Egypt - Case No 2900/2008 Felonies of Madinit Nasr Awal (25/08/2008); (Appeal No 22622/2008 East Cairo)

Prosecution vs. Suez Cement Group, La Farge Titan Group, Al-Amreya Simpore Group, Simx Egypt (Assyout Cement), Egyptian Cement, Sinai Cement, Misr – Bani Suef for Cement, National Cement Company - The First Court Decision under Egyptian Competition Law

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SUMMARY

The Egyptian Competition Authority undertook a research inspection in the cement market and it reached the conclusion that there is a price fixing and limiting production cartel among the 9 market players. It based its conclusion on several evidences. Most notably there was an agreement prior to the law to fix prices, there were a number of confessions by several chairpersons and other economic analyses of the market structure and sales and production capacities. The case was then referred to the competent Minister then to Prosecution and finally reached the competent Court. The Court imposed the maximum sentence of 10 million Egyptian Pounds fine on each participant.

CASE DETAILS

Upon the request of the Minister of Trade and Industry a formal request was referred to the Authority of the Protection of Competition and the Prohibition of Monopolistic Practices (hereinafter Egyptian Competition Authority or ECA) to study whether an anticompetitive infringement was taking place in the cement market. Accordingly, the ECA confirmed that this study falls within it competences and started with the definition of the relevant market.

RELEVANT MARKET (NORMAL PORTLAND CEMENT)

According to the Egyptian Competition law, the relevant market consists of the relevant product and geographical market.[1] The study concluded on one hand that the relevant product market was that of the Normal Portland Cement (hereinafter Cement) (which is

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[1]Article 3 of the Law 3 of 2005 on the Protection of Competition and the Prohibition of Monopolistic Practices.

the commonly used kind of cement). The report based its definition on the main argument that the product had no substitutes from the consumer's point of view due to its own special characteristics. On the other hand, it was found that the relevant geographical market is that of the Arab Republic of Egypt. This is because consumers did not have barriers regarding the transportation of Cement from one area to another. Moreover, no imports were made throughout the whole period of the study. although there was a reduction of import tariffs from 30% to 2% due to the fact that local prices were always cheaper than the international ones.[2]

The ECA limited the study to the period between May 2005, which is the date when the Egyptian Competition Law on the Protection of Competition and the Prohibition of Monopolistic Practices (hereinafter Competition Law) officially came to force, and July 2006 when the report was referred to them from the minister requesting the study. However, they took the period between 2002 and 2005 and the period after the referral of the request as indicatory periods. It was therefore concluded that the relevant market was that of Normal Portland Cement in the Arab Republic of Egypt.

Observations on the Cement Market in Egypt

Moreover, the report indicated several findings on the relevant market. A) It was noted that there is a very limited number of producers of this kind of cement in Egypt (9 producers). B) There is a great deal of transparency in the market. The Ministry of Investment provides a monthly newsletter which has all the prices of cement in Egypt and the market shares of the 9 players. Besides, the reports published by the Chamber of Commerce show the prices in all governorates in Egypt. C) There was a direct contact between the 9 companies where they met and exchanged information and speculations about the future demands. A number of the undertakings involved stated clearly during the meetings with the ECA officials that prices were raised after their meetings in the Federation of Industry. It was also assured by the Chairman of the Chamber of Construction Utilities that the 9 producers had had closed meetings without meeting minutes and no one other than the producers was allowed to attend. He added that there were also other meetings that were held unofficially outside the Federation of Industries.

Evidences brought by ECA

Evidences were the following: 1) an official agreement under the auspices of the Minister of General Operations Sector among the competitors in 2003 (before the Competition Law was enacted in 2005) where its aim was to restore the stability of the prices in the market. This was due to the presence of vigorous competition among the competitors which lowered prices significantly and affected the interests of other investors. This agreement included a requirement to maintain a certain market share of their sales in the national market for each company and to decide a certain percentage of production for each undertaking according to its production capacity (limiting production). This agreement should have spontaneously come to an end in February 2005 after enacting the

[2]The Egyptian Cement is argued to have a comparative advantage due to the abundance of raw materials and cheap labour where they produce high quality cement.

Competition Law. However, this was not the case. The agreement remained unofficially in force as has been confirmed by one of the parties to the agreement during the meetings with the ECA officials. 2) The escalation of prices throughout the period of the study shows that it was never an individual act but also a collective one, although there has been an increase in the capacity of production and the actual production of these companies. What was notable also is that the company which has the lowest price maintained its market share while the other having the highest price also maintained its share throughout the period of the study. There was no attempt by any competitor to try to gain bigger market share or to benefit from a lower price. 3) Prices continued increasing among all the companies although production costs reduced which was the indication that all the producers were following the same strategy of increasing prices regardless of the production costs. It has been shown in the economic analysis that the maximum change of each market share throughout the whole period of study was 1% although the sales of the product varied a lot.

Accordingly, the ECA concluded that the 9 producers infringed Article 6(a) of Competition Law by concluding the agreement to fix and raise prices collectively.

Another infringement was found relating to the limitations of production. The ECA revealed the following evidences: 1) the presence of the previously mentioned agreement of 2003 which introduced limitations on prices and harmonised production capacities of the market players. 2) The export shares of all the market players varied greatly which divulges the presence of serious competition on export sales which is contrary to the situation regarding the national sales. This indicates that there were no limitations on the sales marketing when it comes to exports. 3) According to the economic analysis of the ECA, there has been considerable increase in usage of the production capacities of the 9 market players, however this has not been inversely reflected on the national sales. For example, the Suez Group (one of the 9 market players) increased its usage of its production capacity from 63% in 2004 to 76% in 2007 however, its market share in Egypt remained 31.9% in 2004 and 32.4% in 2006 which limits the change to 0.5%.

Accordingly, the ECA concluded that the 9 companies infringed Article 6(d) of the Competition Law they collectively agreed to restrict their sales marketing in Egypt.

The Board of Directors of the ECA sent the report to the Minister of Trade and Industry requesting him to initiate the criminal action against the 9 market players, for which he agreed. Public Prosecution, which is the only competent authority entrusted with the powers of undertaking criminal actions before the court, opened a criminal investigation whereby it confirmed the aforementioned data and evidences. However, that time all the defendants denied their participation in these criminal offenses.

Court's proceedings regarding the defendants' claims and its findings

The Court began its proceedings and heard the witnesses itself again where they confirmed the previously mentioned information. On the other hand, the defendants submitted expert reports to the Court. However, the latter clearly stated that it was not

obliged to respond independently to these reports. The Court added that it is absolutely free to consider and be convinced with some reports and to disregard the others as long as its conclusion is reasonable and can be justified from the documents presented. It is not clear what are exactly the justifications provided therein.

The defendants raised several other procedural claims regarding the unconstitutionality of certain articles in the law including Article 6 (the base of this case) and other issues. They claimed that Article 6 prohibits any contract or agreement to take place regardless of whether it came to force or not which is accordingly considered to be unconstitutional. However, the Court assured that in this case this argument was not plausible because the agreement has been put into force in practice and therefore they did not have personal benefit in raising this constitutional question.[3] Accordingly, the question as to whether Article 6 is constitutional remains unanswered. In other words, is prohibiting the mere presence of an agreement even if not put into force constitutional?

Another claim by the defendants was that Article 25/2[4] infringes the doctrine of the personality of sanctions as it obliges the undertaking which name is found in the infringement to be cooperatively liable for the fines ordered in the Court's judgment.[5]

The Court argued that it was true that until recently the Egyptian legal system did not recognize the criminal liability of legal persons because it was never needed within a planned economy. However, after the economic developments and liberalizations which led to a shift towards a free market economy the Egyptian legal system started recognizing the liability of legal persons. This meant that the Egyptian legislature accepted the introduction of the direct or indirect criminal liability legal persons. Furthermore the decision added that the doctrine of criminal liability of legal persons does not, in fact, contradict the individuality of the sanction. This is because the fines can be calculated from the financial statements of the undertaking and not from the personal financial statements of the Board members. Therefore, the Court concluded that it is possible to oblige any legal person (undertaking) to cooperate in the payment of the fine with the person who committed this infringement in the first place.

The defendants raised another legal concern. They assured that there was no evidence to prove the direct involvement of the managers and/or chairmen prosecuted or their criminal liability. The Court responded to this argument by assuring that this form of involvement in the economic crimes is presumed and that it is different from other general laws where involvement and knowledge about the occurrence of the crime needs to be proved independently. It added that the presumption is necessary because otherwise it would be hard to apply the economic policy as there would be considerable difficulties in applying the law and proving any crime. Accordingly, as long as the crime is proved, the knowledge and involvement of the defendants can be presumed. Therefore, the legal burden to prove otherwise is shifted on the defendants. They have to provide for sufficient evidence to prove the lack of involvement or existence of a reason that would deny their responsibility. Moreover, the Court added that the defendants in this case were senior officials in their companies and it would be hard to prove that they were unaware or not involved in committing these crimes.

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[3]Having a direct benefit is a condition to accept any constitutional question in the Egyptian Legal System.

[4]Article 25 of the Egyptian Competition Law stipulates,

"The person responsible for the actual management of the juristic person in breach shall be subject to the same penalties stipulated for the acts committed in breach of the provisions of this Law, if it has been established that such person had actual knowledge of such breach and if his default on assuming the duties of his position as the responsible manager has contributed to the breach. The juristic person shall be jointly liable for the payment of the fines and compensation ruled, if the breach has been committed by one of its employees acting in the name or on behalf of the juristic person."

[5]This doctrine stipulates that crime should be directed to an individual in particular.

Furthermore, the defendants assured that there was no clear material evidence that proved the presence of an agreement. However, the Court argued that the law did not limit the understanding of the agreement to a certain form. To constitute an agreement, it is enough to have consenting wills, regardless of the agreement being written, oral, clear or implied. The Criminal Court is free to build its own conviction from any source it wants to prove this agreement. If there was no material evidence such as a memorandum or meeting minutes, which is logically impossible to be caught, then the Court becomes free to build its belief on any direct or indirect evidence submitted in the case. If there was no clear evidence it can rely on circumstantial evidences. In this case, this circumstantial evidence will only provide several indications but when put together they would lead to a reasonably logical conclusion.

Finally, the defendants raised several economic justifications; however the Court rejected them as it was convinced by the report of the ECA and the testimonies of the witnesses in the case.

In a comprehensive reasoning the Court concluded that the court is free to choose from the evidences provided. Evidences must not be discussed on their own and it is not necessary that each evidence lead to a certain conclusion on its own. As noted earlier, the picture should be taken as a whole, so that when all the evidences are put together they would lead to a conclusion that is logical and reasonable.

The Court finally decided that the two crimes of limiting output and price fixing were correlated in a manner that it could not treat them separately and should therefore, be treated as a single crime.[6] As a result, it ordered the 20 defendants (Directors and Chairmen of the 9 Companies) to pay 10 million Egyptian Pounds each, which was the maximum penalty for these crimes at the time.[7]

The defendants appealed to the Court of Appeal. They did not bring up any competition law defense. They rather focused on already raised procedural aspects before the High Court. As a result, the decision was upheld in 31/12/2008. This latter decision is now rendered final and has become thus the first court decision under competition law in the Egyptian history.

Reflections and observations

In this unique judgment (as it is the first) the Court has been able to address several issues that have long been debated before this decision. The High Court in its reasoning provided sufficient legal argumentation for every detail therein. Accordingly, it was logical to persuade the Court of Appeal to uphold the decision (as it did). There are few conclusions that can be drawn. However, there are still several questions that will need to be answered by future judgments.

[6]The Egyptian Law of Criminal Procedures stipulates in Article 35 that if there is more than one crime and they cannot be treated separately then they should be treated as one crime and the punishment should be of the harsher offense.

[7]The Law number 190 of 2008 increased the ceiling of the maximum penalty from 10 million Egyptian Pounds to 300 million Egyptian pounds. (_1 = 8 L.E approximately)

1. What is the constitutionality of Article 6 concerning horizontal restraints in case of agreement or contract being concluded but caught before its implementation? The Court refrained from considering this concern raised by the defendants because in the present case the agreement has been proved and has been applied since 2003.

2. The Court has sufficiently responded to the second claim of the undertaking whether the managers were legally co-responsible. It assured that the Egyptian legislature has accepted this idea as part of the new liberalization trends in the economy.

3. The Court also affirmed the important doctrine concerning the criminal liability presumption of the managers once their undertaking was proved to be involved in an anticompetitive practice. The Court assured that economic legislation differs in this regard from the other branches of law that require clear and separate evidences to prove the presence of the intention and/or knowledge of the criminal act.

4. Finally, the Court discussed one of the most important issues in this case: the defendants objecting to the lack of evidence and the reliance of the judgment only on economic studies prepared by young inexperienced economists. In this regard, the Court said that it can choose from whatever evidence provided, direct or indirect or in any other form, including but not limited to circumstantial evidence. This assures that concerted practices can still fall within the scope of the current Egyptian Competition Law, which is not limited to an agreement or contract as it might be thought from the wording of the Article.