

COMPETITION LAW IN THE MIDDLE EAST AND NORTH AFRICA: THE EXPERIENCES OF TUNISIA, JORDAN, AND EGYPT

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I. INTRODUCTION

Integrationist pressures of globalization have, in the last few decades, had significant effects on political and economic policies in the developing world. Many developing countries have initiated processes of trade liberalization and interna-

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tional economic integration, in response to both domestic and international pressures, and often in pursuance of economic efficiency, development, and poverty reduction.¹ For an increasing number of developing countries, one component of this process of liberalization has been the adoption of a competition regime. Over seventy-two formal competition regimes have emerged around the world since 1998,² and still other countries have elements of competition law in their sectoral regulatory bodies³ or other government entities.

Two of the most longstanding and influential competition regimes in the world are those in place in the United States and European Union. Many developing countries have based the design of their own competition regimes upon one of these two frameworks.⁴ Yet developing countries and economies in transition share a number of commonalities that often require adjustments to accommodate their specific legal frameworks, histories, cultures, and political backgrounds. It is unrealistic, for example, to expect developing countries with limited judicial resources to abandon existing legal frameworks in favor of the private rights of action and procedural frameworks that have made the criminalization of anticompetitive behavior effective in the United States.⁵ Adopting an unmodified E.U. framework would be similarly ineffective in most developing countries, as this system is dependent

1. See U.N. CONFERENCE ON TRADE & DEV., COMPETITION, COMPETITIVENESS AND DEVELOPMENT: LESSONS FROM DEVELOPING COUNTRIES, at 2, U.N. Doc. UNCTAD/DITC/CLP/2004/1 (2004) (discussing the growing awareness of competition law and policy in developing world); see generally R.S. KHEMANI, WORLD BANK, COMPETITION POLICY AND PROMOTION OF INVESTMENT, ECONOMIC GROWTH AND POVERTY ALLEVIATION IN THE LEAST COUNTRIES (2007) (asserting that efficient markets benefit the poor).

2. Frédéric Jenny, Professor & Dir. of Int'l Relations, ESSEC Bus. Sch. in Paris, Presentation on Globalization and Law: Session 5(2014) (on file with author).

3. Common examples of sectoral regulators include authorities with specific powers to address competition concerns in the telecommunications, energy, or financial sectors. See César Córdova-Novion & Deirdre Hanlon, *Regulatory Governance: Improving the Institutional Basis for Sectoral Regulators*, 2 OECD J. ON BUDGETING, no. 3, 2002, at 57, 66.

4. Eleanor M. Fox & Michal S. Gal, *Drafting Competition Law for Developing Jurisdictions: Learning from Experience* 9 (N.Y.U. Law & Econ. Working Papers, Paper No. 374, 2014).

5. Spencer Webber Waller, *Neo-Realism and the International Harmonization of Law: Lessons from Antitrust*, 42 U. KAN. L. REV. 557, 588 (1994).

on a distinctly European tradition and culture of bureaucratic expertise.⁶

Certainly the U.S. and E.U. systems comprise significant benchmarks to be referenced in the development of new regimes. Indeed, in many instances there are benefits to converging with one of these two regimes, as such harmonization may encourage foreign firms to; initiate foreign direct investment, imports, and other forms of engagement.⁷ Yet these advantages must be balanced against factors specific to developing countries that could make a regime directly imported from the United States or European Union ineffective and potentially harmful.

Some of the most prevalent problems among developing economies include high barriers to entry, high risk of capture, lack of economic mobility, scarcity of capital, large informal sectors, corruption, and pervasive state ownership and control.⁸ A competition regime could in theory alleviate some of these problems, but only if it is designed to do so. With regards to economic mobility, for example, many developing countries are characterized by the exclusion of certain actors from subsets of the economy dominated by political or social elites.⁹ These actors' economic mobility, or ability to improve their economic situation, could be increased by improving access to these segments of the economy.¹⁰ U.S. competition law, however, would be ineffective in providing such access. Economic mobility is not as severely limited in the United States, and the system accordingly places less weight on access for marginalized firms.¹¹

6. See *id.* at 589.

7. See Fox & Gal, *supra* note 4, at 7.

8. See Eleanor M. Fox, *Competition, Development and Regional Integration: In Search of a Competition Law Fit for Developing Countries* 11 (N.Y.U. Law & Econ. Research Paper Series, Working Paper No. 11-04, 2012) (comparing the laissez-faire U.S. approach against the process-driven E.U. approach, among other options, in light of the market problems developing countries face).

9. See Bob Rikers et al., *All in the Family: State Capture in Tunisia* (World Bank Policy Research Working Paper Series, Paper No. 6810, 2014) (describing how a small group of firms connected to the Ben Ali family dominated the Tunisian economy, accounting for 1% of jobs while capturing an astounding 21% of private sector profits).

10. Fox, *supra* note 8, at 10–11.

11. *Id.*

The establishment of competition regimes in the Middle East and North Africa (MENA) region is an interesting study in this respect, as many MENA countries exhibit the problems described above, have varying attachments to the United States and the European Union, and have similar ambitions of international economic integration. A significant competitive advantage of the MENA region lies in its proximity to Europe and access to European markets.¹² Certain MENA countries, however, also have a stake in access to U.S. markets, either directly or indirectly, through, for example, political concessions.¹³

Over the past few decades, the pressure to liberalize and integrate has been compounded in the MENA region by both external and internal factors. Externally, the ongoing integration of China, India, and smaller economic rivals (especially in Latin America and Southeast Asia) into the global economy has imposed significant pressure on MENA economies to retain their competitive edge.¹⁴ Internally, a population surge beginning in the 1980s has created a "youth bulge" aged 15-24,¹⁵ which is now entering the labor force and putting pressure on governments to create and maintain employment opportunities in an increasingly competitive global market.¹⁶

MENA economies share many characteristics relevant to the design of a competition regime. Generally, the public sector in MENA economies is disproportionately large, a phenomenon that is especially evident in Egypt.¹⁷ Markets are typically small, are composed of a limited number of sub-sectors,

12. MARCUS NOLAND & HOWARD PACK, *ISLAM, GLOBALIZATION, AND ECONOMIC PERFORMANCE IN THE MIDDLE EAST* 3 (2004).

13. See discussion of Qualifying Industrial Zones in both Jordan and Egypt *infra* Sections III.A and IV.A.

14. NOLAND & PACK, *supra* note 12, at 3.

15. Barry Mirkin, *Arab Spring: Demographics in a Region in Transition* 7 (2013) (informally published by U.N. Dev. Programme Arab Human Dev. Report Research Paper Series) ("A history of High fertility in the Arab region, six children per woman during the 1980s, has produced a youth bulge aged 15 to 24 years. The number of youth more than doubled since 1980 and its share in the population is at an all-time high.").

16. *Id.*

17. Lahouel Mohamed El Hédi, *Competition Laws in MENA: An Assessment of the Status Quo and the Relevance of a WTO Agreement* 2 (Econ. Research Forum, Working Paper No. 200011, 2000).

and are often captured by a small number of firms.¹⁸ In many cases, these firms operate under the protection of the government or a cadre of political elite.¹⁹ Finally, most MENA economies exhibit high market concentration with low import penetration, problems that an effective competition regime has the potential to address.²⁰

In many ways the experiences of Tunisia, Jordan, and Egypt are representative of the broader MENA experience with competition law. Tunisia is a pioneer of competition law in the region and is representative of the Maghreb experience; Jordan is an example of a more recently adopted and generally well-regarded competition regime, and is partly representative of the Levant experience; Egypt is an example of a more problematic regime, and is additionally relevant due to Egypt's size and prominence in the Arab MENA region.

These three economies have much in common. Food manufacturing, for example, is the most important manufacturing sector in both Egypt and Jordan.²¹ Egypt and Tunisia, meanwhile, are both highly specialized, to the extent that 50% of value added and employment depend on just three sectors in Tunisia, and on five sectors in Egypt.²² In each country, economic activity is largely concentrated in one main city: Tunis, Amman, and Cairo, respectively.²³ Meanwhile rural regions remain economically depressed.²⁴ In each economy, mark-ups are high, the productivity growth rate is low, and markets are

18. *Id.* at 3.

19. Before the revolution, ousted President Ben Ali and the Trabelsi family owned over 50% of the businesses in Tunisia. Walid Gani, *Competition and Poverty Reduction*, Org. for Econ. Co-operation & Dev. [OECD] Global Forum on Competition, ¶ 6, OECD Doc. DAF/COMP/GF/WD (2013)10 (Jan. 17, 2013) [hereinafter OECD Tunisia Poverty Report]. See also Rikers, *supra* note 9 (describing the astounding degree of industry capture in Tunisia).

20. El Hédi, *supra* note 17, at 4.

21. Lahcen Achy, Market Structure and Competition Policy in MENA Region, Presentation at the Project Launch Meeting of the Strengthening Constituencies for Effective Competition Regimes in Select West African Countries 7Up4 Project 6–7 (June 19–20, 2008), www.cuts-ccier.org/7up4/En/ppt/Comp_MENA_LahcenAchy.ppt.

22. *Id.* at 7.

23. JEAN-PIERRE CHAUFFOUR, FROM POLITICAL TO ECONOMIC AWAKENING IN THE ARAB WORLD: THE PATH OF ECONOMIC INTEGRATION 289 (2013).

24. See OECD Tunisia Poverty Report, *supra* note 19, ¶ 4 (noting that “rural areas in inland regions are the most affected Tunisian zones by poverty”).

insufficiently exposed to foreign competition in terms of import penetration.²⁵ Each of these three countries has sought to address some of these problems, in part, through the adoption of a competition law.

This Note looks at competition law in the MENA region through the lens of the Tunisian, Jordanian, and Egyptian experiences, exploring the questions of why these three countries adopted a competition regime, what institutional structure each has assumed, what problems have emerged, and how successful each regime has been in addressing these problems. Part II of this Note focuses on the development of a competition law in Tunisia, Part III looks at the subsequent adoption of a competition law in Jordan, and Part IV discusses the challenging process of enacting and instituting a competition law in Egypt. The Note concludes by summarizing some of the commonalities and differences between the three regimes, discussing steps that have been taken to address difficulties encountered in the adoption and implementation of competition law in these three countries, and analyzing proposals that are likely to be most successful.

II. THE CASE OF TUNISIA: AN EARLY MOVER

A. *The Process of Creating the Competition Law*

Tunisia is, in many ways, a pioneer in the realm of both trade liberalization and competition law among Arab MENA countries. Tunisia's Competition and Prices Act of 1991 represented the first competition law in the region apart from Israel.²⁶ Tunisia was also the first Mediterranean country to sign an Association Agreement with the European Community (signed in 1995, entered into force in 1998).²⁷ This agreement sought to establish a free trade zone between Tunisia and European Community members, and to attract European foreign investment.²⁸ Aside from the Association Agreement, Tunisia also acceded to a host of other international commitments, notably the General Agreement on Tariffs and Trade (GATT) in 1990 and a number of regional Arab free trade agreements,

25. Achy, *supra* note 21, at 16.

26. MAHER M. DABBAH, COMPETITION LAW AND POLICY IN THE MIDDLE EAST 152 (2007).

27. *Id.* at 150.

28. *Id.*

including the Greater Arab Free Trade Agreement (GAFTA),²⁹ the Arab Maghreb Union (AMU),³⁰ and the Agadir Agreement.³¹ Tunisia later also entered into a free trade agreement with the European Free Trade Association (“EFTA”), which entered into force in 2005.³² Each agreement sought to increase Tunisia’s integration into the global trade system, and signaled the country’s ambitions to augment its trade connections with Europe and the Arab world.

The Association and the EFTA agreements both contain very similar provisions holding anti-competitive agreements, concerted practices, and abuse of dominance to be “incompatible with the proper functioning” of the agreement.³³ These provisions undoubtedly influenced Tunisia’s decision to adopt a competition regime, the process of drafting the initial framework, and the subsequent development of the competition law. Yet it is notable that tariffs were dismantled and a competition regime introduced well before the Association Agree-

29. Tunisia, along with 13 other Arab countries, was a founding member of the GAFTA in 1997. The agreement sought to progressively remove tariff and non-tariff trade barriers among member countries. Javad Abedini & Nicolas Péridy, *The Greater Arab Free Trade Area (GAFTA): An Estimation of Trade Effects 1* (June 2, 2007) (unpublished manuscript) <http://economics.ca/2007/papers/0300.pdf>.

30. Tunisia, along with 4 other Maghreb countries was a founding member of the AMU in 1989, well before the GAFTA. The Union is focused on Maghreb economic integration. Michele Bigoni, *The Union of the Arab Maghreb and Regional Integration: Challenges and Prospects*, EUR. PARLIAMENTARY RES. SERV. BLOG (Jan. 16, 2014), <http://epthinktank.eu/2014/01/16/the-union-of-the-arab-maghreb-and-regional-integration-challenges-and-prospects/>.

31. The Agadir Agreement, between Tunisia, Jordan, Morocco, and Egypt, was concluded in 2004. The aim the agreement was to establish, in conformity with the GAFTA and E.U. Association Agreements, a common free trade area among Arab-Mediterranean states. Steffen Wipfel, *The Agadir Agreement and Open Regionalism* 8–10 (EuroMeSCo, Working Paper No. 45, 2005).

32. *Id.*; Free Trade Agreement between the States of the European Free Trade Association and the Republic of Tunisia, art. 45(2), Dec. 17, 2004, <http://www.efta.int/media/documents/legal-texts/free-trade-relations/tunisia/EFTA-Tunisia%20Free%20Trade%20Agreement%20EN.pdf> [hereinafter *Tunisia-EFTA Free Trade Agreement*].

33. Euro-Mediterranean Association Agreement between the Member States of the European Communities and the Republic of Tunisia, art. 36, July 17, 1995, 1998 O.J. (L 97) 2 [hereinafter *Tunisia-EC Association Agreement*]; *Tunisia-EFTA Free Trade Agreement*, *supra* note 32, at art. 17.

ment came into force.³⁴ This was in part due to the country's adoption of a structural adjustment program in 1986.³⁵ The program entailed tariff reductions, import restrictions, and the privatization of a large number of state-owned enterprises.³⁶ While Tunisia's need to meet future international obligations and its desire to attract foreign trade and investment had some role in the adoption of a competition regime, a process of economic liberalization was already well underway; the competition law was seen as an integral part of this reform process.³⁷

Tunisia justifies its competition law based on both an acknowledged failure of the state-control model and its aspirations to create a free trade zone with the EFTA.³⁸ According to one Organization for Economic Cooperation and Development (OECD) report, Tunisia recognized the potential benefits of a competition regime both in terms of efficiency and economic integration, but also in terms of indirect benefits through economic growth and poverty reduction.³⁹ An understanding that competition is not an end in-and-of itself—that social objectives can justify economic exceptions—bolsters this broader perception of benefits.⁴⁰ This position is reflected in Tunisia's competition regime, which allows for derogations based on public policy. This model recognizes that to the extent the competition law is designed to promote such ultimate objectives as economic efficiency or equitable opportunity for

34. DABBAH, *supra* note 26, at 151.

35. Mohamed Ayadi & Wided Mattousi, *Scoping of the Tunisian Economy* 4 (U.N.U. World Inst. for Dev. Econ. Research, Working Paper No. 2014/074, 2014).

36. *Id.* at 1, 4.

37. DABBAH, *supra* note 26, at 152-53.

38. See Ghazi Jeribi, *Obstacles Encountered by the Tunisian Competition Council in Fulfilling Its Mission*, Org. for Econ. Co-operation & Dev. [OECD] Global Forum on Competition, ¶¶ 3-4, OECD Doc. CCNM/GF/COMP/WD(2004)15 (Feb. 2, 2004) (explaining that the model of state-controlled private investment, regulation of distributive trade, and limited imports proved "incapable of driving the economy to a higher level or of improving the living conditions of the population.") [hereinafter OECD Tunisia Development Report].

39. OECD Tunisia Poverty Report, *supra* note 19, ¶ 9 ("Tunisian competition policy has not a direct impact on poverty. It has a direct impact on consumer's welfare, which in turn, contributes in reducing poverty level. [sic]").

40. OECD Tunisia Development Report, *supra* note 38, ¶¶ 9, 14, 18.

small firms, derogations should be permitted where enforcement of the law would not promote these objectives.⁴¹

Tunisia's competition law is based largely on the French Ordinance of 1986 and European competition law, as reflected in its emphasis on free price setting and its administrative institutional framework.⁴² The original law covered all concerted practices and agreements restricting competition, which is similar to Article 101(1) of the Treaty on the Functioning of the European Union (TFEU).⁴³ It also covered abuse of dominance, similar to Article 102 of the TFEU.⁴⁴ The law was later expanded to cover mergers and vertical agreements.⁴⁵ The law provides a number of important exceptions

41. *Id.* at ¶¶ 9, 12. See Fox, *supra* note 8, at 10–11 (noting that competition law can be used to empower marginalized firms).

42. DABBAH, *supra* note 26, at 153. The French Ordinance of 1986 significantly reformed the existing French competition regime by removing the power of the government to set prices, and by divesting substantial competition powers from the Minister to a new independent administrative authority, the Competition Council. Frédéric Jenny, *France: 1987–94*, in PETERSON INST. FOR INT'L ECON., GLOBAL COMPETITION POLICY 87, 87–88 (Edward M. Graham & J. David Richardson eds., 1997) The Tunisian law had similar aims.

43. The Tunisian Competition and Prices Act of 1991 prohibits “concerted actions and express or tacit agreements which seek to prevent, restrict or distort market competition,” if designed to hamper free pricing, restrict other firms’ access, control production, or fragment markets (among other aims). Loi 91-64 du 29 juillet 1991 relative à concurrence et aux prix [Law 91-64 of July 29, 1991 on Competition and Prices], art. 5, JOURNAL OFFICIEL DE LA RÉPUBLIQUE TUNISIENNE [J.O.] [OFFICIAL GAZETTE OF TUNISIA] hereinafter Law 91-64 of 1991 (Tunisia)], Aug. 6, 1991, p. 1393. Article 101(1) of the TFEU prohibits “all agreements between undertakings, decisions by associations of undertakings and concerted practices” which have as their object price fixing, placing other parties at a competitive disadvantage, or limiting production (among other aims). Consolidated Version of the Treaty on the Functioning of the European Union art. 101(1), May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU].

44. See Law 91-64 of 1991 (Tunisia), *supra* note 43, art. 5 (prohibiting “abuse of a dominant position on the domestic market or on a substantial portion of that market, or abuse of the state of economic dependence of a client or supplier”); TFEU, *supra* note 43, art. 102 (prohibiting “any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it,” but containing no explicit mention of economic dependence).

45. An exemption procedure was adopted for vertical agreements, though there remains some confusion as to whether exemptions are governed by a “rule of reason.” DABBAH, *supra* note 26, at 155–56.

to general competition principles. Prices are to be set by the "free play of competition," except in the case of essential goods or in sectors long dominated by monopoly or procurement problems, requiring state intervention to set a fair price.⁴⁶ Exemptions are also granted in cases of collusion or abuse of dominance where such practices "generate[] economic or technical progress and provide[] consumers with a fair share of the resulting benefit or profit."⁴⁷ Finally, mergers are subject to the discretion of the Minister of Trade, based on whether a dominant position is likely to be created or strengthened.⁴⁸

B. *Institutional Structure: The Council and the Minister*

Enforcement of the competition law is essentially administrative, entrusted to a Competition Council, which is vested with decision-making and advisory functions.⁴⁹ The Council is composed of thirteen members of diverse backgrounds, recommended by the Minister of Trade and approved by the President.⁵⁰ The chair of the Council must be a judge or someone otherwise qualified.⁵¹ Cases may be brought before the Council upon referral by the Minister of Trade, firms, professional organizations, registered consumer organizations, or the Chambers of Agriculture, Commerce, or Industry.⁵² In deciding cases, the Council has the power to impose fines, order the closure of firms, and grant injunctions; interim measures can also be granted in extreme cases.⁵³ The Council is able to refer cases to a prosecutor to initiate criminal charges against an individual,⁵⁴ and all decisions are appealable to the Administrative Court.⁵⁵

46. OECD Tunisia Development Report, *supra* note 38, ¶ 13.

47. DABBAH, *supra* note 26, at 155.

48. *Id.* at 156.

49. *Id.* at 157-58.

50. *Id.* at 157.

51. *Id.* (for example a person qualified in economics, competition, or consumer protection).

52. *Id.* at 158.

53. The power to close firms is closely related to the Council's injunctive powers, as it is limited to a three-month period, during which the firm must amend its practices to conform to the competition law. *Id.* at 158-59.

54. Law 91-64 of 1991 (Tunisia), *supra* note 43, art. 20.

55. *Id.* art. 21.

While the above functions appear to be a substantial grant of power to the Council, it should be noted that the Minister of Trade retains significant control over the Council. The Minister has influence over the composition of the Council through his power to recommend members⁵⁶ and refer cases.⁵⁷ The Council has some power to initiate proceedings itself, upon recommendation by the general rapporteur.⁵⁸ This power was only added, however, in 1999.⁵⁹ The Council's advisory function on draft laws and regulations remains subject to referral by the Minister,⁶⁰ who also retains extensive powers to authorize mergers, grant exemptions, and take emergency measures in a crisis or abnormal situation.⁶¹

Tunisia's commitment to the flexible adoption of competition rules, with due deference to the socioeconomic imperatives of the state, is arguably reflected in the structure of the regime.⁶² Notable examples of such flexibility include the possibility of exemptions, the Minister's discretion with regard to mergers, the non-applicability of free-pricing to essential goods and services, the ability of the government to set prices in cases of monopoly or procurement problems, the availability of emergency measures, and the delegation of authority to the Minister of Trade.⁶³ Yet it is possible that such provisions undermine the integrity of competition principles and the independence of the Council.

The Council was also not very active during its first ten years in existence, on average handling four cases per year.⁶⁴ This low level of activity is attributable to a number of factors. Tunisia has stressed the importance of gradual implementation; it has also acknowledged that the first ten years of the Council's operation highlighted the limits imposed by the un-

56. *Id.* art. 10.

57. *Id.* art. 11.

58. *Id.* The general rapporteur is an individual, appointed by decree of a judge or certain other officials, responsible for coordinating, monitoring, controlling and supervising the work of all other rapporteurs, as well as carrying out other tasks assigned him by the chairman of the Council. *Id.* art. 13.

59. DABBAH, *supra* note 26, at 158.

60. Law 91-64 of 1991 (Tunisia), *supra* note 43, art. 9.

61. DABBAH, *supra* note 26, at 160.

62. OECD Tunisia Development Report, *supra* note 38, ¶ 12.

63. Law 91-64 of 1991 (Tunisia), *supra* note 43, arts. 3-4.

64. DABBAH, *supra* note 26, at 161.

familiarity of economic actors with the role and value of competition law.⁶⁵ Consumer organizations and the Chambers of Agriculture, Commerce, and Industry, for example, did not file a single petition with the Council during the first ten years of its existence.⁶⁶ This is significant, given the Council's procedural reliance on referrals to initiate investigations. There was also substantial confusion as to the difference between anti-competitive practices and unfair competition, the latter falling outside the scope of the Council.⁶⁷

C. *Looking Forward*

Tunisia has made consistent efforts to address these problems and to develop the capacity of its competition regime. As mentioned above, the law has been amended a number of times to integrate new functions, such as merger review and vertical agreements.⁶⁸ The Council's scope was expanded in 1999 to give it the discretion to continue investigating cases even after a complaint has been withdrawn, as well as to investigate anti-competitive practices in markets directly linked to a case already before the Council.⁶⁹ In 2003 the Council adopted a whistle-blower program, encouraging firms to cooperate in reporting violations in the hope of receiving some leniency from the Council.⁷⁰ From 2002 to 2003, the Council issued a set of opinions that helped clarify the distinction between anti-competitive behavior and unfair competition.⁷¹ Fi-

65. OECD Tunisia Development Report, *supra* note 38; U.N. Conference on Trade and Development, *Voluntary Peer Review of Competition Policy: Tunisia*, ¶¶ 69–70, U.N. Doc. UNTAD/DITC/CLP/2006/2 (2006) (recommending the Council strengthen the culture of competition among consumers and companies through advocacy (media, seminars, brochures for companies)) [hereinafter UNCTAD Tunisia].

66. DABBAH, *supra* note 26, at 161.

67. *See id.* at 161 (explaining that 60% of all cases brought before the Council in the first ten years were held to be outside the Council's jurisdiction); OECD Tunisia Development Report, *supra* note 38, ¶ 34.

68. OECD Tunisia Development Report, *supra* note 38, ¶ 15 (explaining that (as of 2004) the law had been typically amended every 3 years).

69. DABBAH, *supra* note 26, at 158.

70. *Id.* at 159.

71. OECD Tunisia Development Report, *supra* note 38, ¶¶ 5 & 8 n.15 (Case No. 9/93 (Conseil de la Concurrence [Competition Council] Sept. 25, 2002) and Case No. 2143 (Conseil de la Concurrence [Competition Council] Oct. 25, 2003)).

nally, the Council has been active in its advisory capacity, promoting awareness of the function and importance of competition law through engagement with the media, annual reports, seminars, symposia, and, creatively, injunctions requiring the publication of the Council's decision by a party found to be in violation of the law.⁷²

Perceptions of Tunisians regarding the value and function of competition law are mixed. One targeted survey of Tunisian stakeholders in the private, public, and legal sectors found that 83% of respondents considered Tunisians to have average or below average familiarity with competition law.⁷³ When asked to evaluate the effectiveness of the Competition Council, respondents were, when taken as an average of all three sectors, satisfied, though private sector respondents were on average dissatisfied,⁷⁴ suggesting the Council may not be working as well as generally perceived by the public.

III. THE CASE OF JORDAN: AN ATTEMPT AT INTEGRATION

A. *The Process of Creating the Competition Law*

Jordan undertook a millennial economic reform program starting in 2000, one year after King Abdullah II ascended the throne, pushing an agenda of economic liberalization.⁷⁵ After a number of false starts, Jordan successfully adopted a competition law in 2004, as a part of this reform program.⁷⁶ As in the case of Tunisia, Jordan had signed an Association Agreement with the European Union in 1997 (entered into force in 2002), as well as a free trade agreement with the EFTA (signed in 2001, also entered into force in 2002).⁷⁷ These agreements contained virtually identical provisions stipulating that anti-competitive agreements, concerted practices, and abuse of dominance are incompatible with the agreement to the extent

72. DABBAH, *supra* note 26, at 162–63.

73. ARAB CTR. FOR THE DEV. OF THE RULE OF LAW & INTEGRITY, MENA COMMERCIAL LAW STRENGTHENING PROJECT: COMPETITION LAW IN TUNISIA 20 (2009).

74. *Id.* at 24.

75. DABBAH, *supra* note 26, at 168.

76. Law No. 33 of 2004 (The Competition Law), AL-JARIDAH AL-RASMIYAH, no. 4673, Sept. 1, 2004 (Jordan) [hereinafter Law No. 33 of 2004 (Jordan)].

77. DABBAH, *supra* note 26, at 170.

they affect trade between Jordan and E.U. members.⁷⁸ Jordan's adoption of a competition law is closer in date to the coming into force of the Association and EFTA agreements than in the case of Tunisia. It is worth noting, however, that Jordan had twice before attempted to adopt a competition law,⁷⁹ suggesting the impetus did not derive wholly from Jordan's international obligations.⁸⁰ Jordan attempted in 1995 and 1998 to enact a competition law, yet both these attempts failed.⁸¹ These failures were in part due to the heavy-handedness of the government in shaping a competition framework that was overly-ambitious and heavily based on foreign systems, giving undue regard to Jordan's context and capacity.⁸² The successful 2002 framework drew heavily from the Tunisian experience.⁸³

Jordan frames the importance of competition law both in terms of support for economic corrective programs and international integration, with its attendant commitments.⁸⁴ In contrast to Tunisia and Egypt, Jordan's economy is characterized by a scarcity of resources—it does not face significant problems of monopolization or state control.⁸⁵ Yet competition law remains essential insofar as it allows Jordan to promote and maintain the international integration essential to

78. Euro-Mediterranean Association Agreement between the Member States of the European Communities and the Hashemite Kingdom of Jordan art. 53(1)(a)-(b), Nov. 24, 1997, 2002 O.J. (L 29) 15(entered into force May 1, 2002)[hereinafter Jordan-EC Association Agreement]; Free Trade Agreement between the States of the European Free Trade Association and the Hashemite Kingdom of Jordan, art. 18(1)(a)-(b), June 21, 2001, <http://www.efta.int/media/documents/legal-texts/free-trade-relations/Jordan/EFTA-Jordan%20Free%20Trade%20Agreement.pdf> [hereinafter Jordan-EFTA Free Trade Agreement] (entered into force Sept. 1, 2002).

79. DABBAH, *supra* note 26, at 172.

80. Although it should also be noted that a General Cooperation Agreement, signed in 1977, preceded the Association Agreement. *Id.* at 170.

81. *Id.* at 172.

82. *Id.*

83. *Id.*

84. *Competition, State Aids and Subsidies: Contribution from Jordan*, Org. for Econ. Co-operation & Dev. [OECD], Global Forum on Competition, ¶¶ 3-4, OECD Doc. DAF/COMP/GF/WD(2010)41 (Jan. 29, 2010) [hereinafter OECD Jordan Competition Report].

85. DABBAH, *supra* note 26, at 169.

its service economy.⁸⁶ Jordan is also unique from Tunisia in that it has long been dependent on foreign support, which has meant greater reliance on the United States than in the case of many Maghreb countries.⁸⁷ Jordan's Qualifying Industrial Zones illustrate this relationship. In 1997, Jordan signed an agreement with the United States and Israel to the effect that goods produced in certain zones in Jordan, with an input of Israeli resources, would enjoy duty and quota-free access to U.S. markets.⁸⁸ This agreement has had the effect of both increasing exports to the United States and increasing foreign investment in the qualifying zones, as a means through which investors can indirectly gain access to U.S. markets.⁸⁹

Not surprisingly, given the importance of the Tunisian experience in the drafting and implementation of the 2002 law,⁹⁰ there are many similarities between the scope and application of the two competition regimes. The Jordanian law applies to anti-competitive practices and abuse of dominance in much the same way as the Tunisian law.⁹¹ With respect to mergers, the discretion to approve is similarly vested with the Minister of Trade and Industry.⁹² The same is true of exemptions for anti-competitive practices or abuse of dominance. Such exemptions are to be decided by the Minister based on

86. *Id.* at 173 (explaining that the competition law was perceived as a tool to achieve objectives "at the heart of [Jordan's] declared policy of economic openness."); Synopsis of International Workshop on Jordan's New Draft Competition Law: Achievement Made, Improvement Required, Konrad-Adenauer-Stiftung (Oct. 4, 2010) [hereinafter KAS Workshop] (conference held Sept. 27, 2010) (on file with author). See also *The Economy*, THE EMBASSY OF THE HASHEMITE KINGDOM OF JORDAN IN WASHINGTON, D.C., <http://www.jordanembassyus.org/page/economy> (last visited Apr. 22, 2016) (explaining that the service sector constitutes 67.6% of the country's GDP).

87. DABBAH, *supra* note 26, at 169.

88. *Id.* at 171.

89. *Id.* at 172.

90. *Id.*; LUNA ABBADI, *Jordan*, in CONSUMER UNITY & TRUST SOCIETY INT'L, COMPETITION REGIMES IN THE WORLD – A CIVIL SOCIETY REPORT 1–7 (rev. 2012) (explaining how in the early days of implementation, the Directorate, judges, and prosecutors benefited from the experience of Tunisian experts through training programs on the Tunisian system, visits with Tunisian officials, and the annual reports of the Tunisian competition authorities).

91. Although notably the Jordanian system omits any reference to effect on trade. DABBAH, *supra* note 26, at 174–75.

92. While there are no specific criteria, the decision must be reasoned and published. *Id.* at 176.

whether they will improve the competitive ability of enterprises or production and distribution systems, whether they will benefit the consumer, and whether they will lead to technical or economic progress.⁹³ While the decision lies with the Minister, it must be based on the recommendation of the Directorate, a body discussed further below.⁹⁴ As in the Tunisian (and French) system, emphasis is given to the principle of free pricing, though derogations are allowed for basic commodities and exceptional circumstances.⁹⁵

B. *Institutional Structure: The Directorate, the Committee, and the Courts*

The institutional structure of the regime involves three separate entities: the Competition Directorate, the Committee for Competition, and the courts. The Directorate is analogous to the Tunisian Council,⁹⁶ with some key differences. The Directorate has the power to investigate on the basis of received complaints *or* of its own initiative. It also has the power to participate in the legislative process as it relates to competition, and to engage in general advocacy through training, seminars, publications, and other means.⁹⁷ Finally the Directorate is responsible for receiving applications for mergers, and for preparing reports, recommendations, and draft decisions relating to those applications.⁹⁸ The ultimate decision on whether to approve or deny a merger, however, lies entirely with the Minister.⁹⁹

Unlike the Tunisian Council, the Directorate does not have the power to reach a decision regarding complaints of anticompetitive behavior. The findings of the investigation are presented to either the Minister or the courts, as the case may be.¹⁰⁰ The Directorate is not included in the list of entities entitled to present competition-related complaints to the public

93. *Id.* at 179.

94. *Id.* at 179, n. 32.

95. OECD Jordan Competition Report, *supra* note 84, ¶ 7.

96. The main body responsible for receiving complaints of anticompetitive practices in Tunisia. See discussion *supra* Section II.B.

97. DABBAH, *supra* note 26, at 181–82.

98. Law No. 33 of 2004 (Jordan), *supra* note 76, art. 12.

99. *Id.* art. 11.

100. *Id.* art. 12(A)(4).

prosecutors.¹⁰¹ It may be asked by the courts, however to conduct an investigation related to complaints received from entities that are allowed to present such complaints, which include the Minister, private-sector enterprises, injured parties, consumer protection groups, certain government Chambers, unions, and sectoral regulatory agencies.¹⁰²

The Committee for Competition, meanwhile, is an advisory and consultative body charged with policy formation and general competition strategy.¹⁰³ The Committee is chaired by the Minister, while the remaining seats are occupied by a variety of government officials, heads of sectoral regulatory bodies, one consumer advocacy representative, and three persons of relevant expertise.¹⁰⁴ The Minister also has the power to invite non-voting individuals to any specific meeting, reinforcing the dominance of the Minister over this body.¹⁰⁵

Finally, the courts are responsible for the adjudication of competition investigations. Actions are brought by the Attorney General, and the Minister is directed to appear as a party.¹⁰⁶ The law does not establish any permanent specialist body to adjudicate competition claims. The Amman Court of First Instance¹⁰⁷ was the only court competent to hear competition cases for the first two years following the law's enactment.¹⁰⁸ At present, any competent court of first instance has jurisdiction to hear such cases, within which one or more judges, having received special training, are to be nominated to hear competition cases.¹⁰⁹ Three judges within the Amman Court of First Instance were nominated to handle these cases and received special training in competition law.¹¹⁰ Exemp-

101. *Id.* art. 17(A).

102. *Id.* art. 17(A), (C).

103. *Id.* art. 14(C).

104. DABBAH, *supra* note 26, at 182.

105. DABBAH, *supra* note 26, at 182–83.

106. DABBAH, *supra* note 26, at 184.

107. The Amman Court of First Instance is empowered to conduct initial review and hear the facts of a case.

108. Law No. 33 of 2004 (Jordan), *supra* note 76, art. 16(B). Note also that mergers bypass this court on appeal.

109. *Id.* art. 16(D).

110. DABBAH, *supra* note 26, at 183.

tions and merger decisions, as in the case of Tunisia, are made by the Minister, though all decisions are appealable.¹¹¹

The Directorate has ostensibly sought to limit the number of cases before it in order to conduct thorough investigations with limited resources.¹¹² In the years following the Directorate's formation, only a few complaints were brought: a cartel allegation in the aluminum industry, a predatory pricing allegation in the vehicle spare parts industry, and an abuse of dominance allegation in the dairy industry.¹¹³ In each of these cases, the Directorate found no violations.¹¹⁴ The Directorate has been more active in the area of exemptions and merger petitions,¹¹⁵ and consultations.¹¹⁶ The Directorate has characterized its work as diverse, showing a general awareness of the function and importance of the competition regime, and demonstrating the capability of the Directorate itself to handle sensitive cases.¹¹⁷

C. *Looking Forward*

One of the primary concerns regarding the function of the competition regime, has remained the lack of independence of the Directorate from the Ministry of Trade and Industry.¹¹⁸ One aspect of this concern is, naturally, the danger that the Directorate will not have sufficient freedom to adequately research issues and draw its own conclusions—that it will effectively act as an organ of the Ministry. Another aspect of this lack of independence is the potential concern of foreign firms who do not want their private information forwarded to the Ministry of Trade.¹¹⁹

111. Cases are appealable to the Court of Appeal and Court of Cassation; exemptions and mergers are appealable the Supreme Court of Justice. *Id.*

112. *Id.* at 187–88.

113. ABBADI, *supra* note 90, at 5.

114. *Id.*

115. While decided by the Minister, merger petitions are received by the Directorate. In the years following enactment, the Directorate received one merger application and three exemption petitions, in the areas of steel, tourism, and energy. *Id.* at 4.

116. The Directorate has provided consultations in the areas of cement, the meat industry, potash, and steel. *Id.* at 5.

117. DABBAH, *supra* note 26, at 188.

118. *See id.* at 190–91.

119. KAS Workshop, *supra* note 6, at 4.

On a purely procedural level, governments and Ministerial positions in Jordan are notoriously short-lived.¹²⁰ Substantial responsibility to define Jordan's competition strategy and operation is vested in a position that is constantly changing hands, creating long-term problems for the direction and continuity of the regime.

Despite challenges in terms of resources and independence, the regime has established itself as an effective competition authority in the MENA region. This success is in no small part due to effective consultations with the Tunisian Council in the drafting of the 2002 law and in the launch and operation of the Jordanian Directorate. Also notable has been the Directorate's restraint in attempting to limit its scope and caseload in light of its limited resources and evolving expertise.¹²¹

IV. THE CASE OF EGYPT: A FALSE START

A. *The Process of Creating the Competition Law*

The experience of Egypt in enacting a competition regime has been less successful than that of Tunisia or Jordan. National and international pressures beginning in the 1990s led some to argue the necessity of some form of competition law.¹²² Egypt undertook a structural adjustment program in 1991 and a privatization program in 2006–2007; both met with very limited success.¹²³ By the late 1990s, Egypt was keenly feeling the pressures of globalization.¹²⁴ During this period, Egypt was also in the process of shifting its orientation from the United States to the European Union as a preferred

120. DABBAH, *supra* note 26, at 168–69.

121. *Id.* at 187–88, 188 n.70.

122. Bahaa Ali El Dean & Mahmoud Mohieldin, *On the Formulation and Enforcement of Competition Law in Emerging Economies: The Case of Egypt* 2–3 (The Egyptian Ctr. for Econ. Studies, Working Paper No. 60, 2001) (describing the need for a competition law in Egypt given the growing role of the private sector, the country's international integration, and the need to attract and regulate multinationals).

123. DABBAH, *supra* note 26, at 237–38. This may be attributable to a number of factors, including Egypt's long history of Nasserism and a deep skepticism of any foreign intervention.

124. Noland & Pack, *supra* note 12, at 2–5.

trading partner.¹²⁵ As in the case of Tunisia and Jordan, Egypt had signed an Association Agreement with the European Union, entering into force in 2004.¹²⁶ Egypt had also signed a Declaration of Cooperation with EFTA member states in 1995, with the hope that it would eventually develop into a free trade agreement.¹²⁷ The Association Agreement contained the standard provisions requiring competition rules compatible with the European Union on anti-competitive agreements, concerted practices, and abuse of dominance.¹²⁸

While the need to introduce competitive forces into the economy was generally accepted, the need for a competition law, as opposed to only a competition policy, was disputed.¹²⁹ Even accepting the need for a competition law, either to meet international obligations or stimulate competition domestically, there was disagreement as to the content and implementation of the law.¹³⁰ Despite some reluctance by the government, the law that was eventually adopted was framed in terms of an affirmative duty to fight and eradicate harmful anti-competitive behavior and abusive conduct, and to facilitate Egypt's transition from a state-controlled to a market-based economy.¹³¹

125. Although the United States would remain a significant influence in Egypt, through foreign aid as well as through a Qualifying Industrial Zone agreement similar to that concluded with Jordan.

126. DABBAH, *supra* note 26, at 239. This agreement replaced a Cooperation Agreement, as in the case of Jordan.

127. *Id.* at 238. Egypt did ultimately sign such an agreement in 2007. Free Trade Agreement between the States of the European Free Trade Association and the Arab Republic of Egypt, 27 Jan. 2007, <http://www.efta.int/media/documents/legal-texts/free-trade-relations/egypt/EFTA-Egypt%20Free%20Trade%20Agreement.pdf> [hereinafter Egypt-EFTA Free Trade Agreement].

128. Euro-Mediterranean Association Agreement between the Member States of the European Communities and the Arab Republic of Egypt, art. 34, Apr. 21, 2004, 2004 O.J. (L 304) 38 [hereinafter Egypt-EC Association Agreement].

129. Ahmed Farouk Ghoneim, *Competition Law and Competition Policy: What Does Egypt Really Need?* 13 (Econ. Research Forum, Working Paper No. 0239, 2002), <https://www.alexandria.unisg.ch/export/DL/22316.pdf>. Competition law is merely one possible component of a broader competition policy, which could include such elements as competition advocacy, consumer protection laws, anti-dumping policies, firm registration practices, and other measures.

130. DABBAH, *supra* note 26, at 240–42.

131. *Id.* at 242.

The 2005 Law on the Protection of the Freedom of Competition¹³² was both hugely ambitious and poorly drafted. Substantial gaps exist regarding the scope of the act, the penalties imposed, and the institutional structure of the competition authority. Generally, the law ambiguously covers activities that harm “freedom of competition.”¹³³ Specifically, the law applies to instances of collusion, abuse of dominance, and mergers.¹³⁴ The law applies to actions occurring in Egypt or occurring elsewhere and affecting freedom of competition within Egypt. However, the basis for extraterritorial jurisdiction is uncertain, as is Egypt’s ability to apply it.¹³⁵ Notably, in contrast to the Tunisian and Jordanian systems, public firms are not within the scope of the law.¹³⁶

The criteria for merger control are virtually absent, which is especially curious given that an earlier draft of the bill contained an entire chapter on mergers.¹³⁷ The fines are relatively low and their applicability to firms and individual offenders is unclear, with the possibility of higher fines being levied on an individual than the firm on behalf of which that individual was acting.¹³⁸ As in the case of Tunisia and Jordan, prices are to be set by the free play of competition, with possible exceptions for “essential products.”¹³⁹ In contrast to Tunisia and Jordan, however, no indication is given as to what constitutes an essen-

132. Law No. 3 of 2005 (Law on the Protection of Competition and the Prohibition of Monopolistic Practices), *AL-JARIDAH AL-RASMIYAH*, vol. 10, 15 February 2005, p. 5 (Egypt) [hereinafter Law No. 3 of 2005 (Egypt)].

133. DABBAH, *supra* note 26, at 243.

134. Articles 6 and 7 prohibit collusion; Article 8 prohibits abuse of dominance; Article 11(2) charges the Authority with receiving merger applications. Law No. 3 of 2005 (Egypt) *supra* note 132.

135. DABBAH, *supra* note 26, at 244.; TRADE-RELATED ASSISTANCE CTR., AM. CHAMBER OF COMMERCE IN EGYPT, REPORT ON THE SEMINAR: COMPETITION LAW AND POLICY IN EGYPT 12 (2006) (arguing that the Egyptian Competition Authority is not equipped to deal with issues of extraterritoriality, and should confine itself to domestic competition issues) [hereinafter TRAC Egypt].

136. DABBAH, *supra* note 26, at 244; KAS Workshop, *supra* note 86, at 4.

137. DABBAH, *supra* note 26, at 258; TRAC Egypt, *supra* note 135, at 14 (explaining that the Egyptian law is unusual in its failure to address merger controls aside from a post-deal notification requirement and a vague criminalization of monopolistic practices).

138. Law No. 3 of 2005 (Egypt) *supra* note 132, arts. 22–23.

139. *Id.* art. 10.

tial product, or on what basis the decision must rest—pure competition considerations or public policy.¹⁴⁰

B. *Institutional Structure: The Authority, the Minister, and the Courts*

The Egyptian Competition Authority is vested with the power to receive complaints and merger notifications, conduct investigations, engage in advocacy, and order firms to amend their behavior.¹⁴¹ The board that manages the Authority is composed of fifteen diverse members, including representatives from the State Council, various concerned Ministries, industry, and unions, as well as a number of specialists and experts.¹⁴² The Authority is able to open investigations of its own initiative or in response to a complaint, yet it is up to the courts to render a binding decision and, if necessary, impose penalties.¹⁴³ Significantly, only the Minister of Trade and Industry has the power to forward a matter to the courts, as well as the power to reach a settlement at any point during the proceedings.¹⁴⁴ This mechanism essentially allows the Minister to resolve a complaint without resorting to full adjudication by the Egyptian courts, which are notoriously under-resourced and over-worked. This ability to bypass both the Authority and the courts sheds serious doubt on the independence of the competition regime, given the susceptibility of the Minister to lobbying efforts and the history of corruption and cronyism in the Egyptian government.¹⁴⁵

Another significant shortfall of the competition regime is the requirement of actual intention to violate the law in cases of horizontal or vertical agreements.¹⁴⁶ This is a seemingly unnecessary burden, especially on a young and resource-con-

140. *Id.*

141. DABBAH, *supra* note 26, at 246.

142. Law No. 3 of 2005 (Egypt) *supra* note 132, art. 12.

143. *Id.* arts. 20–21.

144. DABBAH, *supra* note 26, at 247.

145. See, e.g., Hamouda Chekir & Ishac Diwan, *Crony Capitalism in Egypt*, 5 J. GLOBALIZATION & DEV. 177 (2014) (describing the pervasiveness of corruption and cronyism among business elites and government officials in Egypt).

146. Law No. 3 of 2005 (Egypt) *supra* note 132, art. 6 (“Agreements or contracts between competing Persons in any relevant market are prohibited if they are *intended* to cause any of the following”) (emphasis added).

strained authority.¹⁴⁷ Finally, the Act's applicability to specially regulated sectors, such as energy or telecommunications, is not defined.¹⁴⁸ This relationship is also unclear, however, in the Tunisian and Jordanian systems.

A number of early cases taken on by the Authority demonstrate both the ambition and some of the failings of the competition law. An investigation was launched in 2006 concerning a price-fixing agreement in the cement industry, likely to have been reached in 2002.¹⁴⁹ During the investigation, the Minister came to an "unofficial agreement" with the producers to set a maximum cap on cement prices, which many saw as a legitimization of price fixing, after which the investigation was suspended.¹⁵⁰ A steel industry investigation was also commenced in 2006.¹⁵¹ According to the Authority, the steel case was initiated in response to pressure by the media.¹⁵² Given its institutional limitations, the best the Authority could do in this case was to use the investigation to demonstrate the weak points of the competition law, under which no violation could be found.¹⁵³

C. *Looking Forward*

Some changes have been made to the regime since its establishment, with the aim of increasing the Authority's effectiveness. Most notably, an amendment in 2011 granted the Authority the ability to initiate criminal actions independent of the Minister.¹⁵⁴ There also exist proposals to increase potential fines, introduce a leniency program, decrease the number of board members, and grant the Authority recourse to structural remedies in settling cases.¹⁵⁵ Finally, a memorandum of

147. DABBAH, *supra* note 26, at 256.

148. *Id.* at 259–60.

149. *Id.* at 250.

150. *Id.* at 250–52.

151. U.N. Conference on Trade and Development, Contributions from Egypt on Communication Strategies of Competition Authorities as a Tool for Agency Effectiveness to the Fourteenth Session of the Intergovernmental Group of Experts on Competition Law and Policy 2 (July 10, 2014), http://unctad.org/meetings/en/Contribution/CCPB_IGE2014_RTComStr_Egypt_en.pdf [Hereinafter UNCTAD Egypt].

152. *Id.*

153. *Id.*

154. Org. for Econ. Co-Operation & Dev. [2012].

155. *Id.* ¶¶ 19–20.

understanding was reached with the telecommunications regulatory authority in 2011 regarding sectoral overlap.¹⁵⁶ It does not appear that the memorandum was implemented, and so the Authority obtained an administrative court judgment granting it full jurisdiction over telecommunication companies.¹⁵⁷

These changes represent progress and an acknowledgment of at least some of the failings of the original law. Yet many gaps and ambiguities remain, notably the law's non-applicability to the public sector, the enlarged role of the Minister in bringing and settling cases, the inadequacy of fines, and the numerous uncertainties regarding the scope and applicability of the law. It is unclear if these issues will be given priority in the coming years, given the relative instability of Egypt in comparison with Tunisia and Jordan. Egypt's economy remains stagnant, especially in the wake of the revolution. Problems of market capture and monopolization persist; the importance of a clear and comprehensive competition regime has not disappeared in the wake of the Mubarak government.

V. COMPARING THE REGIMES

A. *Points of Convergence and Divergence*

As discussed in this Note, most MENA countries—specifically Tunisia, Jordan, and Egypt—share many commonalities in terms of history, current structure, and contemporary problems. Tunisia and Egypt, for example, have long operated state-controlled economies and are still dealing with the implications of that history in terms of market capture, lack of mobility, and extensive public sectors, among other issues. Jordan and Egypt have both long been dependent on foreign support, especially from the United States. While this remains true in both instances, both countries have been shifting their orientation toward European markets, which has in turn influenced the competition regimes each country has adopted. Generally, each of these three countries suffers from high market concentration and low import penetration, problems an effective competition regime has the potential to address.

156. UNCTAD Egypt, *supra* note 151, at 3.

157. *See id.*

The competition laws adopted by each country also share certain commonalities. This is in part due to the fact that each country has recognized its competitive advantage in proximity and connection to Europe. Each country has sought greater access to European markets, and each country has signed both an Association and EFTA agreement,¹⁵⁸ containing provisions regarding the necessity and content of the signatories' competition laws. As a result, Tunisia, Jordan, and Egypt all included anticompetitive agreements, concerted practices, and abuse of dominance in their original laws, reflecting Articles 101(1) and 102 of the TFEU.

Another factor that has led to convergence is the fact that both Jordan and Egypt, as well as other MENA countries, developed their competition regimes in reference to Tunisia, an early pioneer of competition law in the MENA context. This can be seen in the regimes' emphasis on free pricing, as well as exemptions to the free pricing principles in cases of essential goods¹⁵⁹ and exceptional circumstances.¹⁶⁰

Yet there is also substantial divergence between these three regimes. Each law now covers mergers, for example, but the criteria and mechanisms for approval differ greatly between each country, particularly in the case of Egypt. Significantly, both Egypt and Jordan opted for a judicial enforcement mechanism, even though the Tunisian and E.U. systems favor administrative enforcement. Even between Jordan and Egypt, the judicial mechanism varies significantly, the most notable difference being the Egyptian Minister's power to settle at any point in the proceedings.

B. *Looking Forward: How Each Regime Will Address Competition Challenges*

Prospectively, these three competition regimes share many problems to be addressed, though how they address each of these issues will naturally vary according to the differences outlined above.

158. Egypt-EFTA Free Trade Agreement, *supra* note 127.

159. Essential goods exemptions are present in each system, though ambiguous in the case of Egypt.

160. Exceptional circumstances exemptions are present in the Tunisian and Jordanian systems.

One area of concern to each regime is the relevance of competition law and policy to the public sector and sectoral regulators.¹⁶¹ Tunisia and Jordan's laws seem to apply to public utilities, while Egypt's system exempts not only public utilities, but also private firms in their business with public firms. The law's applicability to separately regulated sectors, notably energy and telecommunications, remains unclear in each country, though Egypt has made efforts to clarify its Authority's relation to the telecommunications sector through litigation.

Resource constraints, lack of expertise, and independence are other important issues facing each of these competition authorities. Tunisia and Jordan acknowledged the limits of their authorities early on—the Tunisian Council addressed an average of only four cases per year for its first ten years in existence, rejecting 60% of petitions as falling outside its jurisdiction.¹⁶² The Jordanian Directorate similarly imposed limitations on the cases it would accept, being a new authority with limited resources and experience. In contrast, the Egyptian Authority immediately took on two of the most significant possible competition cases in the cement and steel investigations. This had negative repercussions in terms of the credibility and public perception of the Authority.

Each of these authorities remains constrained in terms of resources, expertise, and dependence on the Ministry of Trade. These will continue to be important issues going forward, for these three countries and for other MENA countries with competition regimes. The gradual accumulation of expertise and the establishment of a competition culture in the Tunisian and Jordanian systems, contrasted with the overreach of the Egyptian experience, are informative in this regard.

One of the most important functions of competition authorities in light of their restraints will be general advocacy. MENA countries must continue to evaluate and articulate the value and function of a competition law in each of their respective economies. This is important not only to define how each competition law should operate and how it should be

161. See UNCTAD Tunisia, *supra* note 65, at 30 (recommending stronger competition policy in the public sector and sectoral ministerial departments in Tunisia).

162. See DABBAH, *supra* note 26, at 161.

amended, but also to justify its existence to the public and to the economic actors that need to be involved in its operation. As competition authorities gradually gain credibility and experience, the MENA region will gain the potential to progressively realize the benefits of competition law.

