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Intra-governmental Struggle For Power Between Competition Authority and Telecommunication Regulator: A Story From Egypt

Eslam Mostafa Saleh · Tuesday, November 23rd, 2021

On the 20th of September of 2021, the Egyptian Competition Authority “ECA” and the National Telecommunications Regulatory Authority “NTRA” announced signing a Memorandum of Understanding with the main purpose to establish a Joint Executive Committee seeking enhancement of free competition in Egypt’s telecom market. Both agencies branded such a step as a major step forward in their relationship.[1] [2] However, this blog post traces remarkable events highlighting the struggle for power between agencies in terms of who possesses the upper hand over antitrust practices in the telecommunications sector. Such events would reasonably raise scepticism about the efficacy of the *latest* “MoU.”

In 2011, Egypt had submitted a case study report to the International Telecommunication Union “ITU” to introduce its *success story* on the cooperation between its national competition authority “ECA” and telecommunication regulator “NTRA.” In such a report, Egypt emphasized that its tool to achieve such productive cooperation was signing a Memorandum of Understanding “MoU” between both agencies in June 2011.[3]

While researching the roots of this “MoU,” the author figured out that a quasi-judicial dispute between both authorities preceded it. In February 2010, the Egyptian Council of State’s General Assembly of Legal Opinion and Legislation Departments, whose competencies include settling intra-governmental disputes with a binding decision according to Article (66) of the Law No. (47) of 1972 establishing the Council, received an official letter from the Chairperson of the ECA requesting the settlement of the dispute between the ECA and the NTRA over whom possesses the jurisdiction to inspect and investigate antitrust practices in the telecom sector. The judicial file of such a dispute explained that the ECA’s request was upon an official letter sent by the NTRA to the ECA affirming that the NTRA had exclusive jurisdiction over such practices. However, the General Assembly closed the dispute without addressing its subject matter due to a later official letter by the ECA’s Chairperson, dated in April 2010, to revoke the initial request to settle the dispute on the ground that both agencies were preparing for signing an “MoU” to define their overlapping jurisdictions.[4]

The key points of the 2011 “MoU” in terms of investigating antitrust practices in the telecom sector were as follows:[5]

- 1- The NTRA shall notify the ECA, as soon as possible, of the practices and deeds that are suspected to be monopolistic and which **the NTRA invites the ECA** to take the needed action to investigate and collect evidence in this regard;
- 2- **The ECA shall notify the NTRA**, as soon as possible, that it has received a complaint, request or **has launched an initiative** related to the ICT sector;
- 3- **The NTRA shall provide** the ECA at the soonest moment with **its opinion concerning the practices investigated by the ECA** competition based on a complaint.

It is essential to mention, in this regard, that according to Article (4) of the Law No. 10 of 2003, which established the NTRA, the NTRA's mission is to "regulate telecom sector... and to encourage national and international investments in the sector considering free competition rules... ." However, such a Law did not delegate the NTRA with the power to refer antitrust infringements in the sector to the Public Prosecutor. On the contrary, according to Article 11 Para. (10) of the Law No. 3 of 2005, which established the ECA, as amended by the Law No. 56 of 2014, the ECA shall "coordinate with sectoral regulators on matters of common concern... ." Furthermore, neither conducting criminal investigations on antitrust cases nor referring such cases to the court is admissible unless upon a request by the ECA, according to Article (21) of the Law No. 3 of 2005 as amended by the Law No. 56 of 2014.

Nevertheless, the NTRA seemed to have been very cautious about granting the ECA the power to initiate investigations on antitrust practices in the telecom sector, as could be easily conjectured from the statutory language used in the *first* MoU. Such extrapolation, however, seems to have firm evidence beyond the statutory language, as further illustrated in this post.

The possession of the upper hand over antitrust practices by the entities working in sectors regulated by sectorial agencies in the Egyptian context grabbed the attention of a scholar who detected that there had been clear inconsistency in the ECA's approach towards regulated sectors. To illustrate, the scholar revealed that the ECA decided in a previous case that it had no jurisdiction over the electricity sector as it is a regulated sector by The Egyptian Electric Utility and Consumer Protection Regulatory Agency "EgyptEra." At the same time, the ECA itself inspected cases in other regulated sectors. [6]

When it came to the ECA jurisdiction over the telecom sector, the ECA in 2013 referred the three mobile operators in Egypt, at that time, to the Public Prosecution to investigate their cartel agreement to move the burden of the stamp tax from their own to that of the consumers; the NTRA later approved such an agreement. In its press release on this case, the ECA stated that the approval of sectoral regulators does not automatically exclude the conduct from the scope of the Competition Law.[7]

Anyway, this question remained without a decisive opinion until the Economic Court of Appeal issued a ruling in 2014. Before discussing this ruling, it should be noted that Economic Courts in Egypt were established earlier in 2008, by the Law No. 120 of 2008, to overcome the delayed justice concerns in the investment and commercial related disputes. Article (6) of such a Law numerates the subjective laws on which the Economic Courts exercise their competence; Competition and Telecommunications Laws were among them.[8]

Back to the court ruling, according to Article (22) bis of the competition law, it is a criminal

offence punished by a fine that ranges from 20,000 EGP to 500,000 EGP to refrain from supporting the ECA with the documents required for market studies and inspection of the competition law infringements. Upon such an Article, the ECA, while inspecting the abovementioned Cartel Agreement, had referred, in February 2013, two mobile operators to the Public Prosecution that referred the case to the Economic Court of First Instance.[9]

The ruling of the First Instance Court was fining one of the two operators with a 100,000 EGP fine. Thereafter, the company challenged this ruling before the Economic Court of Appeal, arguing that the ECA has no competence over the Telecommunications Sector. The Economic Court of Appeal had its final decision and upheld the ruling of the first instance, affirming that the jurisdiction of the Telecommunication Regulator shall never deny the competence of the ECA over the telecommunications market.[10]

On the 8th of December of 2013, the ECA released a statement that its investigations on the Cartel Agreement case had been completed. The ECA decided to refer the three mobile operators to the Public Prosecution for further criminal investigations prior to referring the case to the Economic Court. It seems that the NTRA indirectly supported Mobile Operators against the ECA seeking the revocation of the ECA power over the telecom sector; on 10th of December of 2013, two days after the ECA's Press Release, the NTRA Chairperson stated to the press that the ECA did not coordinate with the NTRA before referring the case to the Public Prosecution and that they were notified after the ECA's released its statement to the press.[11]

In December 2014, a year after these statements, the ECA had submitted a report to the OECD on the developments of competition policy in Egypt. Such a report highlighted the stamp tax Cartel Agreements case: "This case is the first cartel case in a regulated industry. ECA confirms its jurisdiction to detect anticompetitive practices undertaken in the telecommunications market. Anticompetitive practices can occur even where applying a binding statutory provision in another law. The ECA board concluded that agreeing on levying the stamp taxes on pre-paid mobile services was a disguised way to fix the price and limit marketing activities between the three mobile operators, and it violates articles (6/a) and (6/d) of the ECL. The case is referred to prosecution and still pending therebefore."¹²

While none of the Public Prosecution, the ECA, or the NTRA had released precise information about the final decision taken by the Public Prosecution regarding the Cartel Agreement Case, a national newspaper published in February 2015 that the case was dismissed by the Public Prosecution, meaning that the Public Prosecutor decided not to refer the case to the court. The newspaper also leaked the content of correspondences between the NTRA and the Ministry of Telecommunications, in which the NTRA requested the minister to ask the Prime Minister to exclude the telecom sector from Competition Law. The NTRA grounded its request upon the Public Prosecution decision to close the case and that such decision resulted in wasting public financial resources due to lack of coordination between both agencies. [12] It is noteworthy that according to Article (9) of the Competition Law, the ECA, upon the request of the concerned parties, has the power to exclude from the competition law the public utilities indirectly run by the state through private sector entities, and that according to Article (11) of the Competition Law, the ECA is affiliated to the Prime Minister.

Although to the best of knowledge of the author, no exemption was granted to the telecom sector from the competition law, it seems that the Egyptian legislator had learnt the lesson from such an

intra-governmental struggle for power story when the new Banking Law was issued in 2020. Articles (221) and (222) of the Law No. 194 of 2020 on the Central Bank and Banking Sector explicitly exclude the banking sector from the Competition Law and establish a Special Unit in the Central Bank to inspect Antitrust Practices in the banking sector.

To conclude, both competition authorities and sectoral regulators are usually delegated with a wide range of powers; such a delegation requires due diligence in the legislative drafting of the laws establishing such authorities. The intra-governmental struggle for power between the ECA and the NTRA reflected a story of failure in the cooperation between competition authorities and sectoral regulators. Thus, the newly established Joint Executive Committee mandated by the latest “MoU” between both authorities has a very tough job to offset the past failures.

[1] NTRA, Press Release, September 20, 2021, available at: <https://tra.gov.eg/en/ntra-and-eca-sign-a-memorandum-of-understanding-to-enhance-free-competition-practices-in-egypts-telecom-market/>

[2] ECA, Press Release, September 20, 2021, available at: <https://eca.org.eg/ECA/News/View.aspx>

[3] ITU Documents, Cooperation between national regulatory authorities and competition authorities: case study of Egypt, August 18, 2011, available at: <https://www.itu.int/md/D10-SG01-INF-0037/en>

[4] the Egyptian Council of State’s General Assembly of Legal Opinion and Legislation Departments Decision No. (362) of 2012, on the File No. (32/2/4000), unpublished.

[5] ITU Publications, The impact of the licensing and authorization regime and other relevant regulatory measures on competition in a converged telecommunication/ICT environment, 2014, available at: <http://handle.itu.int/11.1002/pub/809b7e58-en>

[6] ElFar, Mohamed, ‘State Compulsion Defense’ under the Egyptian Competition Law (November 1, 2014). E.C.L.R., Issue 11, Vol. 35, 2014., Available at SSRN: <https://ssrn.com/abstract=2545063>

[7] ECA, Press Release, December 8, 2013, available at: <https://eca.org.eg/ECA/News/View.aspx>

[8] Ghanem, Mohamed Abdelnaby, Establishment of Economic Courts in Egypt (July 3, 2014). The European Conference on Politics, Economics and Law 2014, “Individual, Community & Society: Conflict, Resolution & Synergy”, Thistle Brighton, East Sussex, United Kingdom, Thursday - Sunday, July 3-6, 2014, Available at SSRN: <https://ssrn.com/abstract=2489554> or <http://dx.doi.org/10.2139/ssrn.2489554>

[9] ECA, Press Release, February 26, 2013, available at: <https://eca.org.eg/ECA/News/View.aspx>

[10] ECA, Press Release, June 1, 2014, available at: <https://eca.org.eg/ECA/News/View.aspx>

[11] AlMasry AlYom News, December 12, 2013, NTRA Chairperson: “We Knew the Mobile Operator Case Referral Decision from the ECA’s Press Release,” available at:

<https://www.almasryalyoum.com/news/details/1714320>

12 OECD, DAF/COMP/AR(2014)46, December 12, 2014, ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN EGYPT, submitted by Egypt to the Competition Committee, available at:

[https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=daf/comp/ar\(2014\)46&dclanguage=en](https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=daf/comp/ar(2014)46&dclanguage=en)

[12] AlMasry AlYom News, February 27, 2015, “Documents: A Tension Between NTRA and ECA After Mobile Operators Case,” available at: <https://www.almasryalyoum.com/news/details/666110>

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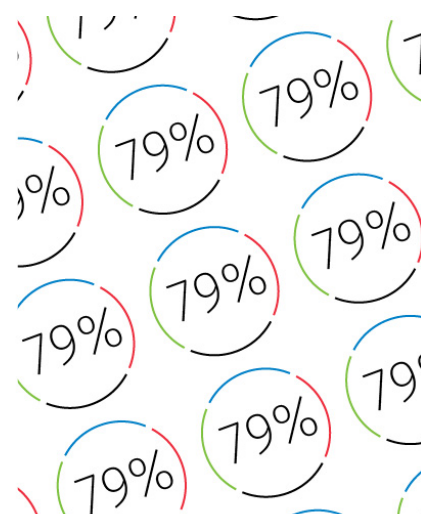
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