust activism' and protecting the economic actors in times of political turmoil and economic and financial difficulties.<sup>10</sup>

Some would argue that the amendment merely introduces a percentage-based formula and would practically have an impact on the truly big businesses whose value of sales exceeds EGP 3,000 million (US\$ 500m). It is true that outside the oil industry, only a handful of companies achieve this level of sales in Egypt, but again, despite the fact that this author see no sense in targeting the true pillars of national economy and the 'driving forces of growth and innovation' according to Schumpeter's neoclassical theory,<sup>11</sup> I am here to detect and point out the policy trends and directions, not the practical consequence of this particular text. The policy trend we can detect here is pointing towards a heavy-

handed approach when dealing with large businesses.

**Extending the scope of Egyptian version of the ‘corporate leniency programme’ to allow those who cooperate with the investigations to benefit from up to the full immunity against penal sanctions instead of partial immunity provided for under the current regime**

As in many other jurisdictions around the world, the Egyptian Competition Law currently provides for a leniency programme, which provides for partial relief from criminal sanction to any person who cooperates with the authorities in exposing and establishing proof of any criminal breach of Articles 6 and 7 of said law (cartels and vertical agreements). The current Article 26 of the Competition Law stipulates that the reduction in sanction can reach up to 50 per cent of the imposed fine.

Leniency programmes are very well known and established concepts in comparative legislations. The ‘Corporate Leniency Program’ (‘CLP’) has been implemented in the US since 1978 and was reformed in 1993. Europe followed suit in 1996. The US CLP actually provides for full immunity against penal prosecution and civil action. It is quite impressive to know that more than two-thirds of cartels have been foiled and prosecuted thanks to the CLP.<sup>12</sup>

There is therefore no doubt that the full immunity from sanctions proposed in the new draft amendment comes largely aligned with the US reformed CLP of 1993 and with most modern legislation.

Yet again, although there is nothing wrong or even particularly objectionable in the proposed amendment, the problem as far as this article is concerned is not in its direct effect or consequences, which I even predict can be positive and recommendable in normal circumstances, the problem lies in the motives behind the amendment and the policy trends it appears to reflect.

Based on discussions with some of the patrons of the proposed amendments, it looks quite obvious that the reason behind this third amendment is mainly reactionary. One of the main arguments used to defend and promote this proposal is that the concept of partial immunity (as against full immunity) currently in place was advocated back in 2008 by some prominent members of the then ruling National Democratic Party (‘NDP’). According to

my interlocutors, the NDP members who were lobbying against the full immunity concept in the original proposal actually intended to strip the proposed leniency programme from its prime ingredient, hence neutralising its impact in order to serve their clearly conflicted business interests. This may be true, but the mere use of this argument at this stage reflects a reactionary trend in the new policy making process. Whatever one may think about the previous government(s)’ policies, one thing is for sure: not all of their deeds were absolute evil and not all of their policies were wrong *per se*.

### Conclusion

I am not defending the rich and powerful businessmen against the poor and underprivileged. A free competition activist myself, I know exactly what kind of potentially destructive impact cartels, monopolies and anti-competitive behaviour in general can have. Whatever the tools and methods, it is crucially important for any society to protect free competition against abuse of power and dominance as an indispensable path towards economic flourishing and consumers’ welfare.

Consumers’ welfare and social justice are, naturally and understandably, the main themes (and slogans) of the Egyptian post-revolution policy making process in a context where poverty and economic conditions were among the core root causes of popular uprising and civil strife which ultimately led to the toppling of the regime.

Having said that, it is important to note also that among the core causes of revolution were strong political factors, not only economic and not mainly economic, in my personal opinion. It is true that 21 per cent of the population lives in poverty,<sup>13</sup> but it is also true that in terms of social inequality as expressed by the GINI Index, Egypt’s position is not as catastrophic as it may sound.

‘A Lower GINI Index is better; Brazil’s is 60, Belgium is 25 and Egypt is 28.9, lower than almost every Latin American country and most other developing countries as well. In fact, it has a slightly more equal distribution of income than does France, which scores 32.7. The top 30% of Egypt’s population accounts for 64% of its GDP. The bottom 30% in Egypt makes up 14.2% of GDP; in France, same bottom tier makes only 10%’.<sup>14</sup>

In order to move forward and out of its current predicaments, it is, therefore, crucial

for Egypt to adopt a balanced policy approach which is not blinded by one theme or one aspect only but which gives appropriate focus and attention to the various challenges it is actually facing: liberal democratisation, education, constitutional reforms, economic stability and growth in a globally challenging environment, the establishment of a solid rule of law, social justice, unemployment, inflation, etc.

Sound policy may or may not be popular and populism does not and probably will not, in most cases, lead to sound policy.

#### Notes

- 1 Richard Whish, *Competition Law*, 6th edn, (Oxford University Press, 2009), p 19.
- 2 GDP growth during the last four years, according to statistical data released by the Central Bank of Egypt, was respectively 7.1 per cent in 2006/2007, 7.2 per cent in 2007/2008, 4.7 per cent in 2008/2009 and 5.1 per cent in 2009/2010: *Business Monthly* (August 2011) p 41. The GDP growth rate in the first two quarters of 2010/2011 reached 5.6 per cent: *Policy View Point* (May 2011) p 1; Magda Kandil, 'The Egyptian Economy Post January 25th: Challenges and Prospects'.
- 3 GDP per capita calculated on the purchasing power parity basis divided by population (PPP) has increased by more than 100 per cent from US\$ 3,000 in 1999 to US\$ 6,200 in 2010: [www.indexmundi.com](http://www.indexmundi.com). Unemployment rate decreased from 11 per cent in 2003 to 9 per cent in 2010: *Business Monthly* (August 2011) p 41.
- 4 Read Barrington Moore Jr, *Social Origins*, on the crucial role of the bourgeoisie (and in my opinion modern-day middle class) in the democratisation process through their new found priorities and aspirations: quoted by Fared Zakaria in his book *The Future of Freedom* (Norton & Company, 2003), p 47.
- 5 Traditionally slow, Egyptian bureaucracy is now even more stagnant after the revolution. There are three main root causes of said stagnation: (i) all bureaucrats are afraid of taking any decision thinking they will facing criminal liability if found to be complicit with any member of the 'suspect' business community, (ii) they are members of the public and therefore they tend to believe what the tabloids write about business people, and (iii) the chain of command has been broken on so many levels following the dismissal of many key governmental officers.
- 6 As an example, one Cairo Court district issued a decision (its first decision on the subject after the revolution) flagrantly contradicting 53 previous decisions the same panel of judges have issued prior to the revolution in favour of one company against some of its former employees. The parties were the same (employees v same company), the context was the same, the claims were identical – the only factor that has changed was the timing of the decision.
- 7 Whish above, p 24.
- 8 See examples of harmful interventionism in the UK: Whish above, p19–20.
- 9 In case of cartel, the fine amounts to 10 per cent of turnover in the European Union and to double the amount of the profit reaped or the damage caused in the US: Emmanuel Combe, *La politique de la concurrence* (Collection Repères Economique, 2008) p 25.
- 10 Combe above, p 7.
- 11 J Schumpeter, *Capitalism, Socialism and Democracy* (Harper and Row, 1942).
- 12 Combe above, p 50.
- 13 M Kandil, *Policy View Point*, (May 2011), p 3.
- 14 Zakaria above, p 137, is quoting World Bank's statistics. In 2010, Egypt's GINI index stands at 34.4, higher than in 2002/2003 but still comparable to France's 32.7 and far below Latin America and most developing countries (Brazil is now 56.7 and, for example, Iran stands at 44.5) (Data from UN Development Programme 2010).