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**The American University in Cairo**

**School of Global Affairs and Public Policy**

**THE POLITICAL DETERMENANTS OF THE EGYPTIAN COMPETITION LAW**

**A Thesis Submitted to the  
Department of Law**

**in partial fulfillment of the requirements for  
the LL.M. Degree in International and Comparative Law**

**By**

**Hassan Mohamed El-Kassas**

**June 2016**

The American University in Cairo  
School of Global Affairs and Public Policy

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A Thesis Submitted by

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LL.M. Degree in International and Comparative Law  
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## ACKNOWLEDGMENTS

First of all, I would like to seize this opportunity to thank my supervisor Professor Hany Sayed for his valuable guidance and support. I would also express my gratitude to Dr. Diana Van Bogaert, Dr. Jason Beckett, Dr. Thomas Skouteris, Dr. Amr Shalakaany and Dr. Gianluca P. Parolin for enriching my sights and enhancing my academic capabilities throughout my period of study at the American University in Cairo.

My greatest gratitude to my parents, sister Nermeen and spouse Yasmeen for their continuous support and encouragement. I thank Allah for my son Yassin who gave me the motivation to finish my LL.M.

I also thank my friend and former LL.M colleague Ramy Bassily for his support and enrichment discussions. And last but not least, my special thanks to my friend and best work colleague ever Ibrahim Wagdy for his support, time and comments.

The American University in Cairo  
School of Global Affairs and Public Policy

Department of Law

## **THE POLITICAL DETERMINANTS OF THE EGYPTIAN COMPETITION LAW**

Hassan Mohamed El-Kassas

Supervised by Professor Hani Sayed

### **ABSTRACT**

During the 1990s, the competition law arena witnessed a huge competition laws adaptation from developing countries creating a fertile soil for scholars and practitioners of competition law to study such a phenomena. The literature mainly corresponds to the inevitable lack of enforcement of such competition legislation within developing countries. In the scholars' attempt to address the routes of the problem, several arguments have been formed. The most important mainstream arguments focus on two different scale arguments. The first argument focuses on the pre-enactment phase that can be called "the best model". While the second argument focuses on the post-enactment phase which concentrates its argument on analyzing the "enforcement mechanisms". The "best model" argument provides two different points of view. The advocates of the first point of view argue that developing countries should transplant the competition law universal norms; in other words, they should transplant Western competition legislation. On the other hand, advocates of the context theory argue that developing countries should seek the contextualization approach that harness such universal/western competition law norms to the developing countries own context. Despite the fact that both "best model" and "enforcement mechanisms" seems to be theoretically different, they are related to each other in one important aspect that seems not to be recognized by the two schools' advocates. This important fact is the role of "political determinants" of the relevant developing country. This paper focuses on the Egyptian competition law as one of the developing countries. The paper takes a different approach than mainstream literature by emphasizing the "political determinants" within the context of a developing country due to its central and important role in determining both the "best model" to be adopted in the pre-enactment phase and on the enforcement phase as well. In support of this approach, the paper magnifies the role played by "political determinants" as the third dimension that moves everything within the competition law arena, including competition policy, legislation model, and thus enforcement mechanism. The Egyptian case reflects the fact that "political determinants" should be examined more closely as it is one of the main reasons for the enforcement problems faced by developing countries.

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## I. Introduction

During the past two decades, developing countries have adopted competition laws with the aim of protecting their local markets from anticompetitive behaviors and regulating the competition process within their markets.<sup>1</sup> The significant increase of developing countries adoption of competition laws that has taken place in the last two decades has created a phenomena worth studying. Such phenomena are subject to extensive academic discussions to identify why developing countries started, suddenly, to adopt competition laws and how they adopted such legislation. In addition, the question, of why and how developing countries face problems in adopting and enforcing such competition laws has also been subject to extensive discussion.<sup>2</sup>

On the first question regarding why the developing countries were suddenly interested in adopting competition legislation, the mainstream literature advocates for the strong correlation between the presence of effective competition legislation and economic development and efficiency.<sup>3</sup> While others justify that international institutions and Western trade partners exert pressures upon the developing countries to adopt competition legislation.<sup>4</sup> Despite, the acceptable argument of the correlation between the adoption of competition legislation and economy developmental and efficiency, the literature indicates that developing countries do not

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<sup>1</sup> Gal, Michal S., *The Ecology of Antitrust: Preconditions for Competition Law Enforcement in Developing Countries. Competition, Competitiveness and Development*, 20-38, at 1 (2004). Available at <http://ssrn.com/abstract=665181>. [hereinafter referred to as Gal, *The Ecology of Antitrust*]. For full details regarding the developing countries enacted their competition laws during this era, see Dina Waked, *Antitrust Enforcement in Developing Countries: Reasons for Enforcement & Non-Enforcement using Resource-bases Evidence* (2011), available at: <http://ssrn.com/abstract=2044047>.

<sup>2</sup> See MICHAL S. GAL ET AL, *THE ECONOMIC CHARACTERISTICS OF DEVELOPING JURISDICTIONS: THEIR IMPLICATIONS FOR COMPETITION LAW* 1 (Michal S. Gal ET AL eds., Edward El Gar 2015). Dina Waked, *Antitrust Enforcement in Developing Countries: Reasons for Enforcement & Non-Enforcement using resource –based Evidence*. M. Gal, ‘*Antitrust in a Globalized Economy: The Unique Enforcement Challenges Faced by Small and by Developing Countries*’ (2009) 33(1) *FORDHAM INTERNATIONAL LAW JOURNAL* 10; See, also, D.J. GERBER, *GLOBAL COMPETITION: LAW, MARKETS, AND GLOBALIZATION* 248 (Oxford University Press, 2010).

<sup>3</sup> Dina Waked, *Competition Law in the Developing World: The Why and How of Adoption and Its Implications for International Competition Law*, 1 *GLOBAL ANTITRUST REV.* 69 (2008); see also EINER EL HAUGE AND DAMIEN GERADIN; *GLOBAL ANTITRUST LAW AND ECONOMICS*; 2nd ed.; (Hart Publishing, 2011) (2007). See also, Bernard Hoekman; ‘*Competition Policy and the Global Trading System: A Developing-Country Perspective*’; (March 1997); 1735 *The World Bank Policy Research Working Paper*; 1. See also D.J. GERBER, *Supra* note 2.

<sup>4</sup> See for instance, MAHER M. DABBAH, *INTERNATIONAL AND COMPARATIVE COMPETITION LAW*, 292-93 (Cambridge, 2015). See also Dina Waked, *supra* note 1 at 2; Francisco Marcos, *Do Developing Countries need Competition Law and Policy?* 3 (2006). World Trade Organization; paper of 18 September 1988; WT/WGTCP/W/80.

fully enforce their competition laws.<sup>5</sup> *Rodriguez and Williams* add, “Antitrust laws have been on the books of several developing countries for a long time, but they have done little to reduce anticompetitive behavior. This suggests that the laws have been ignored.”<sup>6</sup> This leads the literature to give more focus to the question of why developing countries do not enforce their competition law.<sup>7</sup>

In an attempt to address the above question, two main arguments were formulated. . The first argument is what we can call the “pre-enactment” argument which focuses on identifying the “model” that developing countries should adopt as it is perceived to be the main reason behind the non-enforcement of competition law in developing countries. While the second argument can be called the “post-enactment” argument which focuses on the difficulties faced by developing countries on the “enforcement” level rendering a special analysis of the enforcement mechanisms. In each of the arguments, there are sub-arguments within. For instance, in the pre-enactment argument there are two main positions, namely transplantation and contextualization. In this sense, an important question arises: Is there only one standard competition law “model” in which all States adopting free market economy must enact or are there different “models” that can be adopted? If there is more than one model, what is the best model of competition law that can contribute to the developing countries developmental goals; is it mere transplantation of the Western developed countries’ laws or contextualizing such laws to fit the specifics of each developing country? In order to find the right answers for such questions, the next chapter presents the controversial global debate regarding what is the best competition law model to be enacted by developing countries.

On the other hand, the post-enactment is built on the implicit assumption that developing countries enjoy characteristics that are different from the western or developed countries and

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<sup>5</sup> See for instance, Gal Et Al, *supra* note, 2; see also, Michal S. Gal, *When the Going Get Tight: Institutional Solutions when Antitrust Enforcement Resources are Scarce*, 41 LOY. U. CHI. L. J. 417, 417-18 (2010).

<sup>6</sup> A. E. Rodriguez and Mark D. Williams, *The Effectiveness of proposed Antitrust Programs for Developing Countries*, 19 INT’L L. & COM. REG. 209,223 (1994), cited in Dina Waked, *supra* note 1 at 3.

<sup>7</sup> *Id*; *supra* note 1 at 1, Gal, *the Ecology of Antitrust*; Dina Waked, *Do Developing Countries Enforce Their Antitrust Laws? A Statistical Study of Public Antitrust Enforcement in Developing Countries* (Dec. 22, 2011) (unpublished manuscript), available at <http://ssrn.com/abstract=2044047>; see also, Gal, Michal S. and Fox, Eleanor M., "Drafting competition law for developing jurisdictions: learning from experience, *New York University Law and Economics Working Papers*. Paper 374 (2014) available at [http://lsr.nellco.org/nyu\\_lewp/374](http://lsr.nellco.org/nyu_lewp/374). GAL ET AL, *supra* note 2 at 1.



thus enforcement problems are likely to occur irrespective of whether the law was a transplantation of a best practice, or contextualized from the outer the specific circumstances of the country. This theory implicitly recognizes that context matters even if it is not a pre-enactment.

This paper focuses on the “pre-enactment” argument as the starting point due to the significant effect the adopted law model and its wording imposes on the enforcement of the legislation itself. This paper will then focus on a very important factor that both arguments seems to underestimate which is the role of the “political determinants” within a developing country and its impact on the “will” of the ruling regime during the enactment phase. In fact, the political determinant is the governing factor as it is the game changer when it comes to either the adoption of a certain model or its enforcement. Political determinants are the reality constraints affecting decision making within the country. It is all about the relation between the centers of authority and money within a country. It is a web of common interests between oligarchs, powerful institutions, political and economic centers of power influencing the decision making process to ensure the preservation of their own interest at any expense even at the public’s interest. Each of the power centers exercises significant pressure in an attempt to increase and preserve their favored positions and their self-interest with no regard to the public’s interests. Such practices and conflicts over the distribution of the pie usually end up in a compromise between the centers of power and money. The ruling regimes in such countries cannot deviate from preserving the status quo or otherwise it faces the possibility of being ousted. Corruption, favoritism, cronyism, nepotism, lack of democracy, lack of short and long term economic policies are all symptoms of the impact of an active political determinant intervention.

It is argued in this paper that “political determinant” is in fact a crucial and important factor to understand the problems faced by developing countries, more specifically Egypt, when it comes to the competition law enforcement.<sup>8</sup> The “political determinants” is the determinant factor of the

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<sup>8</sup> The groundbreaking work on introducing the “political determinants” as an important factor to understand and analyze the cross-national divergence in corporate governance system has been done by Mark Roe. His thesis illustrates the importance of including the political factors while studying and analyzing the cross-national divergence in corporate governance paradigms and ownership as it provides significant value more than the mainstream plain legal and economic theories do. He adds that such domestic political forces determine the share ownership structure, the institutions of cooperate governance and the advancement of the securities market. For

model of competition law to be adopted and at the same time, it is the determinant factor of the enforcement level and more importantly, it is the reason behind the decision of adopting competition legislation in the first place even before choosing the model. In other words, “political determinants” can be perceived as the third dimension shaking and moving the compass of the competition law adoption and its enforcement back and forth. Due to such an important role, the “political determinants” play, this paper argues that the real phenomena worth studying is the “political determinants” within a developing state as it is construed to be one of the most important reasons behind the occurrence of the enforcement problems that many developing countries suffer from.

In order to achieve such an academic goal, the paper will proceed as follows. First, the paper will demonstrate that existing accounts cannot explain the weak record of enforcement, and the substance of particular provisions of the Egyptian competition law. To demonstrate that Egyptian competition law is deviating from the global recognized best practices, a comparison of the Egyptian competition law with US and EU law with respect to specific issues must take place. First, the standard of evidence in horizontal agreements will be contested between the three jurisdictions. Second, the paradigm of the competition law and its institutional apparatus will be examined as well. Finally, the immunity system will be analyzed and examined. The outcome of this comparative analysis will be examined to assess whether the Egyptian competition law is signing outside the flock because it is contextualized to fit Egypt’s own unique characteristics to achieve developmental goals by addressing the best interest of the public or otherwise. The final outcome will prove that the Egyptian competition law is in isolation of the best practices approach as it is contextualized not to the best interest of the public and economy advancement as promoted by the pro-contextualization theory scholars, but rather to the best interest of the ruling regime along with its oligarchs monopolizing Egypt’s economy and political arena. It will also show that the ruling regime adopted the Egyptian competition legislation only to satisfy the Egyptian external trade partners while simultaneously ensuring that such legislation would not shrink the distribution of the pie as designed by the “political determinants” over the years.

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example, MARK J. ROE, *POLITICAL DETERMINANTS OF CORPORATE GOVERNANCE: POLITICAL CONTEXT, CORPORATE IMPACT* (Oxford University Press, 2003); *Legal Origins, Politics, and Modern Stock Markets*, 120 HARV. L. REV., 460 (2006).

Chapter II details the controversial debate between the economists and practitioners of competition law around the world regarding the “model” vs “models, “transplantation” vs “contextualization” with regard to the best model of competition law for developing countries. In addition, it describes the important factors that should be considered while choosing the best competition law model for developing countries according to the contextualization model. Chapter III compares specific provisions of the Egyptian Competition law and US and EU law to demonstrate that the Egyptian law is deviating from the global competition law best practices. Chapter IV illustrates how the “political determinants” played a fundamental role in marginalizing the Egyptian competition law by examining the Egyptian competition paradigm according to the contextualization theory.

## **II. Why and how developing countries face problems in adopting and enforcing their competition laws**

This chapter starts with a literature review regarding the two main arguments over the best model of competition law for developing countries, transplanted or contextualized model.

### **A. What is the Best for the Developing Countries, Transplantation VS Contextualization**

The extraordinary expansion of competition legislation enactment within the developing countries and failures in enforcing such legislations created mixed and different arguments regarding what is in favor of developing countries.<sup>9</sup>The most important mainstream arguments suggest two different approaches the “transplantation” vs “contextualization”. The last part of this chapter will provide analysis to the “contextualization” approach by examining the important governing factors of such approach that should influence each developing state’s competition law.

Justification of the transplantation argument can be summarized as follows. i) transplantation generally increases legal certainty due to the long interpretation of the law ought to be transplanted as it has been enforced for a long time and thus enjoys a history of implementation, enforcement, and academic discussions; ii) on the trade level, it can also encourage the foreign direct investments into the transplanting state market; And finally iii) it increases the possibility of cooperation between competition authorities in case of cross-border infringement.<sup>10</sup>

According to the supporters of the transplantation approach, such cooperation is most likely to occur in transplantation approach than alternative approaches.

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<sup>9</sup> See, for instance, Eleanor M. Fox, *Antitrust, Economic Development and Poverty: The Other Path*, 13 Sw. J.L. & TRADE AM. 211 (2007) (hereinafter Fox, *The Other Path*) T. Stewart, J. Clarke and S. Jokes, *Competition Law in Action: Experience from Developing Countries* (International Development Research Center, 2007); M. Gal, *Competition Policy in Small Market Economies* (Harvard University Press, 2003); L. Cernat and P. Holmes, *Competition, Competitiveness and Development: Lessons from Developing Countries* (UNCTAD 2004).

<sup>10</sup> For more details regarding the benefits of transplantation, see Gal, Michal S. and Fox, Eleanor M., "Drafting competition law for developing jurisdictions: learning from experience" (2014). New York University Law and Economics Working Papers' Paper 374, at 8.

Some practitioners and scholars argue that there should be a unified competition law “model” for all states to adopt. Although this might seem to be a thankful effort to standardize the competition law among the globe especially after the globalization took place where the convergence became an objective of antitrust law in a globalized world, it is not ideal, as it seems. As *Eleanor Fox* criticize “[c]onvergence implies universal standards, or at least universal norms implemented in common ways. The phrase “universal standards” normally refers to the standards of United States and Europe, which have become the dominant models for the world.”<sup>11</sup> Accordingly, this argument implies tacitly that any state, including developing ones as Egypt, should import its competition law from either the US or the EU jurisdiction. In other words, it publicize that developing countries should resort and transplant either the US or EU competition law model with no regard to the differences in the market scale, economy structure, and political sphere as important governing factors that contributes to the unique circumstances of each state. Discarding the context or internal circumstances of the state will provide a negative implication for developing countries and will increase their economy problems even more.<sup>12</sup> Accordingly, the context matters in drafting competition law for developing countries to minimize the maldistribution of wealth and poverty.<sup>13</sup>

In light of the above, mainstream literature correctively differentiates between developing countries and developed countries with regard to the imposition of the competition policy and therefore the adopted competition law.<sup>14</sup> This differentiation implies that the context matter. However, the developed countries tend to ask that developing countries should apply their competition law models but they illustrate that there will be some obstacles facing the competition authority while enforcing the Law due to the developing countries fragile

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<sup>11</sup> *Id.*, Fox, *The Other Path*, at 5.

<sup>12</sup> For Instance, see Michal S. Gal, *Competition Policy for Small Market Economies*; HARVARD UNIVERSITY PRESS; (2003); 196; arguing that the different and unique nature of “smallness”, which is characterized by high concentration, high entry and exit barriers and weak levels of operation, explains the importance that these developing countries adopt competition legislations that is different from their developed counter peers.

<sup>13</sup> Fox, *The Other Path*, supra note 9 at 10.

<sup>14</sup> See, for instance, Eleanor M. Fox, *THE OTHER PATH*; William Kovacic, *CAPITALISM, SOCIALISM, AND COMPETITION IN VIETNAM*, 13 *Antitrust* 57 (1999); see also William Kovacic, *Designing and Implementing Competition and Consumer Protection Reforms in Transitional Economics: Perspectives from Mongolia, Nepal, Ukraine, and Zimbabwe*, 44 *DEPAUL L. REV.* 1197 (1995). DWIGHT H. PERKINS & MICHAEL ROEMER, *REFORMING ECONOMIC SYSTEMS IN DEVELOPING COUNTRIES*, (Dwight H. Perkins & Michael Roemer, Reforming eds., Harvard Kennedy School 1991); P. COOK, R. FABELLA AND L. CASSEY, *COMPETITIVE ADVANTAGE AND COMPETITION POLICY IN DEVELOPING COUNTRIES* (P. Cook ET AL, Edward Elgar, 2007).

institutions.<sup>15</sup> In fact, both EU and U.S. always tend to influence developing states to imitate their models. This trend is conducted through either introducing incentives or coercing the developing states by tying the adoption of the developed western competition model with aids, market access, and the like.<sup>16</sup> As M. Dabbah, stated “what has become almost normal practice in the field: rules, practices and theories that are developed in certain parts of the world – mostly in the European Union (EU) and the USA – have come to be forced down the throat of countries in developing parts of the world, often with the aid of international organizations.”<sup>17</sup>

However, the degree of such practices varies from developing state to another. For instance, Syria’s accession to the WTO has been tied by fulfilling certain requirements. Among these requirements, is adopting changes to Syria’s economic laws and introducing a certain competition law domestically.<sup>18</sup> Sudan as well was forced to adopt competition law as part of economic structural reforms to comply with the rules and standards of International Monetary Fund and the World Bank.<sup>19</sup> While other developing countries were offered incentives in the shape of accessing the markets of their trade partners, Egypt is among those countries as the EU conditioned the access of the Egyptian goods to the EU markets with the adoption of the competition law as stipulated in the Euro-Mediterranean association Agreement.<sup>20</sup>

However, imposing the developed countries, I mean US and EU, models will inevitably lead to blind legal transplantation that is most likely does not fit the borrowing country’s characteristics.

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<sup>15</sup> These problems lead to the “post enactment” argument focusing on the enforcement mechanisms that will be discussed later in page 13 of this paper.

<sup>16</sup> The IMF forced Indonesia to adopt a specific competition legislation as a condition for granting Indonesia the financial aid it sought. The US and EU trend of coercing developing states to adopt their own litigation with no regard to their domestic context resulted in severe negative implication on the developing countries economy and attributed to the increase of the already spread poverty. However, it is worth noting that the coercion exercised for competition law transplantation is much lower than other laws like the IP. For more details on the coercion regarding legal transplantation, *see* Hassan El-Kassas, Neo Imperialism Project and the Role of International Law. *See also*, the Darwin’s nightmare documentary, available at <https://www.youtube.com/watch?v=IV7Y9FHcdFk>; *See* Robert Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4 (1983); and Violence and the Word, 95 YALE. L. J., 1601-29 (1986).

<sup>17</sup> Maher M. Dabbah, *supra* note 4, at 3.

<sup>18</sup> Maher M. Dabbah, *supra* note 4, at 290.

<sup>19</sup> *Id.*, at 290

<sup>20</sup> Euro-Mediterranean Association Agreement, EU-Egypt, Apr., 21, 2004, 2004/635/EC; *available* at [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2004.304.01.0038.01.ENG&toc=OJ:L:2004:304:TOC#L\\_2004304EN.01003901](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2004.304.01.0038.01.ENG&toc=OJ:L:2004:304:TOC#L_2004304EN.01003901).

Legal transplantation has been proofed to produce negative impact for any state that discards its own context while transplanting and it will end up, in the words of *Dina Waked*, to be “ink on paper.”<sup>21</sup> Transplantation has been proofed to provide more problems to the public and jeopardizes the developmental goals of the State.<sup>22</sup> The developed countries competition model developed over years and currently is built on the idea of achieving maximum efficiency, while the developing countries should build their law to achieve developmental goals.<sup>23</sup> Thus, Egypt as one of the developing countries should seek to adopt a model that responds to its own context. An important and essential element in determining the scope or aims of the competition policy and law within any state should be “context”.

Context is identifying and responding to economic realm, in the broad sense,<sup>24</sup> within the State in question. The extent of protection might and should differ to respond to the political and economic conditions for the state in question. The political elites set the competition policy which is construed to be the foundational stone that formulates the characteristics of any adopted competition legislation. Accordingly, the ruling regime and the surrounding political determinants willingness to adopt free market and competition law differ from one State to another. The presence of conflict of interest between the political forces acting within the State affects the aims of the adopted Competition Law. The economy’s condition and development as well as the market type are also crucial factors in the equation when formulating the competition law paradigm. That is the reason in which some of the scholars are concerned with establishing a differentiation between the developed and developing countries when adopting Competition legislation in the first place. Therefore, in the realm of competition law model, developing countries should pay attention for crucial factors while drafting the competition Law and should not depend on blind and mere transplantation of competition legislation. Some argues that depending on the US or EU transplantation is an effective solution for developing countries. The

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<sup>21</sup> Dina Waked, *Do Developing Countries Enforce Their Antitrust Laws? A Statistical Study of Public Antitrust Enforcement in Developing Countries*, available at <http://ssrn.com/abstract=2044047>

<sup>22</sup> For a full analysis regarding the problems of pure legal transplantation that is does not take into account the country’s conditions, see Daniel Berkowitz, Katharina Pistor & Jean Francois Richard, *Economic Development, Legality, and the Transplant Effect*, 47 EUR. L. REV. 165 (2003).

<sup>23</sup> MorBakhroum, *‘A dual language in modern competition law? Efficiency approach versus development approach and implications for developing countries*, 34(3 ) WORLD COMPETITION, 495 (2011).

<sup>24</sup> It is worth noting that the context of any state is not limited only to the political and economic sphere, but it also related to the culture and social sphere. However, this paper will only focus on the political and economic sphere with all of their components elements to better serve the aims of the paper.

argument goes, that the two dominant US and EU laws are contested and developed through numerous decades and in case of US more than a century.

Accordingly, there is no need to reinvent the wheel.<sup>25</sup> Despite that in the small world of globalization in which convergence is a necessary result, as it accelerates the developmental process of the involved countries, the competition law, as any other law, should derive from within the state's condition not from without it.<sup>26</sup> The legislation should respond to the unique contextual problems that need to be solved within the state.<sup>27</sup> As established by Dina Waked, “[T]ransplantation theories abundantly show that copying-and-pasting laws leads to the inefficiency of these laws and prove their uselessness”,<sup>28</sup> as they do not address the local needs.

## **B. The Political and Economic Considerations**

One of the important factors that should be accounted while drafting and applying competition law within developing countries is the political and economic sphere within the state in question.<sup>29</sup>

In fact, the political and economic sphere contributed directly to the developing countries current weak economic structure. Most of the developing countries have been marginalizing the concept of competition and free market due to the state monopolization over the different sectors of the domestic market.<sup>30</sup> However, after their economic policy shifts from state monopoly towards the

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<sup>25</sup> See Gal *Supra* note 2 at 1. [Presenting a brief on the argument of not reinventing the wheel and its counter argument that context matters as it concluded that there is no one model fit for all countries developed and developing.]

<sup>26</sup> Fox, *The Other Path*, at 11

<sup>27</sup> *Id.*, at 11

<sup>28</sup> Dina Waked, *Do Developing Countries Enforce Their Antitrust Laws? A Statistical Study of Public Antitrust Enforcement in Developing Countries*, available at <http://ssrn.com/abstract=2044047> citing, Daniel Berkowitz, Katharina Pistor and Jean-Francois Richard, *Economic Development, Legality, and the transplant effect*, 51 AM. J. COMP. L. 168 (2003).

<sup>29</sup> As noted earlier, this paper will only focus on the political and economic sphere with all of their components elements to better serve the aims of the paper.

<sup>30</sup> Paul Cook; ‘Competition Policy, Market Power and Collusion in Developing Countries’; (December 2002); 33 Center on Regulation and Competition Working Paper Series, at 13. [Speaking on the erected barriers introduced by developing countries’ governments regarding accessing or exiting the market]; *see also*, Paul Cook; ‘Competition Policy, Market Power and Collusion in Developing Countries’; 33 Center on Regulation and Competition Working Paper Series, at 2 (December 2002). [Illustrating the monopolistic role played by developing countries’ government over enterprises operating in the market place.]



liberalization and privatization, the state behavior shifted towards rent seeking behavior and cronyism.<sup>31</sup> Developing countries experienced some sort of a setback regarding economic performance. This setback is due to the political elite's tendency to strengthen the political and economic status of a few families and individuals in key sectors of the economy.<sup>32</sup> This is what we can call the oligarchies dilemma in the developing countries. The oligarch presence in developing countries resulted in concentrated markets and thus concentration of wealth that developed countries do not experience<sup>33</sup>. The transformation from a situation where the state's control and central planning, to a situation of a free market economy constitutes a challenge for the developing countries.<sup>34</sup>

Furthermore, political liberation within the state plays an important role due to its direct and appreciable effect on the drafting and interpretation of the law. Thus, it must be considered while proposing the competition law model for any state. Developing countries enjoys certain political practices that are not experienced within developing ones. Among these practices, corruption, cronyism, weak institutions, limited democracy, and state preferred oligarchies.<sup>35</sup> Moreover, it is well established that the legislative process usually takes place by the participation and agreement of the political elites within the state. The political elite' status in developing countries differs than most developed states as in the former, the lack of the political liberalization, democracy, and public participation in both decision making and legislation process entitles the political elites high levels of intervention to protect and immunize their interest.

All of these practices contribute to increase the maldistribution of wealth and thus leads to a systematic poverty. Therefore, the political and economic sphere of the developing states represent a cross roads with regards of the model of competition law that should be adopted. As in fact, the pressing need for adopting a competition law varies due to the surrounding political and economic sphere. This simply means that while the developed countries requires competition law model that is concerned with economic efficiency that trusts liberalization and free

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<sup>31</sup> Dina Waked, *supra* note 3 at 78.

<sup>32</sup> Maher M. Dabbah, *Supra* note 4, at 289. Dina Waked, *supra* note 3 at 78.

<sup>33</sup> Cook, *supra* note 30 at 15. Dina Waked, *Supra* note 3 at 78. Fox, *The other path*, at 6.

<sup>34</sup> Maher M. Dabbah, *supra* 4, at 308.

<sup>35</sup> Fox, *The Other path*, at 4

enterprises; the developing countries, on the other hand, should require a competition law model that eliminate or at least reduce the anticompetitive practices they enjoy more than most of the developed countries. Practices such as, opacity, cronyism, political preferred enterprises, and blockage of markets, and further, responds to the maldistribution of wealth. In light of the said, it is unlikely to be helpful for developing countries to transplant a competition law from the developed countries; instead, developing countries should contextualize their competition legislation to respond to their unique characteristics.

Contextualization of the competition law does not mean that we simply tend to reinvent the wheel, we should rather take advantage of all the provisions of the developed countries' legislations that have been challenged and questioned throughout a period of one century and tailor cut them to suit the context conditions of each developing country separately. In fact, I mean that, even developing countries competition laws should be modified to correspond to each state unique context. In other words, there should be some sort of general framework to be likely adopted in all countries that is the identification of the prohibited practices perceived to harm the competition. However, the extent of the enforcement and the scope of the interpretation should vary to respond to the different states' contexts. For instance, the general framework of any competition law should condemn the abuse of dominant position; however, the interpretation of such provision should differ from state to another, which is already noted and applied by the developed countries. For example, a State with the most prosperous economy and market like the US defines the dominance of any enterprise if it acquires the share of two thirds of the relevant market place while the EU requires the acquisition of 40 to 50 percent of the relevant market for undertakings to be classified as dominant. The different percentage of market shares for determining a dominant position is responding to the different market structure between the US and the EU. This implies that even the biggest two markets in the world, who usually offer their competition law model for the developing countries as the "model" to be adopted, contextualize their own competition law paradigm according to their market structure. Therefore, the argument of the sole "model" that should be transplanted is considered a myth and in practice each country, whether developed or developing, should draft its law with the aim to respond to its unique characteristics the "context".

Despite the established above fact, there have been several arguments led by mainstream competition law scholars that the problem of enforcement in the developing countries in general lies solely in the technical and reality constrains the “enforcement mechanism” argument and not to the adopted model.

### **C. Enforcement Mechanisms Problem**

The general analysis on the literature suggests that the developing countries, usually, face some obstacles regarding the enforcement of the competition law. Some experts state that the major obstacle, in Egypt and developing countries in general, lays in the weak institutional infrastructure they have.<sup>36</sup> Despite the fact that I find this allegation plausible, I find it hard to accept the general diagnoses for any problem as it might defer from one state to another due to several unique characteristics that each state enjoys. Such characteristics that differentiate one State from another State. For instance, the culture diversity is one of these characteristics. In addition, the literacy level, which affects the application of a sophisticated legislation like the Antitrust Law differs from one developing country to another.

Within this mainstream perception of the obstacles faced by the developing States, some scholars see the problem is due to the low staffing when compared to population and low budgeting.<sup>37</sup> Others think that the problem is the lack of expertise, which developing countries have regarding the Competition Law and competition policy.<sup>38</sup> Accordingly, this raises the question whether the lack of enforcement problem occurred because of the obstacles mentioned above or it is due to the law itself.

Personally, I believe that all of these obstacles have contributed negatively to the enforcement of the developing countries competition laws, but they can only be accepted and perceived as potential determinative elements of the enforcement problems. However, this is a latter effect on

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<sup>36</sup> Howell E. Jackson & Mark J. Roe, *Public Enforcement of Securities laws: Resource-based Evidence*, 93 J. FIN. ECON. 207 (2009); see Ahmed Farouk Ghoniem, ERF Working Papers (working paper 0239). See also, Alvarez AM et al. Chapter 3: Anti-competitive practices and the attainment of the millennium development goals: Implications for competition law enforcement and inter-agency co-operation, (published as part of United Nations Conference on Trade and Development: Trade and Competition Issues: Experiences at regional level, Geneva and New York, 2007) at 93. Cited in Edward Nathan Sonnenbergs, *Competition Law in The Developing World: A Fish out of water?*, *Fifth Annual Competition Law*, Economics and Policy Conference October (2011)

<sup>37</sup> See Dina Waked, *Supra* note 2 at 10-11. “[t]he average of the staff is blow 1 per million of population” in Egypt, which is too low and below the average of the strong enforcement authority.”

<sup>38</sup> Fox, *The Other Path*, at 18; See also, Edward Nathan *supra* note 5, at 6.

the weak enforcement as it assumes that the adopted law model provides all support to the authority enforcing the law in addition to the presence of the well-known practices of evidence rule. While in fact, the adopted model, in some cases, can omit important best practices and simultaneously deprives the competition authority from the independence required for achieving an effective enforcement. In such case, the enforcement mechanisms cannot be perceived as the main problem of the weak enforcement. The main problem in some cases starts from the wording of the adopted law model. The Egyptian adopted competition law is a good example regarding the effect of the law wording over its enforcement despite the presence of the enforcement mechanisms problems. Therefore, we have to analyze the Egyptian adopted model of competition law in depth before deciding whether these obstacles are the “fundamental” causes for the problem or they are one of the “collateral” causes of the problem.<sup>39</sup> It is untrue to assume that the problem, in Egypt lies in the weak institutions, lack of expertise, low budgeting and staffing compared to the population<sup>40</sup> alone, without contesting the wording of the law to illustrate how it is isolating itself by deviating from the global competition law best practices with regard to the evidence of agreements in cartel cases and minimizing the independence of the competition authority. Such examination is important to assess whether the Egyptian model is contextualized to better serve the public interest and achieve developmental targets or otherwise.

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<sup>39</sup> I believe and agree that most of the developing countries lack the expertise, the strong institutional support funding, and the technological infrastructure. For instance, the official web page of the Egyptian parliament is not working since the dismantle of the pre-revolution parliament. This is just one example of the weak institutions Egypt has, but in general, this paper will prove that the “fundamental” cause of the problem lies on the adopted law model which is signing outside the global competition flock due to the presence and the influence of the political determinants in the adoption phase.

<sup>40</sup> *Supra* note 5.

### **III. Egyptian Competition Law: Deviating from Best Practices Approach**

Egyptian competition Law can be seen to be isolating itself from the competition law best practices when it comes to the competition law sphere. It is of high essence to analyze the wording of the law to understand how did the Egyptian Law omitted important concepts that have been acknowledged by most nations who adopted the law before Egypt did. I do not mean that Egypt should have followed a transplantation approach regarding its competition law provisions; I rather mean that Egypt should have benefited from the developed experiences of other nations that have adjudicated the law for a long period of time and in one case like the US a century ago to contextualize its own model. Such experiences formed a best practice approach in the realm of competition law. This chapter, through an analytical comparative study with EU and US law, will establish that the Egyptian law seems to be following a contextualization approach with regard to its adopted law. However, it was not contextualized to the best interest of the competition or the public.

#### **A. Multilateral Agreements**

The Competition law in general prohibits multilateral conducts that restrains the trade. The vast majority, if not all, of regimes acknowledges that it is almost impossible to prove such conducts as it is prohibited by law, which force the parties of such prohibited conducts to avoid entering in explicit agreements. In fact, “[p]eople of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.”<sup>41</sup> Therefore, the scope of provisions should not as a matter of policy be narrowed to the explicit mutual agreement of parties that are well known to be either in written or oral forms. For instance, law in most countries prohibits drug distribution, let us now assume that two or more parties want to infringe the law and reach an agreement to distribute drugs, they are unlikely to enter into a written agreement or even an oral published agreement as such agreement is illegal. Thus, they are likely to conspire by agreeing in hidden agreement. The

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<sup>41</sup> ADAM SMITH, WEALTH OF NATIONS (1776). Adam Smith has constructed the economic dimension of the Industrial Revolution and contributed also for the shifting of economics into the identity of the most required social science.

same can be applied to competition law, which usually prohibits multilateral agreements that are (a) fixing prices, (b) restricting output, (c) dividing markets, (d) organizing boycotts, (e) organizing bid rigging,<sup>42</sup> or in the general sense restricts<sup>43</sup> or distorts<sup>44</sup> the competition within the relevant market. The question now is how such agreements can be proofed and on whom lies the burden of proof regarding such agreements. Is the wording of the Egyptian Law introduce difficulties on the rule of evidence, if so, does such difficulties are present on the US and EU Competition Laws. In order to address these questions, we must analyze the wording of the Law in the three jurisdictions to establish that the Egyptian wording is in isolation of the global recognized evidence rule best practice approach.

### **1. Prohibited Multilateral Agreements under US Competition law**

It is worth noting that the US introduced competition provisions for the first time ever by virtue of its Sherman Act in 1890.<sup>45</sup> Since this time, a coherent body of different acts have been introducing provisions that are compatible with the Sherman Act with regard to enhance and promote the competition within the US market.<sup>46</sup>

The Sherman Act introduces two major pillars, on which the US competition law enforcement was first initiated and developed over the years. Those two pillars are 1) the multilateral anticompetitive behaviors and 2) the unilateral conduct and monopolization.<sup>47</sup> However, for the best interest of this comparison, the focus will be only on the multilateral anticompetitive behaviors.

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<sup>42</sup> For instance, *see* Sherman Act 15 U.S.C. § 1 (1890); *see also*, article 1 of the TFEU (providing a non-exhaustive list, *see* article 6 of Law No. 3 of 2005 the Law on Protection of Monopolistic Conducts.

<sup>43</sup> The US Sherman Act uses the term “restraint of trade”.

<sup>44</sup> The EU competition law in article 101 of the TFEU uses the terms “restriction or distortion of competition”

<sup>45</sup> 15 U.S.C. § 1 (1890).

<sup>46</sup> In 1894, the Wilson Tariff Act was introduces. In 1914, the Clayton Act, which covers under section 7 and 7A, the tools of controlling mergers in the US competition law regime. In 1914, also, the Federal Trade Commission Act was adopted, prohibiting unfair methods of competition and unfair or deceptive conducts or practices affecting trade. It can be said, that this framework is prohibiting conducts that were already prohibited under the Sherman and Clayton Acts, but the added value can be construed from the wide provided explanation for the term “unfair” which has been used extensively by US courts. Since the Federal Trade Commission Act, a body of Acts has been introduced starting from the 1930 Tariff Act throughout the last adopted Act in 2004 “Antitrust Criminal Penalty Enhancement and Reform Act. However, the Sherman Act provisions are the ones that have jurisdiction over most or all the antitrust cases in US and thus, the paper will focus on the Sherman Act in the comparative study.

<sup>47</sup> Almost all competition laws all over the glob focuses on those two pillars and either add merger control pillar within the competition legislation or cover merger control by virtue of a specific legislation.

Under section 1 of the Sherman Act “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”

It is also worth noting that the Sherman Act did not provide a different provision to the vertical agreements other than the provisions provided under section 1 . In other word, section 1 of the Sherman Act covers all multilateral anticompetitive conducts and agreements including both vertical and horizontal agreements and conducts. The word “every”, under the Sherman Act, is widely construed to cover all agreements that are in restraint of trade. Such agreements are declared to be illegal ipso facto. The term “conspiracy” widens the scope even more. The statute’s recognition to the conspiracy approach block the attempts of the competing rivals to conspire instead of concluding an agreement to avoid being subject for infringing the law.

Explicit agreements that are restraining competition are clearly covered under the Sherman Act. Due to this fact, it is hard to find explicit evidence of the illegal agreement; as it will never be in a simple written form. Therefore, the conspiracy agreement can be inferred from the parallel conduct that would be unprofitable if other firms did not follow the same conduct. This parallel conduct might be a result of either, 1) because the firms are in an oligopolistic market in which they recognize their price interdependence or, 2) they have engaged in a hidden agreement. In both scenarios, this act is illegal. The US case law introduced the recognition of the concerted practices to the prohibited conducts under section 1. In the American Tobacco v .United States, the court convicted each of the conspired firms and the Circuit Court of Appeals affirmed each conviction and provided the following:

In this case, the jury found the petitioner [the three condemned firms] conspired to fix prices ... in the distribution and sale of their principale products. The petitioners sold and distribute their products to jobbers and to elective dealers who bought at list prices, less discounts ... the list process and the discounts allowed by petitioners have been practically identical since 1923 and absolutely since 1928. Since the latter date, only seven changes have been made by the three companies and those have been identical in amount. The increases were first announced by Reynolds. American and Liggett thereupon increased their list prices in identical amounts....On June 23, 1931, the Reynolds, without previous notification or warning raised the list price ...the same day, American increased the list price...

and Liggett [raised] the price for... to the identical price... No economic justification for this raise was demonstrated”<sup>48</sup>

The Court further added:

[i]t is not the form of the combination or the particular means used but the result to be achieved that the statute condemns. It is not of importance whether the means used to accomplish the unlawful objective are in themselves wholly innocent acts. Acts done to give effect to the conspiracy may be in themselves wholly innocent acts. Yet, if they are part of the sum of the acts which are relied upon to effectuate the conspiracy which the statute forbids, they come within its prohibition. No formal agreement is necessary to constitute an unlawful conspiracy ... the essential combination or conspiracy in violation of the Sherman Act in a course of dealings or other circumstances as well as in any exchange of words. Where the circumstances are such to warrant a jury finding that the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement, the conclusion that a conspiracy is established is justified.”<sup>49</sup>

It is well established that the Sherman Act interpretation does not require the presence of a formal agreement in the ordinary written form as in fact it widens the prohibition of harmful conducts to a conspiracy and concerted practices as well. Such practices can be inferred from unified purpose or through a meeting of minds.

It is worth noting that the US courts when applying the provisions of section 1 wording in practice depend on two different approaches, the *per se* and the *rule of reason*. The former means that the court does not need to examine whether the conduct in question unreasonably restrains trade or harms the consumers and competition. The presence of the agreement, conspiracy, or concerted practice to conclude an anticompetitive profit is enough to conclude a verdict against the parties of such conduct. The most obvious agreements are: a) price fixing;<sup>50</sup> b) output restriction;<sup>51</sup> c); market division;<sup>52</sup> d) bid rigging and/or bid rotation;<sup>53</sup> e) concerted horizontal

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<sup>48</sup> *American Tobacco v. United States*, 328 U.S. 781 (1946). Mr. Justice Burton delivered the opinion of the Court.

<sup>49</sup> *Id.*

<sup>50</sup> See *American Tobacco v. United States*, 328 U.S. 781 (1946); See *Ind. Fed'n. Of Dentists*, 476 US 459 (1986); See also *Leegin Creative Leather Products, Inc v. PSKS, Inc.*, 127 S. Ct. 2705, 2712-13 (2007).

<sup>51</sup> *United States V. Topco Assocs., Inc.*, 405 US 596, 607-08 (1973); See also, *Broad Music, Inc. v. CBS*, 441 US 1, 19-20 (1979).

<sup>52</sup> See *Palmar v. BRG of Ga., Inc.*, 498 US 46, 49-50 (1990). The court has held that “agreements between competitors to not compete in other’s territories are *per se* illegal”.



refusal to supply and boycotts.<sup>54</sup> The rule of reason means that the court should consider on case by case basis whether the agreement in question has a plausible procompetitive justification or not. If it has, then the court should weight the anticompetitive harm vs. the procompetitive justification. While the rule of reason approach seems to be applied in all cases where the *per se* approach is not applicable. Vertical price restraints should fall under the scope of rule of reason after the historical US Supreme Court overrule in the 2007 *Leegin Creative Product*<sup>55</sup>, which changed the long standing *per se* approach domination over the vertical price restraints.

The wording of the US Sherman Act provides the required protection to the competition process and the consumer welfare as well by widening the scope above the formal agreements to include concepts like the concerted practice and conspiracy

## **2. Prohibited Multilateral Agreements EU Competition Law**

The EU Article 101 of the TEFU<sup>56</sup> is also widening the scope of the illegal conducts to include “concerted practices and “agreements”. The law provides in the first paragraph of article 101 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.

This wording facilitates the mission of the commission to establish the presence of the illegal conduct that might take the shape of concerted practice or tacit collusion among the rivals in the market. This article grants the commission the authority to challenge vertical agreements, conditioned that there is no dominance of any of the parties in question within the relevant market. If there is a dominant position, then the commission can proceed with the vertical

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<sup>53</sup> See *United States v. Wf Brinkley & Son Construction Company Inc.*, F. 783 F.2d 1157 54 USLW 2508, 1986- Trade Cases 66-963 (1986).

<sup>54</sup> See *United States v. General Motors Corp.*, 384 US 127, 145-46 (1966)

<sup>55</sup> *Leegin Creative Leather Products, Inc v. PSKS, Inc.*, 127 S. Ct. 2705, 2712-13 (2007).

<sup>56</sup> Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C115/47, art 101 (“TFEU”)

restraints case but only under article 102 which regulates the abuse of a dominant position. In addition, one of the distinguished features that the provision of article 101 provide is the non-exhaustive list of the hardcore restrictions, which is dealt with as illegal by object. In this sense, it is the exact match of the US *per se* rule. The only difference is that the US developed the different approaches through judicial interpretations while the wording of the EU treaty addressed those concerns explicitly.

Additional different factor, between US and EU, is that article 101 (3) provided the conditions that might enable an exception for the illegal agreement to evade from being illegal under article 101 (1).<sup>57</sup> The exception conditions are, in fact, almost identical to the rule of reason approach adopted by the US courts. The conditions stipulated in article 101 (3) requires: a) that the agreement, decision, or concerted practice must contribute to the production or distribution of goods or contribute to the economic advancement or to promote technical progress, and; b) granting the consumers a fair share of the resulting benefit.<sup>58</sup> Any of these conditions alone cannot fulfill the requirements of article 101 (3) as the agreement may not impose an inevitable restriction in order to attain its objectives and should not eliminate even a substantial part of the product in question.<sup>59</sup> In this sense, it appears that exceptions granted under article 101 (3) requires a rule of reason as required in some cases in the US courts. This means that the EU sometimes adopt the so-called restriction by object, equivalent to *per se* illegal of US, while in other cases deal with the infringements under the analysis of procompetitive effects vs. anticompetitive effects within the provisions of article 101 (3). This analysis is, by its turn, equivalent to the rule of reason requirement to outweigh the procompetitive effects vs anticompetitive effects.

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<sup>57</sup> Article 101 (3) of the TFEU: “*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 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.*

<sup>58</sup> See Article 101 (3) of the TFEU.

<sup>59</sup> See TFEU Article 101 (3) (a) and (b).

To establish that an agreement falls under the scope of the prohibited agreements or behavior of Article 101 (1), the following shall be found:

i) an agreement or concerted practice between two or more undertakings, or a decision by an association of undertakings must be present; ii) which has as its object or effect the prevention, restriction or distortion of competition; iii) this agreement or concerted practice must have an appreciable effect on competition; iv) an appreciable effect on trade between Member States.

Thus, it is crystal clear the EU adopts the US “Rule of Reason” approach regarding the anticompetitive agreements after all.

The non-exhaustive list under article 101 (1) provides the agreements which are perceived to be illegal by object. The word “object does not mean the subjective intention of the parties; instead it refers to the objective meaning and target of the agreement.”<sup>60</sup> The commission guidelines on the application of article 101 (3) stipulates that “... In the case of horizontal agreements restrictions of competition by object includes price fixing, output limitation and sharing of markets and consumers...”<sup>61</sup>

This was firstly construed in the *Consten* Case in 1966 when the European Court of Justice stated “... there is no need to take account of the concrete effects of agreements once it appears that it has as its object the prevention, restriction or distortion of the competition.”<sup>62</sup>

The European Court of Justice, in *Imperial Chemical Industry* case has established that the parties conduct constitutes a concerted practice that is prohibited by Article 101 of TFEU. The court defined the concerted practices as:

[a] concerted practice does not have all the elements of a contract but may inter alia arise out of coordination which becomes apparent from the behavior of the participants. Although parallel behavior may not by itself be identified with a concerted practice, it may however amount to strong evidence of such a practice if it leads to conditions of competition which do not correspond to the normal conditions of the market, having regard to the nature of product, the size and number of the undertakings, and the volume of the said market. This is especially in the case if the parallel conduct is such as to enable those concerned to attempt to stabilize the prices at level different from that to which

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<sup>60</sup> See Case T 213/00, CMA CGM-FETTCSA, [2003 ] E.C.R., p.II-914 at 183.

<sup>61</sup> See Article 4 and 5 of the Commission Regulation No. 1218/2010, O. J. L 335/43 and 1217/2010, O. J. L 335/36 respectively for more information regarding the application of Article 101 (3).

<sup>62</sup> Joined Cases 56 and 58/64, *Consten SA & Grundin-Verkaufs-GmbH v. Commission*, [1966] E.C.R. 299 at 342

competition would have led, and to consolidate established positions to the detriment of effective freedom of movement of the products in the common market and freedom of consumers to choose their suppliers.”

The court added that:

[a]lthough every producer is free to change his prices, taking into account in so doing the present or foreseeable conduct of his competitors, nevertheless it is contrary to the rules on competition contained in the Treaty for a producer to cooperate with his competitors, in any way whatsoever, in order to determine a coordinated course of action relating to a price increase and to ensure its success by prior elimination of all uncertainty as to each other’s conduct regarding the essential elements of that action, such as the amount, subject matter, date and place of the increase.<sup>63</sup>

In this sense, the EU courts interpretation of the “concerted practices matches the US courts’ interpretations of the “conspiracy” term in the statute and to the judicial introduced “concerted practices” concept.

### **3. Prohibited Multilateral Agreements under the Egyptian Competition Law**

The Egyptian Competition Law was implemented more than a century after the US Sherman Act and more than half a century from the EU.<sup>64</sup> Despite the tardiness in the introduction of a competition law paradigm, the Egyptian Law did not benefit from the long interpretations of either the US and EU jurisdiction. The Egyptian Law deviated from the mainstream of the evidence rule within the most powerful US and EU regimes, which constitute the role model of competition law in the world. This deviation is not problematic in itself, but it is problematic due to its content. No doubt, that contextualizing any law for the unique characteristics of the state is beneficial and, in fact, should be encouraged. However, the Egyptian Law seems to isolate itself from all of its peers. The Egyptian Law can be characterized by its unique adopted rule of evidence regarding the multilateral prohibited agreements. To better understand the nature of the Egyptian Law, it is worth noting that it constitutes of two interrelated laws. The first is Law No.

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<sup>63</sup> Case 48/69, Imperial Chemical Indus. V. commission, [1972] E.C.R. 619.

<sup>64</sup> The EU started firstly introduced competition law within the framework of the Treaty of Rome of 1957.

3 of 2005 Promulgating the Law on the Protection of Competition and the Prohibition of Monopolistic Practices (hereinafter referred to as “Egyptian Law”). The second is the Prime Ministerial Decree No. 1316 of 2005 issuing the executive regulations of Protection of Competition and Prohibition of Monopolistic Practices law No. 3 of 2005 (hereinafter referred to as “executive regulation”). The Executive regulation is an illustrative text to the law and it cannot add any new provisions to the law wording.

Egyptian Law in article 6 defined the horizontal prohibited agreements in the following way:

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.
- b) Dividing product markets or allocating them on grounds of geographic areas, distribution centers, type of customers, goods, seasons or time periods.
- c) Coordinating with regard to proceeding or refraining from participating in tenders, auctions, negotiations and other calls for procurement.
- d) Restricting the production, distribution or marketing operations, or limiting the distribution of services in terms of its kind or volume or applying restrictions or conditions for their availability.<sup>65</sup>

It is revealed from the wording of the Egyptian law that the provision is narrowed only to the “agreements or contracts” and that such agreements or contracts are prohibited if they are “intended” to cause “any of the following”. This wording significantly narrows the prohibition of the anticompetitive behaviors to: i) “agreement or contract”, and ii) to the subjects listed in the exhaustive list. While the term “intended” to cause widen the scope of enforcement to the subject of the agreement or contract without necessarily requiring that the agreement or contract succeed to reach its cause or object. In this sense, it can be perceived as following the US and EU *per se* approach regarding the enforcement of the horizontal agreements provisions. However, an important difference is that the US Sherman Act did not provide an exhaustive list of certain types of agreements that are illegally *per se*, it instead developed such objects through case law. While the EU only provided an un-exhaustive list for the hardcore agreements that are *per se* illegal by their object. The Egyptian Law did provide an exhaustive list of agreements or

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<sup>65</sup> Article 6 of Law No. 3 of 2005 Promulgating the Law on the Protection of Competition and the Prohibition of Monopolistic Practices.

contracts concerning the so-called hardcore agreements that should be *per se* illegal and by doing this; it omitted the possibility to condemn any other horizontal agreements that can harm the competition even under a much lenient approach such as the rule of reason.

The question that is still vague in the Egyptian Law concerns the definition of agreement or contract under article 6. Therefore, we should seek the executive regulation in an attempt to understand what is meant by the terms “agreement or contract” does this covers the concerted practices, conspiracy, or tacit collusions like the US and EU regimes or not.

The executive regulation in Article 10 provided that “the agreements and contracts concluded between the competing persons in the relevant market include written and oral agreements and contracts.”<sup>66</sup>

This wording reveals the ambiguity and affirms that the “agreements or contracts” that are prohibited under Article 6 of the Egyptian law should be only limited to “oral and written” forms. The narrowness of the wording resulted in the omission of any other forms of agreements stipulated in both the US competition law and EU competition law, which adjudicated numerous cases upon forms of anticompetitive practices such as the concerted practice, conspiracy, and tacit collusion.

Contrary to the U.S. and EU law, this wording creates a high burden of proof on the Egyptian Competition Authority to establish the presence of an agreement within the wordings of the Egyptian Law text.

The Egyptian Law continues to provide unique provisions that deviate from the worldwide notions. The following part will tackle the apparatus of the competition law in the three different regimes to establish that the wording problem of the Egyptian law paradigm is reflected in different provisions not only the rule burden of proof.

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<sup>66</sup> Article 10 of the Egyptian Executive Regulation, Prime Minister Decree No.1316 of 2005.

## **B. Institutional Apparatus**

In this part, we will focus on analyzing the Competition law's institutional apparatus within Egypt, US and EU jurisdictions.

### **1. United States Competition Law Paradigm**

#### **i. The US legislative branch**

As stated above, the US competition law is formed basically on the 1890 Sherman Act.<sup>67</sup> The US competition law as one of the legal systems in the US is made up on two different components. The first component is the federal and the other is the local state component. For the best interest of this paper, the main focus will remain for the US federal legal system. The federal system consists of three different but interrelated branches, the legislative branch, the executive branch, and the judicial branch. When it comes to the competition law in US, it is worth noting that the judicial branch, the Congress founded the US competition law paradigm by enacting the 1890 Sherman Act.<sup>68</sup>

#### **ii. The US competition competent authorities**

One of the most distinguished characteristics of the US competition law paradigm is its dual enforcement at the federal level with the competence of two different authorities.<sup>69</sup> The first authority is the Department of Justice in particular its Antitrust Division "Antitrust Division". While the other competition law competent authority in the US is the Federal Trade

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<sup>67</sup> Although there is other, Acts concerned with the regulations of the Competition arena including the 1914 Clayton Act, and the 1914 Federal Trade Commission Act.

<sup>68</sup> It is worth noting that the roots of the US legal System dive back the 1788 US ratified Constitution which established the federal government system and the individual state governments.

<sup>69</sup> The dual authority involvement when it comes to competition law enforcement is one of the unique characteristics of the US Competition law regime that distinguish it from other competition law regimes around world.

Commission “FTC”.<sup>70</sup> The duties and roles of both authorities interrelate and overlap to some extent creating complexities over the years.<sup>71</sup>

One of the distinguished features between the two authorities is that the Antitrust Division is part of the Department of Justice and therefore part of the federal government executive branch, while the FTC is an independent body established by virtue to the 1914 Federal Trade Commission Act and it reports directly to the Congress. The Antitrust Division is headed by the Assistant General Attorney for Antitrust with competence on both criminal and civil enforcement mainly under the 1890 Sherman Act and the 1914 Clayton Act. The FTC main work arises from the notified mergers reviewed under the Clayton Act.

The most important difference between both authorities is the exclusive competence granted to the Antitrust Division over the Sherman Act Criminal enforcement, which is also a top priority to the Division’s agenda; this trend can be perceived from its numerous fierce fights against cartels.<sup>72</sup> The Antitrust Division is granted the required tools to detect and prosecute criminal cases. Such tools include, the collaboration granted with various investigation authorities and public bodies including the Federal Bureau of Investigation (FBI) who may conduct a variety of operations that supports the Division’s investigations. Such operations may include gathering the required incriminating evidence using the FBI undercover operations. The Division, when proceeding with a criminal case before the federal court, must carry out its role as prosecutor to establish in court the facts and infringements of the competition law. The Antitrust Division has the discretion to choose between proceeding with a certain situation either with civil or criminal cases. The anticompetitive conducted behavior plays a central role in this assessment as if the infringement is not significant the Division is most likely to proceed with civil case instead of criminal case and vice-versa.

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<sup>70</sup> The work of FTC is not limited only on the antitrust arena as it also has a bureau of Consumer Protection likewise a bureau of Economics that provides the necessary support to the bureau of Competition.

<sup>71</sup> It is worth noting that this subject was among the institutional structure review of the US law paradigm launched in 2004 by the established Antitrust Modernization Commission (AMC).

<sup>72</sup> See speech of Scott Hammond, Deputy Assistant Attorney General for Antitrust: “*Recent Developments, Trends, and Milestones in the Antitrust Division’s Criminal Enforcement Program*”, speech delivered in the 56<sup>th</sup> Annual Spring Meeting of the American Bar Association Section of Antitrust Law (October 2008, Washington), available at: [www.usdoj.gov/atr/public/speeches/232716.htm](http://www.usdoj.gov/atr/public/speeches/232716.htm).



Both authorities are authorized to investigate and bring enforcement actions for competition law infringement through civil litigation in federal courts.<sup>73</sup> Discretion is also a common feature between the two authorities when it relates to proceeding with the civil cases (and criminal only for the Division) or not based on whether they are convinced that an infringement took place or not. In other words, there is no obligation on the authorities to proceed with all received complaints and initiate cases unless the authorities are convinced that such complaint represents an infringement of the competition law.

A notable difference between the two authorities is that the Antitrust Division can only proceed with civil or criminal cases, while the FTC can issue administrative decisions directly. All FTC decisions are subject to review by the courts of appeals under the deferential standard of review accorded to administrative agencies. This is of a huge importance as will appear later on.

### **iii. Burden of proof under the US competition law paradigm**

As illustrated above, the US has two competition authorities. One of them is part of the executive branch, which is the Antitrust Division. While the other, the FTC, is an administrative agency. The former is granted all the exclusive competence over the criminal cases with a common competence on civil cases with the FTC. In addition, the Division must seek federal courts to extract a decision whether criminal or civil. Thus, the burden of proof regarding the evidence of an anticompetitive situation lays on the Antitrust Division.

On the other hand, the FTC, as an administrative agency, has the right to issue an administrative decision(s) against any enterprise whenever it established the presence of an infringement of the competition law. Hence, such decision(s) are subject to judicial review by the courts of appeals. In such case, the FTC must defend its decision.

One unique feature of the US competition law paradigm that it provides treble damages by private suits according to US Code “[a]ny person who shall be injured in his business or

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<sup>73</sup> See Article 5 of the FTC Act. As established before the criminal infringement exclusive competence is granted to the Antitrust Division.

property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fees."<sup>74</sup>

This wording granting individuals the right to file a claim directly before courts to seek treble damages from the court for any injuries imposed to its business as an effect to antitrust infringement. In such case, the burden of proof lays on the plaintiff.

Accordingly, the burden of proof under the US competition law does not always lay on only one party, instead, it is either on the Antitrust Division or on the individuals who seek private enforcement to compensate the damages they incurred from the infringements of the antitrust law. The private enforcement may be achieved through: i) damages claim,<sup>75</sup> ii) injunctions,<sup>76</sup> iii) class actions,<sup>77</sup> and iv) limitation period.

The reliance on private actions under the US antitrust law regime can be perceived as a positive instrument that carries a considerable advantages whether in terms of providing individuals who are injured from antitrust infringement with an avenue to seek compensation or by offering redress to a wrong specially in cases that the relevant competition authority chooses not to investigate the infringement.<sup>78</sup> In addition, such reliance relieves, in particular, the burden on the Antitrust Division or the FTC to proof presence of a violation within the meaning of the US competition law.

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<sup>74</sup> US Code Title 15, Commerce and Trade. 15 U.S.C., Article 15; "Antitrust Laws" are defined in 15 U.S.C article 12, to be the Sherman Act and Clayton Acts along with their amendments.

<sup>75</sup> By virtue of section 4 of the 1914 Clayton Act, private parties who have suffered loss due to a competition law infringement are granted the right to launch such actions before federal courts. In practice, it can be called treble-damages claim.

<sup>76</sup> Injunctions are one of the private enforcement strands under the US Antitrust law paradigm where it is governed under section 16 of the 1914 Clayton Act to offer equitable remedy for relief.

<sup>77</sup> The class actions are governed by Article 23 of the Federal Rules of Civil Procedures that provides for certification of class action(s).

<sup>78</sup> It is worth noting that in cases publicly enforced, despite the effective and huge penalties it might lead, it does not compensate individuals who suffer injuries resulting from anticompetitive conduct or behavior.

#### **iv. The US Judicial Branch**

The US courts have played such an important role in the US competition law arena due to two main reasons. First, the US antitrust regime is judicially enforced accordingly the courts are granted the required powers to rule on the applicability of competition rules in different situations and to decide on cases. Second, the language on which the US competition law was drafted reveals that it used a broad terms with a common law nature which grants the court the wide discretion in their application of the law.

On the federal level, the district courts are the general competent courts whether on criminal or civil cases. Above the district courts lays the courts of appeals with 11 numbered circuit courts operating on jurisdiction based geographically. The highest court in the US competition regime is the US Supreme Court.

## **2. The EU Competition Law Paradigm**

### **i. The EU legislative Branch**

The EU Competition institution apparatus differs from the US in several aspects. Such differences are caused due to the nature of the Union itself, as it is not a country instead, it consists of different member states that each has its own sovereignty and applicable laws. The legislation was introduced in 1957 by virtue to the Rome Treaty (Treaty of European Community)<sup>79</sup> The Legislative branch for the union became the European Parliament.

### **ii. The EU competition competent authority**

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<sup>79</sup> Precisely Article 81 and 82 of the EC treaty regulated the Competition Law. During this time, there was only six member States. The Treaty of European Union that took place in 1992 replaced this Treaty. The provision regulating the competition law has been changed to be 101 and 102 instead of articles 81 and 82 respectively.

Unlike the US, the EU has only one competent authority when it comes to the enforcement of the competition law within the EU member states. This authority is called the European Commission (hereinafter the “EU Commission”).

The EU commission has been granted all the required powers and independence to ensure the best implementation of the competition policy and law within the EU member states. The vast and various extensive powers granted to the EU commission, by virtue to Regulation 1/2003, include the respond to claims or start its own. The Commissions have the right to require answers to complaints, require documents and any other information it deems necessary to respond in response to investigations. Furthermore, the EU Commission may conduct onsite inspections whether by virtue of a notice or not. The Commissions officials are granted the right to enter premises they suspect contains important documents including private homes and cars.

Moreover, the commission, once proved breaches of the EU competition law, has the right to issue administrative decisions and imposing penalties up to 10 percent of the total worldwide turnover in the business year preceding the breach. Decisions of the Commissions are deemed binding and may only be challenged by the General Court of the EU “GCEU” in which the court has the right to either annul the decision in part or in whole and may increase or decrease the applied penalties.

In addition, the Commission provides guidance to the European community through guidelines and notices. However, the EU competition law, as indicated above, does not have criminal penalties unlike the US Antitrust Law. The EU law differs than the US in an important aspect, which is the sole competence, provided to the commission, as there is no private enforcement or treble damages. In addition, the commission enjoys the exclusive right to investigate and decide upon situations where an infringement of the competition law is suspected. In other words, those who are harmed by competition law infringement in EU have only one path to take which is submitting a complaint to the EU commission. They cannot initiate their own case before courts.

### iii. Burden of Proof under the EU Competition Law paradigm

As indicated above, the EU Commission has the discretion, after investigating the conduct in question, to either issue an administrative decision or to refrain from proceeding with the investigation. If the Commission issued an administrative decision, it is considered enforceable. However, the party that was held liable according to the commission's decision is granted the right to challenge the decision in question before the European Courts. In such case, he becomes the plaintiff and the burden of proof rests on his shoulders as he have to establish before the court that his conduct or behavior is not construed to make an infringement with accordance to the EU competition law. However, it is important to note that the General Court of EU in the case of *European Night Services v. Commission*<sup>80</sup> illustrated that the Commission is obliged to set out the facts and considerations having relevant importance of its decisions. The Court added, that despite the Commission is not required to discuss the facts and issues of law and the consideration which led to issuing the decision in question, it is required by virtue to the Treaty to clarify to the Court and the concerned enterprises the circumstances on which it applied the EU competition rules. Hence, when any Commission decision lacks important analytical data that enables the Court to assess the existence of an appreciable effect, the court might annul the Commission's decision. This is exactly what happened in *Airtours plc v. Commission*,<sup>81</sup> the General Court annulled the Commission's decision because the Commission did not supply a sufficient evidence to support its decision.

Those two particular cases indicate that although the Commission might have the right to issue an administrative decision, it should provide: a) the required analytical data in which it assessed the appreciable effect of the conduct in question; and b) the evidence supporting its outcome decision. Therefore, the burden of proof under the EU is on the Commission. In this sense, the Commission's decision can be perceived as the equivalent of the US FTC's decision(s) as both are subject to judicial review. However, a drastic difference is that the EU commission is granted, by the ECJ, the opportunity to strengthen its grip on the EU competition law enforcement.<sup>82</sup>

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<sup>80</sup> Cases T-374-5 and 388/94 [1998] ECR II-3141 CMLR 718.

<sup>81</sup> Case T-342/99, *Airtours plc v. Commission* [2002] ECR II-2585.

<sup>82</sup> For more information on this, see J.Goyder, *EC Competition Law* (oxford University press, 2002), at 578-81.

#### **iv. EU Judicial Branch**

The EU Judicial apparatus composes of the General Courts of the EU (GCEU) that was established in 1989 to ease the workload of the European Court of Justice (ECJ) and to provide a first instance judicial review to the challenged decisions of the EU Commission. The GCEU has the right either to confirm the Commission's decision or to annul it whether partially or in its entirety.

The ECJ is the highest court in the judicial system and in relation to competition law, it plays the role of the appellate court. The ECJ also have the right to annul the GCEU judgment whether partially or entirety; or to confirm the judgment.

### **3. The Egyptian Competition Law Paradigm**

#### **i. The Egyptian Legislative Branch**

The Egyptian competition law institutional apparatus differs drastically from the US and EU counters in several aspects. Such differences can be perceived from the formation of the competition law regime itself as detailed below. The Egyptian Parliament approved the Law No.3 of 2005 promulgating the Law on Protection of Monopolistic Conducts on the 15th of February 2005.<sup>83</sup>

#### **ii. The Egyptian competition law competent authority**

The Egyptian Competition Authority ("the ECA") was formed in 2005 by virtue of the Prime Minister Decree No. 1316 of 2005 promulgating the Egyptian competition law executive regulation.<sup>84</sup> This regulation stipulates the powers granted to the ECA to execute and fulfill the duties assigned to it whether by virtue to the Law or the Regulation. The ECA enjoys wide-ranging powers with regard to the application of the law. Similarly to the EU Commissions and both US competent authorities, the ECA has the right to receive complaints, conduct

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<sup>83</sup> Promulgated in the Official Gazette No. 6 (bis) on 15th of February 2005 and entered to force on 15 of the same month 2005.

<sup>84</sup> Promulgated in Official Gazette No. 32 (bis) on August 17 of 2005 and entered into force on August 18 of 2005.

investigations, inspection, collect information and issue administrative decisions<sup>85</sup> regarding illegal anticompetitive conducts. During the investigation process, some of the ECA chosen staff might have the status of law enforcement officials to enable them to reach documents and reports of governmental and nongovernmental entities. Article 17 of the Egyptian competition law stipulates that “The employees of the Authority, who shall be specified by virtue of a decree issued by the Minister of Justice, in agreement with the Competent Minister and upon the recommendation of the Board, shall be granted the status of law enforcement officers in applying the provisions of this Law.”<sup>86</sup>

It is worth noting that this status is not granted to all the ECA employees due to their capacities, but it is granted upon; first the recommendation of the board and, second, the agreement of the competent minister; and third, the decree issued by the Minister of Justice upon his agreement.<sup>87</sup> This is an important drastic difference that distinguishes the ECA granted powers compared to both the US Antitrust division and the EU Commission staff who are granted the status of law enforcement officials due to their capacities. It is also worth noting that the Egyptian law does not impose criminal penalties. In this sense it is different than the US Sherman Act and similar to the EU competition law.

### **iii. Burden of Proof under the Egyptian Competition Law Paradigm**

It is essential to illustrate that when it comes to launch the proceeding of the criminal case, the ECA’s hand are tied. According to Article 21 of the Egyptian Competition Law, the

Criminal lawsuits or any procedure taken therein shall not be initiated in relation to acts violating the provisions of this Law, unless a request of the Competent Minister or the person delegated by him is presented. The Competent Minister or the person delegated by him may settle with regard to any violation, before a final judgment is rendered, in return for the payment of an amount not less than double the minimum fine and not exceeding double its maximum. The settlement shall be considered a waiver of the criminal lawsuit

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<sup>85</sup> It is worth noting that the administrative decisions issued by the ECA are of a non-binding nature and may not introduce any sanction. In this sense, it can be perceived as an advisory decision.

<sup>86</sup> Article 17 of the Egyptian Competition Law No. 3 of 2005. Amended in 2014, but this amendment did not change the fact that status of law enforcement officers granted to the ECA employees as the same conditions still apply for granting them this status.

<sup>87</sup> See also Article 26 (D) of the executive regulation regulating the process of recommending the names of certain ECA employees who are chosen by the board to have the status of law enforcers’ officials.

filing request and shall result in the lapse of the criminal lawsuit relevant to the same case subject of suing. May not be a criminal proceeding or action in relation to the acts contrary to the provisions of this law unless a written request from the Prime device management based on the approval of a majority of its members.<sup>88</sup>

In light of this wording, the ECA lacks the independence to proceed with the criminal law suit as this right is exclusively granted to the competent minister or the delegated minister.

In light of the forgoing, even if the ECA succeeded to proof the presence of a prohibited agreement within the extremely narrow meaning of Article 6 of the Egyptian competition law, it cannot issue a binding administrative decision applying the sanctions stipulated in the law and ironically, it cannot either launch the proceeding of the criminal case. In light of the foregoing, it appears that the ECA suffers from an extreme marginalization for its role within the competition law regime. Such marginalization detracts the ECA's independence in an unprecedented way. The significant narrow wording of the Egyptian evidence rule regarding the horizontal agreements along with the ECA's lack of independence confirms that the Egyptian competition law is placing itself in an isolated island abandoning the global competition law flock.

#### **iv. The Egyptian Judicial Branch**

The Egyptian Competent Court regarding the enforcement of the Competition Law is the Egyptian Economic Court by virtue of Law No. 120 of 2008 on the Establishment of the Economic Courts.<sup>89</sup>

The Economic Courts are mainly composed of two chambers or circuits. The first instance chambers and chambers of appeal both chambers are granted the jurisdiction of criminal actions resulting from the crimes provided in the Competition Law. Without prejudice to the cases that are within the jurisdiction of the State Council, the first instance chambers of the Economic

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<sup>88</sup> Article 21 of the Egyptian Competition Law N o.3 of 2005. The author is intentionally focusing on this Article before the 2014 amendment.

<sup>89</sup> Article 4 (14) of Law No. 120 of 2008 Establishing the Economic Courts of Egypt. Entered into force on October 1<sup>st</sup>, 2008. During the period from 2005 to October 2008, the general courts of Egypt were the competent courts according to the geographic jurisdiction.



Courts have the jurisdiction on disputes whose value does not exceed 5 million Egyptian Pounds and that result from application of the following laws, while the appeal chambers have the jurisdiction on case that exceed 5 million Egyptian Pounds.<sup>90</sup> Finally, the Court of Cassation is the highest court on the Egyptian judicial branch.

### **C. Competition Law Immunity System**

The immunity system (also called the leniency program) in the competition law realm means that whoever report or confess, to the competent competition authority, the presence of anticompetitive behavior should be entitled to a waiver from the legal liability conditioned that the submitted information and documents were effective to the authority during the investigations process. This is construed to be one of the most effective tools granted to the competition authorities for detecting competition law infringements. However, Egypt again, did not take into consideration whether the US or the EU developed competition rules regarding this subject matter and it has established a new leniency program that confirms that it remains in deviation with the best practices approach.

#### **1. US Leniency Program**

The US has adopted the leniency program for the first time in 1978 and substantially revised the program with the issuance of a Corporate Leniency Policy in 1993 as well as the Leniency Policy for Individuals issued in 1994.<sup>91</sup> Through the Division's leniency program, an enterprise can avoid criminal liability and imposition of fines, while individuals can avoid criminal liability, prison sentences, and imposition of fines, conditioned of being the first to confess involvement participation in a criminal antitrust violation, fully cooperating with the Division, providing effective information and meeting the six specified requirements under the policy. The same leniency can be extended to the corporate directors, officers, and employees. The importance of such policy is the encouragement it presents for enterprises that have been participating in an anticompetitive conduct or agreement, that infringes the competition law, by providing a waiver

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<sup>90</sup> *Id.*, Article 6 (1).

<sup>91</sup> The Department of Justice Antitrust Division's Corporate Leniency Policy and Leniency Policy for Individuals. Both are *available* at <http://www.justice.gov/atr/public/criminal/leniency.html>.

from the legal questioning of such infringement. The six listed requirements for benefiting from the policy ensures that the whistle blower do not evade the penalties if the process of evidencing the infringement by the division was almost concluded.

## **2. EU Leniency Program**

The EU started its leniency or immunity program since 1996. In 2002, a new commission notice was issued to govern the enforcement of such leniency program. Currently, the EU is working on its last issued commission notice that was issued back in 2006. However, this part will focus only on the 2002 notice, as it was the effective one when the Egyptian competition law was issued. According to the 2002 commission notice Article 8,<sup>92</sup> there should be two different programs. The first is full waiving from the sanctions and it is called “immunity from fines”, while the second is referred to as the “fine reduction program”, where the reporter benefits only from a reduction in the sanction. The “immunity from fines” reads as follows:

The Commission will grant an undertaking immunity from any fine which would otherwise have been imposed if: (a) the undertaking is the first to submit evidence which in the Commission’s view may enable it to adopt a decision to carry out an investigation in the sense of Article 14(3) of Regulation No 17 in connection with an alleged cartel affecting the Community; or (b) the undertaking is the first to submit evidence which in the Commission’s view may enable it to find an infringement of Article 81 EC in connection with an alleged cartel affecting the Community.

While the “reduction in fine” program reads as follows: “Undertakings that do not meet the conditions under section [A] above may be eligible to benefit from a reduction of any fine that would otherwise have been imposed.”<sup>93</sup>

It is revealed from this wording that the EU intention was to encourage the cartel participants to whistle blow this cartel and benefit either from a full “immunity from fines” or “reduction in fine” in return. The detailed criteria that qualify the reporter to either program will not be

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<sup>92</sup> Commission notice on immunity from fines and reduction of fines in cartel cases (2002/C 45/03). Promulgated in the European Community Gazette (Official Journal of the European Communities) on February 19, 2002.

<sup>93</sup> Id.

examined as they fall outside of this paper's scope. The aim of this part is only to highlight the differences between the EU and Egypt Immunity Programs under the competition law to establish concrete analogical evidence that Egypt did not follow the mainstream competition law and it putting itself in a different isolated place.

### **3. Egypt's Leniency Program**

Astonishingly, the Egyptian competition law when it was adopted in 2005 did not have any immunity or leniency policy. This means that while the US started its leniency program back in 1978 and the EU back in 1996, while Egypt's competition law did not implement such program in the law when firstly adopted in 2005. It was not until June 2008, that Egypt firstly introduced its leniency program by virtue of the law No. 193 of 2008.<sup>94</sup> By virtue of this addendum, only one and sole leniency policy was introduced. This policy consists of a 50 percent waiver from applicable sanctions for only the first reporter.<sup>95</sup> Moreover, the relevant court is to assess the significance of the submitted evidence and shall either grant the reporter with the 50 percent sanctioning waiver or refrain according to its will and assessment.

In addition, it is worth noting that even when the leniency article was firstly introduced in 2008 after three years of competition law implementation, the leniency was only for 50 % of the applicable sanctions and fines. The 50 % liability is incompatible with the basic objective behind adopting a leniency policy in the first place, which is encouraging the infringing parties to seek redemption without being subject to legal sanctions and fines. Therefore, it appears from the original text's wording that Egypt did not even mention the leniency policy and when it adopted it, it was in a form that drastically and significantly deviated from the global competition law flock.

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<sup>94</sup> Law No. 193 of 2008 Adding New Article (26) to the Law No, 3 of 2005 Promulgating the Law on the Protection of Competition and the Prohibition of Monopolistic Practices. Promulgated on the official gazette issue 25 (bis-B) on June 22, 2008 and entered into force as of June 23 of 2008.

<sup>95</sup> Important acknowledgment that in accordance to the 2014 amendments, the immunity program of Egypt became a full waiving in which the whistle blower may not be joined in the criminal proceedings. However, to fulfill the needs of this paper, it is important to examine the original text as occurred during the first years of the law adoption.

## D. Comments

As can be seen from the above analysis, the Egyptian competition law drastically differs than the EU and US regarding the enforcement of competition rules in several levels. Firstly, as indicated above, Egypt has adopted an extreme narrow wording when it comes to proofing the presence of a horizontal anticompetitive agreement to oral and written agreements only. The Law omitted from including well-known tacit agreements and collusion practices that are most likely to take place to evade being illegal agreements within the scope of competition laws. *Adam Smith* in his book “*Wealth of Nations*” stated that [p]eople of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices. It is impossible indeed to prevent such meetings, by any law which either could be executed, or would be consistent with liberty and justice. But though the law cannot hinder people of the same trade from sometimes assembling together, it ought to do nothing to facilitate such assemblies; much less to render them necessary.”<sup>96</sup>

According to wording of the Egyptian competition law and its executive regulation, it is revealed that the Egyptian Competition Law only recognizes the proof of any illegal agreement or contract whenever they are either in written or oral forms. This strict and narrow wording ties the hand of the ECA from proving other forms of anticompetitive behaviors. Such anticompetitive behaviors can be concluded through “tacit collusion”, “concerted practices”, and “conspiracy” not only through an “agreement”. In fact, the wording of the Egyptian law omits any reference to such behaviors and concepts. This omission is problematic as in practice the authority is bound to work within the powers granted to it by virtue of the law. In such case, the law limits the ability of the Egyptian Competition Authority to reveal and detect situation of collusion. In fact, the competition authority should be granted, by virtue of the law’s wording, additional concepts or tools to prove the existence of anticompetitive behaviors, other than the oral and written. This narrowness and omission in the wording resulted in making it practically impossible for the competition authority to prove collusions, concerted practices, and conspiracies. This wording contributed in increasing the barriers of the already difficult Competition Authority task to

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<sup>96</sup> Adam Smith, *Supra* note 1 at 201.

prevent such behaviors from being concluded as stated by Adam Smith, two centuries ago, regarding the impossibility of preventing meetings and thus agreements between competitors to “conspire” on the public to maximize their own welfare. On the other hand, the US seems to wisely take precautions towards Adam Smith’s warning regarding meetings that conclude in conspiracy, which can justify the Sherman’s Act wording regarding the prohibition of anticompetitive agreements that explicitly added the term “conspiracy” to the prohibited conducts besides the agreements. The EU as well introduced the notion of concerted practices to cut the road before such collusion and conspiracy.

Second vital and importance difference lays within the identification of the prohibited agreements and behaviors as stipulated in both US, EU, and Egypt competition rules. While the Egyptian Competition Law, in Article 6, provides an exhaustive list of agreements to be prohibited *Per Se* when it used the term “any of the following”, the EU on the other hand widened the scope, again, and provided a non-exhaustive list of Agreements. The US did not provide a list of agreements at all, instead it used general provision wording as it was drafted on a common law form. Upon judicial implementation, the US courts developed a differentiation of the hardcore agreements and other agreements. In case of Egypt, the law omits to include other agreements than the hardcore agreements even if adjudicating such agreements under the rule of reason approach. Meaning that the ECA should prove the anticompetitive agreement either in written or oral forms and the agreement’s subject should fall within the provided exhaustive list.

Third, by virtue of the law’s wording, the ECA lacks the independence and support that enables any competition authority from fulfilling its obligations. In contrast of the competent authorities in US and EU, the ECA is characterized by the following: i) it cannot issue a binding administrative decision even if it is subject to judicial review, ii) not all of the ECA’s employees and staff enjoys the state of law enforcers in a contrast with the US and EU officials who are given such status by virtue of their capacities; iii) ECA cannot launch the criminal proceeding by itself.<sup>97</sup>

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<sup>97</sup> According to the original text of the executive regulation before the 2014 amendments.

Finally, the Egyptian law adopted, in a drastic deviation from the global practice, a leniency program that discourages the infringer(s) from reporting their violation to the applicable competition rules as they will be liable to 50 % of the applicable fines.<sup>98</sup>

It is now established that there is a problem within the Egyptian competition law regime and that the wording of the law is responsible for the Egyptian competition law weak enforcement. However, the relevant question is why the provisions of the Egyptian competition law were drafted on such way. If we contested the two mainstream theories, the pre-enactment and the post-enactment, we cannot find an analogical proof for the Egyptian weak enforcement. While the Egyptian law is contextualized, it appears from the above analysis that it contextualized its law in a way that cannot be explained under the pre-enactment theory. It is neither transplanted nor contextualized to fit its context. In addition, the post-enactment theory, which alleges that the main reason of weak enforcement in developing countries lies within the weak enforcement mechanisms and institutions they have, cannot also justify the weak enforcement of the Egyptian law. To illustrate, let us assume that the EU commission with all of its expertise, funds and strong technical infrastructure has to work with the wording of the Egyptian competition law and within the limited independency provided by its wording, it is unlikely to fail in reach an effective enforcement. Therefore, the post-enactment theory cannot explain the weak enforcement of the Egyptian competition law.

Accordingly, as both mainstream theories failed to provide explanations of the enforcement failures, it is most likely because they underestimated the importance of the political determinants role. Therefore, to better understand the reason(s) behind this wording that places the Egyptian competition law in an isolated place, we should examine the political determinants that substantially contributed to the Egyptian law isolation.

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<sup>98</sup> Article 26 of Law No.3 of 2005. This article was added by virtue of Law. No. 193 of 2008.

#### **IV. Why is the Egyptian Competition Law Singing outside the Flock: The Role of Political Determinants**

As established earlier, the Egyptian Law is not a transplanted model as it omitted important concepts of western competition laws, such as the concerted practices, tacit collusion, and conspiracy between the competing undertakings. In addition, the law deprived the ECA from the required independency to fulfil its tasks. The introduced partial immunity system discourages potential whistle blowers to approach the ECA, which adds more difficulties on the enforcement level. Due to all of these differences between the Egyptian Law and EU and US legislations, it is clear that no transplantation took place. Therefore, the logical analogy is that Egypt's competition model is a contextualized one. To reveal why it is contextualized in such manner, we have to examine it with the context theory.

As we have seen in chapter I, the context theory advocates that the contextualizing state should ensure that the economic and political context is taken into consideration during the contextualization process. Therefore, we should give a brief on the Egyptian economic and political context before and during the enactment phase. Afterwards, the political determinants factor will be added to the equation to understand both questions why the ruling regime was motivated to introduce a competition legislation and why it has intentionally ensured that the law is destined to wane before it sees the light.

##### **A. Economic and Political Paradigm**

Since the 1952 Military coup, the new republic regime started a programmed and organized expropriation program that transforms the titles of the lands, factories, buildings, and companies from private individuals to the republic. During this stage, the Egyptian government played a significant role in the economy that inevitably became without any competition from private sector. In 1952, the contribution of the private sector was estimated by 76 % of the total investments.<sup>99</sup> During the 1960s, the estimation of private sector contribution dramatically

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<sup>99</sup> See Mourad Griess, *The Effectiveness of the Enforcement Activity of Egyptian Competition Law*, 7 MEDITERRANEAN COMPETITION BULLETIN, 3 (2012); available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2167610](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2167610).

decreased by a significant way to constitute only 10 % of the total investments made in Egypt.<sup>100</sup> It is highly illustrated that such state monopolization over almost all market sectors made the idea of adopting competition law was not a plausible idea.

The Egyptian economy is usually defined, since then, as a rentier economy due to its dependence on the rents of either natural resources or its Suez Canal, Tourism, remittances of Egyptian workers abroad, and foreign aids.<sup>101</sup> By mid of the 1980s, the Egyptian economy experienced a dramatic depression due to the crash of oil prices in 1985-86 and hence structural reforms became inevitable.<sup>102</sup> Undoubtedly, this fact created an urging need for economic reform as well as seeking a stabilizing mechanism.<sup>103</sup> In an attempt to overcome the mentioned depression, Egypt adopted an economic reform and structural adjustment in 1991. This program was led by the International Monetary Fund (hereinafter “IMF”) and with the contribution of the World Bank. According to the IMF statement in 1991, the program aimed to “create, 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”<sup>104</sup>. This program as illustrated from the IMF above statement, paved the road for the reintroduction of private sector within the Egyptian market on the expense of the public sector. This means that the Egyptian government should start a systematic privatization program in which the public state owned enterprises are sold to private investors.

However, such reform program is likely to weaken the ruling regime’s grip over the political sphere. As *Samer Soliman* stated “Egypt’s authoritarian regime was heavily dependent on the state’s financial assets to sustain its monopoly on power. These resources were dwindling, and, in order to compensate, the regime was forced to turn increasingly to more politically risky economic policies. *Sufyan Alissa* adds at this time, “Egyptian political elite recognized the desirability of reforms but were concerned that these reforms if conceivably taken too far, could

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<sup>100</sup> *Id.*, at 6.

<sup>101</sup> SAMER SOLIMAN, THE AUTUMN OF DICTATORSHIP FISCAL CRISIS AND POLITICAL CHANGE IN EGYPT UNDER MUBARAK 3 (Peter Daniel Trans., Stanford University Press, 2011) (2006); HAZEM BEBLAWY, THE ARAB STATE, chapter 4 “The rentier State in the Arab World”, 86 (1990)

<sup>102</sup> *Id.*, SAMER SOLIMAN, at 164; Sufyan Alissa, *The Political Economy Reform in Egypt: Understanding the Role of Institutions*, 5, CARNEGIE MIDDLE EAST CENTER, 4 (October 2007).

<sup>103</sup> See Bahaa Ali El Dean and Mahmoud Mohieldin, *On the Formulation and Enforcement of Competition Law in Emerging Economies: the Case of Egypt*, 60, EGYPTIAN CENTRE FOR ECONOMIC STUDIES (2001).

<sup>104</sup> International Monetary Fund, Washington, Arab Republic of Egypt-Recent Economic Development, (1991).



undermine their own power... [t]he regime was aware that fundamental changes in the structure of the public sector and...privatization process would threaten its support base.”<sup>105</sup>

In its attempt to avoid minimizing its own power and monopoly over the state, Mubarak’s ruling regime, started the transformation of the government driven socialist market to a capitalist free market. In this era, the state monopolization over the Egyptian market, have simply been replaced by private monopolization.<sup>106</sup> The economic benefits and the accumulated wealth were systematically allocated for a small minority to acquire its control not only for the mentioned benefits, but also for the accompanied stable economic growth.<sup>107</sup> This small, but powerful minority, the oligarch, who mostly own large businesses, were the major beneficiaries of the economy. The oligarch acquired their economic control, and wealth through systematic corruption and state favoritism.<sup>108</sup> Due to the oligarch monopolization over the Egyptian economy, it became of a concentrated nature. One of the characteristics of the Egyptian market is the oligarch who runs different sectors of the economy. The lack of political liberation under the ousted Mubarak regime resulted in the monopoly of the political arena as well. During this era, Mubarak used to adopt systematic appointments for the highest positions in the state, whether in legislative or executive authority, which focused only on the loyalty to the regime while discarding the expertise and qualifications from the appointments ‘criteria. This is a *cronyism* and *nepotism* approaches in governmental political appointments.

*Soliman* stated that with the:

[g]rowing power and influence of the capitalist class, it becomes easier to understand why more and more prominent businessmen have been occupying key political positions. The distribution of political positions in Egypt obeys a precise equation that reflects the relative weight of various groups in the regime. If army officers obtain a percentage of top posts (governorships, for example), this mirrors the weight of the armed forces. That businessmen are garnering a share of top posts reflects the regime’s acknowledgement of the growing weight of this community for the first time since the inception of the 1952 order.

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<sup>105</sup> *Id.*, Sufyan Alissa, at 8.

<sup>106</sup> Maher M. Dabbah, INTERNATIONAL AND COMPARATIVE COMPETITION LAW, *supra* note 4 at 275. [Mentions in his book that presence of competition law in the domestic market would simply guarantee that state monopolization would not be transformed to a private one]; see also, C.D. Ehlermann and L.L. Laudati, *European Competition Law Annual 1997: Objectives of Competition Policy*, 150-1 (1998)

<sup>107</sup> See Mourad Griess *Supra* note 99 at 18.

<sup>108</sup> *Id.* at 18; see also Magda Kandil, *The Egyptian Economy Post January 25th: Challenges and Prospects*, ECES-Publications (May 2001); available at <http://www.eces.org.eg/Publication.aspx?Id=324>.

Moreover, the process picked up... in the ... 2004 ... government brought on board three businessmen as ministers of industry, transportation, and tourism.<sup>109</sup>

On the political level, it is more likely that the minority of oligarch/businessmen will aside with the ruling regime's politics if it is threatened that political liberation might bring political forces that might harass its interests.<sup>110</sup> Simultaneously, the ruling regime will tend to contain the oligarch to exploit its growing economic and human resources to stabilize its throne. This can be illustrated from the 2000 and 2005 Parliament, as stated by *Soliman*, "[P]eople's Assembly elections in 2000 and 2005 indicate that when electoral fraud is curtailed, businessmen's parliamentary fortunes improve. It follows that, since Egyptian capitalism is already present in the assembly and is capable of increasing its share of seats, it would have little problem with a reduction in the powers of the executive and the establishment of a strong parliamentary order. The electoral experiences have shown that a candidate's best guarantee for securing a parliamentary seat resides in his ability to provide services for his constituents. This ability derives either from his money or his government connection."<sup>111</sup> During this time, most of the oligarch/businessmen joined the National Democratic Party "NDP", Mubarak's party that is headed by his son Gamal.

The internal political forces have changed and a redistribution of power took place. The oligarchs succeeded to force them self in the equation as one of the centers of power. As described by *Soliman*, "the patrons are no longer the bureaucratic and military elites; businessmen are now swelling their ranks."<sup>112</sup> Mubarak's regime before adopting competition law, rested on an alliance concluded between the ruling regime, the NDP, and oligarch.<sup>113</sup>

*Soliman* described this change on the political level by stating:

[t]he chief formula for political change is a political marriage between the state bureaucracy and capitalism under the umbrella of the regime and the

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<sup>109</sup> SAMER SOLIMAN, *Supra* note 101 at 150.

<sup>110</sup> *Id.* at 150.

<sup>111</sup> *Id.* at 152.

<sup>112</sup> *Id.* at 169.

<sup>113</sup> *Id.* at 161.

NDP, in particular. This formula has already obtained the approval of the sector of the capitalist class that is most closely connected with the regime.<sup>114</sup>

Several ministers' cabinets were accompanied with active oligarch/businessmen. Gamal Mubarek and Ahmed Ezz the well-known Steel monopolist producer ruled the National Democratic Party "NDP". The NDP monopolized the parliament (the legislative body in Egypt) with no competition to be remembered. The NDP exercises and the conflict of interest between its representatives as legislator and executives in one hand and as businessmen who are still active within the economic and market arena on the other hand was catastrophic on the economy development.<sup>115</sup> This means that the Egyptian political and market sphere was characterized during Mubarak's regime with cronyism, concentrated market, state favoritism, corruption, maldistribution of wealth, lack of political independence and fair economic participation. It is not surprising that such ruling regime will even think of adopting a competition law paradigm in which it can abolish or limit some of the above practices as it will decrease the state preferred enterprises and this will inevitably create a disorder to the vision of this regime with regard to the wealth and power distribution. In the words of *Maher Dabbah*, "[i]n some parts of the world the idea of having competition is taken to mean a reduction in the power and influence of those few individuals or families controlling specific sectors of the local economy; it is therefore a highly undesirable and disliked idea"<sup>116</sup> to adopt a competition law domestically. This means that the ruling regime has been giving an insufficient and inadequate recognition to the value of competition principle as an essential and foundational stone for the free market economy that leads to the economy development.<sup>117</sup>

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<sup>114</sup> *Id.*, at 154

<sup>115</sup> All of these practices led the public to rise against the NDP and Mubarak regime in the 2011 revolution. The plan of inheriting the throne to Gamal Mubarak as an official heir of the throne within a republic state has contributed to the rise of the people.

<sup>116</sup> MAHER M. BABBAAH *Supra* note 4 at 8.

<sup>117</sup> *Id* at 289.

## **B. The Emergence of Egyptian Competition Law and the Role of Political Determinants**

The logical question that must be answered is why such authoritarian regime even thought of introducing a competition law in the first place. The answer is very simple; it is because of the pressures exerted by two different forces (internal and external). The internal pressure is represented in the Egyptian economic fragile status (ex: high unemployment rates, inflation, etc.) that resulted, in part, from the highly concentrated market levels. Due to this fragile economic status, the ruling regime was forced to take further actions to attract foreign direct investments (FDI). The fact that foreign investors will directly invest and pump huge foreign capitals to the Egyptian market is unlikely to occur without providing the same level of competition protection that they are acquainted to in their home countries.

The other force is represented in the external pressures<sup>118</sup> used by its international trade partners. It is well established, that cross borders trade partners highly influences the competition law scene within developing states.<sup>119</sup> Generally, in developing countries, the usual governments trend is to accommodate western interests, this trend forms the parameters of the competition law and policy if the developing country took the submission path to such pressures.<sup>120</sup> Keeping in mind that Egypt is depending heavily of financial aids as one of its rentier economy. Ironically, both factors, domestic high concentrated market levels and external trade partners' pressures, contradict with regard to their influence on the competition law model to be chosen by Egypt

In the Egyptian case, the external trade partner was the EU. The Egyptian – EU trade relations firstly commenced in 1977 by signing the General Cooperation Agreement.<sup>121</sup> This Agreement prevailed until 1996. During its term, a preferential trade relationship was provided.<sup>122</sup> Egypt, by

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<sup>118</sup> Mourad Griess, *supra* note 99, at 4; *see* MAHER M. BABBAH *supra* note 4 at 361-62 for more information regarding the influence of the trade policy arena on developing countries decision to adopt competition legislation.

<sup>119</sup> MAHER M. BABBAH , *supra* note 4 at 361.

<sup>120</sup> For more information regarding the trade policy arena influence over competition laws of developing countries, *see* MAHER M. BABBAH, *supra* note 4, at 361

<sup>121</sup> Declaration by the EU on the 1977 EU-Egypt General Cooperation Agreement is *available* at [http://europa.eu/rapid/press-release\\_MEMO-95-2\\_en.htm](http://europa.eu/rapid/press-release_MEMO-95-2_en.htm) .

<sup>122</sup> For information regarding the 1977 Agreement is *available* at [http://europa.eu/rapid/press-release\\_MEMO-95-2\\_en.htm](http://europa.eu/rapid/press-release_MEMO-95-2_en.htm),

virtue to this Agreement, was granted a non-reciprocal free market access to the EU market place for all industrial exports excluding clothing and textiles.<sup>123</sup> There was no requirement or mentioning for the need of competition legislation, not until the 1995 Barcelona Conference when negotiations of Association Agreements took place that the competition legislation subject was brought to the light.<sup>124</sup> The aim of Barcelona negotiations is to establish a strong and coherent understanding between the parties to adopt a free trade area (FTA) between the EU in one hand, and the Mediterranean neighbors in the other hand by no later than 2010.<sup>125</sup> The outcome of the excessive serious of negotiation was the bilateral Euro-Mediterranean Association Agreement with the EU and each of the Mediterranean neighboring countries.<sup>126</sup>

The EMAA with Egypt come into effect in July 2004.<sup>127</sup> During this time, Egypt did not have any competition law in place. The EMAA gave Egypt a provisional period of five years to implement some of its obligations, amongst them was the adoption of competition law provisions.<sup>128</sup> Not only this, but Article 72 of the EMAA stipulated that a “financial cooperation package shall be made available to Egypt” focused among others on “the accompanying measures for the establishment and implementation of competition legislation.”<sup>129</sup> This article indicates that Egypt must fulfill certain obligations as a prerequisite condition for receiving a cooperation package from the EU, its external trade partner. In addition, Article 34 (1) of the same Agreement states:

[T]he following are incompatible with the proper functioning of the Agreement, insofar, as they may affect the trade between the [Union] and Egypt:

- (i) All agreements between undertaking, decisions, by associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction, or distortion of the competition of competition;

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<sup>123</sup> Mourd Griess, *Supra* note 99 ,at 6

<sup>124</sup> *Id.* at 6; more information regarding the Barcelona Negotiation is available at [europa.eu/rapid/press-release\\_MEMO-01-101\\_en.pdf](http://europa.eu/rapid/press-release_MEMO-01-101_en.pdf)

<sup>125</sup> *Id.* at 6.

<sup>126</sup> M. Montanari, *The Barcelona Process and the political Economy of Euro-Mediterranean Trade Integration*, 45 JOURNAL OF COMMON MARKET STUDIES, 1011 (December 2007).

<sup>127</sup> Euro-Mediterranean Association Agreement, EU-Egypt, Apr., 21, 2004, 2004/635/EC; available at [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2004.304.01.0038.01.ENG&toc=OJ:L:2004:304:TOC#L\\_2004304EN.01003901](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2004.304.01.0038.01.ENG&toc=OJ:L:2004:304:TOC#L_2004304EN.01003901)

<sup>128</sup> *Id.*, Article 34 (2).

<sup>129</sup> EU-Egypt EMAA, *supra* note 127, article 72.

- (ii) Abuse by one or more undertakings of a dominant position in the territories of the Community or Egypt as a whole or in a substantial part thereof;
- (iii) Any public aid which distorts, or threatens to distort, competition by favoring certain undertakings or the production of certain goods.<sup>130</sup>

It is well established from this wording that anticompetitive agreements, even if in the shape of concerted practices, abusive practices, and public aids that does not have a negative effect on the trade between the EU and Egypt shall be subject to domestic competition law jurisdiction according to the place where the anticompetitive conduct has taken place. In light of this, it is obvious that the EMAA competition prohibition regarding the anticompetitive agreements and conducts followed the footsteps of the TFEU rules by adopting the rule of reason approach regarding such agreement and conducts. The EMAA in Article 34 (2) presented important declarations from both parties. The EU unilaterally makes the first declaration and it reads as follows:

The [Union] declares that, until the adoption by the Association Council of the implementing rules on fair competition referred to in Article 34 paragraph 2, in the context of the interpretation of Article 34 paragraph 1, it will assess any practice contrary to that Article on the basis of the criteria resulting from the rules contained in Articles (101, 102 and 107 of the Treaty on the Functioning of the European Union).<sup>131</sup>

The second declaration made under Article 34 (2) was collectively made by both parties and it reads as follows:

The Parties recognize that Egypt is currently in the process of drafting its own competition law. This will provide the necessary conditions for agreeing on the implementation rules referred to in Article 34 (2). While drafting the law, Egypt will take into account the competition rules developed within the European Union.<sup>132</sup>

This declaration explicitly requires Egypt to consider the EU competition rules while drafting the Egyptian competition law model for the aim of convergence between the trade partners. This is an open invitation for transplantation of the EU competition law norms in the general sense, or

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<sup>130</sup> Article 34 (1) of the Euro-Mediterranean Agreement Establishing an Association between the EU and its member states on one hand, and the Arab Republic of Egypt on the other hand.

<sup>131</sup> EU-Egypt EMAA, Article 34 (2) European Community declaration.

<sup>132</sup> *Id.*, collective Declaration made by Egypt and EU under Article 34 paragraph 2.

that Egypt's competition law must be at least influenced by or converged to the EU competition law rules. By contesting the wording of Article 34 (1) of the EMAA with Egypt, it is easy to see the transplantation of the EU competition law, precisely Articles 101, 102, and 107 in the TFEU.<sup>133</sup> It is obvious that the EU competition law as transplanted in the EMAA Article 34 (1), is to be applied even if the anticompetitive behavior, agreement, or conduct took place within the Egyptian jurisdiction.

This fact can be perceived as the motive behind the acceleration of adopting competition legislation in Egypt to avoid the EU competition law implementation within the Egyptian jurisdiction for long a period of time. This fact responds to the first question on why did Egypt, among several developing countries, suddenly adopted competition law. One may say, that the EMAA provision of implementing the EU competition laws even on cases within the Egyptian jurisdiction is the reason behind the short period between the EMMA commenced on April, 2004 and the adoption of the first Egyptian competition law on February, 2005.

However, as established in the previous chapter, the Egyptian law's provisions did not transplant nor did it consider the US and EU competition rules not even when it was required to consider the EU competition rules by virtue of the EMMA. This seems to be ideal, as the competition law should benefit from the international norms and provisions applied in practice while corresponding to its own context. In other words, a competition law should be home grown rather than exported. However, the Egyptian Law disregarded the important rules and concepts of tacit collusion, conspiracy, and concerted practices as forms of anticompetitive agreements; simultaneously, it introduced a partial discouraging immunity system for whistle blowers and finally the law deprived the ECA from the required independence to fulfil its obligations. The Presence of such rules is unlikely to correspond to the Egyptian concentrated market and thus it will not achieve the expected developmental targets. Thus, the contextualization of the Egyptian law was not aiming for responding to its fading economy, concentrated market, maldistribution of wealth, and the increased rates of poverty.

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<sup>133</sup> Refer to chapter III to see the wording of article 101 (previously 81).

The only logical justification on why did the law omitted such important rules and concepts, is the presence of the reality constraints offered by the Egyptian political determinants. As established in the first part of this chapter, the centers of power have dramatically changed during the past decades of Mubarak's regime. The oligarchs monopolizing the Egyptian economy forced themselves into the political sphere. The ruling regime embraced and contained them within the NDP. The ruling regime and NDP articulated their political rise whether in cabinets or in Parliament. The trade of was simple, ensure my existence to ensure yours. As the oligarchs forced themselves as one of the centers of power, the ruling regime must support them to ensure their political and social support on one hand and to tighten the regime's grip over the political sphere on the other hand. Becoming holders of cabinets, legislators in the Parliament and more importantly monopolizes of the economy, the oligarchs will utilize all their powers to avoid shrinking their pie. The introduction of a competition law that responds to the Egyptian context is a great threat to their self-interests preservation and thus they will fight it fiercely.<sup>134</sup>

In practice, the political elites mutual interests with oligarchies tend to preserve the inadequate and maldistribution of wealth and power provided by the concentrated market without a healthy competition. Therefore, both the regime and oligarchs benefit from the fragile economy status that lacks any sort of competition. Thus, they will focus on the avoidance of any regulatory legislative that might compromise some of their accumulated wealth and power.<sup>135</sup> As *Rodriguez and Mark D. Williams* argued, the competition law in developing countries seems to be largely inappropriate, as the liberal effects of the law will be quickly undermined by interest group politics procuring protection.<sup>136</sup> *Eleanor Fox* added, “[A]ntitrust law attacks artificial obstruction that market players create.”<sup>137</sup> Accordingly, they are expected to resist the idea of a competition

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<sup>134</sup> “[C]operate elites ... [are most likely to] resist policy reforms...” Dutz, Mark; Khemani, R. Shyam. 2007. *Competition law and policy: challenges in South Asia*. Washington, DC: World Bank at 12 (2007); available at <http://documents.worldbank.org/curated/en/2007/03/9866453/competition-law-policy-challenges-south-asia>.

<sup>135</sup> Robert Cover has warned us in his articles, that the law is always the violent imposition of order on the weak. He added the law is the violence imposition by the strong community, he meant the community elites, on the weaker communities [communities refer to the rest of society, the marginalized ones] who do not participate on the legislation process but they are subject to its enforcement. It can be said that this violence aims to serve the economical welfare of the community elites on this case it was the ruling regime that was protecting the welfare of oligarchs within the Egyptian market. See *Nomos and Narrative*, 97 HARV. L. REV. 4 (1983); and *Violence and the Word*, 95 YALE. L. J., 1601-29 (1986).

<sup>136</sup> A.E. Rodrigues and Mark. D. Williams, *The Effectiveness of Proposed Antitrust Programs for Developing Countries*, 19 N. C. J. INT'L & COM. REG, 209 (1994).

<sup>137</sup> Eleanor Fox, *The Other Path*, *supra* note 11, at 10.



legislation that might shrink the size of their aggregate wealth, or in other words the pie. *Fox* adds, “government control and indifference to the plight of the excluded – blocks the market through excessive regulation, privilege, and cronyism. The powerful insiders protect their friends at the expense of the public and often at the particular expense of the poor.”<sup>138</sup> *Adam Smith* provided illustrates:

To widen the market and to narrow the competition, is always the interest of the dealers... The proposal of any new law or regulation of commerce which comes from this order, ought always to be listened to with great precaution, and ought never to be adopted till after having been long and carefully examined, not only with the most scrupulous, but with the most suspicious attention. It comes from an order of men, whose interest is never exactly the same with that of the public, who have generally an interest to deceive and even oppress the public, and who accordingly have, upon many occasions, both deceived and oppressed it.<sup>139</sup>

This is applicable in the case of Egypt, as during the adoption of the competition law, the country lacked democracy, political liberation and economic free participation while it enjoyed *cronyism*, state preferred enterprises, and politics monopolization by the NDP. Ahmed Ezz, the close friend of the ousted president’s son, is the steel monopolist in Egypt, and was the former head of the political committee of the National Democratic Party.<sup>140</sup> Ezz and other oligarch minority are always eager to widen the market while narrowing the competition and thus they will spare no efforts or powers to evade the adoption of a legislation that might have the potential to shrink their pie even if on the long term.

Due to such facts, it is apparent that the ruling regime found itself on shaky grounds. The regime has to choose between: i) losing the incentives of the financial package stipulated in the EMAA, ii) sacrificing the possibility of attracting FDI, and iii) hindering its relation with the biggest trade partner; or iv) signing the EMAA and risks the loss of the oligarchs’ social and political support that might cost the regime its throne. Due to such political determinants, the regime had to reach compromises on the internal political arena before entering to the EMAA to yield its benefits. Accordingly, adopting a contextualized a competition law model that remains on the

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<sup>138</sup> *Id.*, at 8.

<sup>139</sup> ADAM SMITH, WEALTH OF NATIONS, Chapter XI, Conclusion of the Chapter, at 267

<sup>140</sup> The NDP obtained 95 percent as an ultimate majority within the Egyptian Parliament. During this period, the corruption of the litigation process was at its peak. The NDP as the ruling regime forming the cabinet and monopolizing the legislation body, thus, controlling both executive branch and legislation branch.

shelves without enforcement stabilizes the internal political arena to preserve oligarchs support to the regime. Simultaneously, this model even if it is drafted to remains on shelves without enforcement, fulfils the EMAA requirement which preserves the flow of incentive packages and financial support of the external trade partner. This illustrates why the Egypt was suddenly interested in adopting competition law while it contextualized a model that omits important concepts and provisions that should be included to ensure that an effective enforcement is most likely to take place.

The Egyptian case justifies how the political determinants affected the paradigm of any competition law to be drafted on a developing country with fragile context. The lack of political liberation, public representation in the decision-making and legislative process, conflict of interest between politicians monopolizing the political mechanisms and their own investments interest negatively influenced the Egypt's competition law paradigm.

With this being said, political determinants is established to play a centric role in both, the pre-enactment phase by choosing the legislation model and the post enactment phase choosing the enforcement level.

## V. Conclusion

This paper penetrates the discussion of why and how developing countries were suddenly eager to adopt competition legislations during the past couple of decades while they were unable to enforce it. The paper discusses the main theories provided by the literature regarding such phenomena. Throughout this discussion, we have established that the most suitable model for the developing countries is the contextualized model as it corresponds to each of developing countries unique characteristics. The Egyptian competition law, as one of the developing countries, was subject to a case study to assess why it is facing enforcement problem. Thus, the Egyptian competition paradigm was subject to a comparative study analysis including the US and EU paradigm. This study proved that the Egyptian competition paradigm is isolating itself from global counter peers.

In addition, this paper examines the contextualization's theory approach and focuses on the the most important two context factors, among other factors,<sup>141</sup> that are the political and economic contexts. This paper however, argues that there is one additional factor within the context of the state which has the power to repress and curb any developmental targets including the protection of fair competition. This variable is the political determinants which is the result of and the link between each of the other variables.

The political determinants force itself aggressively on the scene in developing States due to the fragile context they enjoy. Such fragile context is a natural consequence for the lack of political liberation, participation in the decision-making, and the waning economic structure that exists in such states. The presence of high level of corruption leads to *cronyism*, *nepotism*, and favoritism approaches that pave the way for the uprising of the oligarchs' power and the concentration of the state's wealth and power within their hands. All of the foregoing indicates the presence of certain centers of power that manipulates the State and the public to preserve their own privileged status. Although the ruling regime might be authoritarian, it is not the sole decision maker in such states; instead, the regime is only one of the centers of power that creates decision.

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<sup>141</sup> Other variables such as the cultural, historical, and ethnic context.

Compromises between the centers of power take place before reaching a deadlock as each center seeks the preservation of its self-interest and thus they coordinate with each other.

The Egyptian competition paradigm's isolation was not spontaneous due to the ruling regime's lack of expertise or vision; instead, it was intentioned. The rent-seeking approach followed by the Egyptian state since the 1952 coup focused, and still, on the foreign financial aids significantly along with the Suez Canal and national resources as the main sources of its budget.

Therefore, pleasing the external trade partners is a top priority. The EU is considered Egypt's biggest trade partner and by virtue of the 2004 concluded EMAA, the EU will provide Egypt with financial package and a free pass for the Egyptian goods to access the EU market, but both were conditioned by economy reforms. The introduction of a competition law within five years was one of the required economic reforms stipulated in the EMAA. Within the five years grace period, the EU transplanted its competition law provisions within the EMAA, which should also be applied within the Egyptian jurisdiction.

The adoption of competition law is most likely to abolish the market artificial entry and exit barriers introduced by the oligarchs monopolizing different market sectors. Thus, competition law might affect their privileged status and they will spare no efforts in utilizing their powers to avoid adopting such legislation and at the same time to evade being subject to the EU's competition provision enforcement.

Accordingly, the ruling regime found itself in between two different interests that need to be preserved, the external trade partner support with the aids expected to reinforce its declining budget and the internal oligarch support that provides political and social support stabilizing its throne. Developing countries usually face such political determinants dilemma. In the Egyptian case, the ruling regime tended to please both parties and thus in less than one year the, regime, introduced the Egyptian competition law with the aim to please the external trade partner, while simultaneously, please the internal forces represented in the oligarchs' interests. The law was contextualized in a negative extent that makes the ECA's mission to enforce it almost impossible. In addition, the law also ensured that the institution apparatus of enforcing the law is lacking independence and required funds, which are two of the main reasons provided by the post-enactment (enforcement mechanism) theory supporters.

Due to the political determinants, the Egyptian competition paradigm was contextualized not to the best interest of the public or to achieve developmental targets; rather it was contextualized to preserve the status quo. It did not respond to its context that is characterized by concentrated markets, maldistribution of wealth, poverty, lack of participation, cronyism, nepotism, and lack of political participation. The ruling regime instead opted to contextualize the law to preserve the persistence of abovementioned characteristics. The common interest of the political and economic elites prevailed on the expense of the public. The ruling regime and oligarch reached a win-win situation; compromises were made to ensure that the pie would not shrink.

Compromises are made only when centers of power are reluctant to any change that might affect their accumulated power. The ruling regime wanted to stabilize its throne while the oligarchs wanted to preserve their favored status and interests.

With this being said, the case of Egypt proves that the political determinants should be recognized more in the literature addressing the enforcement problems of developing countries adopting competition law, especially the supporters of the context theory. Political determinants matter in the context of any country and more specifically in developing countries and thus need to be heavily considered.