

Independence of the Egyptian Competition Authority: Assessment and Recommendations

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There is a wide understanding that independence is significant for the success of national competition authorities. This article synthesizes the literature on independence and by focusing on the Egyptian Competition Authority as a case study it proposes comprehensive criteria to measure such independence of competition authorities.

1. INTRODUCTION

The adoption of competition laws has been receiving much attention at the national, regional and international levels. During the last decade, many developing countries have moved towards the adoption of national competition laws¹. Egypt has not been outside this trend and accordingly it has issued its competition law in 2005².

The adoption of competition law - despite its importance - is just one pillar among other equally important pillars for achieving effective competition in the market. Certainly, competition in the market will not be achieved by the mere adoption of competition law, i.e. the existence of a perfectly drafted competition law without its effective enforcement is useless.

Effective enforcement of competition law is largely dependent on the institution that is entrusted with its implementation. There is a wide understanding that independence is one of the most significant pre-conditions behind the success of national competition authorities. In fact, the effects of competition law can be neutralized or offset after its enactment, through denying or limiting the independence of the competition authority.

Despite the wide comprehension that competition authorities should be independent, there is far less understanding of the definition of 'independence', what constitutes such 'independence' or how such 'independence' could be optimally accomplished as an organizational matter.

The purpose of this article is to highlight the importance of independence of competition authorities and the possible adverse consequences that may occur as a result of its absence. The article synthesizes the literature on independence of a competition authority and proposes comprehensive criteria against which the independence of such an authority should be measured.

The notion of 'independence of competition authority' is divided into two main concepts, namely the 'Institutional Independence' and the 'Personal Independence'. On the one hand, 'Institutional Independence' refers to the competition authority's freedom in undertaking its day-to-day tasks, without interference or supervision from the government. On the other hand, 'Personal Independence' means the freedom of the members of the decision-making body of the competition authority to decide cases merely on the merit (i.e. based on the law and the facts of the case) and not under the influence of political considerations or their individual interests.

This article will focus on the assessment of the extent of the institutional and personal independence of the Egyptian Competition Authority (hereinafter referred to as 'ECA'), according to the proposed criteria and recommends amendments to the competition law in order to enhance such independence.

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¹ This was recognized by Whish; he emphasized that 'Competition law has grown at a phenomenal rate. The expansion of the law has been geographic: there are now at least 100 systems of competition law in the world, in all continents and in all types of economies, several others are in contemplation'. See Whish, Richard, *Competition Law*, LexusNexis UK, Fifth Edition, 2003, at page 1.

² Law No. 3/2005 on the Protection of Competition and the Prohibition of Monopolistic Practices (hereinafter referred to as 'Egyptian Competition Law'). The law was issued on February 15, 2005 and has been entered into force on May 16, 2005.

2) INDEPENDENCE OF COMPETITION AUTHORITIES

A) Importance of 'Independence'

Over the last decade, there was a wide understanding that independence is one of the most significant factors behind the success of national competition authorities. Khemani & Dutz are among the earliest scholars who propose that transition economies create independent competition authorities that have no links to existing government ministries. Also, Khemani has stressed the fact that the best watchdog of competition is an impartial, independent competition law enforcement agency⁴.

Furthermore, the UNCTAD Model Law on Competition advocates that 'the most efficient type of administrative authority is one which is a quasi-autonomous or independent body of the Government with strong judicial and administrative powers for conducting investigations, applying sanctions, etc., while at the same time providing for the possibility of recourse to a higher judicial body. Note that the trend in most of the competition authorities created in the recent past (usually in developing countries and countries in transition) is to award them as much administrative independence as possible. This feature is very important because it protects the Authority from political influence'⁵.

In the same light, the World Bank recommends that governments need to ensure the independence of the competition authority⁶. Moreover, the OECD and the majority of its participating countries have acknowledged the importance of having a competition agency independent from the government⁷. Also, the CUTS Centre on Competition, Investment and Economic Regulation (hereinafter referred to as 'CUTS Centre') has identified independence as one of the most important factors underpinning the development of successful national competition institutions. The CUTS Centre has described independence as a key ingredient to build credibility⁸.

³ Khemani, R. Shyam and Mark A. Dutz, *Instruments of Competition Policy and their Relevance for Economic Development*, in Claudio R. Frischtak (ed.), *Regulatory Policies and Reform: A Comparative Analysis*, Washington D.C., The World Bank, 1995, at page 16, paragraph 28.

⁴ Khemani, R. Shyam, *Competition Policy and Economic Development*, Policy Options, (1997), at page 26. Available online at: www.irpp.org/po/archive/oct97/khemani.pdf

⁵ Article 8, paragraph 121, UNCTAD Model Law on Competition, United Nations, Geneva, (2000), at page 33.

⁶ World Bank, *Building Institutions for Markets*, World Bank Development Report, Oxford University Press published for the World Bank, 2002, at pages 141-142.

⁷ OECD Centre for Cooperation with Non-Members, Directorate for Financial, Fiscal and Enterprise Affairs, Third Global Forum on Competition, Session I on the *Optimal Design of Competition Agency* held on 10-11 February 2003.

⁸ Mehta, P. S., *Friends of Competition – How to Build an Effective Competition Regime in Developing and Transition Countries*, paper published under the '7-Up Project', CUTS Centre, (2003), paper # 0301, at page 22. The 7-Up project is a comparative study of competition regimes of seven developing countries of the Commonwealth, namely: India, Kenya, Pakistan, South Africa, Sri Lanka, Tanzania and Zambia.

The UNCTAD Intergovernmental Group of Experts on Competition Law and Policy attempts to explain the reason why competition authorities have to be independent, by stressing the necessity of separation between policy implementation and policy making. The Group advises that governments should broadly formulate competition policy and afterwards entrust its enforcement to an independent agency. This is important because governments may be influenced by interest groups (that have either elected them or have provided them with campaign funds). As a direct consequence of entrusting the enforcement of regulations to autonomous institutions, the private interest groups are denied the possibility to lobby ministers and lose the means for gaining favourable treatment. Accordingly, this will lead to decisions that are essentially technical and not subjected to political interference or pressures of interest groups⁹.

Additionally, the business community needs a considerable degree of certainty about the enforcement of government policies that directly affect them. Therefore, 'in order to decrease the regulatory uncertainty or transform it to a manageable risk, implementation of those policies should be entrusted to an independent regulator with a specific mandate and predictable decision-making that does not change with the change in government'. If national competition authorities are influenced by political pressure, 'with a more 'pro-business' party in power the authority will approve mergers in highly concentrated sectors and with a more 'pro-consumer' party in power the authority will impose structural remedies to break up those mergers'. This creates serious inconsistency in policy implementation¹⁰.

Another reason that explains why a competition authority should be independent and not affiliated to the government is that such an affiliation will lead to a natural conflict. This conflict exists because, unlike the competition authority, the ministry's interests are not necessarily directed to achieve the long-term goal of a competitive market, but rather the short-term success of the economy, to gain publicity and support¹¹.

⁹ Mehta, P. S., *Friends of Competition – How to Build an Effective Competition Regime in Developing and Transition Countries*, paper published under the '7-Up Project', CUTS Centre, (2003), paper # 0301, at page 22. The 7-Up project is a comparative study of competition regimes of seven developing countries of the Commonwealth, namely: India, Kenya, Pakistan, South Africa, Sri Lanka, Tanzania and Zambia.

¹⁰ UNCTAD Secretariat, *Independence and Accountability of Competition Authorities*, a note submitted on the ninth session of the UNCTAD Trade and Development Board, Commission on Investment, Technology and Related Financial Issues, Intergovernmental Group of Experts on Competition Law and Policy, TD/B/COM.2/CLP/67, 15-18 July 2008, at page 3, paragraph 4.

¹¹ Mateus, Abel M., *Why Should National Competition Authorities Be Independent? And How Should They Be Accountable?*, paper presented at the 10th Anniversary of the Romanian Competition Council, Bucharest, April 26th, (2007), at pages 4-5.

¹² Kalbfleisch, P., *On Independence and Influence: The Netherlands Competition Authority*, in Barry E. Hawk (ed.), *International Antitrust Law & Policy*, Fordham Competition Law Institute, Juris Publishing Inc., 2008, Chapter 9, at page 234.

There is a consensus among a number of Egyptian scholars on the necessity of conferring independence on the ECA. In particular, Ali El Dean & Mohieldin stated that a competition agency in Egypt must have as a prerequisite 'a transparent, independent and impartial administrative structure'. Moreover, they explained that achieving this 'will be difficult for several reasons, including the novelty of the institution'¹². Furthermore, Ghoneim argued that 'to ensure effectiveness of the competition law, the competition authority must enjoy independency and shielding from political and other vested interests' influence'¹³. Also, independence was seen as one of the key elements and principles of the ECA advocacy policy and process standards¹⁴.

The possible negative consequences from lack of independence are exemplified in the case of *Kibo Breweries v. Tanzania Breweries Limited (1998)*. The Commissioner of Trade Practices in Tanzania found that Tanzania Breweries with a market share of over 80% to be abusing its dominant position by barring agents and mini-wholesalers from stocking competitors' beer brands and threatening to punish them by not selling to those who did not obey on the same terms as to those who obeyed. The Tanzanian Commissioner of Trade Practices directed Tanzania Breweries to cease its anticompetitive practices. Tanzania Breweries argued that the Tanzanian Competition Act was not in place when those practices were committed and therefore the Tanzanian Commissioner of Trade Practices lacks jurisdiction to review those practices. The Permanent Secretary of the Ministry of Industry and Trade, who was a member of the Tanzania Breweries Company's board, supported the company's stand. The Tanzanian Commissioner of Trade Practices, being under the Ministry of Industry and Trade, could not do much to alter such a decision¹⁵.

¹²Ali El Dean, B and Mahmoud Mohieldin, *On the Formulation and Enforcement of Competition Law in Emerging Economies: The Case of Egypt*, Egyptian Centre for Economic Studies, working paper no. 60, (2001), at pages 11-12.

¹³Ghoneim, A. Farouk, *Competition Law and Competition Policy: What does Egypt Really Need?*, paper submitted for the Economic Reform Forum, 9th Annual Conference, Working Paper No. 0239, (2002), at page 17.

¹⁴Yassine, M., Farida Tawdi, Haytham El Gammal and Ibrahim Ahmed, *The Independence of Competition Agencies – Case of Egypt*, in Barry E. Hawk (ed.), *International Antitrust Law & Policy*, Fordham Competition Law Institute, Juris Publishing Inc., 2008, Chapter 12, at pages 285-294.

¹⁵CUTS Center, *Competition Law & Policy - A Tool for Development in Tanzania*, (2002), paper # 0207, table 6.

Another example is Pakistan, where the independence of the Monopoly Control Authority was seriously restricted by political interference. In one case, the decision of the authority was overturned due to the intervention of a minister who was on the board of the company under review¹⁶. In another case, the Monopoly Control Authority has intended to start prosecution in cement cartel but the government intervened and made an 'amicable' settlement, where prices were fixed at a 'mutually acceptable' level¹⁷.

B) What Constitutes 'Independence'?

Despite the wide understanding that competition authorities should be independent, there is far less comprehension with regard to the definition of 'independence', what constitutes such 'independence' or how such independence could be optimally accomplished as an organizational matter¹⁸.

William Kovacic, a current Commissioner and a former Chairman of the United States Federal Trade Commission (hereinafter referred to as 'FTC') suggested that 'the requisite independence most often is to be achieved by creating a new commission modelled along Western lines. The new commission should have no links to existing government ministries and should possess the power to issue binding decisions subject to judicial review. In principle, this structure is seen to be the most effective enforcement mechanism because independence gives the new agency a single-minded focus on promoting competition. By divorcing the agency from government, bodies that oppose or are indifferent to reform independence would provide a stronger platform for challenging government impediments to competition'¹⁹.

¹⁶Holmes, Peter M., *Some Lessons from the CUTS 7-Up Comparative Competitive Policy Project*, 2003, unpublished manuscript in G. Michal, *The Ecology of Antitrust: Preconditions for Competition Law Enforcement in Development Countries*, UNCTAD Conference on Competition, Competitiveness and Development, June (2004), at pages 20-38.

¹⁷CUTS Centre, *Competition Regime in Pakistan - Waiting for a Shake-Up*, (2002), paper # 0210, section 4.2.6. Also See Jensen, Olivia, *Towards a Healthy Competition Culture*, paper published under the 7-up Project, CUTS Centre, (2003), paper #0304, at page 49.

¹⁸United States, *Optimal Design of a Competition Agency*, OECD Third Global Forum on Competition, Session I, held on 10-11 February 2003, at page 6.

¹⁹Kovacic, William E., *Getting Started: Creating New Competition Policy Institutions in Transition Economies*, Brooklyn Journal of International Law, vol. 23, (1997), 403-453, at page 10, paragraph 424.

The OECD has conducted a questionnaire relating to the design of 37 national competition authorities from those who were participating in the Third Global Forum on Competition. The questionnaire was divided into four main parts, namely the position of the competition authority in the public administrative structure, its tasks and powers, relations to other governmental bodies and, finally, questions relating to influence and independence. With regard to the position of competition authority in the public administration structure and its actual and perceived independence from political influence, many factors were identified, such as the structural independence from other branches of government or separation from the ministerial structure, the implications of institutional design on transparency and public confidence in the competition authority, the budget of the competition authority, appointment of the head of the competition authority and how the head can be dismissed from office²⁰. However, the OECD concluded that independence and influence 'are factors that are difficult to define in quantitative terms, and consequently also difficult to measure' and it stated that 'the concept of independence in a more profound sense would need to be analysed and defined'²¹.

On the other hand, the World Bank suggests that, to achieve independence, the competition authority should be independent of a government ministry and should have its own budget. The World Bank stressed that competition agency should have the authority to lodge suits, because, if the government is the only agent with this authority, the effectiveness of competition law can be undermined. Another suggestion is that the head of the authority should be appointed by a committee or the parliament rather than by the president or the prime minister²².

The UNCTAD Intergovernmental Group of Experts on Competition Law and Policy (hereinafter referred to as 'UNCTAD') defines independence of competition authorities in terms of their distinct legal personality and structural separateness from government. The UNCTAD referred to institutional (also known as functional) independence, which includes the functions, the powers and the manner in which management and staff are appointed, their tenure and dismissal, and how the body is financed. These attributes are supposed to assure organizational autonomy²³.

²⁰ OECD Secretariat Note on the *Optimal Design of Competition Agency*, 20 January 2003, OECD Centre for Cooperation with Non-Members, Directorate for Financial, Fiscal and Enterprise Affairs, Third Global Forum on Competition, Session I, held on 10-11 February 2003, at page 10, paragraph 37.

²¹ Ibid, page 6, paragraph 26.

²² See above note 6, at pages 141-142.

²³ UNCTAD Secretariat, op.cit above note 9, at page 4, paragraph 5.

The UNCTAD explains that a competition authority that has independence is usually established as an independent institution not physically located in a government ministry. Institutional independence refers to the degree of freedom, which the competition authority has in its daily decisions. It is usually interpreted that the competition authority is not subject to routine direct supervision by government. Such an authority would thus have the discretion to set its own priorities as to the identification and investigation of competition cases and the pursuit of competition complaints. It would also have the discretion to decline to investigate cases where it suspects the grounds on which the complaint was made. In this context, ministerial departments are constrained because they would be subject to ministerial priorities and political interference²⁴.

The UNCTAD clarified that the appointment of competition officials by a minister is less conducive to independence than appointment procedures that provide for the participation of representatives of more than one government branch. Furthermore, it is assumed that competition officials, whose terms are not renewable and cannot be removed from office, except by legal procedure, have less incentive to please with their decisions those who appointed them²⁵. The ability of a competition authority to freely comment on and recommend improvements in public policy, regulation and legislation was identified by the UNCTAD to be another attribute, by which the institutional independence of competition authorities is assessed²⁶.

The CUTS Centre also agrees that 'independence' means that the competition authority is a legally independent body and not part of any government department. It further agrees that the government cannot simply remove members without proper justifications. Moreover, the authority should also be financially independent. A combination of funds allocated by the legislature and those received from filing fees seems to be the best solution. A danger with having funds allocated by a government department is that they become subject to political influence²⁷.

²⁴ Ibid, at page 6, paragraph 16.

²⁵ Ibid, at page 8, paragraph 21.

²⁶ Ibid, at page 9, paragraph 27.

²⁷ CUTS Centre, *Pulling up our Socks: A Study of the Competition Regimes of Seven Developing Countries of Africa and Asia: The 7-up Project*, (2003), paper #0303, at pages 53-54.

In another study, the CUTS Centre has characterized as the most independent institutions those that are not only administratively separate from the government, but they are staffed by competition professionals and do not rely on the government for a budget allocation. The least independent authorities were considered to be those that form part of a government ministry and are also subject to civil service restrictions on recruitment and on central budget allocations for the administrative services²⁸.

The ICN Advocacy Working Group has conducted a questionnaire among 53 countries on advocacy activities. Answers to the said questionnaire have revealed interesting findings in relation to independence of competition authorities. The findings identified three elements, important for measuring the degree of independence of competition authorities, i.e. (a) the appointment mechanism of the head and higher officials of the competition agency, (b) the easiness with which they can be removed and (c) the budget allocation mechanism. The budget allocation mechanism was one element frequently brought up by the respondents to the questionnaire when assessing their autonomy. With regard to budgetary independence, 40% of the respondents found that parliament or congress allocation mechanisms provide them in practice with more autonomy than having the budget allocated by the ministry²⁹.

Different means to enhance budgetary independence have been identified. For example, some authorities are empowered to discuss and negotiate the budget directly with the legislative powers. This power makes them better off than those who only have access to their head ministry. Additionally, the liberty to dispose of the assigned budget was seen to be enough in order to offset dependency. Furthermore, independence can be achieved whenever the appointment mechanism for the authority's members guarantees their independence and there is institutional autonomy guaranteed by the legal framework³⁰.

²⁸ Jensen, Olivia, op.cit above note 17, at page 49.

²⁹ Advocacy Working Group of International Competition Network, *Advocacy and Competition Policy*, ICN Conference, Naples Italy, (2002), at page 40.

³⁰ Ibid, at pages 56-58.

Accordingly, the ICN Advocacy Working Group concluded that budgetary considerations could hinder institutional autonomy of the competition authority only to the extent that the institutional activities have to be limited by the lack of financial resources. The budgetary dependence would have little effect on the independence by which the competition authority takes its decisions or imposes sanctions, because no matter how the budget allocation mechanism is carried out, several countries consider that budgetary autonomy can be enhanced³¹.

Voigt has conducted a comparison of 57 competition laws, whereby he synthesizes various variables into indicators; among those indicators is the independence of competition authorities³². Voigt attempts to measure the independence of competition authorities by referring to the following variables:

- Whether the agency is under the direct supervision of the government. Agencies under the direct supervision of the government are less independent.
- Whether the sole task of the agency is to safeguard competition. Agencies pursuing other goals deflect the attention from competition.
- Whether the agency has sufficient competences to fulfil its' tasks independently. The less competences, the less the agency can perform its tasks independently.
- Whether decisions of the agency can be appealed to the court. The possibility of appealing decision both on procedural and substantive aspects increases the incentives to apply the competition law independently.
- Whether the appointment of leading members of the agency is by ministry or by the parliament. Appointment by one member of the executive is less conducive to independence than appointment by more than one government branch.
- Whether the appointment term is open or fixed. Officers are more independent if they are appointed for life or up to a mandatory retirement age and cannot be removed from office, save by legal procedure.

³¹ Ibid, at page 57.

³² Voigt S., *The Economic Effects of Competition Policy – Cross-Country Evidence Using Four Indicators*, Working Paper, University of Kassel, (2006), at pages 9-19.

- Whether the appointment term is renewable. Officers are less independent if their terms are renewable because they will tend to please those who can reappoint them.
- Whether officers can be easily removed. The more difficult it is for government to remove officers, the more independent the agency can be.
- Whether one of the government branches enjoys discretion in determining the salaries of officers. If one of the government branches enjoys discretion in determining the salaries, this raises incentives to take the preferences of government into account.
- Whether case allocation within the agency is determined by general rules or is left to the discretion of officers. If allocation of cases is at the discretion of officers, the outcomes of cases can be potentially influenced by allocating cases to those who are expected to reach favourable decisions. Independence is larger if there is a general rule according to which cases are allocated.
- Whether the executive has the power to give instructions to the agency. The agency will be less independent if the executive has the power to give instructions.
- Whether the executive has the power to override the agency's decisions. If the executive has the power to override the agency's decisions, this will lead to less independence.
- Whether the agency has an obligation to publish its decisions. Publications of decisions allows others to scrutinize these decisions and the reasoning can become subject to public debate. This will make it more difficult for officers to have irrelevant considerations influencing their decisions.

Other criteria used for measuring the status of independence of competition authorities are developed by Mateus. In particular, he developed a five-level criteria measuring independence³³:

- Level 1 – The Board is nominated by the government with fixed term appointment, without any possibility of being dismissed, except in cases of 'caus majeur' or serious breach of the institution's performance.
- Level 2 – The Board is appointed by the government or president after a parliamentary hearing and cannot receive any directions from the government as in level 1.

³³ Mateus, Abel M., *op.cit* above note 10, at page 3.

- Level 3 – as in level 2, plus administrative autonomy and own revenues.
- Level 4 – as in level 3, plus the capability of defining the details of the applicable competition policy.
- Level 5 – as in level 4, plus the possibility of issuing non-binding recommendations to the government, the ability to be consulted on competition assessment matters in the legislative process and the right to judicially challenge governmental decisions which are in conflict with competition law.

Mateus stressed the importance of appointing the board members of a regulatory agency to be designed in a careful manner, because the board enjoys a high level of discretionary power in applying the competition law provisions in each case. In fact, the board members are like judges and therefore consideration should be given to candidates with high level of integrity. Mateus argues that the process is too important to be left only to the government and that at least a parliamentary hearing should be carried out. He further argues that it is not advisable that the appointment process should be left only to the parliament, since this tends to reproduce the representation of political parties, which leads to a highly politicized board³⁴.

Mateus's criteria can be criticized, since some competition authorities may possess some of the characteristic of more than several levels. Thus, it poses difficulty on positioning those competition authorities according to the five-level criteria. The approach followed by Voigt is therefore more appropriate, by identifying the list of elements that indicate whether or not the competition authority is independent. Accordingly, the most independent institutions are those, which comprise a number of those elements, and the least independent authorities are those which lack these criteria. Authorities that possess some – but not most – of those elements can be characterized, as semi-independent³⁵. It is clear that a competition authority's independence depends on a combination of factors and that each of these factors individually does not guarantee it.

³⁴ *Ibid.*

³⁵ The OECD questionnaire on the Optimal Design of Competition Agency conducted on 37 countries, from those who were participating in the Third Global Forum on Competition, revealed that around 33% of the competition authorities are independent from the Government, 45% are incorporated into a ministry and 22% are in-between. See OECD Centre for Cooperation with Non-Members, Directorate for Financial, Fiscal and Enterprise Affairs, Third Global Forum on Competition, Session I, held on 10-11 February 2003

C) Our Proposed Criteria

Based on the above, for the purpose of this article, the notion of ‘independence of competition authority’ will be divided into two main concepts, i.e. the ‘Institutional Independence’ and the ‘Personal Independence’.

The ‘Institutional Independence’ refers to the freedom of a competition authority to undertake day-to-day tasks, without the interference or direct supervision from the government. We propose that the criteria for assessing the institutional independence of competition authorities can be summed up in the four main points below:

1. The Competition Authority’s Relationship vis-à-vis the Government, i.e. whether or not the competition authority forms part of government ministry or it is under the direct supervision of the government or whether it reports directly to the parliament.
2. The Competences of Competition Authority, i.e. whether the competition authority has sufficient competences to fulfil its role of promoting competition. Competences that can enhance the institutional independence of the competition authority can be recapped into the following main competences, namely:
 - a. The Power to Initiate Competition Cases.
 - b. The Power to Issue Binding Decisions.
 - c. The Power to Impose Sanctions.
 - d. The Discretion to Decline Review of Competition Cases.
 - e. The Power to Comment on and Recommend Improvements in Public Policy, Regulation and Legislation.
3. Government Powers in Relation to Competition Law. Government powers may take several forms including giving instructions to the competition authority or overruling the competition authority’s decision.
4. The Competition Authority’s Budgetary Independence, i.e. whether the competition authority’s budget is part of that of the government or whether the competition authority has independent budget allocated by the parliament.

It is important to recognize the fact that even though the competition authority may enjoy full institutional independence, such independence will be jeopardized if institutional independence is not associated with ‘Personal Independence’ as well. By ‘Personal Independence’ we refer to the freedom of the members of the decision-making body of the competition authority to decide cases merely on the merit (i.e. based on the law and the facts of the case) and not being influenced by political considerations or their individual interests³⁶. The criteria proposed for assessing the personal independence of competition authorities can be summed up in seven main points:

1. Appointment Mechanism, i.e. whether appointments of members of the management and decision-making body of the competition authority are made by government or parliament.
2. Appointment Criteria, i.e. whether the appointment is based on a member’s individual experience and background or is based on the representation of the government or interests groups and whether the competition authority has sufficient rules to control any possible conflict of interests which may arise thereof.
3. Appointment Term, i.e. whether the appointment term is short or long and whether it is renewable.
4. Appointees’ Remuneration, i.e. whether or not the salaries of the members of management and of the decision-making body are determined by the government and whether salaries can be increased or decreased by the government.
5. Dismissal of Appointees, i.e. whether the law sets out conditions for dismissing the members of the management and of the decision-making body, whether such conditions are easy or difficult of be met and whether dismissal decisions have to be reasoned.
6. Judicial Review of Competition Authority’s Decision, i.e. whether the competition authority’s decision is subject to judicial review and whether such review is on the merit or only on procedural issues.
7. Publication of the Competition Authority’s Decision, i.e. whether the competition authority has an obligation to publish its decisions and whether the rules governing the publication guarantees transparency.

³⁶The term ‘Intellectual Independence’ was used by the Chair of the Board of the Netherlands Competition Authority to reflect the concept of ‘Personal Independence’. See Kalbfleisch, P., op.cit above note 11, at page 241.

3. ASSESSMENT OF THE ECA'S INSTITUTIONAL INDEPENDENCE

A) The ECA's Relation Vis-V-Vis The Government

The ECA is not a part of the government ministry but instead it is considered as a separate institution from any such ministry. The ECA is not physically located in an office within any government ministry, but it has its own separate premises. However, the ECA as an institution is affiliated to the Prime Minister, who has delegated his competences in relation to the ECA to the Minister of Trade and Industry (hereinafter referred to as the 'Minister')³⁷.

It is argued that the reason behind the affiliation of the ECA to the Minister is to make its actions politically accountable before the parliament, since by virtue of the Egyptian Constitution only the Prime Minister, his deputies, the ministers and their deputies are responsible before the parliament³⁸. However, the requirement of political affiliation, as set out in the Constitution, could be fulfilled without granting the Minister the vast competences in the enforcement of competition law, as explained below. Additionally, the ECA is responsible to submit an annual report on its activities, future plans, and recommendations to the Minister, even if the law stipulates that the ECA has to send a copy of such a report to the Parliament and the Shura Council (Consultative Council)³⁹. Accordingly, even though the ECA is principally responsible to report to the Minister, it is also responsible to directly communicate such report to the Parliament and the Shura Council. The ECA does not need to acquire the Minister's prior approval on the content of the annual report and the Minister does not have the right to request an amendment of the annual report prior to its submission to the Parliament and the Shura Council.

³⁷ Article 2 of the Preamble of the Egyptian Competition Law and Prime Minister's Decision No. 571 as of 2006.

³⁸ Article 124 of the Egyptian Constitution. See Yassine, M., Farida Tawdi, Haytham El Gammal and Ibrahim Ahmed, *op.cit* note above 14, at page 290.

³⁹ Article 11(9) of the Egyptian Competition Law.

B) The Competences Of The ECA

1) ECA's Power to Initiate Competition Cases

The Egyptian competition law provides that the ECA has the right to conduct the necessary studies and researches to discover cases of anti-competitive effects and to prepare a comprehensive database on the economic activity in the market in order to serve the authority in its work in all aspects, relating to the protection of competition⁴⁰.

Conversely, the executive regulations are clearer and they state that the ECA has the right to start procedures of inquiry, inspections and fact findings on its own initiative, without receiving a complaint⁴¹. Accordingly, the ECA can independently initiate cases, without the prior approval or interference from the government. Since its establishment, the ECA has initiated only two studies related to the sugar and fertilizers industries⁴².

The implementing regulations of the Egyptian competition law further state that the ECA's personnel shall have the status of law-enforcement officers and as such may review records and documents, as well as obtain any information or data from any governmental or non-governmental entity⁴³. They may enter – during official working hours – the workplaces or headquarters of the persons under examination in order to obtain the necessary information. Moreover, they may – when needed – call for the assistance of the police. The Egyptian competition law defines persons as natural or juristic persons, economic entities, unions, financial associations and groupings, groups of persons, irrespective of their means of incorporation⁴⁴. Nevertheless, the personnel having the status of law enforcement officers must be, specified by virtue of a decree from the Minister of Justice, in accordance with the Competent Minister (i.e. the Prime Minister or whoever the Prime Minister delegates) and with the recommendation of the ECA's Board⁴⁵. However, once nominated by the decree, the personnel would have the right to use its competences as law enforcement officers only by having the written permission of the ECA's Executive Director and without needing any further confirmation or approval from the Minister of Justice or the Competent Minister. In fact, such a decree was issued conferring the status of law enforcement officer on the ECA's executive director, head of legal department, head of economic department, legal researchers, economic researchers and information technology specialists⁴⁶.

⁴⁰ Article 11(3) of the Egyptian Competition Law.

⁴¹ Article 33 of the Executive Regulation of the Egyptian Competition Law.

⁴² Egyptian Competition Authority Annual Report for 2006-2007, at page 29.

⁴³ Article 38(1) of the Executive Regulation of the Egyptian Competition Law.

⁴⁴ Article 38(2) of the Executive Regulation of the Egyptian Competition Law. Article 2 of the Egyptian Competition Law.

⁴⁵ Article 17 of the Egyptian Competition Law.

⁴⁶ Minister of Justice Decree No. 8483 as of 2006.

II) The ECA's Power to Issue Binding Decisions

The ECA has the right to issue administrative decisions by the majority of its board members, i.e. 8 members. The ECA's decisions determine whether a violation of competition law has taken place and such decisions are issued without any need for approval or ratification from the government⁴⁷. Moreover, the government does not have the right to give instructions to the ECA as to what decisions it should reach.

The ECA's decision may require the violator to cease the violation immediately or within a given period as determined by the ECA. The ECA's decision may also include an order for the violator to remedy the violation and to adjust its position in accordance with the law⁴⁸. The ECA's decisions are binding and cannot be repealed by the government. Also, the ECA's decisions can only be appealed before the administrative court.

III) The ECA's Power to Impose Sanctions

The ECA cannot impose any penalties on violators of the law, because violations of competition law are considered to be of criminal nature, since the Egyptian Criminal Law states in Article 11 thereof that 'misdemeanour are those crimes that are penalized by prison or by fine exceeding hundred pounds'. The competition law provides that a fine of no less than Egyptian pounds 100,000 (approximately the equivalent of USD 17,857) and not exceeding Egyptian pounds 3,000,0000 (approximately the equivalent of USD 53,571,428) should be imposed for violations of competition law⁴⁹. Therefore, the ECA as an administrative body cannot impose criminal penalties on violators of the law. Penalties can only be imposed through the final decision of the Economic Courts⁵⁰.

⁴⁷ Article 13 of the Egyptian Competition Law.

⁴⁸ Article 20 of the Egyptian Competition Law.

⁴⁹ Law No. (190) as of 2008, amending the Egyptian Competition Law. Prior to the amendment, the penalties for competition law violation were lower, namely: a fine in the amount of more than Egyptian pounds 30,000 (approximately the equivalent of USD 5,357) and not exceeding Egyptian pounds 10,000,000 (approximately the equivalent of USD 1,785,714).

⁵⁰ Egyptian Law Establishing the Economic Courts Law No. 120 as of 2008.

The ECA cannot initiate a criminal lawsuit in relation to a violation of competition law. Instead, it should refer its decision to the Minister, who has the exclusive right by virtue of competition law to request in writing the initiation of a criminal lawsuit⁵¹. Therefore, by making the initiation of such lawsuits conditional upon the Minister's written request, the real enforcement of competition law remains at the Minister's hands and discretion.

Additionally, the public prosecution – not the ECA – defends competition lawsuits before the court; this is because the Egyptian Criminal Procedures Law in Article 1 thereof states that the public prosecution is the only competent entity to defend criminal lawsuits.

Currently, however, the public prosecution lacks the necessary expertise in competition to be able to defend the case. For this reason, the ECA's officers are usually called upon, as expert witnesses before the court, as they are more specialized in competition as well as economics; accordingly they will be able to better present and explain complex competition and economic issues to the court, than the public prosecution⁵².

IV) The ECA's Discretion to Decline Review of Competition Complaints

In principle, the ECA is obliged to review all competition complaints submitted to it. This is because competition law violations are criminal in nature and therefore, they cannot be declined.

⁵¹ Article 21 of the Egyptian Competition Law.

⁵² Interview with Dr. Khaled Hamdy, the Executive Director of the Egyptian Competition Authority, dated August 9, 2009, text on file with author.

However, the ECA may decline the review of complaints, if the information or the documents required to be submitted under competition law were incomplete⁵³. The required information and documents include the following:

- The name of the complainant, address, profession, capacity and interest in filing the complaint and the supporting documents. Accordingly, the ECA will decline anonymous complaints or complaints where personal interest is not established.
- The identity of the firm against which the complaint is made, its address and the nature of its activity. Thus, the ECA may decline general complaints specifying only the industry or the market. In this case however, the ECA may initiate a study into that market or industry if the complaint included information that suggests that there are anti-competitive practices.
- The type of the breach. However, the ECA will not be limited to the complainant characterization of the breach and its inspection may conclude that different violations were committed.
- The supporting indications on which the complaint is based and related documents. However, if this information is not available, it would not mean that the complaint is incomplete.
- The damage incurred by the complainant should be indicated. However, if there is no clear indication of the damage, this should not make the complaint incomplete, since most of the competition law provisions are *per se* rules, i.e. some acts are considered illegal without the need to prove damage or harm inflicted as a result of those acts.

The ECA has the discretion to establish whether a complaint is complete or not and therefore it has the discretion to decline its review. The ECA exercises this discretion of pursuing or declining complaints without any intervention or instructions from the government. Nevertheless, such discretion is subject to judicial review.

However, if the ECA considers that the complaint is complete, it has to review it and conduct the necessary inspection, inquiry and fact finding related thereto⁵⁴. The ECA shall then prepare a report with its opinion and submit it to the board within ninety days⁵⁵. The board shall issue a reasoned decision either to close the case or to continue

⁵³ Article 32 of the Executive Regulations of the Egyptian Competition Law.

⁵⁴ Article 37 of the Executive Regulations of the Egyptian Competition Law.

⁵⁵ Article 39 of the Executive Regulations of the Egyptian Competition Law.

the inspection, inquiry and fact finding procedures⁵⁶. Such a decision is made without any intervention or instructions from the government. However, the ECA's decisions in this regard are subject to judicial review.

Furthermore, the Minister may request the ECA to conduct competition studies. The ECA cannot decline such a request and must therefore pursue such studies.

V) The ECA's Power to Comment on and Recommend Improvements in Public Policy, Regulation and Legislation

Which stresses the importance of the right given to the competition authority 'to scrutinise legislation that will bring about, or is responsible for, a distortion of competition in the economy. The reality is that states and international regulatory authorities are capable of harming the competitive process at least as seriously as private economic operators'⁵⁷.

The ECA has the right, by virtue of law, to give its opinion on draft laws and regulations relating to competition⁵⁸. Draft laws could include the drafting of either 'new' laws or of amendments in 'existing' laws. However, the ECA cannot present its opinion directly before the Parliament. Nevertheless, the Internal Rules of Procedures of the Parliament (hereinafter referred to as the 'Rules') created Specialized Committees and entrusted them with the duty to study and give their opinion on draft laws that fall within their areas of specialization. Competition falls within the specialization of the Economic Affairs Committee⁵⁹. The Committee then prepares a report and presents it before the Parliament. The Rules give to the Specialized Committees and to the Minister the right to invite the ECA to have its opinion and clarifications on draft laws⁶⁰. In this way, the ECA's opinion will certainly reach the Parliament, because the Committee's report must include all the opinions that were expressed in its sessions, even if different from the Committee's opinion⁶¹.

⁵⁶ Article 40 of the Executive Regulations of the Egyptian Competition Law.

⁵⁷ Whish, Richard, op.cit above note no. 1, at page 23.

⁵⁸ Article 11(5) of the Egyptian Competition Law.

⁵⁹ Article 44 of the Egyptian Parliament Internal Rules of Procedures decided in its session dated 16 October 1979.

⁶⁰ Article 63 of the Egyptian Parliament Internal Rules of Procedures.

⁶¹ Article 76 of the Egyptian Parliament Internal Rules of Procedures.

The ECA cannot influence the legislative process in an independent manner because its role depends largely on whether or not the Committee or the Minister invites the ECA to attend the Committee's sessions. Accordingly, if such an invitation is not made, the ECA's opinion will not reach the Parliament and the ECA will not have any other alternative but to present its opinion to the Minister, which – unlike the Committee - has no legal obligation to present its opinion to the Parliament.

Additionally, by virtue of the competition law, the ECA's function is more reactive than proactive, meaning that the ECA's right is restricted only to giving its opinion on 'already proposed' draft laws or amendments and does not have the right to independently propose new laws or amendments to existing laws relating to competition.

However, in practice, the latest amendments made to the Egyptian Competition Law were initially proposed by the ECA to the Minister, who has forwarded them to the Parliament.

The ECA held meetings with the Parliament's Economic Affairs Committee in order to discuss the proposed amendments and the Minister participated in the parliamentary session discussing the proposed law and expressed his support for the proposed amendments. The Parliament, however, did not approve all the proposed amendments⁶².

Considering the above, there are two obvious issues:

- In reality, the ECA has acquired a *de facto* competence of proposing legislative amendments; this competence is not set out in the law.
- Despite the support of the Minister, the effectiveness of the ECA's participation in the legislative process might be undermined by the Parliament where competition culture is apparently lacking.

With regard to the ECA's influence on public policy, even though the law does not expressly provide the ECA with the right to comment or make recommendations for improvements to the public policy, in reality the ECA was requested by the Minister to study various markets in order to discover problems in accordance with the competition law and propose recommendations to remedy those problems. Moreover, the Minister of Investment has requested the ECA to give its advisory opinion on the privatization of various public companies and their effect on the market⁶³.

⁶² Press Release by the Egyptian Competition Authority dated June 17, 2008.

Available online at: www.eca.org.eg

⁶³ Egyptian Competition Authority Annual Report for the year 2006-2007, at pages 28-32.

However, the ECA should not limit itself to requests submitted to it by the government. Indeed, there are other proactive ways available for the ECA to influence public policy. One way, is through its advocacy activities, i.e. press releases and informal contacts with the government. Another way is by including its recommendations in its decisions, studies and annual reports, which are published and available to the public.

C) Governmental Powers In Relation To Competition Law

I) Minister's Power to Request the ECA to Conduct Studies

The Minister has requested the ECA to study various markets in order to discover problems pursuant to competition law and propose recommendations to remedy those problems. Those studies initiated by the government represent the majority of the workload of the ECA⁶⁴. This means that the activities undertaken by the ECA are largely influenced by the government's agenda⁶⁵.

It appears that the Minister is using his power to request the ECA to conduct studies. This leads to the shift of public pressure and public blame from it to the ECA, since most of the studies initiated by the Minister relate to public opinions with regard to markets where prices are high or are in continuous increase. The steel, cement, imported red and processed meat, edible oil and milk market studies were all requested by the Minister.

II) The Minister's Power to Request the Initiation of Competition Lawsuits

The Minister has the exclusive right to request in writing the initiation of criminal lawsuits⁶⁶. As previously mentioned, penalties for violation of competition law cannot be imposed by the ECA's decision and must be imposed by a court's decision. Therefore, the real deterrent of implementing the competition law provisions is vested with the Minister.

⁶⁴ Ibid.

⁶⁵ Yassine, M., Farida Tawdi, Haytham El Gammal and Ibrahim Ahmed, op.cit above note 14, at page 292.

⁶⁶ Article 21 of the Egyptian Competition Law.

III) Minister's Power to Settle Competition Lawsuits

The Minister has the exclusive right and discretion to settle any violation of competition law before the court renders its final judgment. The only condition provided by law for settling violations, is that the defendant makes a payment in the amount of no less than the double of the minimum limit of the fine and not exceeding the double of its maximum limit⁶⁷.

Unfortunately, the ECA is not granted a similar competence in this regard and the law does not require the Minister to consider the ECA's opinion before the conclusion of such a settlement. Furthermore, the law does not provide for sufficient guidelines or rules according to which the Minister shall decide whether or not to settle a violation and under what conditions.

IV) Cabinet of Ministers' Power to Fix Prices of Essential Products

Even though price-fixing is considered one of the hardcore restrictions of competition, the Cabinet of Ministers, after considering the ECA's opinion, may issue a decree determining the selling price for one or more essential product for a specific period of time⁶⁸. The ECA shall assist the Cabinet of Ministers in determining the sale price of the essential products by conducting the necessary studies⁶⁹. However, the ECA's opinion is of recommendatory nature only.

But what is exactly meant by referring to an 'essential product' remains elusive. The law should have set criteria for assessing the essentiality of a product. Indeed, such provision if it remains vague, it may be used by the government to curb the effectiveness of the competition law.

The law further provides that any agreement made by the government for the purposes of implementing these prices shall not be considered as an anti-competitive practice⁷⁰.

⁶⁷ Article 21 of the Egyptian Competition Law.

⁶⁸ Article 10 of the Egyptian Competition Law.

⁶⁹ Article 19 of the Egyptian Competition Law.

⁷⁰ Article 20 of the Executive Regulations of the Egyptian Competition Law.

This suggests that the prices of essential products will be fixed only with regard to the agreements where the government is a party and will not be fixed for the whole market⁷¹.

Therefore, according to the considerations set out above, the Minister has broad powers in relation to the implementation of the law. Hence, this fact makes the enforcement of law not entirely independent of political influence.

D) The ECA's Budgetary Independence

The ECA's budget is not part of the ministerial budget. In particular, the ECA has an independent budget allocated directly from the State's general budget⁷². Also, the ECA has the right to directly discuss and negotiate its budget with the parliament. Furthermore, the ECA has the freedom to dispose of its budget as it may see fit and without any intervention from the ministry.

The ECA may generate its own funds through: (a) grants, donations and any other resources accepted by the board that do not conflict with its goals and (b) revenues from the fees paid to the ECA according to the law⁷³.

However, the law does not set any clear criteria to determine when exactly the 'grants, donations and other resources' will not contradict with the ECA's goals. The absence of clear criteria for monitoring the acceptance of grants, donations and other resources opens the door for corruption and conflict of interest situations, because pressure groups may use the grants and donations as a gateway to influence the implementation of competition law within the ECA.

The Executive Director of the ECA stated that the ECA does not have internal rules for regulating the acceptance of grants, donations and other resources in order to ensure their non-contradictions with the ECA's goals. The acceptance of any proposed grants, donations or other resources is made on a case-by-case basis. The Executive Director of the ECA clarified that the latter does not accept any financial grants or donations and that since its establishment it has only received donations and grants in kind, i.e. such as training, books, computers, printers, etc⁷⁴.

⁷¹ Interview with the Executive Director of ECA, op.cit above note 53.

⁷² Article 14 of the Egyptian Competition Law.

⁷³ Ibid.

⁷⁴ Interview with the Executive Director of ECA, op.cit above note 53.

Concluding, in some aspects, the ECA may be viewed to have institutional independence, while in reality there are other factors, which heavily undermine such independence. The ECA's institutional independence can be demonstrated by the fact that it has a separate budget from the government.

Furthermore, the ECA's institutional independence can be evidenced by the fact that a copy of its annual report – which comprises its activities, future plans, and recommendations – is submitted to the Parliament and the Shura Council. The ECA does not need to acquire the Minister's prior approval on the content of the annual report and the Minister does not have the right to amend the annual report prior to its submission to the Parliament and the Shura Council.

Moreover, the ECA has the right to independently initiate inquiries, issue binding decisions as well as decline the review of incomplete complaints based on the ECA's sole discretion and without any intervention from the government. In particular, the government neither can give instructions to the ECA as to what decisions it should reach, nor can it amend or repeal its decisions.

Nevertheless, the budgetary independence, the reporting to the Parliament as well as to the Shura Council and the ECA's right to initiate inquiries, to issue binding decisions or to decline the review of incomplete complaints are not sufficient to guarantee the ECA's institutional independence.

On one hand, the ECA does not seem in practice to fully use its competences in initiating inquiries. In particular, since its establishment in 2005 and until 2009, the ECA has only initiated two market inquiries; the majority of the ECA workload—studies is requested by the government. Therefore, the agenda and directions of the ECA are not entirely independent and are heavily influenced by the political agenda and priorities of the government⁷⁵. Reaching a majority decision within the ECA's board is very hard to achieve due to the large number of board members and their diverse affiliation and interests (as explained below).

⁷⁵ Yassine, M., Farida Tawdi, Haytham El Gammal and Ibrahim Ahmed, *op.cit* above note 14, at page 292.

On the other hand, the ECA is affiliated to a governmental ministry, where the Minister has the exclusive right to initiate competition lawsuits and the exclusive right to settle any violation. Thus, the real deterrent implementation of the competition law is made dependent upon the Minister and not the ECA.

Therefore, in light of the broad powers of the Minister in the implementation of the law, the ECA is left with its advocacy efforts as the only means to curb the Minister's political influence in the implementation of the law. Through the publication of the ECA's decisions and advocacy activities with the media and the public, the Minister could face pressures if he did not initiate lawsuits in cases where the ECA's decision concluded that there was a violation of competition law. Also, the ECA's annual report can serve as an important advocacy tool for the ECA and a way to exert pressure on the Minister, since the annual report submitted to the Parliament and the Shura Council includes all its decisions.

The Egyptian competition law provides the Cabinet of Ministers with the right to fix the selling price of essential products and to enter into agreements to apply those prices, without setting the criteria for assessing the essentiality of a product. This creates a possibility for the government to misuse the concept of essential products in order to curb the effectiveness of competition law.

Currently, the Egyptian competition law does not secure the access of the ECA's opinion on draft laws or the possibility to propose legal amendments to the Parliament. Moreover, at present, the Egyptian competition law does not provide the ECA with a formal channel through which it can voice its opinion on public policy. The fact that the ECA's influence on legislation and public policy are not guaranteed by virtue of law, makes the success of such an influence to be largely dependent on the ECA's advocacy efforts and on the degree of the government's cooperation.

4. ASSESSMENT OF THE ECA'S PERSONAL INDEPENDENCE

The independence of the competition authority will not be complete by merely giving institutional independence to such an authority. Indeed, full institutional independence will be ineffective if the head of the authority, members of top management and the decision-making body do not make use of such institutional independence or when making such use they are influenced by political considerations or individual interests. Thus, even though the competition authority may on the surface seem to enjoy full institutional independence, such independence will be jeopardized if it is not associated with 'Personal Independence'.

'Personal Independence' refers to the freedom of the members of the decision-making body of the competition authority to decide cases merely on the merit (i.e. based on the law and the facts of the case) and not being influenced by political considerations or their individual interests. The extent of the 'de jure' and the 'de facto' institutional independence of the ECA are assessed below, in light of our proposed criteria.

A) Appointment Mechanism Of The ECA's Board

The members of the Board of Directors of the ECA (hereinafter referred to as the 'Board') are appointed by virtue of a Ministerial Decree⁷⁶. The Board consists of fifteen members; only the Chairperson is appointed on full-time basis, while the other board members convene at least monthly and whenever it is necessary⁷⁷. The Board may assign one of its members or a committee formed by its members in order to carry out a specific assignment or to supervise any aspect of the ECA activities⁷⁸.

Eight of the fifteen members (including the Chairperson) are appointed by the sole discretion of the Minister, while the other seven members are appointed based on nominations from their respective organizations⁷⁹. The Executive Director of the ECA is also appointed by virtue of a Ministerial Decree, based on a nomination from the Chairperson⁸⁰.

⁷⁶The current Board is appointed by virtue of Prime Minister Decree 1342/2005.

⁷⁷Articles 12 and 13 of the Egyptian Competition Law.

⁷⁸Article 27 of the Egyptian Competition Law.

⁷⁹The counsellor from the State Council is chosen by the president of the State Council as per Article 12(2) of the Egyptian Competition Law. Also, federations and unions set out in Article 12(5) chose their own representatives inside the Board of ECA.

⁸⁰Article 15 of the Egyptian Competition Law.

B) Appointment Criteria Of The ECA'S Board

The Egyptian competition law does not set any minimum requirements or qualifications for the ECA's Board members, with the exception of the State Council's Counsellor, who has to be of a vice-president rank and the Chairperson, who has to be of a 'distinguished experience'⁸¹. Conversely, the law does not provide any further details or guidance on what constitutes 'distinguished experience'. In the same light, the law does not set any minimum requirements or qualifications for the Executive Director of the ECA. Moreover, the law does not specify which field of specialty or expertise should the Executive Director have. As an illustration, the current Executive Director has a judicial background⁸².

It is important here to mention that Egypt has only started to move towards liberalization of its markets in 1995, by joining the WTO, and has issued its competition law only four years ago. Until today, competition law is not taught in undergraduate courses in the Egyptian Universities. Therefore, lack of expertise in the area of competition is a logical consequence. Accordingly, the fact that the law does not require the appointees to have background and experience in competition is understandable.

The law does not require a minimum representation of particular fields of specialty or expertise within the Board. The majority of the current Board members are of non-legal background, mainly revolving around economic (the area of expertise of the Chairperson), finance and business backgrounds. Only four out of the fifteen Board Members have a legal background.

The majority of the Board members are appointed based on their occupational capacity or their membership in federations or unions and not based on their individual background and qualifications. This means that if their occupational capacity or membership may be terminated for any reason, their membership in the ECA Board will also cease automatically.

⁸¹ Article 12(1) and (2) of the Egyptian Competition Authority

On the one hand, five Board members are appointed in their occupational capacity, namely a counsellor from the State Council and four members representing the relevant ministries. On the other hand, six members are appointed based on their membership in industry associations or unions. The remaining four members are the Chairperson and three experts and specialists, who are appointed in their individual capacity based on their background, experience and qualifications⁸³.

The law does not specify which ministries are the ‘relevant ministries’. In the first appointment in the Board, the four ministries’ representatives were the First Assistant of the Minister of Trade and Industry, the Chairman of the General Authority For Investment and Free Zone (subordinated to the Ministry of Investment), the Chairman of the Commercial Registration Authority (subordinated to the Ministry of Supply and Internal Trade) and the Assistant of the Minister of Finance.

Until the end of 2005, the Ministry of Trade and Industry was responsible for external trade, whereas the Ministry of Supply and Internal Trade was responsible for domestic trade. However, by virtue of a presidential decree, trade – whether internal or external – comes under the control of the Ministry of Trade and Industry. Accordingly, the Commercial Registration Authority is moved and is currently under the jurisdiction of the Ministry of Trade and Industry⁸⁴. This increases the number of representatives from the Ministry of Trade and Industry in the ECA Board to two instead of one. The Counsellor for Legal and Legislative Affairs for the Minister of Trade and Industry later replaced the Chairman of the Commercial Registration Authority⁸⁵.

In theory, having four members representing government ministries does not heavily influence decision-making within the ECA’s Board. This is attributed to the fact that the decisions in the ECA Board are taken by the absolute majority of eight members, provided that the other eleven members are completely insulated from the government. However, this rule is not applicable, because two of the members appointed under the category of ‘experts and specialists’ also work for the government⁸⁶.

⁸² Interview with the Executive Director of ECA, op.cit above note 53.

⁸³ Article 12 of the Egyptian Competition Law.

⁸⁴ Presidential Decree No. 420/2005 on Regulating the Ministry of Trade and Industry.

⁸⁵ Minister of Trade and Industry Decree No. 642 as of 2006.

⁸⁶ One member is appointed as Expert, but he is in reality the Assistant of the Minister of Trade and Industry and another member is appointed as Expert, but he is also the Senior Financial Advisor to the Minister of Investment.

The Egyptian competition law does not set any rules controlling the political affiliations of the members of the Board; particularly, there is no limitation on the number of Board members representing one political party. Four members of the Board are members in the National Democratic Party (‘NDP’), i.e. the ruling party in Egypt⁸⁷.

Therefore, in reality there are six members representing the government (three from the Ministry of Trade and Industry one of which is a member of the NDP, two from the Ministry of Investment and one from the Ministry of Finance) and another three members, who although do not work for the government, are members of the NDP. Thus, nine members out of the fifteen board members (60%) have some political affiliation to the government.

Furthermore, the Egyptian competition law does not place any restrictions on the freedom of Board members to pursue economic activities while they are serving on the ECA Board. Indeed, two of the current board members are active businessmen⁸⁸. However, the Egyptian Competition law does provide that a Board member should not participate in the deliberations or voting concerning a case presented to the Board, if: (i) that member has an interest in the case, or (ii) any of the member’s relatives up to the fourth degree is a party to the case, or (iii) that member currently represents or has represented any of the parties to the case. The law does not provide any explanation of what constitutes an interest in the case. It is unclear whether the term ‘interest’ is construed broadly or strictly.

The Egyptian competition law provides that relevant government ministries representation, inside the ECA’s Board, undermines the personal independence of the

⁸⁷ One of the representatives of the Ministry of Trade and Industry is a member of the High Council for Policies of the NDP, the representative of the General Federation of the Chambers of Commerce is a member in the Business Sector Committee of the NDP, the representative of the Egyptian General Union of Labour is a member in the NDP and the representative of the General Federation for Consumer Protection is a member in the Moral and Legal Affairs Committee of the NDP; available online in Arabic at www.ndp.org.eg

⁸⁸ The representative of the General Federation of the Chambers of Commerce is the Managing Director of Henkel Company Egypt, See Euromonitor Major Market Share Companies: Eastern Europe, Middle East and Africa, Volume 6, Global Market Share Planner 4th Edition (2006). The representative of the General Federation of the Chambers of Commerce is the Chairman of Mac Company for Drum Break Production, available online in Arabic at http://www.fei.org.eg/committees/Membership_Development_Resources_board.pdf. The former representative of the General Federation of the Chambers of Commerce is the Chairman and CEO of Hero Nutritional Food Industries Egypt, available online at <http://www.businessodayegypt.com/article.aspx?ArticleID=6699>

latter. Obviously, members representing government ministries cannot reach a diverse decision to the position of the ministry that they are representing. The situation is worsened by the fact that government representation within the ECA is not limited to the four members set out in the law but is extended to include members appointed as experts and specialists but who are in reality also governmental employees.

Moreover, the Egyptian competition law allows interest groups to secure seats in the ECA Board, thus providing them with the opportunity to affect the personal independence of the decision making in the ECA, by lobbying for their own interests. Hence, instead of taking decisions from a competition perspective, the emphasis will divert to take account of other considerations, such as trade, industry, banking, NGOs, consumer protection and labour.

There are no sufficient rules restricting the political affiliations of the Board members. The Egyptian competition law does not set any constraints on the number of Board members affiliated to one political party (especially the ruling party). By having four members of the Board belonging to the NDP, the decision making of the ECA may be affected by such political affiliation.

Finally, the fact that the Egyptian competition law does not place any limitation on the freedom of Board members to pursue economic activities may compromise the personal independence of the ECA. The rules set out in the Egyptian competition law to prevent situations of conflicting interests are very basic and might not be sufficient to ensure personal independence. Even if a Board member's business is completely unrelated to the case reviewed before the ECA, there will always be a tendency for that member to compare the behaviour of the company under review to his own business. If his business undertakes similar behaviour, the member will be reluctant to set a precedent that such particular behaviour is in fact anti-competitive.

In light of the above considerations, it is important to mention that in Egypt, the business and political elites are intertwined. A considerable percentage of members in the Egyptian Parliament and in the NDP are indeed prominent businessmen. This reality makes it more difficult for Board members to undertake independent decisions without

being influenced⁸⁹. A clear example is the steel case, in which the ECA ruled that there was no violation pursued by the dominant firm⁹⁰. The owner of the dominant firm is the Chairman of the Budget and Planning Committee in the Parliament and he is the Secretary of the NDP's Committee for Organizational Affairs. Numerous media commentators perceived the ECA's decision as being influenced by the political ties of the owner of the dominant firm to close the case. As a consequence of this case, the image of the ECA as an independent institution has been heavily undermined in the eyes of the public.

C) The ECA'S Board Appointment Term

The appointment term for the Board members is four years; conversely, there is no fixed term for the appointment of the Executive Director. The term of four years is a considerably short duration. By contrast, the term for appointing the commissioners in the US FTC is seven years and it is eight years in U.K.'s Competition Commission.

The appointment term of the ECA Board can be renewed only once for another term⁹¹. However, this possibility might give an incentive to some Board members to please the Minister in order to be reappointed. Therefore, the Board members interested in reappointment may be keen to adopt votes for decisions that are not against the directions of the government.

D) Remuneration Of The ECA's Board

The remuneration of the Chairperson, Board members and Executive Director are all determined by the Minister without any need for endorsement from any other government branch⁹². This fact undermines the independence of the Chairperson, of the Board members and of the Executive Director in relation to the Minister.

⁸⁹ In 1995, 20.7 per cent of the 179 deputies elected in the Parliament were businessmen. The Assembly included 66 businessmen, 59 of whom belonged to the NDP and one to the Liberal Party; the other six were independents. Businessmen totalled over 16.5 per cent of all Parliament members. However, this percentage declined in 2000 since only 25 businessmen joined the Parliament (15 of which are NDP and 10 are entrepreneurs running as independents). Businessmen amount to approximately 9 per cent of the overall number of deputies. See Abdel Latif, O., *Why Would a Successful Entrepreneur Want to Play Politics?*, Al-Ahram Weekly Newspaper, Issue No. 537, 7-13 June (2001).

⁹⁰ Steel Report decided by ECA in Board Meeting dated 27 January 2009.

⁹¹ Article 12 of the Egyptian Competition Law.

⁹² Articles 12 and 15 of the Egyptian Competition Law.

E) Dismissal Mechanism Of The ECA'S Board

The Egyptian competition law is silent on the dismissal of the Board members. The law does not provide for any conditions needing to be fulfilled in order to dismiss a Board member. This could be interpreted as meaning that the Board members cannot be removed from their appointment prior to the completion of their term, unless they lost their occupational capacity or membership as explained before. For example, the Chairman of GAFI has been replaced within the ECA's Board by the new Chairman, as being the representative for the Ministry of Investment⁹³.

However, one of the Board members representing the Ministry of Trade and Industry was replaced by virtue of a ministerial decree after one year of his appointment⁹⁴. The decree does not provide any reasons for removing a Board member prior to the completion of the appointment term.

The ambiguity of whether and on what basis, the Minister has the power or not to remove Board members, prior to the completion of their terms, adds another incentive for the Board members to consider government directions when voting for the adoption of decisions within the ECA.

F) Judicial Review Of The ECA'S Decisions

All final administrative decisions are subject to the judicial review of the Administrative Judicial Court. Individuals and entities may request the court to annul final administrative decisions if such a request is based on any of the following grounds: (a) non-jurisdiction, (b) violation of laws and regulations, (c) misapplication or

⁹³ Egyptian Competition Authority Annual Report for 2006-2007, at page 6.

⁹⁴ Minister of Trade and Industry Decree No. 642 as of 2006.

misinterpretation of the law or (d) abuse of power⁹⁵. Judgments of the Administrative Judicial Court can be challenged before the High Administrative Court. However, in order for the request to be accepted by the court, the plaintiff must have a personal interest in the case⁹⁶.

Accordingly, the ECA decisions can be judicially reviewed not only on procedural matters but also on the merit, this supposedly increasing the incentives of the ECA's Board members to properly apply the competition law provisions, based on the facts of the case and not to take into account any other political or personal considerations so as to prevent their decisions from being revoked.

In order for the judicial review to act as a real pressure on the ECA's Board members, the judiciary itself should also be impartial and independent. Generally, in Egypt the judiciary has always maintained a good reputation of being independent. Furthermore, it is important that administrative judges are trained in competition law and economics, in order to effectively scrutinise the ECA's decisions.

G) Publication Of The ECA'S Decisions

The law provides an obligation on the ECA to publish periodical reports comprising the decisions, recommendations, procedures and measures adopted by the ECA⁹⁷.

The public, media and academia will be able to scrutinise and criticise the ECA's decisions. If there is an obligation on the ECA to publish its' decisions, this could make it more difficult for the Board members to have irrelevant considerations influencing their decisions.

However, in order for the publication to be effective, it must include full details on the facts of the case and the rationale behind the decision, so as to enable a real debate over the ECA decisions. In reality, the ECA's publications are, to a very large extent summarised, brief and do not include sufficient details to allow for a synthesis or criticism of its decisions.

⁹⁵ Articles 10 and 13 of the Egyptian Law No. (47) of 1972 on State Council.

⁹⁶ Article 23 of the Egyptian Law No. (47) of 1972 on State Council.

⁹⁷ Article 11(8) of the Egyptian Competition Law.

In conclusion, according to the above-mentioned considerations, it is apparent that the ECA, by virtue of the law but also in practice, lacks most of the elements that would make its board members independent. The fact that the law requires publication of the ECA's decisions and that it allows for judicial review thereof, does not compensate for the lack of the other elements mentioned above.

5. RECOMMENDATIONS

It is important to firstly highlight some facts that would greatly affect any recommendations that attempt to enhance the independence of the competition authority in Egypt.

Hence, the adoption of competition law in Egypt was highly controversial. It took the Egyptian Parliament almost fourteen years to finally approve the competition law since the legislation was first proposed⁹⁸. For any legislation to be adopted there must be support from the government, the public and the business sector and there must be conviction of the benefits that such legislation can yield; apparently such support and understanding were lacking. Therefore, the reasons behind the delay in the adoption of competition law in Egypt can be summed up as follows:

- 1) Consumers in Egypt are not well aware of the extent of benefits that competition can yield to them. In general, non-governmental organizations (NGOs) concerned with consumer protection are weak, they have no significant role in policy advocacy and lack collective action initiatives⁹⁹. The law on consumer protection has been recently enacted and definitely it needs time to start changing consumer culture¹⁰⁰. For this reason, consumers in Egypt played no role at all in enacting the competition law.
- 2) There was a general fear and resistance from the business community in Egypt against the promulgation of competition law and due to the active involvement of

⁹⁸ Said, S., Anti-monopoly law passes go, *The American Chamber of Commerce in Egypt Business Monthly*, March 2005.

⁹⁹ Ghoneim, A. F., op.cit above note 13, at pages 5-6.

businessmen in the political life and their influence towards the Parliament, they succeeded to lobby for their interests and affect the legislation process, resulting in a delay and a weak law. The reaction of the business community was the following¹⁰¹:

- a. Fear of government intervention in a new form under the name of protection of competition.
 - b. Possible abuse of the law by particular firms that may use it unjustifiably to charge competitors with anti-competitive practices.
 - c. The law will cover only registered firms, leaving informal activities and smuggling intact.
 - d. Those who will be responsible for implementing the law may not have sufficient knowledge of idiosyncrasies and peculiarities of particular segments of the market.
 - e. Just implementing the law may be hindered by corruption and profiteering.
- 3) The lack of pressure from consumers as regards the issuance of the law and the existence of resistance from the business community against the law makes the government reluctant to push for the adoption of the law. Even if the government believes that the adoption of a competition law is economically desirable, both the legislature and the government may be motivated to please the business community in return for political support¹⁰².

Moreover, the Egyptian Parliament is highly dominated by the ruling party (NDP) and does not represent a sufficient balance of different segments of the society. The supreme dominance of the NDP within the Parliament makes it difficult for other political parties to succeed in affecting the decision-making contrary to the government's direction¹⁰³.

¹⁰⁰ Law No. 67 as of 2006.

¹⁰¹ Ali El Dean, B., and Mahmoud Mohieldin, op.cit above note 12, at page 27.

¹⁰² Kaplow, L., *Transition Policy: A Conceptual Framework*, Harvard John M. Olin Centre for Law, Economics and Business, Discussion Paper No. 412, 2003.

¹⁰³ In the 2005 Parliament elections 68.5% of seats were won by the NDP, in addition to 2.2% unelected members that are appointed directly by the president.

It is important to evidence that the above reasons, leading to the delay in the promulgation of the law and its' promulgation with weak contents, did not vanish. On the contrary, most of the above reasons still exist and are likely to affect any future attempts to amend the current competition law.

It is necessary to learn from the experience of the competition law amendment that took place in 2008. The Parliament stripped the key provisions proposed by the ECA and approved, instead, a watered-down version, which critics say failed to strengthen the law. On one hand, it is believed that powerful business interests influenced the outcome of the case. On the other hand, Mohamed Talaat, a partner in Baker & McKenzie law firm believes that 'the concept of the antitrust law is still new in Egypt, and the government didn't properly educate the parliament [before introducing the amendment for a vote]¹⁰⁴.

Accordingly, it is important for the ECA to undertake more vigorous advocacy activities, before proposing any new amendments. In the presence of the business community's influence inside the Parliament, the only way for the ECA to move forward with any amendments, is to activate advocacy, in order to raise the level of understanding of the proposed alterations, to explain in detail the intended benefits behind them and support its proposed amendments with data and information from other jurisdictions.

A) Recommendations To Enhance The ECA's Institutional Independence

1) The ECA's Relation Vis-A-Vis The Government

In order to make the ECA totally independent from any government ministry and directly accountable to the parliament, constitutional amendment is needed, since by virtue of the Egyptian Constitution only the Prime Minister, his deputies, the Ministers and their deputies are responsible before the parliament¹⁰⁵. However, the amendment of the constitution is a long process and it is very difficult to achieve.

¹⁰⁴ Craig, Geoffrey, *Lawmakers Soften Antitrust Provisions*, American Chamber Business Monthly, August 2008.

¹⁰⁵ Article 124 of the Egyptian Constitution. See Yassine, Mona, Farida Tawdi, Haytham El Gammal and Ibrahim Ahmed, *op.cit* above note 14, at page 290.

Nevertheless, the mere affiliation to the Minister does not in itself affect the independence of the competition authority; it is the powers that are granted to the Minister that matter. For this reason, taking into consideration the difficulty of constitutional amendments, the affiliation to the Minister may remain, provided that:

- the powers of the Minister are diminished and in return the powers of the ECA are enhanced, as recommended below. This is quite important because while the current Minister is a reform-oriented person who has not abused his competences and powers, this might not be the same in the future, with a different person who might be adhering to a more conservative policy.
- the personal independence of the ECA's board members is ensured, as recommended below.

II) The Competences Of The ECA

The ECA's Power to Initiate Criminal Lawsuits

The right to initiate criminal lawsuits should not be conditional upon the Minister's request and should be vested only with the ECA. This right will enable the ECA to operate independently and without any form of governmental interference. In order to give to the ECA the right to file and defend competition lawsuits, only the competition law should be amended. No amendments are required to the Egyptian law regarding criminal procedures, since Article 1 thereof states that 'the public prosecution is the only competent entity to file and defend criminal lawsuits unless otherwise provided for in the law'.

The Executive Director of the ECA agrees that the competition law must be amended in order to grant to the ECA the right to initiate lawsuits before the court. However, he points out the fact that such an amendment might take several years to be materialized. Hence, he suggests that, until such amendments are made, the Minister may delegate his lawsuit initiation power to the ECA board¹⁰⁶.

¹⁰⁶ Interview with the Executive Director of ECA, *op.cit* above note 53.

The ECA's Power to Settle Competition Lawsuits

The competition law should be amended in order to grant the power of settling competition lawsuits to the ECA instead of the Minister. However, such right should not be absolute. Indeed, the law should set guidelines that must be followed by the ECA in settling lawsuits; such guidelines should spell out the necessary conditions that must be fulfilled in order for the ECA to make such settlements. In this way, the discretion of the board members in settling lawsuits will be limited and double standards, selective and arbitrary settlements will be minimized.

The ECA's Power to Comment on and Recommend Improvements in Public Policy, Regulation and Legislation

Even though, the competition law stipulates that one of the ECA's competences is to comment upon draft laws and regulations relating to competition, it is not sufficient to guarantee the active participation of the ECA in the legislative process. The law should place a clear obligation on the parliament to receive the ECA's opinion on laws relating to competition, i.e. the ECA's opinion would be a prerequisite for promulgating the law. The Executive Director of the ECA has shown support to the importance of making the request for the opinion of the ECA a mandatory requirement for promulgation of laws relating to competition¹⁰⁷.

The success of the ECA in affecting legislation depends largely on the timing and relates to the question as to when it is involved. Accordingly, the law should ensure the involvement of the ECA at the early stages.

Furthermore, the law must give to the ECA the right to propose amendments of legislation to the Minister and must place an obligation on the Minister to present the ECA's proposed amendments to the parliament without any alteration. The Minister may only insert his position and opinion on the proposed amendments.

Moreover, the law should provide for the mandatory invitation and participation of the ECA in any ministerial meetings, where issues relating to competition may possibly be discussed. In this way, the law will guarantee the ECA's involvement and influence on public policy.

¹⁰⁷ Ibid.

III) Governmental Powers In Relation To Competition Law

The right to fix prices of essential products is the only right that may remain with the Cabinet of Ministers. However, the law should be amended to clarify the concept of an 'essential product', which shall be subject to strict criteria in order to avoid its abuse.

IV) The ECA's Budgetary Independence

The law should be amended by setting guidelines that will determine when the gifts and donations will not contradict with the goals of the ECA. However, since such an amendment may take some time to pass, the ECA is advised to form its own internal rules for acceptance of such gifts and donations, because while the current board members only accept donations and grants in kind, nothing will prevent subsequent board members from changing their policy in that matter. Thus, the ECA should publish internal rules in relation to budgetary evidence which will help to build transparency, integrity and credibility of the ECA in the eyes of the public.

B) Recommendations For Enhancing The ECA's Personal Independence*1) Appointment Mechanism Of The ECA's Board*

The Minister shall appoint the Chairperson of the ECA but the Parliament should approve such appointment. Also, the Chairperson shall appoint the members of the ECA's Board of Directors but the Parliament should also approve such appointments. Accordingly, the Minister should not exclusively have the power to appoint Board members, because as Mateus argues the process is too important to be left only to the Government and that at least a Parliament hearing should be carried out¹⁰⁸.

Additionally, the above recommendation is in line with the conclusion reached by Voigt as well as the conclusion reached by UNCTAD, where the appointment of competition officials by a minister is seen as less conducive to independence than appointment procedures providing for the participation of representatives of more than one governmental branch¹⁰⁹.

¹⁰⁸ Mateus, Abel M., op.cit above note 10, at page 3.

¹⁰⁹ UNCTAD Secretariat, op.cit above note 9 and Voigt, S., op.cit above note 32.

However, the recommended amendment may not yield the intended result and may not completely eliminate the governmental influence with regard to the appointments of the ECA's board members, since the Egyptian Parliament is highly dominated by the ruling party (NDP). This makes it difficult for other political parties to succeed in affecting the decision-making contrary to the government's direction.

Nevertheless, the above recommendation will definitely lead to a better decision with regard to appointments, as it requires the approval of the majority of the 454 persons in the parliament to validate such appointment, instead of making the appointments decided by the mere discretion of only one member of the executive, i.e. the Minister.

II) Appointment Criteria For The ECA's Board

Capacity of the Board Members

The Board Members should be appointed in their individual capacity and should not represent any government ministry or interest groups. The number of board members should be reduced to a maximum of seven members, where the quorum for holding meetings should be five members and the decisions should pass by a majority of only four. This would facilitate the decision making process.

With regard to the above-mentioned recommendation, the Executive Director of the ECA agrees that the number of board members and their different affiliations, the quorum for attendance of board meetings and the quorum for voting is very high, all of which act as a barrier to decision making and makes it very hard to reach decisions. For this reason, he agrees that the number of board members, the quorum for attendance of board meetings and the quorum for voting should be reduced¹¹⁰.

The Executive Director also agrees that having board members not affiliated to any government ministry is the ideal scenario for the independence of a competition authority, but he believes that in practice such recommendation will not be approved by the parliament, since the parliament is highly dominated by the ruling party. Besides, he thinks that four board members out of fifteen being affiliated to the government, is not a

big number that will necessary mean that the ECA decisions will be influenced by their affiliation to the government. However, in order for this to be true, he stresses that the law should be amended to ensure that the three members appointed as 'experts and specialists' should not be affiliated to the government and he believes that such an amendment is possible to achieve¹¹¹.

The Executive Director considers that the representation of industry and commerce associations inside the Board is important, as in practice their involvement has been proved to be beneficial. He explains that in the absence of sufficient official data and documented information about industries in Egypt, the participation of representatives of industry and commerce associations becomes essential. Those representatives have closer and deeper exposure to problems in the market as well as they are aware of facts and information relating to industries that might not be available to the ECA, thus making the ECA's decisions more accurate. However, he believes that there is no need to have representatives from the labour union and the banking association inside the board and that those representatives may be invited to board meetings, whenever their opinion is needed, but without having voting rights¹¹².

Nevertheless, the justification of the Executive Director for having representatives from the industry and commerce associations are not quite convincing, for the following reasons:

- while it is true that Egypt lacks sufficient official data about industries, businesses and commercial activities, this does not justify the involvement of representatives of industry and commerce associations in the ECA Board. The ECA should concentrate on solving the problem of the lack of official data, by focusing in its early years of its establishment on building up reliable databases about industries, businesses and commercial activities in Egypt, instead of just being dependent on the information from representatives of industry and commerce associations.
- the same argument provided by the Executive Director for not having representatives from labour union and the banking association is valid for not having representatives from industry and commerce association. The ECA may indeed seek information from representatives of the industry and commerce associations by inviting them to Board meetings, only whenever there is a fear that their decision might not reflect actual business or industry practices, but without having voting rights.

¹¹⁰ Interview with the Executive Director of ECA, op.cit above note 53.

¹¹¹ Ibid.

Qualifications of Board Members

In the future, the law should require the Board Members to have a minimum qualification and experience in a field relevant to competition law. Additionally, the law should be amended to ensure a balance between the number of the Board members that are of a legal background and the number of members that have an economic background. But in any event, the number of members of economic background should not exceed the number of members with a legal background.

The Executive Director of the ECA admits that the current composition of the Board members – where only four out of the fifteen are of legal background – is causing problems to the decision making process of the ECA. He agrees that there must be a balance between the number of members that are of legal background and those who are of economic background. However, he insists that the presence of members from an economic background is necessary¹¹³.

Political Affiliations of the Board Members

Ideally, the law should be amended to ensure that board members do not have any political affiliation during their term of service on the Board. At least, the law should be amended in order to limit the number of members who have political affiliation to one political party, especially the ruling party. Such recommendation is in line with widely accepted international practice, as for instance in the US no more than three out of five commissioners of the FTC can be from the same political party¹¹⁴.

The Executive Director of the ECA considers that the above-recommended amendment is good in theory, but is hard to materialise in reality, since the Parliament is highly dominated by the ruling party. However, he believes that the law should be amended in order to ensure that, if such political affiliation gives rise to a conflict of interest, concerning a case under investigation, the Board member should not participate in the deliberation or vote in that case¹¹⁵.

¹¹² Ibid.

¹¹³ Ibid.

¹¹⁴ FTC official website, available at: www.ftc.gov/commissioners/index.shtml

¹¹⁵ Interview with the Executive Director of ECA, op.cit above note 53.

The Board Members' Freedom to Pursue Economic Activities

The law does not limit the freedom of the Board members to pursue economic activities. The Executive Director of the ECA believes that, in light of the fact that the Board members serve on a part time basis, it is hard to require them not to pursue economic activities¹¹⁶.

While the law should not eliminate completely the possibility for the Board members to pursue economic activities simultaneously, while serving on the ECA Board, it should at least limit the number of the members of the Board that are allowed to do so. It is important to note here that the UNCTAD stresses the fact that 'Competition enforcement, particularly in jurisdictions that draw members of the board of commissioners from the private sector on a part-time basis, raises some tricky issues relating to members' impartiality and independence. Concerns revolve around the ability of part-time board members holding senior positions in private companies to attain and maintain desirable levels of objectivity'¹¹⁷.

Currently, the law only excludes a Board member from the deliberations or voting concerning a case under investigation, if such a member (i) has an interest in the case, (ii) is a relative to any of the parties under investigation up to the fourth degree or (iii) is currently representing or has represented any of the parties under investigation.

In the absence of criteria for establishing what constitutes an 'interest' in the case, conflict of interest situations might not be wholly prevented. It is important for the law to be amended in order to prevent less evident situations of conflict; the law should prevent situations not only when a Board member represents or has represented any of the parties to the case, but also when a Board Member, for example:

- represents a company in the same industry/relevant market, as the party under investigation; where shares of that company may be affected by the outcome of the investigation,

¹¹⁶ Ibid.

¹¹⁷ UNCTAD Secretariat, op.cit above note 12, at page 14 paragraph 46.

- is employed by or is a consultant or advisor to one of the parties under investigation, or
- has close business links with one of the parties under investigation, by being a client or supplier thereof.

III) Appointment Term Of The ECA's Board

It is advisable that the law would be amended in order to make the term of Board members appointment longer than four years, with no possibility for renewal. In this way, the Board members will be motivated to act independently, because regardless of whether they please the government or not, their term cannot be renewed by virtue of law. Moreover, longer terms will allow the Board members to accumulate experience and to build up expertise in competition.

It is also suggested by the Executive Director of the ECA that the amendment of the law should allow for overlap in the Board members' appointment terms. He stresses the importance that the appointment term of the Board members should not commence and expire at the same time, in order to enable new members to learn from the experience and expertise of the old members¹¹⁸.

IV) Dismissal Mechanism Of The ECA's Board

Dismissal of Board members should not exclusively be determined according to the sole discretion of the Minister but instead it should be determined internally by the Board itself. The law should set out exhaustive conditions, which once they are fulfilled a Board member can be dismissed. The Executive Director of the ECA believes that the law has a shortfall in this regard. He suggests that a Board member should be dismissed, if the Board member (i) dies, (ii) loses his representative capacity, (iii) repeatedly fails to attend Board meetings and (iv) fails to announce conflict of interest¹¹⁹. With the exception of point (ii), the above-suggested conditions are agreed with.

¹¹⁸ Interview with the Executive Director of ECA, op.cit above note 53.

6) CONCLUSION

In some aspects, the ECA may be viewed to have institutional independence, while in reality there are other factors, which heavily undermine such independence. Additionally, it appears that the law does not sufficiently guarantee the personal independence of the ECA's decision-making. Many factors have contributed to this result, as presented hereinafter.

Firstly, the ECA is affiliated to the Minister which has broad powers in relation to the implementation of the law and has the result that the enforcement of the law will not be entirely independent and will be influenced by political considerations of the government.

Secondly, the appointment mechanism of the Board members allows the ministries of government to be represented inside the ECA's Board. The situation is worsened by the fact that government representation within the ECA is not limited to the 4 members set out in the law, but is extended to include members appointed as experts and specialists but who are in reality also working for the government.

Thirdly, the law allows interest groups to secure seats in the ECA Board, thus providing them with the opportunity to affect the personal independence of the ECA decision making, by lobbying for their own interests.

Fourthly, there are no sufficient rules restricting the political affiliations of Board members and the law does not place any limitation on the freedom of the Board members to pursue economic activities.

In accordance with the above, it is apparent that the ECA lacks most of the elements that would make it an independent institution. For this reason, more powers should be granted to the ECA in relation to the implementation of competition law. The structure of the Board in terms of the number of members, the quorum for meetings and voting, the appointment mechanism and the appointment criteria should be revisited, as it is recommended in this article.

¹¹⁹ Ibid.