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**The American University in Cairo**

**School of Global Affairs and Public Policy**

**COMPETITION LAW AND POLICY  
IN DEVELOPING COUNTRIES: THE CASE OF  
THE EGYPTIAN STEEL MONOPOLY**

**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**

**Hany Abdel Massih Eskander Ghaly**

**May 2011**

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

COMPETITION LAW AND POLICY  
IN DEVELOPING COUNTRIES: THE CASE OF  
THE EGYPTIAN STEEL MONOPOLY

Hany Abdel Massih Eskander Ghaly

Supervised by Professor Thomas Skouteris

ABSTRACT

The structure of the economy of developing countries and the political forces at play are different from their counterparts in developed countries. Therefore and theoretically, the adoption of antitrust policies in developing countries might not rely on the model of developed countries. Poverty and market size play a fundamental role in identifying the right formulation of competition law and policy. Small economies face different issues than large economies, such as productive efficiency, that may lead small economies to a higher level of industry concentration and allow the achievement of some market power. This paper argues that although monopoly is regarded as a necessary evil for small economies, given their high market concentration nature, it should be properly regulated not based on anticompetitive conduct or intent, but rather on high prices, restricted output, or other specified trading practices. Also, the political economy obstacles to antitrust should be considered when adapting competition policy for developing countries. Two obstacles are often confronted. First, those who address public policies do not always adopt policies that fulfill social desire but rather favor certain limited players. Second, institutional incompetence and dependency weaken the effectiveness of competition. This paper argues in particular that Egyptian law and policy as it relates to antitrust policy was not properly designed to meet the best possible practice for developing countries which have led to the emergence of a well-known monopoly in the steel industry. This monopoly has been blamed for being the major reason behind the ongoing increases in real estate prices and as a result an increase in the average age of marriage.

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## I. Introduction

The local Egyptian steel industry is a monopoly due to the dominant market position of a major steel manufacturer that is Ezz Steel Rebars, Numbers indicate that the price of steel increased from 1200 LE a ton to 3200 LE a ton on in 2006 according to a report from the Al Ahram Strategic and Political Studies Center.<sup>1</sup> Such numbers indicate that Egyptian competition law has failed to prevent the enormous increases in steel prices. This is simply because there are monopolistic practices in that sector performed by two dominating companies that possess almost 67% of market share<sup>2</sup> and are owned by only one person, Mr. Ahmad Ezz. He holds several influential positions such as being a leading member of the newly revamped NDP party and Chair of the People's Assembly's Planning and Budget Committee.

Ezz is one of the main backers of free market economics in Egypt. In 1994, Mr. Ezz began his expansion by buying Albaraka Steel Mills, previously owned by a Saudi billionaire.<sup>3</sup> Following that acquisition in October 1999, Ezz group consolidated its market position with the purchase of 20.89 percent of Alexandria National Iron & Steel Company and El Dekheila, one of Egypt's largest steel producers.<sup>4</sup> That newly created horizontal merger led to the creation of a single company that controls almost 70 percent of the total local market seriously discourages new players from attempting to enter the market,<sup>5</sup> and eliminated existing rivals such as Abdel Wahab Kouta of ex- Kouta Steel Company, Ezz Steel Company's main competitor before its merger with Ezz El Dekheila.<sup>6</sup>

There are continuous and rather erratic increases in the price of residential real estate, making it almost impossible for young men to own even a very small

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<sup>1</sup> Strategic Economic Directions Report of 2007, Al Ahram Centre for Strategic and Political Studies, published in Al Ahram Daily Newspaper on March 7, 2007.

<sup>2</sup> EFG Hermes Report on Market Share of the Steel Market, 2001

<sup>3</sup> Abdalla f. Hassan, *Local monopoly steel self for antitrust law* (January 2003) Available at [http://www.amcham.org.eg/Publications/BusinessMonthly/January%2003/Reports\(Localmonopolysteelselfforantitrustlaw\).asp](http://www.amcham.org.eg/Publications/BusinessMonthly/January%2003/Reports(Localmonopolysteelselfforantitrustlaw).asp)

<sup>4</sup> Abdalla f. Hassan, *supra* note 3

<sup>5</sup> *ID*.

<sup>6</sup> Ahmed Farouk Ghoneim, Competition Law and Competition Policy: What Des Egypt Really Need, 7-8/The Economic Research Forum for the Arab Countries, Iran and Turkey Working Paper Series, Paper No. 0239, 2002.

apartment. Consequently, the number of bachelors is increasing and the frequency of sexual harassment are increasing as well in Egyptian society.<sup>7</sup>

This paper aims to analyze the antitrust policies of Egypt as a developing country and investigate various claims of whether there is an anticompetitive conduct which leads high prices in the steel sector or not. It also explores whether the Egyptian political system is moving in a specific direction towards favoring small groups of Egyptians or if it is following free market principles and whether it is doing this consciously or unconsciously. To succeed in this analysis, we shall discuss pertinent antitrust theories applicable to the Egyptian case with a specific emphasis on the doctrines of poverty and development, small economies and concentration, and the political economy of antitrust. Then, we will discuss these theories in the context of Egyptian competition law and policy using the case of Ezz Steel's domination of the market as a case study.

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<sup>7</sup> Antar Sayed, *the steel causes a heartbreak for the real estate* (20 June, 2004), available at <http://www.alaswaq.net/articles/2004/06/20/276.html>

## **II. The Adoption and Implementation of Competition Laws and Policies for Developing Countries**

### **A. Competition policy in Developing Countries**

Economic development has many instruments; a main one of them is competition policy. It plays a big role in economic development. It is considered as the enforcement of competition laws that regulate anti-competitive practices. However competition policy includes more essential aspects of economic policy, intending to promote market principles all over the entire economy. For example, competition policy contains market reform policy that facilitates market entry barriers, and assures equal opportunities to market participants; inspiring a competition mindset in the market players in order to develop a competition culture; acting as a competition advocate to guarantee sector based policies; embed market principles in the privatization process of state enterprises.<sup>8</sup>

It should be highlighted that although competition policy exists to encourage competition, the link between competition policy and competition is not always clear in all situations, as competition can occur without the existence of competition policy. On the other hand competition policy does not guarantee competition except if there is some sort of enforcement powers and comprehensive guidelines identified in competition policy.<sup>9</sup>

#### **1. Antitrust and Efficiency**

In developing countries, policymakers state the requirement of a special antitrust paradigm that is unlike the antitrust paradigm of the developed world, where universal norms can be applied regardless to the different sets of circumstances.<sup>10</sup>

Additionally, spokespeople explain antitrust as being “for efficiency.”<sup>11</sup> Efficiency is the only common factor in any antitrust formulation. The minimum

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<sup>8</sup> Nam-Kee Lee, THE ROLE OF COMPETITION POLICY IN ECONOMIC REFORM – BASED ON THE KOREAN EXPERIENCE 2 (Oct. 2001), <http://www.oecd.org/dataoecd/0/3/2434995.pdf>

<sup>9</sup> See Patrick Rey, COMPETITION POLICY AND ECONOMIC DEVELOPMENT (1997).

<sup>10</sup> See AJIT SINGH, U.N. CONF. ON TRADE & DEV., COMPETITION AND COMPETITION POLICY IN EMERGING MARKETS: INTERNATIONAL AND DEVELOPMENTAL DIMENSIONS (2002).

<sup>11</sup> See, e.g., Makan Delrahim, *The Long and Winding Road: Convergence in the Application of Antitrust to Intellectual Property*, Remarks at George Mason Law Review Symposium (Oct. 6, 2004),



standard of objectives of any antitrust formulation is to serve the consumer welfare. The objective of efficiency could be realized in output-limitation, for instance the absence of cartel in the market shall be considered as efficient.<sup>12</sup> Generally there are some ways to consider efficiency and to pave the way to it, one of which is to ensure the protection of some sort of structure and forces for competition by promoting a competition process that creates incentives to compete and invent the available resources by market players. Second tool is promoting public awareness to maximize the knowledge of the competition benefits and the acceptance of the openness to trade diversity which allows new entrance to the market.<sup>13</sup>

## **2. Antitrust Law Formula**

The real paradigm with antitrust is how to shape efficiency in specific formula that governs competition. As a policymaker, what is the best formulation of antitrust law for a country where its economic problem is severe poverty, worsened by corruption, weak institutions, unsteady democracy, and cronyism? Is it better to adopt a model that is based on the trust of free enterprise and liberalization, this would be the first model, or to choose another model that basically takes into consideration the blockage, market's political capture, obscurity, including some ways of evaluating and measuring the level of economic empowerment of people, this would be the second model?<sup>14</sup>

To answer the above question, one should put into consideration factors such as high market concentration, high barriers to entry, high ownership concentration and weak corporate governance. Those factors lead to inefficiency, and rigidity in the financial and industrial structures of the market. They also show that there are unfavorable consequences on the encouragement and promotion of effective competitiveness and competition, in addition to the governance at the corporate and state levels and the prevailing of mutual interest between market firms and government to establish market power by buying political favoritism. As we will

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*in* 13 Geo. Mason L. Rev. 259 (2005) (“consensus-based antitrust enforcement is vital to global business and consumer welfare”)

<sup>12</sup> Eleanor Fox, *What is Harm to Competition? Exclusionary Practices and Anticompetitive Effect*, 70 ANTITRUST L.J. 371 (2002).

<sup>13</sup> Eleanor M. Fox, *Economic Development, Poverty, and Antitrust: The Other Path*, 13. SW. J.L. & TRADE AMERICAS, P. 103, 2007.

<sup>14</sup> Fox, *supra* note 13, at 103 at footnotes.

discuss later in this paper, in high concentrated markets used to have large firms with limited number and they have financial organization capacities and advantages to influence regulations.<sup>15</sup> There are two main models that can be used to formulate the antitrust law. The first model is based on free market economy with all its conditions and factors. This formulation pre-assumes that market can work independently and any intervention from the government will cause negative impacts that are called “new-liberal assumption.” The second model is based on the opacity, blockage and political capture of the market, in addition to the inclusion of specific regulation that empower firms economically to be able to compete. This model is suitable for markets that have favorable elites and suffer from inequitable distribution of wealth.<sup>16</sup>

Generally, the second model might be good in developing economies because market players in these economies cannot work independently. However, the first model provides clear and simple rules with minimum intervention and moderate discretion by officials.<sup>17</sup>

### **3. Larger Context vs. Neo-Liberal**

Achieving efficiency within either model as discussed above and there achieving economic welfare in some economies may not require the dependency on free market tools, which are promoted by new-liberal doctrines.<sup>18</sup> Applying such principles to developing countries may not be efficient for those countries, as they would need to experiment a more sympathetic way to their specific context.<sup>19</sup> Such specific context may be elaborated within the highly concentrated nature of markets in developing countries, which shall be discussed more in detail later in this chapter.

In the current globalization, entry barriers have been reduced to enjoy the efficiency benefits of markets. The usual approach if for the merger between

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<sup>15</sup> MARK DUTZ & R. SHYAM KHEMANI, COMPETITION LAW & POLICY: CHALLENGES IN SOUTH ASIA 11 (2007).

<sup>16</sup> Fox, *supra* note 13, at 103 at footnotes.

<sup>17</sup> *Id* at 104.

<sup>18</sup> Both the United States and the European Union have launched commissions or projects to consider how competition law should be modernized. Moreover, in the United States, successive Supreme Court opinions have narrowed the purview of U.S. antitrust law. *See, e.g.*, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., No. 06-480, 2007 WL 1835892 (U.S. June 28, 2007); Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc., 127 S. Ct. 1069 (2007); Volvo Trucks N. Am., Inc. v. Reederimco GMC, Inc., 546 U.S. 164 (2006); Ill. Tool Works Inc.v. Independent Ink, Inc., 547 U.S. 28 (2006).

<sup>19</sup> Fox, *supra* note 14 at 104.

liberalization and antitrust to maximize benefits using efficiency as the scale of antitrust gains and without looking to differences between consumer and total economic welfare as a scale of efficiency. Such an approach ignores the aggregate facts of the formula which should take into consideration all consumers on one side and all consumers and producers on the other side, by trying to answer the question whether the winners win more than the losers lose and if so, the distributional consequences should be disregarded.”<sup>20</sup>

To answer such a question, a larger context of antitrust for developing countries should be considered to include unhealthy economic factors such as high entry barriers, high market concentration and the lack of appropriate governance, and the political agenda they follow or get from developed countries within the world community.<sup>21</sup> By doing this, competition policy will compromise between losers and winners and achieve the less acceptable economic welfare. For example, the free-market policies are intended to excessively advantage the already advantaged market players. Thus, those policies are considered improper for developing countries.<sup>22</sup>

Accordingly, the above would be seen as reasons why antitrust for developing countries may be different from the neo-liberal approach as reflected in the competition laws of developed countries. However, this does not mean that developing countries’ antitrust should be completely different from the antitrust of developed countries.<sup>23</sup> In this context, the United Nations developed the Millennium Development Goals seeking to downsize the poverty in developing countries by adapting antitrust law that pays attention to poverty and just distribution of resources regardless how much such law is different from antitrust laws of developed countries.

#### **4. The United Nations’ Millennium Development Goals (MDGs)**

In the year 2000, the United Nations’ Millennium Development Goals (MDGs) were produced in view of increased worldwide concern of poverty. The MDGs were

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<sup>20</sup> *Id* at 105.

<sup>21</sup> *Id* at 105.

<sup>22</sup> See Nancy Birdsall, *Inequality Matters: Why Globalization Doesn’t Lift All Boats*, BOSTON REV., Mar.-Apr. 2007, at 7; Francis Fukuyama, *Keeping Up with the Chavezes*, WALL ST. J., Feb. 1, 2007, at A17; Peter Sutherland, *The Doha Development Agenda: Political Challenges to the World Trading System—A Cosmopolitan Perspective*, 8 J. INT’L ECON. L. 363 (2005).

<sup>23</sup> Fukuyama, *supra* note 22.

targeted at assisting the world's severely poor by 2015. It is now almost two thirds of the way there in terms of years and the extreme poverty rates are still dropping.<sup>24</sup>

This should not be taken to mean that antitrust law should be the law of poverty. However, a developing country's antitrust law that pays no attention to poverty and unjust distribution of resources is likely to be considered a hostile law without root-cause legitimacy or an unfair competition law that does not pay attention to the market's specific characteristics.<sup>25</sup>

Basically, the MDGs are about allocation. The best economic development policy has to put severe poverty ahead of other problems in developing countries. This can be realized by keeping prices competitive, enhancing market incentives to firms, and encouraging innovation.<sup>26</sup> It implies awareness about not enlarging the gap between the enabled and the powerless, the rich and the poor.<sup>27</sup>

## **B. Development and Concentration**

In the last section, we highlighted the importance of the efficiency of competition policy in the economic development. In the following section, we shall discuss another basic and fundamental dilemma within development that affects the choice of competition law and policy: market size.

### **1. Definition of Market Size**

From the economic perspective, market size is described as the ratio between the demanded outputs at a price that is just covering the minimum cost of a unit, to the unit of production's size that is large enough to attain the lowest average cost of production.<sup>28</sup> Independent sovereign economy is the definition of a small economy that is capable of supporting few competitors in nearly all its industries to fulfill its

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<sup>24</sup> U.N., Millennium Development Goals Report 2006 (2006).

<sup>25</sup> Fox, *supra* note 14 at 109.

<sup>26</sup> See Mark Dutz, Janusz Ordovery & Robert Willig, *Entrepreneurship, Access Policy and Economic Development: Lessons from Industrial Organization*, 44 *European Econ. Rev.* 739 (2000). The ladder metaphor is also used in JEFFREY D. SACHS, *THE END OF POVERTY: ECONOMIC POSSIBILITIES FOR OUR TIME* 73 (2005).

<sup>27</sup> Fox, *supra* note 14 at 111.

<sup>28</sup> Michal S. Gal, *Size Does Matter: The Effects of Market Size On Optimal Competition Policy*, 74 *S.CAL.L.REV.* 1439 (2003)

demand.<sup>29</sup> This definition clarifies some economic consequences of the size that have substantial effect on the efficiency of competition policy.<sup>30</sup>

In the definition of a small economy there is no defined number that sharply distinguishes between a small and large economy. However, local economies states can be categorized based on their size. Examples of very small: Jersey with an approximate population of 90,000, Faro Islands with an approximate population of 40,000, and Malta with an approximate population of 350,000. These are small geographical island states. Also Israel is considered as an island economy for political reasons but with a big population of about six million.<sup>31</sup>

Australia is considered as a small economy, although it is much larger geographically, because most of the Australian industries have a concentrated market structure. The Australian's population is scattered over wide geographic areas, at the same time, concentrated around some urban centers. This formulates market regionalization that leads to the existence of problems similar to that of the small markets. In the past, before the reduction of the trade barriers because of NAFTA,<sup>32</sup> Canada was like Australia having highly concentrated market.<sup>33</sup> To be considered as a small economy, it is not necessary to have all the industries in a specific economy as highly concentrated. Yet some industries, like retail services, are actually highly competitive even in small economies. On the other hand, firms that exist in small economies can influence and also may control the world markets. In such cases, the scale of production is not constrained by the domestic market's size. However, such firms are considered as exception and not the rule, and still the is considered as a small economy.<sup>34</sup> .

## **2. Specially Tailored Competition Policy**

As long as small economies face different issues in welfare maximization compared to large economies, they require a specially tailored competition policy. In some markets, the size of some industries can be suboptimal due to the limitation of the

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<sup>29</sup> Gal, *supra* note 28 at 1439

<sup>30</sup> *Id.* at 1439.

<sup>31</sup> *Id.* at 1440.

<sup>32</sup> North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.- Mex., Parts One – Three,

32 I.L.M. 289, Part Four-Eight & Annexes, 32 I.L.M. 605 (1993)(entered into force Jan. 1, 1994).

<sup>33</sup> Gal, *supra* note 28, at 1440

<sup>34</sup> *Id.* at, 1441.

market demand, which limits the development and growth of domestic productive activities' mass that are required to reach the least costs of production. Small economies are capable of supporting few competitors in most of their industries because of the high entry barriers and the scale of economy, even if they achieve the productive efficiency. The existence of concentrated market structures negatively affects the output and price. For that reason, the small economy should realize and maintain a good balance between allowing firms' growth and integration to benefit from the scale economies, and guaranteeing effective rivalry. This is challenging.<sup>35</sup>

These important characteristics result in some critical policy consequences because in small economies, it is necessary to formulate and conceive good endogenous policies that compensate some of the negative effect of the small size. One of the important factors that require customizing the competition law to economy size is that the competition laws are commonly full of general formulations that fit to all that are made to best realize the law's goals in every similar type of cases, such as cartels and mergers, although there are some unreal negatives and unreal positives on a side.<sup>36</sup>

The minor incidents that exist in large economies represent major incidents in small economies, because the small size multiplies the occurrence of highly concentrated markets protected by entry barriers. The observable facts in the special market are having severe effect as extremes dominate and turn out to be the rule. That is why its effect looks like a magnifying glass. For that reason, the competition policy paradigm of the large markets cannot fit and meet the small economies' needs. Therefore, for the small economies to adjust their markets efficiently it is required from them to pay close attention to their competition laws.<sup>37</sup>

Furthermore, in small economies, it is very important to have a proper structure of competition policy and to ensure that it is enforced efficiently. Since small economies have a very weak self-adjusting propensity, the negative consequences resulting from the inappropriate design and implementation of the competition laws will be more severe in the short and long run. In small economies there should be specific regulations to control the behavior of the market players to

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<sup>35</sup> *Id.* at 1441.

<sup>36</sup> *Id.* at 1441.

<sup>37</sup> *Id.* at 1441, 1442.

ensure the competition is efficient in those industries by enforcing limits on the behavior of operating firms in markets that are not fully self-adjusting.<sup>38</sup>

The main doctrines that apply to large economies apply also to small economies. Those general doctrines are aimed at producing sustainable practical competition to enrich the social welfare through implementing the market economy. Nevertheless, and giving the preferential characteristics of the small economies such as "tradeoffs,"<sup>39</sup> small economies need different regulations to control the behavior of the market players efficiently by preventing tradeoffs.<sup>40</sup>

As a matter of fact, the openness to trade is the integral solution to most of the critical problems of small economies because it helps expanding the market. Therefore, competition policy as a regulation in small economies could perform three roles. First, reduce barriers to entry and domestic exports. Second, fix the lack of international trade to solve the small economy's inefficiency. Third, act as a good solution for the regulation closed and semi-closed markets.<sup>41</sup>

With regard to competition policy, some issues regarding small economies could apply to small markets within large economies.<sup>42</sup> However, the difference between small economies and large ones regarding the lack of concentrated market structures entails not only that small economies operate most of the time with concentrated market structures, but also competition policy treatments should be built on respective thresholds and assumptions.<sup>43</sup>

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<sup>38</sup> *Id.*, at 1442

<sup>39</sup> Tradeoff is defined as "Alternative key objectives, all of which cannot be attained in a decision, a design, or project and their associated benefits and opportunity cost. Tradeoffs play a particularly important part in negotiations where the positions of opposing parties can be quantified." BusinessDictionary. Com, available at <http://www.businessdictionary.com/definition/tradeoffs.html>

<sup>40</sup> *Id.*, at 1442

<sup>41</sup> *Id.*, at 1442

<sup>42</sup> For example, the U.S. health care industry has many of the characteristics of a small and concentrated market, given the regionalization of its services. This has been acknowledged by the DOJ and the FTC. See Department of Justice and Federal Trade Commission Statements of Enforcement Policy and Analytical Principles Relating to Health Care and Antitrust, 4 TRADE REG. REP. (CCH) ¶13,152 (Sept. 30 1994) [hereinafter Statement of Policy in Health Care Industry]. & W.T. Standbury eds., 1991); David Gilo, Antitrust Policy in Small Economies (1994) (unpublished LL.M. Paper, Harvard Law School).

<sup>43</sup> Gal, *supra* note 28, at 1444

### **3. Economy of Scale**

As discussed above, small economies require a specially tailored competition policy. In order to succeed in that, an attention should be paid to the production levels of those concentrated markets. Small economies require certain production levels to meet most of their demand. Such requirements produce an entry barrier to the small size market. Hence, new entrants with less production than minimum efficient scale (MES) will be disadvantaged in terms of cost compared to other market players with MES plants. If MES is higher than demand and at the same time the cost burdens of operating below MES are essential, a new entrant must enter the market at such a large scale so that the collective outcome of all operating firms can be supplied only at lessened prices, and under moderate total cost.<sup>44</sup>

The economy of scale would also influence the firms' choice of technology especially if profits gained from more efficient production technologies rely on a big quantity of supply with respect to demand. Thus installing different technologies with less efficiency would end up with more profits to firms and with lower production cost which is sufficient to demand.<sup>45</sup> This is the handicap of small economies that is resulting from the small size which requires to produce at levels that supply to a large size of demand and at the same time, it is required to achieve minimum costs of productions

“This basic handicap of small economies results in three main characteristics: high industrial concentration levels, high entry barriers, and suboptimal levels of production.”<sup>46</sup>

### **4. Productive Efficiency vs. Competitive Conditions in Small Economies**

There is conflict that arises from the special characteristics of small economies with their MES as described in the last subheading. This conflict occurs between competitive conditions and productive efficiency. If the efficient operation in an industry requires a specific number of firms, productive efficiency is the factor that

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<sup>44</sup> *Id.*, at 1445

<sup>45</sup> G. Marcy, *How Far Can Foreign Trade and Customs Agreements Confer upon Small Nations the Advantages of Large Nations?*, in ECONOMIC CONSEQUENCES OF THE SIZE OF NATIONS.

<sup>46</sup> Gal, *supra* note 28, at 1445



determines this number by which all market players shall be operating efficiently and with higher levels of production.<sup>47</sup>

Sometimes, productive efficiency may lead to a higher industry concentration in small economies and allow the achievement of some market power. This would affect the efficiency by monopolistic behavior which harms producers in such highly concentrated industries. This is the evil of monopoly which can be recognized in a highly concentrated market and which leads to higher prices and lower supply levels than under competitive circumstances. This would lead to Inefficiency and the cost rent seeking behavior under an oligopolistic market, the behavior of competitors has direct effect on each other. Accordingly, firms may behave interdependently either explicitly or implicitly to collectively enjoy market power or narrow competition. Such behavior shall affect the entry of new players to a higher industry concentration in small economies.

Such behavior negatively affects productivity and allocation of resources, where prices are likely to be above cost; inefficiently small competitors [may be able] to enter the market beneath the fixed-price umbrella; capacity is allowed to expand in the wrong locations or in increments that are too small [to exhaust scale economies]; ... and various other forms of non-price competition that drain resources are encouraged.<sup>48</sup>

Under both structures, firms may enjoy incentives to engage in anti-competitive conduct such as exclusionary behavior. . Moreover, high levels of concentration are not good because of the allocation of profit resulting from higher market power and the weaknesses of the social and political status as a normal reaction to extreme concentration of economic power.<sup>49</sup>

## **5. Birth of Monopolies: A Consequence of Concentration**

As argued above, competition policy in small economies must contend with technical restraints which are required in a productive efficiency structure on the number of

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<sup>47</sup> *Id.* at 1449.

<sup>48</sup> Australia's distance from major exporters, for example, is large enough to make natural protection quite substantial for some products. See Richard E. Caves, *Scale, Openness, and Productivity in Manufacturing Industries*, in THE AUSTRALIAN ECONOMY 313,313 (Richard E. Caves & Lawrence B. Krause eds., 1984).

<sup>49</sup> Gal, *supra* note 28, at 1450

rivals within certain types of concentrated industry. This could not be achieved by small size firms with lower market share which could find itself easily out of the game for not being able to meet the productive efficiency. However, bigger size firms with bigger market share could survive by trying to dominate the market.

In small economies, a dominant firm might be necessary to realize productive efficiencies of scale, which is the necessary evil of having a high level of concentration to reach efficiency. Consequently, a sympathetic competition policy should be promoted to improve the individual firm supply through either internal growth or mergers which permit the use of economies of scale that are not used in less anti-competitive ways.

The negatives of such a policy of prompting internal growth or mergers are that high level of concentration may lead to absolute monopoly control. Such negative aspects of the above policy are well demonstrated in horizontal merger policies.<sup>50</sup> Consequently, the best competition policy for small economies should be an optimal balance between structural efficiency and competitive power by which firms could operate efficiently and consumers enjoy greater efficiency as well.

## **6. Horizontal Merger in Small Size Economies: Good or Bad**

In the last subheading, we highlighted that promoting a sympathetic competition policy that encourages mergers would be an option in small economies. In the following subheading, we will discuss whether horizontal mergers are good or bad as a choice of competition law and policy in small economies with highly concentrated markets to realize productive efficiencies of scale.

The best illustration of productive efficiency in small size markets is a horizontal merger policy. Theoretically, a horizontal merger reduces the amount of competitors in the market. The merged entity usually has a bigger market share than both of the merging rivals had before the merger. This reduction in the number of rivals and the increase in market share minimize competition by enlarging the market power of the joined entity or through easing interreliancy between firms. On the other hand, a horizontal merger might enrich efficiency by permitting firms to achieve the economy of scale which was unachieved prior to the merger because of either the interreliancy

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<sup>50</sup> *Id.*, at 1454,1455

or the absolute size of firms. The benefits of decreased cost might be moved to consumers if the advantage of the cost is so great than the new price is less than the price prior to merger.<sup>51</sup>

Large economies are likely to apply structural variables to decide intended competitive results of mergers. In large economies, there is no such obstacle of efficiency and achieving the economy of scale on one side, and increasing market power and its limitation to competition on the other side. Hence, most large economies select one formula that identifies the absolute value of competition against increased overall efficiency. It is assumed that there is no need for high concentration, in large economies, to approach efficiency, as they could have many firms that operate efficiently. Therefore, it is said that a merger would have a smaller effect on a large economy than on a small one.<sup>52</sup>

For instance, the US treatment of horizontal mergers until the 1970s was based on a strict structural assumption that high concentration damages the economy and therefore should be prohibited, even if it implies efficiency.<sup>53</sup> The dominant approach focused on “the absolute value of competition”<sup>54</sup> as a regulatory tool. In a quote from *Philadelphia National Bank*, the Supreme Court ruled that a merger creating an anticompetitive effect “is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial.”<sup>55</sup> Thus and if a merger decreases competition, it is generally prohibited regardless of the impact on efficiency. Given the assumption that higher concentration produces negative outcomes on competition, large economies’ agencies and courts such as in the United States have initiated unified market share rules for illegal activities.<sup>56</sup> This policy might be unfavorable for small economies, for which concentration is a necessity in

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<sup>51</sup> *Id.*, at 1455

<sup>52</sup> R. Shyam Khemani, *Merger Policy and Small Open Economies: The Case of Canada*, In PERSPECTIVE IN INDUSTRIAL ORGANIZATION 215, 223 (Ben Dankbaar, John Groenewegen, & Hans Schenk eds., 1990).

<sup>53</sup> Moreover, Hovenkamp proposes that mergers were banned because they may enhance efficiency and therefore enlarge the entry barriers into their respective markets. See HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY 499-500 (2D ED. 1999). The Supreme Court has rejected the interrelation between efficiency and horizontal mergers. See, e.g., *Ford Motor Co. v. United States*, 405 U.S. 562 (1972); *FTC. V. Proctor & Gamble Co.*, 386 U.S. 568, 580 (1967) (“[p]ossible economies cannot be used as a defense to illegality”); *United States v. Philadelphia Nat’l Bank*, 374 U.S. 321 (1963); *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

<sup>54</sup> Gal, *supra* note 28, at 1456

<sup>55</sup> *Philadelphia Nat’l Bank*, 374 U.S. at 371.

<sup>56</sup> HOVENKAMP, *supra* note 46, at 500

realizing the economy of scale. Accordingly, forbidding all mergers that raise concentration in small economies would be harmful from an economic perspective, as it might stop necessary mergers that improve efficiency. Instead, small economies should implement a merger policy that prevents the structural rigid variables or presumptions and supporting necessary efficiency.<sup>57</sup> However, an excessive liberal policy might establish monopoly in a market. This would be more beneficial to small economies than to large ones. In addition, a horizontal merger would act as the most privileged available instrument in the competition policy tools to stop anticompetitive behavior such as collusion and creation of market structures. Hence, competition policy for small economies should include flexible tools which should be applied on a case by case basis to achieve both a pro-competitive merger and advance economic efficiency.<sup>58</sup>

## **7. Market Share as an Indicator of Market Power**

To assess a horizontal merger in a small economy and decide whether it is good or bad in promoting competition and supporting efficiency, you have to look at the market shares of rivals post mergers. This would give an indication of market power and whether the assessed merger has been an abuse of dominance.

One of the differences between large and small economies is the usage of predetermined market share threshold in deciding the possessed market power of a specific firm. However, most courts all over the world depend on “long-standing” market share as a basic scale of market power with interpreting case by case data within the actual demand and supply. This proves that predetermined assumption is incorrect and proper modifications are required for small economies.<sup>59</sup> In small economies, the standard threshold of market share that denotes market dominance should be less than in larger economies because supply will typically be less with the existence of the economy of scale and oligopolistic interdependence. Accordingly, and where the barriers to entry are high in small markets, only the dominant firm will

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<sup>57</sup> Khemani, *supra* note 52, at 223

<sup>58</sup> *Id.*, at 226. See also OLIVER E. WILLIAMSON, MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS 249 (1975).

<sup>59</sup> William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 946-47 (1981).

be able to achieve low productions costs, whilst fringe firms shall bear higher productions costs under the umbrella of the dominant firm's price, or compete with different products.<sup>60</sup> Hence, in small economies, a standard market share will typically represent more market power than in larger economies with the assumption that some adjustments would be necessary for some elements such as the elasticity of demand and supply.<sup>61</sup>

## **8. Monopolies in Small Economies: Whether Per Se or Rule of Reason**

As discussed above, in small economies, a standard market share will typically represent more market power than in larger economies that would make dominant firms turned to be monopolies. The question is whether to apply the Per Se rule or the Rule of Reason when judging monopolies.

In small economies the emphasis should be put on whether or not the evidence of anticompetitive behavior or intention should be considered when regulating monopolies. Regulating only the monopoly has several negative consequences in both small and large economies, as this leads to distorting the reward of firms to innovate and to compete in the market and without clear introduction to remedies. There are two factors that determine whether to regulate a monopoly. First the market's self-adjusting ability which is more available in large economies than in small economies. In large economies there is a self-service to effectively deal with non-natural monopolies.<sup>62</sup> Second, single firm dominance in a small economy would be more

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<sup>60</sup> This argument can be proven by using algebraic formulae. The Lerner index which indicates the proportional derivation of price at the firm's profit maximizing output from the firm's marginal cost at that output can be calculated by using three factors: market demand elasticity, supply elasticity of competing or fringe firms and the relevant firm's market share. The market power of a firm can be computed as follows:  $L_i = S_i / (Edm + Esj(1 - S_i))$  where "Li" is the Lerner index of firm I, "Si" is the market share of firm I, "Edm" is the market elasticity of demand, and "Esj" is the elasticity of supply of competing or fringe firms. Using the Lerner index formula, it is simple to see that when we hold Li (the degree of market power) and Edm constant and we vary Esj. When Esj is high, we need to lower Si to offset its effect. It should be noted that the Lerner index is based on assumptions of Cournot competition.

<sup>61</sup> Gal, *supra* note 28, at 1463, 1464

<sup>62</sup> See, e.g., *Standard Oil Co. v. United States*, 221 U.S. 1, 62 (1911); *United States v. Am. Can. Co.*, 230 F. 859, 902 (D. Md. 1916) (speculating that "[p]erhaps the framers of the Anti-Trust Act believed that, if such illegitimate attempts were effectively prevented, the occasions on which it would become necessary to deal with size and power otherwise brought about would be so few and so long postponed that it might never be necessary to deal with them at all"). See also Oliver E. Williamson, *Dominant Firms and the Monopoly Problem: Market Failure Considerations*, 85 HARV. L. REV. 1512, 1513-14 (1972) The conduct approach is based on the belief that "competition works – at least in the limited

positively influential than in a large economy. Surely, a large economy would suffer more severely from the single firm dominance than a small economy. There will be a proportional effect in small economies in case of the existence of dominance in bigger industries.

On account of the above mentioned concerns, in a small economy, it is necessary to have a deep analysis of cases in order to treat monopolies using the per se rule, given the fact that small economies lack self-adjusting mechanisms by which market economy forces would not deal with monopoly on time. Nevertheless and in case of abuse of monopoly, the said monopoly regulations will have a limited efficiency because banning such abuse of monopoly will facilitate the market to operate efficiently without regulations.

Many small economies highlight the obstacle of monopoly and its abuse in the light of the respective behavior by promoting “regulation of conduct” that is not based on anticompetitive conduct or intent, but rather emphasizes high prices, restricted output, or other specified trading factors. By doing so, the law constitutes a safeguard against monopolistic behavior, without the per se treatment of monopoly. “The efficacy of conduct regulation depends, inter alia, on the scope of conduct regulated, the regulatory procedure, the experience and expertise of the regulator, and the remedy.”<sup>63</sup> For instance, controlling only excessively high prices by limitation decreases price variations and reduces and encourages firms to compete and utilize resources in order to become monopolists. It could be argued that this is a limited tool but at least it minimizes the damage to consumers only if prices are severely high.<sup>64</sup>

## 9. Conclusion

For the improvement of small economies, we should differentiate between large and small economies with respect to the best practice competition policy. For small economies, it is necessary to adapt flexible rules to be applied without blocking the basic interests of small economies, such as productive efficiency and consumer welfare. At the same time, solid guidelines should be established on how firms can

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sense that, absent deliberate impairment of competition, actual and potential business competitors can be relied upon to perform self-policing functions by responding appropriately to opportunities for private gain.” *Id.*

<sup>63</sup> Gal, *supra* note 28, at 1473

<sup>64</sup> *Id.*, at 1472, 1473

operate in small economies. On the contrary, the adaptation of large economies' competition policy as it is might offset its ordinary benefits and moreover, harm the domestic welfare.

### **C. The Political Economy of Competition Law in Developing Countries**

In the last two sections, we highlighted the basic characteristics of competition policy in developing countries. In the following section, we shall discuss another basic and fundamental dilemma within development that affects the choice of competition law.

#### **1. The Political Economy Obstacles to Antitrust**

Adding to poverty and high concentration of small market economies of developing countries as major characteristics of those countries that inhibit competition is the choice of competition law. One of the main obstacles to antitrust in developing countries is that those who are addressing public policies do not always adopt policies that fulfill the social desire. There maybe also exist political forces that affect the incentives of decision makers to adopt a competition law.<sup>65</sup> In addition, many scholars put the emphasis on the importance of institutional competence and independence to reach the effectiveness of competition.<sup>66</sup> Hence, policy and the institutional competence are the two major elements that determine the political economy of competition law.

Some market participants who have political power are used to benefiting from competition by government-made or private barriers to entry, and adopting competition law would change the rules of the game, therefore, groups or firms of dominant positions has to secure and maintain the new policy that favors them up to the total expected profits.<sup>67</sup>

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<sup>65</sup> See MICHAL GAL, *THE ECOLOGY OF ANTITRUST: PRECONDITIONS FOR COMPETITION LAW ENFORCEMENT IN DEVELOPING COUNTRIES* pp. 20-38, 30

<sup>66</sup> See William E. Kovacic, *Getting Started: Creating New Competition Policy Institutions in Transition*

*Economies*, 23 Brook. J. Int'l L.: 403, 406-407 (1997).

<sup>67</sup> See Posner, R.A., *Antitrust Law: An Economic Perspective*, University of Chicago Press, 8-18 (1976).

## 2. Regulatory Capture

Another obstacle regarding the choice of competition law in developing countries is Regulatory Capture. It occurs in the absence of constraints, where both legislatures and governmental officials may have intentions to abuse their decision-making power by singling out particular individuals or groups and bestowing government largesse upon them in return for political support.<sup>68</sup> Such capture arises when small groups with large per-capita stakes in a policy organize and cause the government to regulate in ways that are against the public interest and usually against consumers, who are poorly organized and have small per-capita stakes in the specific regulation.<sup>69</sup> Regulatory capture is exacerbated in democratic societies, especially where the ultimate policy decision lies in the hands of one politician or a small group of politicians (e.g. the relevant minister or a legislative committee) rather than the government as a whole, as specific, well-organized sectors can ensure the politicians' re-election.<sup>70</sup> The law's non-sector-specific nature, such as competition law, increases the influence of politically influential groups, as its beneficiaries – consumers and small businesses – are generally dispersed. Moreover, its focus on long-term goals usually requires political fortitude that is typically in short supply among political figures.<sup>71</sup>

## 3. Crony Capitalism

Adding to The political economy and regulatory capture obstacles in small market economies of developing countries, there is what is called Crony Capitalism. Since the Asian economic collapse of 1997, scholars and policymakers have grown increasingly interested in the phenomenon of crony capitalism. Indeed, much of the surprisingly rapid meltdown of the East Asian economies is often attributed to widespread cronyism.<sup>72</sup>

Crony capitalism is usually thought of as a system in which those close to the political authorities who make and enforce policies receive favors that have large

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<sup>68</sup> See Kaplow, L., *Transition Policy: A Conceptual Framework*, Journal of Contemporary Legal Issues, pp. 13-161 (2003)

<sup>69</sup> M. Gal, Supra note 65, at 20, pp.31

<sup>70</sup> See Wiley, J. jr., *A Capture Theory of Antitrust Federalism*, Harvard L.Rev. 99: 713 (1986)

<sup>71</sup> M. Gal, Supra note 65, at 20, pp.32

<sup>72</sup> Stephen Haber, *Introduction: The Political Economy of Crony Capitalism*, xi, [http://media.hoover.org/documents/0817999620\\_xi.pdf](http://media.hoover.org/documents/0817999620_xi.pdf).



economic value. These favors allow politically connected economic agents to earn returns above those that would prevail in an economy in which the factors of production were priced by the market. Frequently, the factor of production that is provided cheaply to cronies is capital.<sup>73</sup>

Cronies may also be rewarded with the ability to charge higher prices for their output than would prevail in a competitive market. Indeed, one very common form of entitlement is to award a favored economic group with an official or quasi-official monopoly, thus allowing that group to earn monopoly rents. Even if it is not possible to create a monopoly, however, cronies can still be protected from international competition by high levels of trade protection. This allows cronies to earn rents through the ability to charge prices well above those that prevail internationally. In fact, if the trade regime requires that firms obtain licenses to import certain key inputs, governments may use the selective award of these licenses to create monopolies in industries that otherwise would be characterized by more competitive markets.<sup>74</sup>

Crony capitalism is a solution, albeit a second-best one, to a fundamental problem faced by all governments: Any government strong enough to protect and arbitrate property rights is also strong enough to abrogate them. The ability of the government to arbitrarily predate on asset holders creates a dilemma. Unless the government can find a way to tie its hands, asset holders will not invest. If asset holders do not invest, there will be no economic growth. In addition, if there is no economic growth, the government will be unable to finance its needs because there will be insufficient tax revenue.<sup>75</sup>

Crony capitalism is not, however, as good a solution to the commitment problem as limited government. From the point of view of economic growth and distribution, crony capitalism has three major drawbacks.

First, crony capitalism encourages the misallocation of resources. The whole point of crony capitalism is that the government designates a set of economic policies that provides some privileged group of asset holders with a high-enough rate of return to induce them to invest without the security of limited government. Without these

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<sup>73</sup> S. Haber, *Supra* note 72, at xii

<sup>74</sup> *Id.*, at xii

<sup>75</sup> *Id.*, at xii, xiii

special entitlements, asset holders would not invest. Thus, crony capitalism not only permits rent seeking, it requires rents to be earned and distributed. Once rent seeking becomes a fundamental part of economic life, however, rent seeking beyond the minimum needed to induce investment will almost inevitably occur. In fact, asset holders must share some of the rents with crucial members of the political elite (in order to secure the implicit contract between the asset holders and the government). The level of rent seeking must therefore be even higher still. Industries will exist that would not exist otherwise, monopolies and oligopolies will exist in industries that should be characterized by more perfect competition, and opportunities will be denied to entrepreneurs who have the required skills and assets but not the political access or protection required. In short, crony capitalism is economically inefficient.<sup>76</sup>

Second, the fact that crony systems ultimately depend on the personal connections of particular asset holders and government actors means that the commitments of the government are credible only so long as that particular government is in power. This stands in stark contrast to limited government, in which government commitments are made credible by the fundamental institutions of the polity, regardless of the identity of the individuals exercising power. Under a crony system, if the government is replaced, those personal connections vanish and with them the protection of the property rights of even privileged economic groups. For this reason, economic agents under crony systems, including the politically connected, will operate with short time horizons. This causes cronies to demand high rates of return even for projects that have short maturities. It may, in fact, completely discourage long-term investing.<sup>77</sup>

Third, crony capitalism has negative consequences for the distribution of income. In a crony system, some privileged asset holders must be able to earn rents in order to induce them to invest. These rents must come from somewhere: usually everyone else in the society. Imagine, for example, that a group of cronies has obtained from the government a monopoly on some important line of economic activity, such as banking or telecommunications.<sup>78</sup> Its politically created monopoly will allow it to charge prices for services well above what would prevail under

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<sup>76</sup> *Id.*, at xiii, xvi

<sup>77</sup> *Id.*, at xvi

<sup>78</sup> *Id.*, at xvi, xvii

conditions of free entry. Essentially, then, there will be a transfer of income from everyone using telecommunications or banking services to the managers and shareholders of those firms.<sup>79</sup>

#### **D. Conclusion**

The main obstacle to antitrust in developing countries is utilizing the highly concentration nature of those countries' economies and adopting policies that favor certain members of the society regardless of the fulfillment of social desire. Cronies are common phenomena in developing countries' economies, where certain political forces affect the incentives of decision makers to adopt an efficient competition law. Furthermore in crony systems, some market participants who have political power are used to benefiting from competition by government-made or private barriers to entry and by promoting the adoption of competition law that would help to change the rules of the game. Therefore, groups or firms of dominant positions have to secure and maintain the new policy that favors them up to the total expected profits.

In addition, developing economies suffer from the lack of institutional competence and independence, which is considered the last safeguard of competition. Accordingly, it could be concluded that the whole cycle of the political economy of competition law in developing countries is disadvantaged, starting from the choice of competition policy to the cronyism status, and ending with the dependant Regulators.

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<sup>79</sup> *Id.*, at xvi, xvii

### **III. The Case of Egypt: An Example of the Political Economy of Competition Law in a Developing Country**

In the first chapter, we discussed poverty and the high concentration of small market economies of developing countries as the central obstacles to antitrust in developing countries. Additionally, we defined the main characteristics of the political economy of antitrust within emerging economies with great power granted to decision makers. In this chapter, I argue that Egyptian antitrust combines all of the above elements, specifically with regard to high concentration of markets and political economy. In this chapter, we will assess the Egyptian steel market to identify the essence of Egyptian competition law and agency.

#### **A. The Foundation of Egyptian Competition Law**

The Egyptian Competition law like any other competition law is a form of regulation that represents a code of conduct in the economic arena. It mainly provides for anti-competitive practices and structures in the economy, with a view to maximizing the benefits of the competitive process. The adoption of a free market economy, in itself, is not a guarantee that its private actors will be competitive. Here the law interferes to guarantee, inter alia, that any anti competitive attitude is sanctioned.<sup>80</sup>

Law-making should come from within, not without. Legislation should respond to contextual problems that need to be solved. Law is not ideally generated by outsiders who say: We have this law and you should, too.<sup>81</sup> The two opinions need a link. Does the outsider claim that the law is needed to solve negative externalities visited on the outsider, as in pollution: Your smokestacks are polluting us? Does the outsider claim that its businesses pay a cost and to be fair the insider's businesses should pay the same costs? Does the outsider claim: If only you will make your laws like ours, our businesses will find it easier to make more money in your backyard? Or is the outsider altruistic; a paternalistic good Samaritan: We know this is good for you; we "offer" it to you.<sup>82</sup>

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<sup>80</sup> Bahaa Ali El-Din, *Introducing Competition Law*, in PRIVATISATION AND THE CREATION OF A MARKET –BASED LEGAL SYSTEM, *THE CASE OF EGYPT* PP 134-135

<sup>81</sup> Ali El-Din, *supra* note 80 at 135.

<sup>82</sup> See Daniel Berkowitz, Katharina Pistor & Jean Francois Richard, *Economic Development, Legality, and the Transplant Effect*, 47 EUR. L. REV. 165 (2003), for a discussion of the problems of legal transplants when the law is not adapted to the country's conditions.

Following ten years of discussions from 1994 to 2005 and confronting wide opposition from monopoly beneficiaries, the Egyptian competition law was issued. There were many reasons that delayed the issuance of the law,<sup>83</sup> One of which is the role of the private sector: Egyptian business figures have influenced policy makers to abandon the legislation of a competition law for some reasons such as, the fear of renewed governmental intervention under the guise of protecting competition; the law would give unfair advantage to non-incorporated and black market firms; the law might upset the corruption and profiteering.

Second, the government's attitude: The government's delay in passing appropriate competition legislation is related to four considerations: the lack of international institutional pressure for competition law; the relatively low priority of the government to such legislation; the lack of the administrative and technical capabilities necessary to enforce the law; the lack of coordination between the various concerned ministries.

However, one of the main reasons that motivated the government to present the new law to the People's Assembly is the contractual obligation derived from the Euro-Mediterranean treaty signed by Egypt, to make a new legislation for Anti Trust.<sup>84</sup>

The issuance of the law formally referred to as the Law on Competition Protection and the Prevention of Monopolistic Practice was contentious, and it has since been criticized for being ineffective. The following paragraphs will discuss the ineffectiveness of the law and the agency regardless to the Egyptian officials' allegations that the law and agency are positive tolls in liberalizing the Egyptian Economy.

In her message declared on the Egyptian Competition Authority's website, the Chairperson of the Authority says:

The Law No.3 of 2003 on the Protection of Competition and the Prohibition of Monopolistic Practices, followed by the issuance of the Executive Regulations, is a cornerstone of free market economy that assures free competition and free entry to and exit from the market based on economic efficiency. The law provided

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<sup>83</sup> Ali El-Din, *supra* note 71, at 5 PP 164-165.

<sup>84</sup> *Id.*, at 5 PP 165-166.

for the establishment of an Authority, responsible for monitoring the market and enforcing the provisions of the Law. It receives complaints and notifications and can initiate inspections when in doubt of malpractice that may harm competition and is in violation of the provisions of the law. On a wider scale, the competition policy provides for a framework for promoting competition culture and broadening people's awareness of the provisions of the law. In addition, the Authority coordinates with different sector regulatory bodies, as well as interacts with national and international organizations to exchange opinions and experiences in the field of competition and to build the institutional and human capacity of the Authority.<sup>85</sup>

To better assess whether the Egyptian competition law and agency are effective as promoted by the officials or ineffective as per critics, a case study of a famous monopoly will be introduced and apply the provisions of the Egyptian law on it to reach a conclusion about the correct assessment.

### **B. Ezz Steel: A Case Study of an Egyptian Monopoly**

The local steel industry is accused of being a monopoly due to the dominant market position of such monopoly and to entry barriers to the market. In this respect, numbers indicate that the price of the steel increased from 1036 LE per ton in 2000 to 5100 LE per ton in March 2008.<sup>86</sup> This means that the steel price increased 500% during the last eight years. Accordingly and as per the threshold of market share, the Egyptian steel sector is dominated by Ezz Steel Rebars. Therefore, it is relevant to take the Ezz Steel Rebars (Ezz Steel) as our case study of whether the Egyptian steel sector suffers from a monopoly or not.

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<sup>85</sup> The Egyptian Competition Authority website, available at <http://www.eca.org.eg/EgyptianCompetitionAuthority/Static/Message.aspx?MainNav=About&SubNav=Message> (This is the message of the Chairperson of the Egyptian Competition Authority as broadcasted on the ECA website)

<sup>86</sup> As per a report issued and distributed by Ezz Steel Company, the Egyptian dominant producer., April 2008

## **1. Historical Background of Ezz Steel Rebars**

In October 1999, Al-Ezz Rebars took over a controlling share in Alexandria National Iron and Steel Company which is considered as the largest Egyptian steel producer. The acquired share represented 28 percent of the company shareholding, and following Al-Ezz's purchases, he succeeded to enlarge its market share to be 67.1 percent of the steel market in Egypt. The objective of EZDK is to keep up its dominance over its share in the Egyptian steel market by maintaining its increasing market share. Furthermore, the board of directors of the Alexandria National Iron and Steel Company had appointed Ahmed Ezz as a managing director and joint Chairman of Al Ezz Steel and Alexandria National Iron and Steel company. This move was targeting the consolidation of both companies. The two company's brands were totally unified and both companies became under the name of EZZ-Dekhila and using the same sales force.<sup>87</sup>

## **2. Alleged Antitrust violations by Ezz Steel on the Basis of Egyptian Law**

The provisions of the Egyptian law contain some anticompetitive practices that are penalized. In the following paragraphs, those provisions will be applied to the case study to assess whether Ezz Steel is violating the Egyptian competition law or not.

### **a) Abuse of Dominance as Anticompetitive Behavior**

Having a dominant position or monopoly is in itself not a violation of competition law. The abuse of that dominant position is what can constitute a violation.

Dominance is defined differently in each jurisdiction. Each competition law sets its own market share percentage for dominance, for example: US market share percentage is two thirds or more, EU market share is from 40 percent to 50 percent, and East Asia's market share is from 50% to 75%.<sup>88</sup>

As for the Egyptian law, in accordance with article 4 of the Egyptian law on the Protection of Competition and the Prohibition of Monopolistic Practices (Law No. 5

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<sup>87</sup> Ahmed Farouk Ghoneim, Competition Law and Competition Policy: What Des Egypt Really Need, 7-8/The Economic Research Forum for the Arab Countries, Iran and Turkey Working Paper Series, Paper No. 0239, 2002.

<sup>88</sup> Meghawery Shalabi Ali, Competition Protection and Prohibition of Monopolistic Activities International Experiments, Ahram economic monthly book 212, July 1, 2005

of the year 2005), dominance in a relevant market is achieved when a person holds a market share exceeding 25% of that market.<sup>89</sup>

Ezz Steel Company's market share is 67.1 percent.<sup>90</sup> Therefore, according to the Egyptian Law Ezz Steel Company has a dominant position in the Egyptian steel market.

The question that needs to be answered is whether Ezz Steel abuses its dominant position in an anticompetitive way. To answer this question, we have to analyze whether Ezz Steel Company's activities could be considered an abuse of its dominance.

#### **b) The Dominant Market Share in the Egyptian Competition Law**

The following table will introduce the market share of Egyptian Rebar producers. It indicates the dominant position of Ezz Steel among its competitors.

Table 1: Market Share of Local Steel Rebar Producers, 2000

<b>Supplier</b>	<b>Production (000) Tons</b>	<b>Market Share (%)</b>
Ezz Steel	1147	27.5
Alex. National Iron & Steel	1375	33.2
<b>Ezz-Dhekhila</b>	<b>2522 (1147+1375)</b>	<b>60.7 (27.5+ 33.2)</b>
Int'l St. R.M.-Beshay	275	6.6
Kouta Group	360	8.6
Delta Steel	91.8	2.2
Menoufeya Steel	46	1.1
Al-Said Steel	50	1.2
Suez Co. Al-Koumy	82	2.0
Ayyad Rolling	36	0.9

<sup>89</sup> Article 4 of of Law No. 3 of 2005 promulgating the Law on the Protection of Competition and the Prohibition of Monopolistic Practices

<sup>90</sup> Ghoneim, *supra* note 88, at 5 PP 0239.



Misr Iron & Steel	24	0.6
Sarhan Steel	0	0.0
Egyptian Iron & Steel	56.2	1.3
El-Temsah Steel	24	0.6
Egyptian Copper Wk	34.2	0.8
Al-Arabi Planet Sharkawi	33	0.8
Egyptian Metal Hatem	80	1.9
National Metal Ind.	16.9	0.4
Total	3731.1	89.65
Imports	440	10.55

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### **c) Excessive Pricing as a Potential Abuse of Dominance by Ezz Steel**

As previously discussed, numbers indicate that the price of the steel increased from 1036 LE per ton in 2000 to 5100 LE per ton in March 2008.<sup>92</sup> This means that the steel price increased 500% during the last eight years. This is a potential abuses that can be held against Ezz Steel because such continuous increase of its steel price can be interpreted as an excessive pricing abuse. Internationally, US and EC differ on excessive pricing abuses, with the US courts, on the one hand, taking the position that merely charging profit-maximizing monopoly prices is not antitrust violation.<sup>93</sup> On the other hand the EC courts take the position that a firm with a dominant position has a legal obligation not to charge excessive prices.<sup>94</sup>

Nationally, dominance in a relevant market as defined by the Egyptian competition law is the ability of a person, holding a market share exceeding 25% of the aforementioned market, to have an effective impact on prices or the volume of supply on it, without his competitors having the ability to limit it. The law also

<sup>91</sup> EFG Hermes Report on Market Share of the Steel Market, 2001.

<sup>92</sup> As per a report issued and distributed by Ezz Steel Company, the Egyptian dominant producer., April 2008

<sup>93</sup> See *Verizon Communications v Law Offices of Curtis V Tinko*, 540 US 398 (2004)

<sup>94</sup> See Case 27/76, *United Brands Company and United Brands Continental BV v Commission of the European Communities*, [1978] ERC 207

stipulates that “The Authority shall determine the situations of dominance according to the procedures provided for in the Executive Regulations of this Law”<sup>95</sup>. The executive regulations determine the situations of dominance as follows:

the person who has a dominant position in a relevant market shall have an effective impact on the prices of the products in that relevant market if this person has the ability, through his/her individual acts, to determine the prices of these products or the quantity supplied in that market where his/her competitors do not have the ability to prevent these acts. The article determined five factors that define the effective impact on the prices of the products as follows:

- a) The person’s share in the relevant market and his/her position in comparison to the remaining competitors.
- b) The conduct of the person in the relevant market in the previous period.
- c) The number of competing persons in the relevant market and its relative impact on the structure of that market.
- d) The ability of the person and his/her competitors to obtain the raw materials necessary for production.
- e) The existence of barriers facing other persons to enter the relevant market.<sup>96</sup>

As identified in the above article and its related executive regulation, Egyptian law does state the effective impact on prices by the dominant person and the factors that lead to that impact but neither the law nor its executive regulations set the excessive pricing as one of those factors although it is one of the major factors of the abuse of dominance.

By applying the above articles on the Ezz Steel and by referring to table 1 above, Ezz Steel has a dominant position in the steel sector by possessing more than 67% of the market share. In addition, Ezz Steel conduct in the steel market in the previous years indicates that Ezz Steel acquired a controlling stake in Alexandria National Iron and Steel Company, the largest steel producer in Egypt in 1999.<sup>97</sup> This acquisition has given the company its dominant position since that transaction.

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<sup>95</sup> Article 4 of Law No. 3 of 2005 promulgating the Law on the Protection of Competition and the Prohibition of Monopolistic Practices

<sup>96</sup> Article 8 of the Executive Regulations of Law No. 3 of 2005 promulgating the Law on the Protection of Competition and the Prohibition of Monopolistic Practices.

<sup>97</sup> Ghoneim, *supra* note 88, at 5 PP 0239

However the EC Treaty sets the excessive pricing as the first factor in determining the abuse of dominance. Article 82 of the treaty articulates the following:

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States. Such abuse may, in particular, consist in:

(a) Directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;<sup>98</sup>

We can conclude from the above that unlike the EC law, the Egyptian competition law lacks to regulate the anticompetitive behavior of excessive pricing. Albeit numbers show that there was a repetitive price increases in the steel market, which increases would be imposed by the one of a dominant position

#### **d) Abuse of Dominance Clause in the Egyptian Competition Law**

Tuning to our basic question of whether Ezz Steel Company abuses its dominant position in the Egyptian steel industry, the Egyptian competition law in its article no. 8 stipulates all of the prohibited actions that the person with a dominant position in a relevant market is forbidden to carry out. These prohibitions are defined in more detail in article 13 as follows:

A Person holding a dominant position in a relevant market is prohibited from carrying out any of the following:

Any act that limits distribution of a specific product, on the basis of geographic areas, distribution centers, clients, seasons or periods of time among Persons with vertical relationships. Vertical relationship shall mean the relationship between the Dominant Person and any of its suppliers or between the Dominant Person and any of its clients.

For the Person with a dominant position to dictate on Persons dealing with it not to allow the usage of their utilities or services to any of its competitors, despite this being economically possible. These utilities and services shall include those which are privately owned by those dealing with the Person in a

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<sup>98</sup> Article 82 of the EC Treaty

dominant position, and which are indispensable for the competing persons to enter or to remain in the market.

Imposing an obligation on a supplier not to deal with a competitor. The non-dealing shall mean the refraining from dealing with a competing person, whether totally or reducing the size of dealing with him to the extent that would drive it out of the market or prevent the potential competitors from entering the market.<sup>99</sup>

#### **e) Horizontal Merger**

The Egyptian Competition Law does not cover mergers. It provides for only the requirement to notify the Egyptian Competition Authority with any mergers to be concluded.<sup>100</sup> In the United States and the EC, mergers judged under a Rule of Reason test look at the competitive and anticompetitive effects of each merger. Since the Egyptian Competition Law does not cover mergers, let us use the Rule of Reason test to judge the merger concluded between El-Ezz Steel Rebars Company and Alexandria National Iron and Steel Company that resulted in the gain of 67.1% market share by the merged company. Ezz Steel gained significant market position - 60.7% - while its nearest rival the Kouta Group was left with only 8.6 percent.

An important assessment is whether Ezz Steel Company's merger with Dekhela is to be considered anticompetitive. Ezz's horizontal merger with its main competitor aimed to give the new merged company a dominant position that seriously discouraged new players from attempting to enter the market. In addition, the new merger, at that time, might have caused the elimination of one of the rivals - Sarhan Steel which possessed zero percent of the steel market one year after the merger.

Hence, Ezz Steel Company had succeeded in gaining a dominant position in the Egyptian steel industry years before the enactment of the law on the protection of competition and the prohibition of monopolistic practices. In light of the fact that the

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<sup>99</sup> Undertaking one or more of the above could be the key for answering our basic question of this paper, namely, whether Ezz Steel abused its dominant position in a way that violates the Egyptian law. Investigating the actions that have been carried out by Ezz Steel that might have violated the above listed provisions requires the availability of data and information, which often does not exist for any scholar or researcher.

<sup>100</sup> See Article 11 of Law No. 3 of 2005 promulgating the Law on the Protection of Competition and the Prohibition of Monopolistic Practices

Egyptian Competition law does not have a merger regulation, such a merger even after the passing of the law could have been allowed.

#### **f) Vertical Agreement**

In the last section, we highlighted the horizontal mergers as anticompetitive behaviors are not covered under the Egyptian law. However, vertical agreements are regulated in the Egyptian law. Before applying vertical agreements Egyptian law provisions, let us look to the similar in the US and the EC laws. Under the US and the EC laws a vertical agreement that restricts dealing with rivals is prohibited. Therefore, any vertical agreement is subject to the Rule of Reason to test whether it is competitive or anticompetitive. The following will turn to one of these prohibited actions in an attempt to analyze it in order to see if it applies to our case study or not. The law states that agreements or contracts between a person and any of its suppliers or clients are prohibited if they are intended to restrict competition. This article prohibits any person holding a dominant position from carrying out any act that limits distribution of a specific product, on the basis of geographic areas, distribution centers, clients, seasons or periods of time among persons with vertical relationships.<sup>101</sup> Vertical relationship refers to the relationship between the dominant person and any of its suppliers or between the dominant person and any of its clients. The law states that agreements or contracts between a person and any of its suppliers or clients are prohibited if they are intended to restrict competition. The executive regulations stipulate that the evaluation of whether or not the agreement or contract between a person and any of its suppliers or clients would restrict competition is based on the inquiry made by the Authority on a case by case basis in light of the following factors:

- 1- The effect of the agreement or contract on the freedom of competition in the market.
- 2- The existence of benefits accrued to the consumer from the agreement or contract.
- 3- The considerations of preserving the quality of the product, its reputation, safety, and security requirements, in a manner that do not harm competition.

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<sup>101</sup> See Article 7 of Law No. 3 of 2005 promulgating the Law on the Protection of Competition and the Prohibition of Monopolistic Practices

4- The extent of compliance of the conditions of the agreement or the contract with established commercial customs in the activity subject to examination.<sup>102</sup>

Applying these provisions to the case of Ezz Steel there is evidence of vertical agreements that might be considered a violation of the competition law. The Egyptian press reports concentrate on Ezz's vertical agreements with certain distributors, all over Egypt. In March 2008, Sout El Oma reported that explain "Amed Ezz has controlled the steel market through number of distributors all over Egypt, through which he collected millions of Egyptian pounds during the last three months through which the steel price had increased from LE 3800 to over LE 6000."<sup>103</sup> The report further describes how those vertical agreements are concluded. "Ezz put his tough conditions to approve one of the steel merchants to be an agent to his factories, as Ezz does not permit his factories to deal directly with any merchant or construction company" one of those tough conditions is having a minimum capital of LE 2,000,000. As per the report, the total number of Ezz's vertical partners is 87 agents.<sup>104</sup>

If such agreements are approved, it will constitute anticompetitive practice on the grounds that those vertical agreements affect the freedom of competition in the market because all the steel produced by the dominant producer are kept with some suppliers and not by others. Thus, such Ezz-approved suppliers possess the majority of the supply of steel and therefore, increase its price to maximize their profits. This clarifies the allegation of Ezz Steel that the price by which they sell is less than the end user's price. No matter whether such allegation is true, it does not exempt Ezz Steel, the main supplier, from sharing joint responsibility with the steel distributors for the increase in the steel price. Thus, Ezz Steel and its distributors are jointly violating article 7 of the Egyptian Competition Law.

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<sup>102</sup> See Article 12 of executive regulations of Law No. 3 of 2005 promulgating the Law on the Protection of Competition and the Prohibition of Monopolistic Practices

<sup>103</sup> Ahmed Abo El Khair, *Ahmed Ezz sets monthly meetings with his distributors*, Sout El Oma Newspaper, March 10, 2008 at

<sup>104</sup> Abo El Khair, *supra* note 92 at 14

### **g) Conclusion**

As identified from the above applications of the Egyptian law on the Ezz Steel case, we can conclude the following:

- 1- Ezz Steel might have set excessive pricing but the Egyptian Competition Law does not regulate the excessive pricing as an abuse of dominance.
- 2- Ezz Steel engaged in a horizontal merger before the enactment of the law, which granted Ezz Steel a big market share and increased the steel sector concentration which led to the removal of rivals and set barriers of entry in the market for new players.
- 3- Ezz Steel might have vertical agreements with its suppliers which the law prohibits as vertical agreements between a person and its suppliers. This could be an anticompetitive practice by Ezz but proving such needs a comprehensive investigation and complicated law enforcement tools. The law grants the employees of the Authority the status of law enforcement officers in applying the provisions of the Law.<sup>105</sup> The authority should use such vested power to investigate such potential violation.

### **3. The Increases in Real Estates Prices: Uncertain Social Cost of Steel Monopoly**

For a fair judgment on the reasons for the increase in the price of flats anti-competitive behaviors in the cement industry should be included. As per the report of Al Ahram Strategic and Political Studies Center, there were twelve cement companies in 2004 most of which were public sector companies; after the privatization of those public corporations, only seven multinational companies dominated and controlled the entire cement market. The cement's price increased suddenly in a short period of time as in 2002 the cement ton's price was 110 Egyptian Pounds, and in 2006 the price exceeded 300 Egyptian Pounds per ton.<sup>106</sup>

The prices of the steel and cement jumped up sharply after the major producers of both commodities dominated the domestic market and imposed their rules for conducting business. This led to an increase in the prices of the two

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<sup>105</sup> See article 17 of Law No. 3 of 2005 promulgating the Law on the Protection of Competition and the Prohibition of Monopolistic Practices.

<sup>106</sup> Strategic Economic Directions Report of 2007, Al Ahram Centre for Strategic and Political Studies, published in Al Ahram Daily Newspaper on March 7, 2007.

commodities which lead to more increase in prices of residential real estate, and making it even more difficult for young men to obtain even a small apartment.<sup>107</sup>

Consequently, official reports have noticed that the rates of the bachelors are increasing and the rates of sexual harassment felonies are increasing as well.<sup>108</sup>

#### **4. Defenses of Ezz Steel**

The coming section will highlight the defenses of Ezz Steel toward the above accusation. This section will cover the two sides' arguments and better assess our case study. In March 2008 and upon the ongoing increases of steel prices and the accusations directed at Ezz Steel for being the main reason behind such increases by the media and the public, Ezz Steel prepared a report defending itself against antitrust practices.<sup>109</sup> Ezz alleges that the main reason of the continuous increase of the steel prices is the big increase of the international demand of steel raw materials, where statistics show that China buys 36% of the world production of the raw materials after it was representing only 15% of purchases ten years ago. It also alleges that Egyptian Steel industry is connected to the prices of the world's raw materials; as such raw materials represent almost 82% of the final product. Ezz Steel added that from 2002 to 2008, the average increase of Ezz Steel price is less than the increase of the prices of the raw materials (crabs, billet, and others) with 30%. Ezz Steel emphasizes that Ezz Steel prices are less than other local producers' steel prices with 624 Egyptian pounds. Finally, they see at Ezz Steel that it is not true that the steel price is the only reason for the increase of real estates prices, as the cost of steel does not exceed 13,5% of the total cost of any building.

#### **5. Responses to the Defenses of Ezz Steel**

Ezz's allegations may be true but they also apply to other steel producers

As for the allegation that the increase of the Egyptian Steel price is due to the increase of the price raw materials internationally, yes, The Egyptian steel sector relies heavily

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<sup>107</sup> Sayed, *supra* note 7 at <http://www.alaswaq.net/articles/2004/06/20/276.html>.

<sup>108</sup> *Id.* at <http://www.alaswaq.net/articles/2004/06/20/276.html>.

<sup>109</sup> The report was not publicly published however; it was distributed among those who are concerned with the issue of the continuous increase of the steel price. I obtained a copy of the report



on rebar, which account for around four fifths of all steel sales in Egypt.<sup>110</sup> For production of rebar, steel billets are used as raw materials. The rebar require billets to be produced and these billets have to be imported from abroad at high prices. However, Ezz is the only producer who produces billets in Egypt so it does not incur the high costs of importing it like the other firms do. Hence, Ezz Steel is the only Egyptian Steel producer who is not affected by the increase of the prices of raw materials such as Billets.

As for the allegation that the average increase of Ezz Steel price is less than the increase of the prices of the raw materials (crabs, billet, and others) with 30%, it confirms the fact that Ezz Steel is not affected by the increase of the price of raw materials because if he is affected, thus the percentage of the increase of Ezz Steel should have matched with the percentage of the increase of the raw materials. Otherwise, Ezz would have made losses not profits.

As for the allegation that Ezz Steel prices are less than other local producers' steel prices of 624 Egyptian pounds, such a big difference indicates that Ezz' status is different from other local producers in terms of cost and therefore, in price.

As for the allegation that the cost of steel does not exceed 13.5% of the total cost of any building, it is debatable how much actually Steel represents as a component of any building. Some studies indicate that Rebars and other steel products account for 30 percent of construction and 10% to 25% of building costs in Egypt.<sup>111</sup> The average of the four figures is almost 20%, and it is a big number that would influence and motivate the increase in construction and housing.

### **C. Ezz and the Political Economy of High Concentrated Market**

I argued that in small economies, productive efficiency will lead to higher industry concentration and allow the achievement of some market power. This is what happened in the Egyptian Steel Market, where Ezz dominate the Market and enjoys a market share of 67.1 percent, a percentage that exceeds the Egyptian dominance position scale of 25%. On the contrary, we added that such gain of market power would affect the efficiency by monopolistic behavior which harms producers in

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<sup>110</sup> Egypt: Steel Industry Overview 2001, available at <http://www.mesteel.com/cgi-bin/w3-mssql/goto.htm?url=http://www.mesteel.com/countries/egypt/overview3.htm>

<sup>111</sup> Tarek H. Selim, *supra* note at 18

those highly concentrated industries. This is the evil of monopoly which can be found in a highly concentrated market like the Egyptian market. Such a monopoly leads to higher prices of the steel and lower supply levels, and which is an unlikely occurrence under competitive circumstances. The Egyptian Steel sector is an oligopolistic market, in which the behavior of small number of competitors has direct effect on each other. Accordingly and to answer the question of whether Ezz is abusing its dominant position in an anticompetitive way that harms the other rivals in the market, Ezz might have behaved interdependently either explicitly or implicitly to collectively enjoy market power or narrow competition. Such behavior negatively affects productivity and allocation of resources, where price of steel is likely to be above cost. This is one major negative feature of the concentration and monopoly that is apparent in the Egyptian steel sector. The second major factor is the issue of political economy that imbues the issue. One would suspect that in Ezz case, there is regulatory capture concern, where both the legislature and governmental officials may have reasons to abuse their decision-making power by singling out particular individuals or groups and bestowing government largesse upon them in return for political support taking into consideration that Mr. Ezz is a very high political figure in the ruling party.. Thus, we can conclude that “regulatory capture” and “crony capitalism” are the real culprits with regard to the Egyptian choice of competition law and policy, and this can be realized by Ezz monopoly of the steel market and gathered in his political and economic participation. .

#### **D. The Political Economy of the Egyptian Agency**

An important angle of the political economy of competition law and policy is the regulator of competition. The following section will highlight the characteristics of the Egyptian competition authority and how it is independent in regulating competition in accordance with the powers granted to it by the law

##### **1- The Dependency of the Egyptian Competition Authority**

After years of opposition by monopoly beneficiaries and their governmental friends, the Egyptian competition law was born by a caesarean operation, stimulating the models of both Rule of Reason and Per Se Rule of the US and EC competition laws. This Egyptian infant law, however, was born disabled in the efficiency of its

enforcement, as it mainly deprives the “Authority for the Protection of Competition and Prohibition of Monopolistic Practices” from its power.<sup>112</sup>

Law No. 3 of 2005 promulgating the Law on the Protection of Competition and the Prohibition of Monopolistic Practices stipulates that:

There shall be established an authority called “The Authority for the Protection of Competition and the Prohibition of Monopolistic Practices”. The Authority shall be located in Cairo and shall have the public juristic personality. The Authority shall be affiliated to the Competent Minister.<sup>113</sup>

As can be identified from the given rule, the Egyptian Competition Authority is merely an affiliation of the Competent Minister who is the Minister of Trade and Industry. Moreover, the Authority is managed by a Board of Directors that is composed by the Competent Minister.

The Authority shall be managed by a Board of Directors the composition of which shall be formulated by virtue of a decree of the Competent Minister as follows:

- (1) A full-time Chairperson with distinguished experience.
- (2) A Counselor from the State Council, holding a vice-president rank, to be chosen by the President of the State Council.
- (3) Four members representing the concerned ministries to be nominated by the Competent Minister.
- (4) Three specialists and expert members.
- (5) Six members representing the General Federation of the Chambers of Commerce, the Egyptian Federation of Industries, the Banking Federation, the General Federation for Civil Associations, the General Federation for Consumer Protection and the Egyptian General Union of Labor. Each Federation/Union shall appoint its own representative.

The Board shall be appointed for four years which may be renewed for another term.

The Decree on the formation of the Board of Directors shall contain the remuneration of the Chairperson and Board Members.<sup>114</sup>

As apparent from the above article, the authority is subject to the Minister of Trade and Industry which conflicts with its independence. This

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<sup>112</sup> Ghoneim, Supra note 88, at 8.

<sup>113</sup> Article 11 of Law No. 3 of 2005 promulgating the Law on the Protection of Competition and the Prohibition of Monopolistic Practices

<sup>114</sup> Article 12 of Law No. 3 of 2005 promulgating the Law on the Protection of Competition and the Prohibition of Monopolistic Practices

means that the Authority is not separate from the state influence that is likely to influence the transparency and credibility of the Authority and is likely to define the Authority as an integral part of the Executive Branch of the Egyptian Government. Furthermore, the Board of the Authority is composed of four Ministers' assistants. It is unlikely that those four assistants to the Ministries would vote on a case's decision on their own.

In addition, the authority cannot undertake any lawsuit against any violator of the provisions of the Competition law. Lead in...

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 filing request and shall result in the lapse of the criminal lawsuit relevant to the same case subject of suing.<sup>115</sup>

As can be understood from this article, the Egyptian Competition Authority is managed by the Ministry of Trade and Industry who has the power to initiate any lawsuit against any person whose actions violated the provisions of the law.

## **2- The Independence of the Egyptian Central Bank**

To better understand the political economy of the Egyptian competition agency, the following section will discuss the independency of another regulator in Egypt, indicating how the law assures the independency of the regulator.

Identifying other Egyptian public agencies shall confirm the political choice to weaken the Egyptian Competition Authority.

As has been discussed in the previous section, the Egyptian Competition Authority does not have any enforcement capacity which empties the whole Egyptian law from its content and misleads with its promise of protecting competition. Theoretically, the Egyptian Competition Authority is a regulator of the different sectors of Trade and Industry regarding the protection of competition in each sector or

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<sup>115</sup> Article 21 of Law No. 3 of 2005 promulgating the Law on the Protection of Competition and the Prohibition of Monopolistic Practices

market but practically, it is merely an affiliation of the Ministry of Trade and Industry. However, other regulators in Egypt or in any developed country enjoy some sort of independence and the laws give those regulators the power to regulate all the players of the business and enforce the provisions of the law without any interference from the state. Comparing the Egyptian Competition Authority with the US Federal Trade Commission reveals many defects and deficiencies in the Egyptian law that disables the Authority from regulating the competition.

If we look to another Egyptian regulator such as the Central Bank of Egypt, we find that it enjoys independence regulatory power over the banks which are working in Egypt by virtue of the law. Although the Central Bank of Egypt is supervised by the President, the Board of Directors of the Central Bank sets rules for regulation and supervision over banks, and regulations relevant to banks' activities according to the provisions of this Law, with due regard to international banking norms.<sup>116</sup>

Moreover, no criminal action shall be brought or any investigation procedures shall be taken in the crimes stipulated in this Law and the decrees issued for its enforcement, and in Articles 116 (bis) and 116 (bis-A) of the Penal Code within the scope of enforcing the provisions of the Central Bank Law, except upon a request by the Governor of the Central Bank or the Prime Minister.<sup>117</sup>

Hence, we can conclude that Central Bank of Egypt enjoys a significant amount of independence from the executive branch of the state, whose independence gives the banking sector two benefits. First, a great success compared to other business sectors in terms of the profits achieved by all the banks. Second, the increase in the number of foreign banks that come and works in the Egyptian market because of the trust of the strength of the Egyptian banking sector and because it is not controlled by the government.

However, we admit that there is a technical difference between the Competition Authority and other regulators that each regulator has jurisdiction only over a certain business sector but the Competition Authority is concerned with all the

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<sup>116</sup>See Article 56 of Law no. 88 of 2003 Promulgating the Law of The Central Bank, The Banking Sector And Money, Amended by Law No. 162 of the Year 2004 and Law No. 93 of the Year 2005.

<sup>117</sup>See Article 131 of Law no. 88 of 2003 Promulgating the Law of The Central Bank, The Banking Sector And Money, Amended by Law No. 162 of the Year 2004 and Law No. 93 of the Year 2005

goods and services sectors. Also, each regulator has intensive technical experience in the business that it regulates but the Competition Authority does not have such technical awareness regarding each sector and market. On the other hand, the Competition Authority and other regulators are public juristic persons that aim to maintain the rule of law and apply the law fairly on all the players without any bias, in order to enhance the free market economy which is the general trend of the Egyptian state in the last two decade, which trend is supposedly leads to the consumer welfare and affordable goods and services with quality. Hence, it is beneficial to our research to examine other Egyptian regulators to seek the truth regarding the independence of those regulators and whether such independence leads to the enforcement of the law on everyone participating in the game or there are other rules for the game rather than the Rule of Law.

#### **IV. Conclusion**

This paper has argued that in small economies, productive efficiency will lead to higher industry concentration and allow the achievement of some market power. This is what happened in the Egyptian steel market, where Ezz Steel dominates the market enjoying a market share of 67.1 percent, which exceeds the Egyptian dominance position scale of 25%.<sup>118</sup> Such a gain of market power would affect the efficiency by allowing monopolistic behavior which harms producers in such highly concentrated industries. This is the evil of monopoly which can be recognized in such highly concentrated markets and which leads to higher prices and lower supply levels than under competitive circumstances. Inefficiency of concentrated market and the cost of rent seeking behavior under an oligopolistic market have direct effect on each others by formulating the political economy of antitrust for those concentrated markets. This effect would lead to emergence of monopolies that would commit anticompetitive practices and put many barriers to entry. As a case study and to answer the question of whether Ezz is abusing its dominant position in an anticompetitive way that harms the other rivals in the market, it was argued that firms with monopoly such as Ezz may behave interdependently either explicitly or implicitly to collectively enjoy market power or narrow competition. also argued that such behavior negatively affects productivity and allocation of resources, where price are likely to be above cost; and we quoted that “inefficiently small competitors [may be able] to enter the market beneath the fixed-price umbrella; capacity is allowed to expand in the wrong locations or in increments that are too small [to exhaust scale economies]; ... and various other forms of non-price competition that drain resources are encouraged.”<sup>119</sup>

The second major factor in the dilemma of concentration monopoly is the political economy aspect that is covering the whole issue, and which we referred to in the second part of the first chapter. It was emphasized that the regulatory capture concern, which occurs in the absence of constraints, where both legislatures and

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<sup>118</sup> Article 4 of of Law No. 3 of 2005 promulgating the Law on the Protection of Competition and the Prohibition of Monopolistic Practices

<sup>119</sup> Caves, *supra* note 34, at 313,313.

governmental officials may have intentions to abuse their decision-making power by singling out particular individuals or groups and bestowing government largesse upon them in return for political support. However, small economies should highlight the obstacle of monopoly and its abuse in light of the respective behavior by promoting “regulation of conduct” that is not based on anticompetitive conduct or intent, but rather focuses separately on high prices, restricted output, or other specified trading factors. By doing so, the law will safeguard against monopolistic behavior without the per se treatment of monopoly and especially with the existence of regulatory capture and crony capitalism as the real culprits behind the political economy of antitrust in small economies.

In the last part of Chapter two we discussed the Egyptian political choice to weaken the Egyptian Competition Authority which has an integral role in the political economy of Egyptian competition law and policy. Unlike other regulators in Egypt such as the Central Bank of Egypt and by interpreting the Egyptian competition law provisions we have concluded that the Egyptian Competition Authority is merely an affiliation of the competent minister who is the Minister of Trade and Industry. Moreover, the Authority is managed by a Board of Directors that is appointed by the Minister of Trade who is the only one who has the power to initiate any lawsuit against any person whose actions violate the law’s provisions. Furthermore, the Board of the Authority is composed of four Ministers’ assistants. It is unlikely that these four assistants to the Ministers would adopt an opinion dissimilar to the Minister’s.

Thus, Egyptian law and policy was not correctly regulated to fulfill the best theoretical practice for developing countries. This led, for example, to the emerging of well-known monopoly in the Steel Industry which is offended and considered as the major reason on the continuous increase of the real estate prices and the increase in the average age of marriage.