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## Abuse of dominance under the Egyptian Competition Law: investigating peculiarities that may have special effects in the economy

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	<b>EDITORIAL</b>	<i>By Juan Antonio Rivière</i>	3
	<b>ALGERIA</b>	<i>PRESENTATION DU PROJET DE LOI n° 10-05</i>	5
		<i>COMPILATION DU TEXTE DE L'ORDONNANCE n°03-03</i>	6
		<i>PROJET DE JUMELAGE CONCURRENCE</i>	18
	<b>EGYPT</b>	<i>ABUSE OF DOMINANCE: PECULIARITIES AFFECTING ECONOMY</i>	22
		<i>By Mourad Greiss</i>	
		<i>SOUTH-SOUTH COMPETITION COOPERATION: QIZ CASE STUDY</i>	36
		<i>By Mohamed El-Far</i>	
	<b>JORDAN</b>	<i>NEW DRAFT COMPETITION LAW, ACHIEVEMENT &amp; IMPROVEMENT</i>	49
		<i>By Dr. Martin Beck, Moritz Ader, Léa Collet</i>	
		<i>THE KONRAD ADENAUER STIFTUNG IN AMMAN</i>	54
	<b>MACEDONIA</b>	<i>FIVE YEARS OF COMPETITION ENFORCEMENT: ASSESMENT</i>	56
		<i>By Ms Rozeta Karova &amp; Marco Botta</i>	
	<b>MAROC</b>	<i>POLITIQUE DE CONCURRENCE ET L'APPUI DE L'UE</i>	73
		<i>COMPETITION POLICY AND ITS SUPPORT BY THE EU</i>	90
		<i>Par Krzysztof Jaros</i>	
	<b>SERBIA</b>	<i>RECENT DEVELOPMENTS IN THE COMPETITION LAW</i>	96
		<i>By Srdjana Petronijevic</i>	
	<b>SYRIA</b>	<i>ACT OF COMPETITION PROTECTION AND PREVENTION OF MONOPOLY</i>	100
	<b>TUNISIE</b>	<i>CONCLUSIONS OF THE COMPETITION LAW AND POLICY STUDY</i>	110
		<i>JUMELAGE: MODERNISATION DU TRIBUNAL ADMINISTRATIF</i>	114
	<b>UNITED STATES OF AMERICA</b>	<i>TOWARD INDEPENDENT COMPETITION ADVOCACY IN THE MEDITERRANEAN WORLD: LEARNING FROM THE AAI MODEL</i>	117
		<i>By Albert Foer</i>	
	<b>EUROPEAN UNION</b>	<i>THE EUROPEAN OMBUDSMAN: RESOLVING COMPLAINTS, PROMOTING GOOD ADMINISTRATION</i>	129
		<i>By P. Nikiforos Diamandouros</i>	
		<i>THE ROLE OF PUBLIC SERVICES IN "EUROPE 2020"</i>	135
		<i>By Joaquín Almunia</i>	
		<i>CEEP DECLARATION ON PUBLIC SERVICES SHAPING EU</i>	140
		<i>CYPRUS' COMPETITION COMMISSION IMPOSES FINES</i>	141
		<i>ARLEM - EURO-MED REGIONAL AND LOCAL ASSEMBLY</i>	142
	<b>EUROMED</b>	<i>EMPA -EURO-MED PARLIAMENTARY ASSEMBLY RECOMMENDATION</i>	145
		<i>APPEL DE HAMMAMET</i>	154
		<i>EURO-MED BUSINESS DECLARATION 2010</i>	155
		<i>SECRETARIAT OF THE UNION FOR THE MEDITERRANEAN</i>	158
		<i>INFRA-MED</i>	164
		<i>INTERNATIONAL CITY FOR THE MEDITERRANEAN PROJECT</i>	165
	<b>INFORMATION</b>	<i>LISTE OF ARTICLES IN MCB-BMC n° 1</i>	166
		<i>EUROPEAN COMPETITION NETWORK BRIEF 4</i>	169

## **Abuse of dominance under the Egyptian Competition Law: Investigating peculiarities that may have special effects in the economy**

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1. Introduction
2. The treatment of abuse of dominance under Egyptian Competition Law
  - 2.1. Determination of dominance
  - 2.2. Abusive practices: Exploring peculiarities in Egyptian Law
    - 2.2.1 The lack of excessive pricing prohibition
    - 2.2.2 An effects-based approach to abuse of dominance
3. Evaluating potential effects on Egyptian economy that may arise from peculiarities in the treatment of abuse of dominance
  - 3.1 The lack of excessive pricing prohibition
  - 3.2. Employing an effects-based approach to abuse of dominance
4. Methods to tackle peculiarities
5. Conclusion

### **1. Introduction**

The prohibition of abuse of dominance constitutes an integral part of any competition law regime; given the fact that abusive practices tend to distort the competitive process. This is why peculiarities in treatment of abuse of dominance in one way or another may be formidable to the extent that they may eventually harm economies of concerned nations. Peculiarities in this respect may appear in two forms. First, where the competition law at stake does not regulate or discipline certain abusive practices, and; second, where the competition authority in question employs an enforcement approach that may not be suitable to it at the current stage.

The aim of this paper is to explore these peculiarities and to evaluate their potential effects on the Egyptian market and, in turn, economy. The paper will start off by analysing the treatment of abuse of dominance under Egyptian Competition Law, while exploring peculiarities in such treatment. It will then move on to evaluate the potential effects of such peculiarities on the Egyptian market and economy. The final part will attempt to tackle these peculiarities.

### **2. The treatment of abuse of dominance under Egyptian Competition Law**

#### **2.1 Determination of dominance**

Dominance is defined under Article 4 of Law No. 3 of 2005 Promulgating the Law on Protection of Competition and Prohibition of Monopolistic Practices ('Law No. 3/2005') as follows: "dominance in a relevant market is the ability of a person<sup>2</sup>, holding a market share exceeding 25% of the aforementioned market, to have an effective impact on prices or on

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<sup>1</sup> D.Phil. Candidate (University of Sussex). The views expressed in this paper are personal. The author would like to thank Professor Malcolm Ross, Dr. Peter Holmes and Dr. Yuri Borgmann-Prebil (University of Sussex) for their valuable comments on an earlier draft. The author is also thankful to Dr. Ahmed Ghoneim for initially recommending him to contribute in the Mediterranean Competition Bulletin.

<sup>2</sup> The term 'person' encompasses "Natural and juristic persons, economic entities, unions, financial associations and groupings, groups of persons, whatever their means of incorporation, and other related parties". Article 2(a), Law No. 3 of 2005 promulgating the Law on Protection of Competition and Prohibition of Monopolistic Practices

the volume of supply on it, without his competitors having the ability to limit it”<sup>3</sup>. In this sense, for a firm to be found dominant under Law No. 3/2005, it has to satisfy the following pre-requisites:

1. Market share exceeds 25% of the relevant market<sup>4</sup>;
2. The ability to have an effective impact on prices or volume of output; and
3. The inability of competitors to limit such ability.

It is important to note that the pre-requisites above-mentioned *all* ought to be satisfied. This means that if the Egyptian Competition Authority (‘ECA’) and/or Court finds that the firm under scrutiny does not satisfy one of these pre-requisites, it shall not resume its appraisal of the remaining criteria; and will thus not find that firm as dominant. That said; the ECA has shown reluctance to rely on market share thresholds for dominance findings. For instance, in the *cement* case, albeit finding Suez Group to have held a threshold of 30%, the ECA did not reach a dominance finding on the basis of not satisfying other pre-requisites<sup>5</sup>. Likewise, in its study of the *vegetable oil* market, the ECA found that although one of the companies held 45.56% of the relevant market, it was not dominant on the basis of its inability to have an effective impact on prices<sup>6</sup>. This means that market share thresholds provide no more than a first indication that guides the ECA on whether to analyse the remaining criteria.

Article 8 of the Prime Ministerial Decree No. 1316 of 2005 issuing the Executive Regulations of Protection of Competition and Prohibition of Monopolistic Practices Law No. 3 of 2005 (‘executive regulations’) expands on the generic stipulation provided by Article 4. It provides that: “the person shall have effective impact on the prices of the products or the quantity supplied in the relevant market if this person has the ability, through his/her individual acts, to determine the prices of these products or the quantity supplied in that market where his/her competitors do not have the ability to prevent these acts, taking into consideration the following factors:

- 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; and
- e) The existence of barriers facing other persons to enter the relevant market”<sup>7</sup>

While investigating whether or not a firm(s) is in a dominant position in light of the three conditions stipulated under Article 4, the above-mentioned factors are collectively given due consideration. For

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

<sup>4</sup> Market share threshold is the percentage quantifying the volume of sales that a firm attains in the relevant market. See O’Donoghue, R. & Padilla, A. J. (2006) “*The Law and Economics of Article [102 TFEU]*” First Edn., Hart Publishing, Oxford and Portland, Oregon, p.109

<sup>5</sup> Report of the Egyptian Competition Authority “*Study on the Cement Market in the Arab Republic of Egypt in light of the Law on Protection of Competition and Prohibition of Monopolistic Practices*” Study by virtue of the Minister of Trade and Industry’s request dated 16<sup>th</sup> July, 2006 [Report in Arabic], published on the website on 5<sup>th</sup> September, 2008, available from: (<http://www.eca.org.eg/ECA/Publication/List.aspx?CategoryID=1>) accessed 01-10-2009, p.29

<sup>6</sup> See Report of the Egyptian Competition Authority “*Study of the Vegetable Oil Market light of the Law on Protection of Competition and Prohibition of Monopolistic Practices*” Study by virtue of the Minister of Trade and Industry’s request dated 26<sup>th</sup> December, 2007 [Report in Arabic], published on the website in September, 2010, available from: (<http://www.eca.org.eg/ECA/Publication/List.aspx?CategoryID=1>) accessed 15-09-2010, p.31

<sup>7</sup> Article 8, Prime Ministerial Decree No. 1316 of 2005 issuing the Executive Regulations of Protection of Competition and Prohibition of Monopolistic Practices Law No. 3 of 2005

instance, while determining whether or not the market share of a firm subject to investigation exceeds 25% of the relevant market, the ECA compares that firm's share with that held by its competitors. Moreover, a firm satisfies the 'effective impact on prices' criterion only if it is found that its competitors were obliged to set their prices below it; even in the case of higher levels of demand. In other words, the ECA may declare this criterion as satisfactory only if the firm in question was capable of setting its prices individually. In relation to the 'ability to affect the volume of output' criterion the ECA takes into account factors such as the firm's total production capacity and the ability to obtain raw material; all of which to be made in comparison with its competitors. If it finds that the firm under scrutiny has privilege over its competitors at the time of the investigation, it may reach a finding that such criterion is fulfilled. With respect to the 'inability of competitors to have an effective influence on prices or output' criterion, the ECA takes into consideration factors such as legal barriers and the ability to establish new industries through often incurring irrecoverable costs (also known as sunk costs) to reach a finding over whether or not the firm under scrutiny satisfies such criterion.

## 2.2 Abusive practices: Exploring peculiarities in Egyptian Law

### 2.2.1 The lack of excessive pricing prohibition

The fact that the list of abuses stipulated under Article 8 of Law No. 3/2005 is *exhaustive* and that it does not encompass excessive pricing implies that such practice is not prohibited in the Egyptian market<sup>8</sup>. In fact, the ECA's chair-person, in her message in the Annual Report of 2006-2007, stated that: "[...] the increase in prices has become a major problem in the marketplace. Though [high] price is not directly addressed by the competition law, it can, however, indicate practices that violate the law"<sup>9</sup>. This may indeed explain why the ECA in various occasions conducted studies on markets primarily on the basis of high prices. For instance, the ECA conducted the study on the *cement* market due to the unjustified increase in cement prices<sup>10</sup>. In fact, its *steel* report was entitled: "study on justifications behind increase in prices of steel rebar in the Egyptian market"<sup>11</sup>. In other words, the

<sup>8</sup> Note that there exists no precise definition for excessive pricing. Nonetheless, it is commonly perceived that prices are contemplated as *fair* if they are equivalent to "competitive" market prices; or otherwise not higher than these prices. The complexity, however, which competition authorities tend to face while investigating excessive pricing relates to the determination of the "competitive price" of the product or service at stake. There appears to be various approaches for such determination. For discussion of these approaches, see Evans, D. S. & Padilla, A. J. (2005) "Excessive pricing: using economics to define administrable legal rules" 1(1), *Journal of Competition Law and Economics*, Oxford University Press, pp.100-101

Aside of Egypt, some other jurisdictions (most notably U.S. antitrust law) do not prohibit excessive pricing. The debate over whether or not competition law should discipline excessive pricing is substantial. Opponents of regulating excessive pricing tend to argue that disciplining such practice may discourage innovation and cost reduction. In fact, the U.S. Supreme Court had once stated that the "opportunity to charge monopoly prices – at least for a short period – is what attracts "business acumen" in the first place; it induces risk taking that produces innovation and economic growth". See *Verizon Communications Inc. v. Law Offices of Curtis V Trinko LLP*, 540 US 398, 407 (2004)

Moreover, it is often suggested that excessive pricing induces market entry – often known as market *self-correction*. It is also argued that the determination of whether or not a price is excessive is multifaceted. It is equivocal as to which standards and benchmarks should investigators rely on. Proponents of an activist approach, on the other hand, tend to rely on the detrimental effects on consumers. For more insights on arguments for and against regulating excessive pricing, see Evans, D. S. & Padilla, A. J. (2005) "Excessive pricing: using economics to define administrable legal rules" 1(1), *Journal of Competition Law and Economics*. Oxford University Press; Ezrachi, A. & Gilo, D. (2008) "Are excessive prices really self-correcting?" 5(2), *Journal of Competition Law and Economics*, pp.254-262

<sup>9</sup> Annual Report of the Egyptian Competition Authority, (2006/2007) published on the following website on 15<sup>th</sup> June, 2008, available from: (<http://www.eca.org.eg/EgyptianCompetitionAuthority/Publication/List.aspx>) accessed 16-06-2008, pp.3-4, emphasis added

<sup>10</sup> See Report of the Egyptian Competition Authority on the Cement Market.

<sup>11</sup> See Report of the Egyptian Competition Authority "Study on the justifications behind the increase in prices of Steel Rebar in the Egyptian Market in light of the Law on Protection of Competition and Prohibition of



fact that the ECA rationalises its intervention by high prices in a given market does not necessarily mean that it deems excessive or generally high pricing, in itself, as a violation to competition law.

It may be, however, surprising – and perhaps questionable – to some that the Law No. 3/2005 and its executive regulations stipulate the “ability of a person [...] to have an effective impact on prices [...] without his competitors having the ability to limit it [...]” as means for determination of dominance (as delineated earlier); whilst *not* explicitly prohibiting excessive pricing<sup>12</sup>. In essence, this stipulation means that a firm’s ability to increase market prices should not be influenced by its competitors’ ability to successfully undercut it. Hence, the difference between such stipulation and regulating excessive pricing is that the former stands as a means for determining dominance that is *not in itself* prohibited under Law No. 3/2005, while the latter is an abuse of such position. In other words, a firm may not be able to price excessively in a successful manner if it was not dominant in the first place.

Nevertheless, some *may* argue that excessive pricing may develop in the form of refusal to deal and could, thus, be caught under Article 8(b) of Law No. 3/2005<sup>13</sup>. Advocates of such view may invoke the procedures for investigating refusal to deal conducts stipulated under the executive regulations. More specifically, Article 13(b) prohibits a dominant firm from: “refraining from entry into sale or purchase transaction regarding a product with any person or totally ceasing to deal with it in a manner that results in *restricting that person's freedom to access or exit the market at any time, which includes imposing financial conditions or obligations or abusive contractual conditions or conditions that are unusual in the activity subject matter of dealings*”<sup>14</sup>.

However, an argument as such may be countered on the basis that the wording of Article 13(b) seems to primarily confine the prohibition to upstream market dealings or dealings amid producers, suppliers, distributors, wholesalers or retailers and, as such, may not extend to consumers. Moreover, Article 13(b), though may be construed to prohibit imposing high or abusive prices, is in fact limited to the situation where the purchase agreement in question does not come into force. This means that the tangible effects of the excessiveness of prices are merely confined to the firm(s) which found that the sale conditions were deemed as *unusual*. In fact, in this case, the concerned firm’s welfare may not be deterred; in contrast with an explicit prohibition of excessive pricing which assumes that the transaction was concluded and that harm was inflicted on the relevant firm and/or consumers’ welfare. This signifies that Article 13(b) is only restricted to refusal to deal abuses and may not encompass an actual practice of excessive pricing.

Moreover, it *may* be argued that high pricing could be prohibited in the form of price discrimination; in relation to the firm(s) incurring such prices, pursuant to Article 8(e) of Law No. 3/2005<sup>15</sup>. However, such abusive practice assumes that the dominant firm at stake charges different prices to its customers; a practice which a dominant firm may not necessarily resort to. In other words, the dominant firm may rather choose to charge similar high prices to all its customers - a practice that would certainly not be caught under Article 8(e). In the same vein, the prohibition of price fixing among competitors, whilst this may often lead to high prices in the relevant market in question, does

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*Monopolistic Practices*” Study by virtue of the Minister of Trade and Industry’s request dated 16<sup>th</sup> July, 2006 [Report in Arabic], published on the website on 18<sup>th</sup> June, 2009, available from: (<http://www.eca.org.eg/ECA/Resolution/List.aspx?CategoryID=2>) accessed 02-11-2009

<sup>12</sup> Article 4, Law No. 3 of 2005 Promulgating the Law on Protection of Competition and Prohibition of Monopolistic Practices

<sup>13</sup> Article 8(b) of Law No. 3/2005 prohibits a dominant firm from “refraining to enter into sale or purchase transactions regarding a product with any Person or totally ceasing to deal with him in a manner that results in restricting that Person’s freedom to access or exit the market at any time”.

<sup>14</sup> Article 13(b), Prime Ministerial Decree No. 1316 of 2005 issuing the Executive Regulations of Protection of Competition and Prohibition of Monopolistic Practices Law No. 3 of 2005

<sup>15</sup> Article 8(e) of Law No. 3/2005 prohibits a dominant firm from: “discriminating between sellers or buyers having similar commercial positions in respect of sale or purchase prices or in the terms of the transaction”.

not cover all the common elements of prohibition of excessive price abuses. First, price fixing assumes the existence of an agreement on market prices – whether verbal or written - between two or more competitors (horizontal agreement). Second, such agreement may not necessarily relate to high prices<sup>16</sup>. Excessive pricing, on the opposed hand, may be practiced by *one* or more firms (that must be in a dominant position) and as such does not require an agreement among competitors.

The concern pertaining to a prohibition of excessive pricing as such should instead be narrower in scope. If excessive pricing was to be prohibited, the Egyptian legislator would have provided a definition of excessive pricing and stipulated the necessary test. This includes the agreed upon benchmark that is ought to be followed in investigations. Consequently, the fact that the aforementioned provisions may, in some occasions, discipline high pricing does not necessarily mean that they encompass excessive pricing; given the absence of a benchmark to determine the element of excessiveness.

### ***2.2.2 An effects-based approach to abuse of dominance***

Article 8 of Law No. 3/2005 prohibits a dominant firm from exercising any of nine abuses. The approach for the appraisal of these abuses is stipulated primarily under the executive regulations. However, the approach does not seem to be consistent under Egyptian competition law. While Article 13 of the executive regulations provides for an effects-based approach to some abuses, on the one hand, it left it open for investigating authorities to choose between a *per se* approach or effects-based analysis in relation to other abuses, on the other hand. This seems to depend on whether or not the practice in question has no other purpose but to restrict competition or that may otherwise be objectively justified from a business point of view. Generally speaking, however, the Egyptian legislator seems to have required an effects-based approach to the majority of abuses prohibited under Article 8 of the Law No. 3/2005.

More specifically, prohibiting a dominant firm from “undertaking an act that leads to the non-manufacturing, or non-production or the non-distribution of a product for a certain period or periods of time” is decided by virtue of an effect-based approach<sup>17</sup>. This may be envisaged from the wording of Article 13(a) of the executive regulations: “[...] *period or periods of time shall mean the period or periods of time that suffice to result in the prevention, restriction or harm of the freedom of competition*”<sup>18</sup>. This entails that exercising a practice that limits the manufacturing, production or distribution process for a period of time in itself is not adequate for a dominant firm to be caught under Article 8(a). The ECA is required to prove that exercising such conduct during the period of time in question has distorted competition in the relevant market. The same approach seems to be required in relation to refusal to deal abuses. A dominant firm is not caught under Article 8(b) of Law No. 3/2005 unless its “refraining from entry into sale or purchase transactions regarding a product with any person or totally ceasing to deal with him” leads to “[...] *restricting that person’s freedom to access or exit the market at any time* [...]”<sup>19</sup>. In this sense, any dominant firm that refuses to deal with another firm – whether this concerns sale or purchase of a product – shall not be caught under Article 8(b) unless such refusal undermines that firm’s ability to enter or exit the relevant market.

Articles 8(c) of Law No. 3/2005 prohibits a dominant firm from “undertaking an act that limits distribution of specific product, on the basis of geographic areas, distribution centers, clients, seasons

<sup>16</sup> See Article 6(a), Law No. 3 of 2005 Promulgating the Law on Protection of Competition and Prohibition of Monopolistic Practices; Articles 10, 11(a), Prime Ministerial Decree No. 1316 of 2005 issuing the Executive Regulations of Protection of Competition and Prohibition of Monopolistic Practices Law No. 3 of 2005

<sup>17</sup> Article 8(a), Law No. 3 of 2005 Promulgating the Law on Protection of Competition and Prohibition of Monopolistic Practices

<sup>18</sup> Article 13(a), Prime Ministerial Decree No. 1316 of 2005 issuing the Executive Regulations of Protection of Competition and Prohibition of Monopolistic Practices Law No. 3 of 2005

<sup>19</sup> Article 8(b), Law No. 3 of 2005 Promulgating the Law on Protection of Competition and Prohibition of Monopolistic Practices

or periods of time among persons with vertical relationships [...]”<sup>20</sup>. Article 8(c) as such left it open for investigating authorities to choose between an effects-based analysis or a *per se* approach. In other words, silence in relation to the approach of analysis under Law No. 3/2005 does not necessarily signify that investigating authorities should employ a *per se* approach; as EL-Far argues<sup>21</sup>. For instance, the ECA, in its *steel* study, employed an effects-based approach to this practice. It was particularly concerned with the compatibility of Ezz Group’s standard distribution agreement with Article 8(c). Article 4 of such agreement stipulates that: “in the event where the second party (approved distributor) refrains from receiving the quantities specified to him/her on a monthly basis by virtue of this agreement by a volume exceeding 10% of the quantity initially agreed upon due to reasons related to him/her and not the market for a period of two consecutive months, the first party (Ezz Group) shall be entitled to reduce his/her monthly quantity to the extent of the actual quantities received for the remaining period of the agreement”<sup>22</sup>. The ECA found that Ezz Group’s system of approved distributors and monthly portions did not violate competition law. As for the issue of reduction of quantities, it perceived that this approach may raise competition law compliance concerns. More specifically, it stated that a practice as such may lead to exclusivity in dealing with Ezz Group’s product. However, contrary to what El-Far suggests, the ECA concluded that such practice did not violate Article 8(c) on the premise that *the volume of sales of other producers was not deterred. It indicated, on the contrary, that throughout the period of study, the demand on steel rebar in general significantly increased*<sup>23</sup>.

The Egyptian legislator, furthermore, stipulates an effects-based approach to price discrimination abuses. Article 13(e) of the executive regulations provides that: “discriminating between sellers or buyers having similar commercial positions in sale or purchase prices or in terms of the transactions, *in a manner that weakens their ability to compete with one another or leads to drive out some of them from the market*”. This means that price discrimination exercised by a dominant firm shall not be caught under Article 8(e) of Law No. 3/2005 *unless* it is proven that such practice undermines the position of related purchasers in the market or otherwise drives them out of the market. In the same vein, predatory pricing or pricing below marginal cost or average variable costs does follow the same approach. In fact, the Egyptian legislator stipulates a four-tiered test for determination of whether or not such pricing structure is anti-competitive. Article 13(h) of the executive regulations provides that: “[...] for the determination of whether the product is sold below their marginal cost or the average variable cost the following elements shall be taken into consideration:

1. *If the sale will drive out the dominant persons’ competing persons from the market;*
2. *If the sale will prevent the dominant person’s competing persons from entering the market;*
3. *If the dominant person will be able to increase prices after driving out its competing persons from the market;*
4. *If the period of time of the sale of a product below its marginal cost or its average variable cost will result into the occurrence of any of the aforementioned*”<sup>24</sup>.

In this sense, for a predatory pricing practice to be deemed as abusive, the Egyptian legislator required the satisfaction of the above-mentioned elements collectively. For instance, if the pricing below marginal or average variable costs by the dominant firm does not drive its competitors out of the

<sup>20</sup> Article 8(c), Law No. 3 of 2005 Promulgating the Law on Protection of Competition and Prohibition of Monopolistic Practices; Article 13(c), Prime Ministerial Decree No. 1316 of 2005 issuing the Executive Regulations of Protection of Competition and Prohibition of Monopolistic Practices Law No. 3 of 2005

<sup>21</sup> El-Far, M. (2010) “Enforcement Policy of the Egyptian Competition Law” *Competition Law International*, Journal of the Antitrust Committee of the International Bar Association, [April 2010 issue], p.55

<sup>22</sup> See Report of the Egyptian Competition Authority on the Steel Rebar Market, pp.42-44

<sup>23</sup> Ibid, p.45; El-Far, M. (2010) “Enforcement Policy of the Egyptian Competition Law” *Competition Law International*, Journal of the Antitrust Committee of the International Bar Association, [April 2010 issue], p.55

<sup>24</sup> Article 13(h), Prime Ministerial Decree No. 1316 of 2005 issuing the Executive Regulations of Protection of Competition and Prohibition of Monopolistic Practices Law No. 3 of 2005



market or generate significant entry barriers, then the practice shall not be contemplated as abusive; even if the remaining elements were satisfied. The Egyptian legislator, similarly, imposes an effects-based approach to exclusive dealing abuses. Article 8(i) of Law No. 3/2005 prohibits a dominant firm from “obliging a supplier not to deal with a competitor”<sup>25</sup>. Article 13(i) of the executive regulations adds to such stipulation that: “[...] 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>26</sup>. This means that a dominant firm is not prohibited from obliging its supplier/distributor from dealing with its competitors *unless* such exclusivity drives the latter out of business or precludes market entry.

Similar to Article 8(c) of Law No. 3/2005 (as discussed above), the Egyptian legislator left it open for investigating authorities to choose the approach they find suitable to abusive practices stipulated under Articles 8(d) on tying arrangements, 8(f) on the refusal to produce scarce products whenever it is economically feasible, and 8(g) on the prevention of competitor(s) from gaining access to the dominant firm’s utilities or services; despite being economically viable. Hence, the ECA and Courts may either choose to employ an effects-based approach in respect of these practices.

### 3. Evaluating potential effects on Egyptian economy that may arise from peculiarities in the treatment of abuse of dominance

#### 3.1 The lack of excessive pricing prohibition

The fact that excessive pricing is not regulated under Egyptian competition law means that firms are entitled to set their prices above prevailing market ones. Notwithstanding the plausibility of some of the arguments countering the success of excessive pricing<sup>27</sup>, exercising such practice by large firms should not be ruled out; at least in some exceptional circumstances. This may particularly be the case in emerging economies like Egypt. In fact, the high levels of concentration that prevail in the Egyptian market as a result of the 1991 privatisation programme may increase the chances of excessive pricing. This could be the case due to the lack of effective competition culture in many sectors. This may also be attributed to the existence of high barriers to entry. For instance, in the fresh juice and non-alcoholic beverages industry, there are only 2 or 3 firms that dominate 75% of the market. 70% of the fabrics production industry is dominated by only a few firms. In the cement industry, while 12 firms operate, only 3 of them account to 70% of total production. The above data indicates that the Egyptian market in general is *highly concentrated*<sup>28</sup>.

In fact, the Harvard School’s proponents argue in favour of a link between market concentration and high prices in a given market; namely the ‘structure, conduct and performance paradigm’. They suggest that the structure of a given market identifies the market behaviour of its players that in turn verifies its performance. Specifically, they argue that companies that hold substantial market share thresholds do essentially have monopoly power that may, in turn, result in high prices<sup>29</sup>. The question

<sup>25</sup> Article 8(i), Law No. 3 of 2005 Promulgating the Law on Protection of Competition and Prohibition of Monopolistic Practices

<sup>26</sup> Article 13(i), Prime Ministerial Decree No. 1316 of 2005 issuing the Executive Regulations of Protection of Competition and Prohibition of Monopolistic Practices Law No. 3 of 2005

<sup>27</sup> See footnote 8 (above)

<sup>28</sup> See Abdellatif, L. M. & Ghoneim, A. F. (2008) “Competition, Competition Policy and Economic Efficiency in the MENA Region: The Case of Egypt” Sekkat, K. (Eds.), *Competition and Efficiency in the Arab World*, New York: Palgrave, Macmillan.

<sup>29</sup> See Monti, G. (2007) “*EC Competition Law*” First Edn., Cambridge University Press, pp.57-59; Peeperkorn, L. & Verouden, V. (2007) “The Economics of Competition” *The EC Law on Competition*, Second Edn., Faull & Nikpay (Eds.) Oxford University Press, p.6

Nevertheless, many Chicago School views remain sceptic about the pragmatism of such approach. For instance, see Demsetz, H. (1973) “Industry Structure, Market Rivalry and Public Policy” (3), *Journal of Law and Economics*, pp.1-9

that lies beneath this school of thought is how the Egyptian market and economy may incur potential losses from high prices in general?

In essence, high prices *directly* deter consumer welfare<sup>30</sup>. The core objective of antitrust law should be to yield the gains of competition to consumers. Consumer gains in this sense are achieved through offering low-priced and quality products accompanied by reasonable choice. Put differently, the objective of antitrust is to protect consumers from anti-competitive and exploitative activities that may “unfairly” shift welfare from consumers to dominant firms. This shift may not indeed result in total welfare maximization; but would merely increase welfare of the dominant firm(s) at stake. Prices set above the competitive level tend to generate “allocative inefficiency”. While monopoly raises prices and in turn reduces the volume of output. Products that are no longer sold may be valued more for future buyers relative to what they would cost the society to manufacture. This entails a case of “pure social loss” in a manner that comprises “allocative inefficiency”<sup>31</sup>.

Moreover, some argue that the likely purpose of antitrust is to promote the efficiency of economies. Particularly, it is submitted that “[t]he whole task of antitrust can be summed up as the effort to improve allocative efficiency without impairing productive efficiency so greatly as to produce either no gain or net loss in consumer welfare”<sup>32</sup>. This means that competition in itself encourages allocative efficiency that would inevitably enrich consumer welfare – needless to say that the success of excessive pricing may in itself imply lack of competition<sup>33</sup>. This argument is rationalized by the ideology that “the preference for competitive rather than monopolistic resource allocation is most clearly explained and firmly based upon a desire to maximize output as consumers value it”<sup>34</sup>.

In this sense pricing above the competitive level or excessive pricing in particular - in light of the foregoing views – is incompatible with the objectives of competition law on the premise that it causes an allocative inefficiency and is detrimental to consumer welfare and efficiency of the economy. Such effects may indeed be featured in the Egyptian market. For instance, if the price of a particular good or service is excessive, consumer welfare may be deterred in a manner that may lead to allocative inefficiency - an outcome that may gradually be passed on to the Egyptian economy; depending on the importance of that good or service and its usage. In fact, the potential effects of excessive pricing may be better explained by two scenarios: first, excessive prices in the primary market, and; second, excessive prices in the secondary market.

The first scenario presupposes that excessive prices prevail in the primary market (i.e. market that supplies the main product). This scenario assumes that the excessively priced product or service in the primary market is complementary to another product or service in the secondary market (e.g. raw material). Assume that concrete producers charge excessive prices (primary market). Concrete is indeed an essential product for construction (secondary market). Consequently, when concrete prices

<sup>30</sup> Consumer welfare may be defined according to Bork, a Chicago School observer, as “maximization of wealth or consumer want satisfaction”. See Orbach, B. Y. (2010) “*The Antitrust Consumer Welfare Paradox*” Arizona Legal Studies, Discussion Paper No. 10-07, available from:

([http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1553226](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1553226)) accessed 28-07-2010, p.11

However, the framework of consumer welfare that will be employed in this paper does not only cover consumers; but also includes suppliers, distributors or retailers; depending on the position of the incumbent firm practicing excessive pricing (i.e. producer, distributor, etc.); although the direct effect is posed to consumers.

<sup>31</sup> Kirkwood, J. B. & Lande, R. H. (2008) “The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency” 84(1), *Notre Dame Law Review*, pp.192,197 For more detail on how allocative inefficiency is caused by high prices, see Mansfield, E. (1982) “*Microeconomics: Theory and Applications*” Fourth Edn., pp.277-292

<sup>32</sup> Bork, R. H. (1993) “*The Antitrust Paradox*” Second Edn., New York: Free Press, p.91

<sup>33</sup> See Orbach, B. Y. (2010) “The Antitrust Consumer Welfare Paradox” Arizona Legal Studies, Discussion Paper No. 10-07, available from: ([http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1553226](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1553226)) accessed 28-07-2010, p.10

<sup>34</sup> Bork, R. H. (1967) “The Goals of Antitrust Policy” (57), *American Economic Review*, p.245

increase, infant and medium-sized construction firms may undeniably be harmed – apart from end-users in both markets. In fact, if such price increase is lengthy, these construction firms may be driven out of the market. In this sense, the effects of excessive prices in the primary market, aside of its effects on consumers of that primary product, may have a formidable impact on the secondary market. Indeed such cause may have a chilling effect on other corresponding markets as well. The second scenario, in contrast with the first, assumes that excessive prices exist in aftermarkets (or secondary markets). Aftermarkets are markets that offer goods or services that complement the primary product or that are otherwise essential for it (spare parts, maintenance services, etc). Assume that a car manufacturer was dominant in the aftermarket of servicing and spare parts where it charged excessive prices; as opposed to the primary market (car manufacturing) where it was not dominant and prevailing prices were not excessive<sup>35</sup>. Inevitably, consumers/buyers of that car may incur significant financial losses as a result of excessively priced spare parts and maintenance services<sup>36</sup>.

Notwithstanding the foregoing potential effects, maximizing consumer welfare and attaining economic efficiency remains a priority in Egypt. The ECA in several occasions implied that consumer gains and economic efficiency lie at the heart of competition law. For instance, former executive director of the ECA has once stated that: “competition is not a goal in itself but rather a means for ***Making Markets Work Better For Consumers***”<sup>37</sup>.

Moreover, in a statement of its vision in its Annual Report 2006-2007, the ECA mentioned that it “aims to bring benefit to the national economy in general and welfare to the society”<sup>38</sup>. While the attainment of these priorities and aims may seem pragmatic, the aforementioned potential effects of excessive prices may suggest otherwise. Some *may*, however, argue that these potential effects may be averted by the application of Articles 10 of the Law No. 3/2005 and 19 of its executive regulations<sup>39</sup>. Particularly, Article 10 of the Law No. 3/2005 provides that: “The Cabinet of Ministers may, after taking the opinion of the Authority, issue a decree determining the selling price for one or more essential products for a specific period of time. Any agreement concluded by the Government for the purposes of the implementation of these prices shall not be considered an anti-competitive practice”<sup>40</sup>. Article 19 of the executive regulations extends on this by providing that: “the Authority carries out the necessary studies for the Council of Ministers Cabinet to perform its competence set

<sup>35</sup> Although under ordinary circumstances, a firm that holds a dominant position in the primary market will in turn be dominant in the related aftermarket. However, this is not always the case. For instance, General Motors was not dominant in the cars manufacturing market; whilst being dominant in the aftermarket of conformity certificates for cars that were purchased through parallel imports (i.e. imports through car dealers rather than the manufacturers) in Belgium. See Commission Decision IV/28.851, *General Motors Continental*, [1974] O.J. L 029. Note that this decision was overturned by the Court of Justice. See Case 26/75, *General Motors Continental v. Commission* [1975] E.C.R. 1367. Moreover, in *Hugin v. Commission*, the Court of Justice upheld the Commission’s decision that found Hugin dominant in the market for spare parts of cash machines (aftermarket) which Hugin itself produces; as opposed to its position in the primary market. See Case 22/78 [1979] E.C.R. 1869, 3 CMLR 345.

<sup>36</sup> Indeed reasonable consumers usually inquire about prices in aftermarkets prior to or at the time of purchasing the relevant primary product. However, information on pricing in aftermarkets may not always be passed on to consumers at the time of purchase either because they did not inquire about aftermarket prices or that information was not existent or deliberately hidden by the seller of the relevant primary product. For more insights on aftermarkets, see Mosso, C. E., Ryan, S. A., Alback, S. & Centella, M. L. T. (2007) “Article [102]” *The EC Law on Competition*, Second Edn., Faull & Nikpay (Eds.), Oxford University Press, pp.337-338

<sup>37</sup> Attia, K. (2009) “Introducing Competition Law and Policy - The Case of Egypt” (1), *Mediterranean Competition Bulletin*, p.18

<sup>38</sup> See Annual Report of the Egyptian Competition Authority (2006-2007), p.15

<sup>39</sup> Note that Article 18 of the executive regulations is more or less a replica of Article 10 of Law No. 3/2005.

<sup>40</sup> Article 10, Law No. 3 of 2005 Promulgating the Law on the Protection of Competition and the Prohibition of Monopolistic Practices

out in Article 10 of the Law regarding the determination of the selling prices of the essential products and prepares the reports on the opinion of the Authority on this matter”<sup>41</sup>.

However, these provisions have hardly been used since the introduction of Law No. 3/2005 and its executive regulations. This is in spite of the fact that prices of *essential products* such as cement and red meat have substantially increased throughout the period 2006-2009 and that the ECA had already conducted studies on these sectors. Despite these studies found that prices of the mentioned products were high, the Council of Ministers Cabinet did not make use of Articles 10 and 19<sup>42</sup>. This may, however, be explained by the fact that Articles 10 and 19 as such are incompatible with Article 10 of the Law No. 8/1997 for Investment Guarantees and Incentives which provides that any firm incorporated with an aim to engage in any activity will not be subject to any form of price control<sup>43</sup>.

### 3.2 Employing an effects-based approach to abuse of dominance

As discussed earlier, most of the abusive practices stipulated under Articles 8 of Law No. 3/2005 are settled through an effects-based approach, pursuant to Article 13 of the executive regulations. The debate over whether investigating authorities should employ a *per se* approach or effects-based analysis in relation to the settlement of competition-related disputes in general is substantial. Advocates of a *per se* approach tend to argue that such approach provides the business community with predictability and legal certainty in relation to what is prohibited from what is not. In fact, commenting on legal certainty of the *per se* approach, the Court in *U.S. v. Topco Assocs.*, stated that “without the *per se* rules, business men would be left with little to aid them in predicting in any particular case what courts will find to be legal and illegal [...]”<sup>44</sup>.

Furthermore, some argue that investigating authorities may lack the necessary knowledge to rationally resolve matters through an effects-based approach<sup>45</sup>. Specifically it is often suggested that firms which essentially select the practices *themselves* “may or may not know what is special about [them]. They can describe *what* they do, but the *why* is more difficult. Only someone with a very detailed knowledge of the market process [...] as well as data needed for evaluation would be able to answer that question. Sometimes *no one* can answer it”. He, moreover, added that “what can be conveyed in the corporate board room is hard to articulate in a trial, when the judge and jury lack economic training and business expertise”<sup>46</sup>. Not only, however, is knowledge the sole problem. The process of discerning the welfare effects of practices often lies “beyond our ken”. The inquiries which effects-based approaches seek to obtain are often farfetched. In fact, the U.S. Supreme Court, while favouring a *per se* approach over an effects-based analysis on the basis of inability, had once stated that: “judges often lack the expert understanding of industrial market structures and behavior to determine with any confidence a practice’s effect on competition”<sup>47</sup>.

<sup>41</sup> Article 19, Prime Ministerial Decree No. 1316 of 2005 issuing the Executive Regulations of Protection of Competition and Prohibition of Monopolistic Practices Law No. 3 of 2005

<sup>42</sup> The only essential product that was referred to the Council of Ministers Cabinet due to high prices so far was *fertilizers*. See Report of Egyptian Competition Authority “*Study on the Fertilizers Market in the Arab Republic of Egypt in light of the Law on Protection of Competition and Prohibition of Monopolistic Practices*” May 2007, available from: (<http://www.eca.org.eg/ECA/Publication/List.aspx?CategoryID=1>) accessed 02-08-2010

<sup>43</sup> Article 10, Law No. 8 of 1997 for Investment Guarantees and Incentives; see also Dabbah, M. M. (2007) “Competition Law and Policy in the Middle East” First Edn., Cambridge University Press, p.249

<sup>44</sup> See *United States v. Topco Assocs.*, 405 U.S. 596, 609, n.10 (1972)

<sup>45</sup> See Brennan, G. & Buchanan, J. M. (1985) “*The Reason of Rules*” Cambridge: Cambridge University Press; Christiansen, A. & Kerber, W. (2006) “Competition Policy with optimally differentiated rules instead of per se rules vs. rule of reason” 2(2), *Journal of Competition Law and Economics*, Oxford University Press, pp.219-220

<sup>46</sup> Easterbrook, F. H. (1984) “The Limits of Antitrust” 63(1), *Texas Law Review*, pp.5, 8

<sup>47</sup> See *Arizona v. Maricopa*, 457 U.S. 332, 343 (1982). Nevertheless, in a more recent occasion, the U.S. Supreme Court in *Leegin* employed a rule of reason approach to minimum resale price maintenance and suggested that such practice may not necessarily be anti-competitive; and hence, a *per se* approach may not be appropriate. See *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 U.S., 2713-2715 (2007)



In this respect, one should distinguish between two types of errors which judges (or competition authorities) may commit in antitrust disputes. First, falsely ignoring or not condemning practices that may be anti-competitive ('type I errors') – also known as “false negatives”. Second, erroneously condemning practices that yield pro-competitive benefits ('type II errors'). This category is also known as “false positives”. The question that lies beneath this classification: given the likely inevitability to avoid errors; what type of errors is more favourable (or less costly) over the other? Irrespective of which type is favoured over the other, the decision-maker in question should not disregard the fact that by choosing one type (say type II) the inevitable implication would be that he/she accepts the costs of the other type of errors (type I in this example); no matter how detrimental the effects of these errors are<sup>48</sup>.

According to Easterbrook, decision-makers should opt for judicial errors that do *not* condemn “questionable practices” essentially based on the premise that: “the economic system corrects monopoly [type I errors – unpunished anti-competitive practices] more readily than it corrects judicial [type II] errors [pro-competitive practices falsely punished]”. Put differently, this approach seems to favour excusing practices that may be anti-competitive on the basis that the market will automatically maintain or correct itself. The problem with a *per se* approach is that it prohibits the “whole” category of practices; rather than being premised on case-by-case analysis. That said; type II errors could be unavoidable under a *per se* approach. In this sense, Egyptian investigating authorities, by employing an effects-based analysis to abuse of dominance, seem to conform to Easterbrook’s error-cost framework by arguably avoiding type II errors (erroneously punishing pro-competitive conducts)<sup>49</sup>.

However, a key question that should be raised in this respect: is Egypt, as an emerging economy with a newly introduced competition law, ready to deploy an effects-based approach to abuse of dominance at this particular stage? The mainstream of literature suggests that emerging economies, while new to competition law, should avoid employing complex economic analysis. For instance, Mohieldin argues that “emerging economies with either little or no experience of administering a complex regulatory framework may at first opt for a competition law that can be easily enforced”. In other words, he believes that an effects-based approach may not be the best possible approach for emerging economies. Instead, these economies should employ the “more straightforward *per se* approach”<sup>50</sup>. In addition, the dilemma, as Mohieldin writes, is that competition law requires a substantial amount of knowledge on the interface between law and economics. Education and practice in emerging economies, on the other hand, tend to detach law from economics. Such dividing line makes the task harder when it comes to carrying out economic analysis for competition law. Thus legal practitioners arguably lack the necessary experience to conduct economic analysis of laws in this particular field<sup>51</sup>.

Furthermore, some argue that investigating authorities of emerging economies with little experience may likely provide a misapplication or improper enforcement of competition laws<sup>52</sup>. In fact, the problem which investigating authorities may face – particularly at the early stages of antitrust enforcement - is when it comes to the anticipation of harms or effects caused by abusive practices.

<sup>48</sup> See Whish, R. (2008) “Competition Law” Sixth Edn., Oxford University Press, p.190; McChesney, F. S. (2010) “Easterbrook on Errors” (10), *Journal of Competition Law and Economics*, Oxford University Press, p.5

<sup>49</sup> Easterbrook, F. H. (1984) “The Limits of Antitrust” 63(1), *Texas Law Review*, p.15

Note that the U.S. Supreme Court seems to adopt the same view. See *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko LLP*, 540 US 414 (2004)

<sup>50</sup> Mohieldin, M. (2002) “On the Formulation and Enforcement of Competition Law in Emerging Economies: The Case of Egypt”. OECD, Global Forum on Competition, Contribution from Egypt, p.3

<sup>51</sup> Ibid, p.5

<sup>52</sup> Mehta, P. S., Agarwal, M. & Singh, V. V. (2007) “Politics Trumps Economics – Lessons and Experiences on Competition and Regulatory Regimes from Developing Countries” Intergovernmental Group of Experts on Competition Law and Policy, CUTS International, available from:

([http://www.unctad.org/sections/wcmu/docs/c2clp\\_ige8p11Cuts\\_en.pdf](http://www.unctad.org/sections/wcmu/docs/c2clp_ige8p11Cuts_en.pdf)) accessed 05-05-2010, p.24



This is indeed the most critical and multifaceted part which investigators encounter while employing effects-based analysis. Thus, it is often argued in favour of the necessity of economic expertise as a central pre-requisite for successful deployment of effects-based analysis.<sup>53</sup> In fact, the likely, yet understandably, lack of economic expertise in this field in Egypt may lead to costly judicial errors. The cost of these errors may indeed be formidable. Aside of reducing public and government confidence in investigating authorities, as some suggest in relation to judicial errors in general, these errors may eventually impede foreign direct investment ('FDI')<sup>54</sup> in Egypt, discourage innovation, and impair cross-border transactions and trade. Indeed FDI and trade are generally renowned as vital pillars of an economy. If substantially hindered through such errors, these effects may be passed on to the economy.

#### 4. Methods to tackle peculiarities

While the effects that might be generated from the foregoing peculiarities may be potential, it may be worthwhile attempting to tackle them. The determination of whether or not a price is excessive is a sophisticated process. More specifically, the complexity which competition authorities tend to face in investigating excessive pricing relates to the determination of the "competitive price" of the goods or services at stake. There appears to be various approaches for such determination. One approach is to base such "competitive" price on the incremental cost of production with market demand in mind<sup>55</sup>. In this sense, the product or service at stake is bought by consumers who have no problem in paying more than its incremental cost of production. However, this mode of determination assumes that markets are "static" and that production is not subject to high economies of scale. This is indeed hardly the case. The "competitive" price in dynamic markets for instance is not determined on the basis of marginal costs of production. This is because these markets are characterized by low incremental costs and high fixed costs and, thus, obtaining the relevant data on costs would not suffice for determination "competitive" prices. The investigator, instead, would have to conduct studies that survey the number of consumers who intend to pay for the good or service at stake<sup>56</sup>.

Furthermore, it is sometimes suggested to avoid employing these price-cost determinants and instead rely on a profits-based benchmark. In this sense, prices are contemplated as excessive if the firm at glance gains profits that exceed those which were otherwise initially predicted in a "competitive market". Nonetheless this approach is often criticised on the basis of likely estimation impreciseness. For instance, complexities in such benchmark may arise when dealing with a set of "related" products instead of just one product. In addition, such approach may be impractical if the goods at stake are produced, for example, through numerous firm sectors or in more than one country<sup>57</sup>.

<sup>53</sup> For instance, see Vanberg, V. J. (2009) "*Consumer Welfare, Total Welfare and Economic Freedom – On the Normative Foundations of Competition Policy*" Freiburg Discussion Papers on Constitutional Economics, available from: ([http://walter-eucken-institut.de/publikationen/09\\_03bw.pdf](http://walter-eucken-institut.de/publikationen/09_03bw.pdf)) accessed 15-10-2009, p.24

<sup>54</sup> FDI may be defined as: "ownership and (normally) control of a business or part of a business in another country". It is also renowned as a "driver" for economic development. For an expansive discussion on FDI, see Trebilcock, M. J. & Howse, R. (2005) "*The Regulation of International Trade*" Third Edn., Routledge, London and New York, pp.439; Evenett, S. J. (2003) "Links between Development and Competition Law in Developing Countries" available from: ([www.alexandria.unisg.ch/EXPORT/DL/22249.pdf](http://www.alexandria.unisg.ch/EXPORT/DL/22249.pdf)) accessed 07-05-2010, p.7.

<sup>55</sup> Incremental costs entail the additional cost to produce a larger increment in output. Technically speaking, the difference between marginal and incremental costs is minor. While marginal costs refer to the additional cost to produce a *single* unit, incremental costs entail the additional cost to produce a larger volume of output than merely one unit. Hence, incremental and marginal costs may overlap when the increment in output is negligible. On the classification of costs in general, see O'Donoghue, R. & Padilla, A. J. (2006) "*The Law and Economics of Article [102 TFEU]*" First Edn., Hart Publishing, Oxford and Portland, Oregon, pp.237-238

<sup>56</sup> See Evans, D. S. & Padilla, A. J. (2005) "Excessive pricing: using economics to define administrable legal rules" 1(1), *Journal of Competition Law and Economics*, Oxford University Press, pp.100-101

<sup>57</sup> Ibid., pp.101-102

However, estimation problems do not pose the sole concern in relation to the profits benchmark. A further matter is that the accounting proceedings do not take into consideration aspects such as inflation, capitalization of research and development, as well as advertising, and that the rates of return for risk are not accurately adjusted; all of which lead to unworkable determinations. It is, therefore, not surprising to deem the profits benchmark, akin to the price-cost benchmark, as highly controversial. Given such sound debate over the appropriate benchmark (and complexity as it appears), it may be useful to explore how comparable emerging economies treat excessive pricing. Put differently, do they encounter difficulties in the investigation of such practice?<sup>58</sup>

In *Harmony Gold Mining Ltd. & Durban Roodepoort Deep Ltd. v. Mittal Steel South Africa Ltd. & Macsteel International B.V.* ('Mittal'), the South African Competition Tribunal ('Tribunal') found Mittal guilty of charging excessive prices for flat steel. Particularly, it found that Mittal had charged import parity prices in the South African market that were substantially higher than its prices in the export market<sup>59</sup>. The Tribunal's decision was, however, highly controversial. First, it did not conduct a comparison between Mittal's price and the *reasonable* economic value of flat steel – the method of appraisal stipulated under the South African Competition Act<sup>60</sup>. Thus, the Tribunal did not discern whether or not Mittal's prices were *reasonable* per se in relation to economic value. Though finding Mittal's prices as excessive, it did not estimate what would have then been the "right price" that would have circumvented these allegations. In fact, the Tribunal did not find Mittal guilty on the basis of charging import parity prices in the South African domestic market; but instead relied on resale prices of flat steel in the domestic market<sup>61</sup>.

Given the above-mentioned gaps in the Tribunal's decision, it was not surprising to see that it was overturned by the Competition Court of Appeal ('CAC'). The CAC criticised the Tribunal for not comparing the actual price with economic value and suggested that the competition act rather presupposes a four-step test that ought to be followed. First, is to identify the actual price that is alleged to be excessive; second, to determine the "economic value" of the good or service in question; third, to discern whether the actual price exceeds the economic value and, if so, whether the difference is "unreasonable"; and, fourth, is to investigate whether such excessive is detrimental to consumers<sup>62</sup>.

Although the CAC had identified the necessary four-step test as means for inquiry, it still remains equivocal how investigating authorities should determine economic value and in turn the reasonableness in relation between it and the actual price. In fact, as some rightly suggest: "the CAC's judgement is clearer on how *not* to assess excessive pricing than it is on how to actually assess it"<sup>63</sup>.

<sup>58</sup> Ibid., pp.102-103; Fisher, F. M. & McGowan, J. J. (1983) "On the Misuse of Accounting Rates of Return to Infer Monopoly Profits" (73), *American Economic Review*, p.82

<sup>59</sup> See South African Competition Tribunal's decision dated 23<sup>rd</sup> March, 2007, *Mittal Steel South Africa Ltd and Macsteel International B.V.* Complaint (Case 13/CR/FEB04)

<sup>60</sup> Section 1(1)(ix) of the South African Competition Second Amendment Act 39 of 2000 defines excessive pricing as "a price for a good or service which [...] bears no reasonable relation to its economic value of that good or service [...]". This means that investigating authorities are ought to compare the actual price with economic value.

<sup>61</sup> See Plessis, L. D. & Blignaut, L. (2009) "*Staying safe – dominant firms' pricing decisions in industries where high prices do not attract entry*" Third Annual Competition Commission, Competition Tribunal and Mandela Institute Conference on Competition Law, Economics and Policy in South Africa, available from: ([www.compcom.co.za](http://www.compcom.co.za)) accessed 22-08-2010, p.6 ; Parr, G. (2007) "South Africa: Excessive pricing – don't get caught in the Mittal!" available from: (<http://www.mondaq.com/article.asp?articleid=52022>) accessed 22-08-2010, p.6

<sup>62</sup> South African Competition Appeal Court's decision dated 29<sup>th</sup> May, 2009, *Mittal Steel South Africa Ltd and Macsteel International B.V.* Complaint (Case 70/CAC/Apr07), para.32

The CAC then returned the case to the Tribunal for reappraisal in light of the mentioned four-step test. Later on, however, the case was privately settled.

<sup>63</sup> See Plessis, L. D. & Blignaut, L. (2009) "*Staying safe – dominant firms' pricing decisions in industries where high prices do not attract entry*" Third Annual Competition Commission, Competition Tribunal and Mandela

The *Mittal* case as such generally illustrates how the practice of excessive pricing is *difficult* to assess; at least at the early stage competition law enforcement<sup>64</sup>. This indeed explains why the Egyptian legislator did not regulate such practice under Law No. 3/2005 at this particular stage. However, given the potential effects that may be generated from this practice, it may still be suggested to re-consider regulating excessive pricing in the future. This should precisely be the case if the practice continues to pose risks on the market and economy.

Likewise, employing an effects-based approach at this stage may be questionable due to the potential effects of errors that may derive from the relative lack of economic expertise in competition law<sup>65</sup>. However, the ECA's legal and economic analysis in the studies it conducted so far suggests that it is capable of competently employing such approach. While the effects of type II errors may be substantial on the market, particularly in relation to falsely condemned firms, and given that this category of errors is more likely committed through a *per se* approach, it may be suggested stick by an effects-based analysis. However, investigating authorities should be cautious; particularly with practices that have *questionable* effects on the market. In any event, cooperation with competition authorities of the developed world remains indispensable.

## 5. Conclusion

This paper exemplified two peculiarities under Egyptian Competition Law. With respect to the misrecognition of excessive pricing, and notwithstanding the potential effects that may arise from such practice, *Mittal* shows that the Egyptian legislator seems to have adopted the *right* approach not to regulate it at this stage. In fact, had the legislator regulated excessive pricing at this stage, and due to the complexities in calculation of the *competitive price*, this *may* have led to type II errors (erroneously condemning pro-competitive practices). In this case, the likely costs of committing this category of errors may outweigh the detrimental effects of the practice itself.

The Law No. 3/2005 and executive regulations seem to require an effects-based approach to most abusive practices. The pros of such approach, as opposed to a *per se* approach, is that type II errors may be avoided. Although it is often argued that an effects-based analysis may not be the best of approaches to emerging economies with newly introduced competition laws and least experience, the ECA's analysis in the studies it conducted until current exemplifies that it is capable of employing such approach. Hence, an effects-based approach may still be the suggested method of analysis; so long as a cautious approach is adopted in relation to that generate questionable anti-competitive practices. However, whether for the purposes of regulating excessive pricing in the future or employing an effects-based approach, and apart from the necessity of cooperating with competition authorities of the developed world, increasing economic expertise in competition law in Egypt remains vital.

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Institute Conference on Competition Law, Economics and Policy in South Africa, available from ([www.compcom.co.za](http://www.compcom.co.za)) accessed 22-08-2010, pp.6, 11

<sup>64</sup> Particularly given that *Mittal* represents the first excessive pricing case in South Africa.

<sup>65</sup> On the judicial level, however, the Egyptian government introduced the Law No. 120 of 2008 Establishing Economic Courts. Competition-related disputes, among several other related fields, are now subject to the exclusive jurisdiction of economic courts. This development indeed serves as a positive implication for the future of economic expertise in Egypt.