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EDITORIAL ***By Juan Antonio Rivière*** 3

ALGERIA
PRESENTATION DU PROJET DE LOI n° 10-05 5
COMPILATION DU TEXTE DE L'ORDONNANCE n°03-03 6
PROJET DE JUMELAGE CONCURRENCE 18

EGYPT
ABUSE OF DOMINANCE:PECULIARITIES AFFECTING ECONOMY 22
By Mourad Greiss
SOUTH-SOUTH COMPETITION COOOPERATION: QIZ CASE STUDY 36
By Mohamed El-Far

JORDAN
NEW DRAFT COMPETITION LAW, ACHIEVEMENT & IMPROVEMENT 49
By Dr. Martin Beck, Moritz Ader, Léa Collet
THE KONRAD ADENAUER STIFTUNG IN AMMAN 54

MACEDONIA
FIVE YEARS OF COMPETITION ENFORCEMENT: ASSESMENT 56
By Ms Rozera Karova & Marco Botta

MAROC
POLITIQUE DE CONCURRENCE ET L'APPUI DE L'UE 73
COMPETITION POLICY AND ITS SUPPORT BY THE EU 90
Par Krzysztof Jaros

SERBIA
RECENT DEVELOPMENTS IN THE COMPETITION LAW 96
By Srdjana Petronijevic

SYRIA
ACT OF COMPETITION PROTECTION AND PREVENTION OF MONOPOLY 100

TUNISIE
CONCLUSIONS OF THE COMPETITION LAW AND POLICY STUDY 110
JUMELAGE: MODERNISATION DU TRIBUNAL ADMINISTRATIF 114

UNITED STATES OF AMERICA
TOWARD INDEPENDENT COMPETITION ADVOCAY IN THE MEDITERRANEAN WORLD:LEARNING FROM THE AAI MODEL 117
By Albert Foer

EUROPEAN UNION
THE EUROPEAN OMBUDSMAN: RESOLVING COMPLAINTS, PROMOTING GOOD ADMINISTRATION 129
By P. Nikiforos Diamandouros
THE ROLE OF PUBLIC SERVICES IN "EUROPE 2020" 135
By Joaquin Almunia
CEEP DECLARATION ON PUBLIC SERVICES SHAPING EU 140
CYPRUS COMPETITON COMMISSION IMPOSES FINES 141
ARLEM - EURO-MED REGIONAL AND LOCAL ASSEMBLY 142

EUROMED
EMPA -EURO-MED PARLIAMENTARY ASSEMBLY RECOMMENDATION 145
APPEL DE HAMMAMET 154
EURO-MED BUSINESS DECLARATION 2010 155
SECRETARIAT OF THE UNION FOR THE MEDITERRANEAN 158
INFRAMED 164
INTERNATIONAL CITY FOR THE MEDITERRANEAN PROJECT 165

INFORMATION
LISTE OF ARTICLES IN MCB-BMC n° 1 166
EUROPEAN COMPETITON NETWORK BRIEF 4 169

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EDITORIAL[1]

Chers amis d'Euromed,

Voici une nouvelle édition grâce à la collaboration des auteurs des articles et aux nouvelles intervenues ces derniers mois en provenance des autorités de concurrence. Je souhaite les remercier d'avoir fait possible cette édition.

Il est important de souligner les efforts entrepris dans les pays du Maghreb où les jumelages concurrence continuent et en particulier les modifications de l'ordonnance de la concurrence en Algérie. Aussi en Egypte et en Jordanie les réflexions continuent à approfondir la pratique comme le montrent les articles et le séminaire d'étude de la législation. Nous devons constater l'intérêt croissant pour la politique de concurrence en Serbie, Macédoine et Syrie. L'encouragement de l'advocacy indépendante de la concurrence sur base des expériences aux Etats Unis est offert aux milieux académiques et professionnels de la région. Le discours du Vice-président de la Commission Européenne sur le traitement des services publics est de grand intérêt pour les régulateurs de la région.

L'année 2010 a vu initier le fonctionnement du Secrétariat de l'Union pour la Méditerranée et une activité importante de la société civile et le monde d'affaires pour promouvoir la création d'entreprises et les projets d'investissements régionaux. La concurrence et les autres disciplines du marché sont appelées à jouer un rôle majeur pour assurer le cadre réglementaire qui facilite l'activité des entreprises et la réalisation des nouveaux projets d'investissements.

Cordialement,
Juan Antonio Rivière

Dear Euromed friends,

I wish to thank the authors of the articles and that competition authority's news during last months, that had made possible the new edition of the bulletin.

It is to be underlined the importance efforts in the Maghreb countries where twinning programmes continue and in particular those changes in the Algerian competition law. Egypt and Jordan study and revise his practice and legislation in greater detail. New hopes for competition enforcement appear in Serbia, Macedonia and Syria. Independent advocacy is encouraged from the United States experience. The Vice-president of the European Commission is speaking on public services, which is of interest for the region.

2010 saw the Union for the Mediterranean Secretariat initiating his activities and civil society and business world focusing in promoting companies and investment regional projects. Competition and other market regulations will play a major role as facilitators of companies and new investments.

Sincerely,
Juan Antonio Rivière

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NOTE DE PRESENTATION[1] DU PROJET (LOI n°10-05) RELATIF A LA CONCURRENCE MODIFICATIONS DE L'ORDONNANCE N° 03-03[2]

I. PRINCIPAUX OBJECTIFS DU DISPOSITIF:

Renforcer l'intervention de l'Etat et la rendre plus efficace dans le domaine de la fixation et du contrôle des prix et des marges des biens et services, notamment en ce qui concerne les produits et services de première nécessité ; Doter l'Etat d'un dispositif homogène et de mécanismes efficaces de régulation et de contrôle du marché ;

Stabiliser le marché, à travers l'encadrement des marges et des prix des biens et services de première nécessité et de large consommation ; Assurer plus de transparence et de loyauté dans la réalisation des transactions commerciales, notamment celles ayant trait au respect des prix réglementés afin de stabiliser le marché ;

Mettre fin aux dysfonctionnements qui peuvent affecter le marché notamment ceux qui résultent de la spéculation des prix et qui touchent le pouvoir d'achat des consommateurs ; Éradiquer la spéculation sous toutes ses formes, qui est à l'origine de hausses excessives et injustifiées des prix des biens et services.

II. CONTENU DES AMENDEMENTS INTRODUITS:

Élargissement du champ d'application du texte en vigueur aux catégories d'agents économiques, activant dans les secteurs de la production et de la distribution agricoles (agriculteurs, éleveurs, mandataires, maquignons et chevillards), de la pêche ainsi que dans l'importation de biens pour la revente en l'état. En effet, ces activités se rapportent à des biens et services particulièrement stratégiques par rapport à l'approvisionnement et à la stabilité du marché et au pouvoir d'achat du consommateur ;

Consécration des missions et des prérogatives de l'Etat en matière de stabilisation du marché, à travers l'encadrement (fixation, plafonnement et d'homologation) des marges et des prix des biens et services ; Identification du mode opératoire devant régir les actions de fixation, de plafonnement et d'homologation des marges et des prix des biens et services ; Détermination des paramètres devant être à la base des mesures d'encadrement des marges et des prix des biens et services, qui doivent être liés essentiellement à la lutte contre la spéculation et la stabilisation des niveaux de prix ;

Réaffirmation du pouvoir conféré à l'Etat d'intervenir en matière d'encadrement des marges et des prix, en temps réel, en cas notamment, de hausses excessives et injustifiées des prix ; Suppression au niveau de l'ordonnance en vigueur relative à la concurrence de la notion de « biens et services stratégiques » et de la durée ferme fixée par le texte en vigueur (06 mois) en ce qui concerne les mesures de réglementation des prix et marges lorsque des circonstance particulières l'exigent, car elles limitent l'intervention de l'Etat en la matière.

[1] Page du Ministère de Commerce Algérien

[2] Le projet a été adopte par l'Assamblé Populaire National le lundi 12 Juillet 2010, devenu la Loi 10-05 du 15 Août 2010 où les articles 2, 4 et 5 concernant les disposition générales et les prix de l'Ordonnace n°03-03 du 19 Juillet 2003 ont été modifiés

Compilation du texte en vigeur relative à la concurrence[3] de l'Ordonnance n° 03-03 du 19 juillet 2003

Titre 1 - Dispositions générales (1-3)

Titre 2 - Principes de la concurrence
Chapitre 1 - Liberté des prix (4-5)
Chapitre 2 - Pratiques restrictives de la concurrence (6-14)
Chapitre 3 - Concentrations économiques (15-22)

Titre 3 - Conseil de la concurrence (23-33)
Chapitre 2 - Attributions du conseil de la concurrence (34-49)
Chapitre 3 - Procédure d'instruction (50-55)
Chapitre 4 - Sanctions des pratiques restrictives et des concentrations (56-62bis1).
Chapitre 5 - Procédure de recours contre les décisions du Conseil de la concurrence (63-70)

Titre 4 - Dispositions transitoires et finales (71-74)

Titre 1 - Dispositions générales

Art.1.- La présente ordonnance a pour objet de fixer les conditions d'exercice de la concurrence sur le marché, de prévenir toute pratique restrictive de concurrence et de contrôler les concentrations économiques afin de stimuler l'efficience économique et d'améliorer le bien-être des consommateurs.

Art. 2. - Les dispositions de la présente ordonnance s'appliquent, nonobstant toutes autres dispositions contraires :

- aux activités de production, y compris agricoles et d'élevage, aux activités de distribution dont celles réalisées par les importateurs de biens pour la revente en l'état, les mandataires, les maquignons et chevillards, aux activités de services, d'artisanat et de la pêche, ainsi qu'à celles qui sont le fait de personnes morales publiques, d'associations et de corporations professionnelles, quels que soient leur statut, leur forme et leur objet ;
- aux marchés publics, à partir de la publication de l'avis d'appel d'offres jusqu'à l'attribution définitive du marché.

Toutefois, la mise en œuvre de ces dispositions ne doit pas entraver l'accomplissement de missions de service public ou l'exercice de prérogatives de puissance publique

Art.3.- Il est entendu au sens de la présente ordonnance par :

a) entreprise: toute personne physique ou morale quelle que soit sa nature, exerçant d'une manière durable des activités de production, de distribution, de services ou d'importation.
b) marché: tout marché des biens ou services concernés par une pratique restrictive, ainsi que ceux que le consommateur considère comme identiques ou substituables en raison notamment de leurs caractéristiques, de leurs prix et de l'usage auquel ils sont destinés, et la zone géographique dans laquelle sont engagées les entreprises dans l'offre des biens ou services en cause ;

[3] Modifiée et completée par la Loi n° 08-12 du 25 juin 2008, en particulier pour les articles 3,6,10,19,21bis, 23, 24, 25, 26, 27, 28, 31, 32, 33, 34, 36, 37, 39, 47, 49, 49bis, 50, 56, 58, 59, 62bis, 62bis1, 63 et 70 et la Loi n° 10-05 du 15 Août 2010 en particulier pour les articles 2, 4, 5, 24 et 73 bis.

c) position dominante: la position permettant à une entreprise de détenir, sur le marché en cause, une position de puissance économique qui lui donne le pouvoir de faire obstacle au maintien d'une concurrence effective, en lui fournissant la possibilité de comporte ments indépendants dans une mesure appréciable vis-à-vis de ses concur rents, de ses clients ou de ses fournis seurs ;
d) état de dépendance économique: la relation commerciale dans laquelle l'une des entreprises n'a pas de solu tion alternative comparable si elle sou haite refuser de contracter dans les conditions qui lui sont imposées par une autre entreprise, client ou fournis seur;
e) régulation: toute mesure quelle que soit sa nature, prise par toute institution publique et visant notamment à renforcer et à garantir l'équilibre des forces du marché et le jeu de la libre concurrence, à lever les obstacles pouvant entraver son accès et son bon fonctionnement ainsi qu'à permettre l'allocation économique optimale des ressources du marché entre ses différents acteurs conformément aux dispositions de la présente ordonnance.

Titre 2 - Principes de la concurrence
Chapitre 1 - Liberté des prix

Art 4. -Les prix des biens et services sont librement déterminés conformément aux règles de la concurrence libre et probe.

- La liberté des prix s'entend dans le respect des dispositions de la législation et de la réglementation en vigueur ainsi que des règles d'équité et de transparence concernant notamment :
- la structure des prix des activités de production, de distribution, de prestation de services et d'importation de biens pour la revente en l'état ;
- les marges bénéficiaires pour la production et la distribution des biens ou la prestation de services ;
- la transparence dans les pratiques commerciales

Art. 5.- En application des dispositions de l'article 4 ci-dessus, il peut être procédé, par voie réglementaire, à la fixation, au plafonnement ou à l'homologation des marges et des prix de biens et services ou de familles homogènes de biens et services.
Les mesures de fixation, de plafonnement ou d'homologation des marges et des prix des biens et services sont prises sur la base de propositions des secteurs concernés pour les principaux motifs suivants :

- la stabilisation des niveaux de prix des biens et services de première nécessité ou de large consommation, en cas de perturbation sensible du marché ;
- la lutte contre la spéculation sous toutes ses formes et la préservation du pouvoir d'achat du consommateur.

Peuvent être également prises, dans les mêmes formes, des mesures temporaires de fixation ou de plafonnement des marges et des prix des biens et services, en cas de hausses excessives et injustifiées des prix, provoquées, notamment, par une grave perturbation du marché, une calamité, des difficultés durables d'approvisionnement dans un secteur d'activité donné ou une zone géographique déterminée ou par des situations de monopoles naturels.

Chapitre 2 - Pratiques restrictives de la concurrence

Art.6.- Sont prohibées, lorsqu'elles ont pour objet ou peuvent avoir pour effet d'empêcher, de restreindre ou de fausser le jeu de la libre concurrence dans un même marché ou, dans une partie substantielle de celui-ci, les pratiques et actions concertées, conventions et ententes expresses ou tacites et notamment lorsqu'elles tendent à :

- limiter l'accès au marché ou l'exercice d'activités commerciales ;
- limiter ou contrôler la production, les débouchés, les investissements ou le progrès technique ;
- répartir les marchés ou les sources d'approvisionnement ;

- faire obstacle à la fixation des prix par le libre jeu du marché en favorisant artificiellement leur hausse ou leur baisse ;
- appliquer, à l'égard de partenaires commerciaux, des conditions inégales à des prestations équivalentes en leur infligeant de ce fait un désavantage dans la concurrence ;
- subordonner la conclusion de contrats à l'acceptation, par les partenaires, de prestations supplémentaires qui, par leur nature ou selon les usages commerciaux, n'ont pas de lien avec l'objet de ces contrats.
- permettre l'octroi d'un marché public au profit des auteurs de ces pratiques restrictives.

Art.7.- Est prohibé tout abus d'une position dominante ou monopolistique sur un marché ou un segment de marché tendant à :

- limiter l'accès au marché ou l'exercice d'activités commerciales ;
- limiter ou contrôler la production, les débouchés, les investissements ou le progrès technique ;
- répartir les marchés ou les sources d'approvisionnement ;
- faire obstacle à la fixation des prix par le libre jeu du marché en favorisant artificiellement leur hausse ou leur baisse ;
- appliquer, à l'égard de partenaires commerciaux, des conditions inégales à des prestations équivalentes en leur infligeant de ce fait un désavantage dans la concurrence ;
- subordonner la conclusion de contrats à l'acceptation, par les partenaires, de prestations supplémentaires qui, par leur nature ou selon les usages commerciaux, n'ont pas de lien avec l'objet de ces contrats.

Art.8.- Le Conseil de la concurrence peut constater, sur demande des entreprises intéressées, qu'il n'y a pas lieu pour lui, en fonction des éléments dont il a connaissance, d'intervenir à l'égard d'un accord, d'une action concertée, d'une convention ou d'une pratique tels que définis aux articles 6 et 7 ci-dessus.
Les modalités d'introduction de la demande de bénéficier des dispositions de l'alinéa précédent sont déterminées par décret.

Art.9.- Ne sont pas soumis aux dispositions des articles 6 et 7, les accords et pratiques qui résultent de l'application d'un texte législatif ou d'un texte réglementaire pris pour son application.
Sont autorisés, les accords et pratiques dont les auteurs peuvent justifier qu'ils ont pour effet d'assurer un progrès économique ou technique, ou qu'ils contribuent à améliorer l'emploi, ou qui permettent aux petites et moyennes entreprises de consolider leur position concurrentielle sur le marché. Ne pourront bénéficier de cette disposition que les accords et pratiques qui ont fait l'objet d'une autorisation du Conseil de la concurrence.

Art. 10.- Est considéré comme pratique ayant pour effet d'empêcher, de restreindre ou de fausser le libre jeu de la concurrence et interdit, tout acte et/ou contrat, quels que soient leur nature et leur objet, conférant à une entreprise une exclusivité dans l'exercice d'une activité qui entre dans le champ d'application de la présente ordonnance.

Art.11.- Est prohibée, dès lors qu'elle est susceptible d'affecter le libre jeu de la concurrence, l'exploitation abusive, par une entreprise, de l'état de dépendance dans lequel se trouve à son égard une entreprise, client ou fournisseur. Ces abus peuvent notamment consister en :

- un refus de vente sans motif légitime ;
- la vente concomitante ou discriminatoire ;
- la vente conditionnée par l'acquisition d'une quantité minimale ;
- l'obligation de revente à un prix minimum ;
- la rupture d'une relation commerciale au seul motif que le partenaire refuse de se soumettre à des conditions commerciales injustifiées ;
- tout autre acte de nature à réduire ou à éliminer les avantages de la concurrence dans un

marché.

Art.12.- Sont prohibées les offres de prix ou pratiques de prix de vente aux consommateurs abusivement bas par rapport aux coûts de production, de transformation et de commercialisation, dès lors que ces offres ou pratiques ont pour objet ou peuvent avoir pour effet d'éliminer d'un marché ou d'empêcher d'accéder à un marché, une entreprise ou un de ses produits.

Art.13.- Sans préjudice des dispositions des articles 8 et 9 de la présente ordonnance, est nul tout engagement, convention ou clause contractuelle se rapportant à l'une des pratiques prohibées par les articles 6, 7, 10, 11 et 12 ci-dessus.

Art.14.- Les pratiques visées aux articles 6, 7, 10, 11 et 12 ci-dessus sont qualifiées de pratiques restrictives de concurrence.

Chapitre 3 - Concentrations économiques

Art.15.- Aux termes de la présente ordonnance, une concentration est réalisée lorsque :

1. deux ou plusieurs entreprises antérieurement indépendantes fusionnent,
2. une ou plusieurs personnes physiques détenant déjà le contrôle d'une entreprise au moins, ou bien, une ou plusieurs entreprises, acquièrent directement ou indirectement, que ce soit par prise de participations au capital ou achat d'éléments d'actifs, contrat ou par tout autre moyen, le contrôle de l'ensemble ou de parties d'une ou de plusieurs autres entreprises.
3. la création d'une entreprise commu ne accomplissant, d'une manière durable, toutes les fonctions d'une entité économique autonome.

Art.16.- Le contrôle visé au point 2 de l'article 15 ci-dessus, découle des droits des contrats ou autres moyens qui confèrent seuls ou conjointement, et compte tenu des circonstances de fait ou de droit, la possibilité d'exercer une influence déterminante et durable sur l'activité d'une entreprise et notamment:

1. des droits de propriété ou de jouissance sur tout ou partie des biens d'une entreprise ;
2. des droits ou des contrats qui confèrent une influence déterminante sur la composition, les délibérations ou les décisions des organes d'une entreprise.

Art.17.- Les concentrations qui sont de nature à porter atteinte à la concurrence en renforçant notamment la position dominante d'une entreprise dans un marché, doivent être soumises par leurs auteurs au Conseil de la concurrence qui prend une décision dans un délai de trois mois.

Art.18.-Les dispositions de l'article 17 ci-dessus s'appliquent à chaque fois que la concentration vise à réaliser un seuil de plus de 40 % des ventes ou achats effectués sur un marché.

Art. 19. - Le conseil de la concurrence peut, après avis du ministre chargé du commerce et du ministre chargé du secteur concerné par la concentration, autoriser ou rejeter, par décision motivée, la concentration.
L'autorisation du Conseil de la concurrence peut être assortie de prescriptions de nature à atténuer les effets de la concentration sur la concurrence. Les entreprises parties à la concentration peuvent d'elles-mêmes souscrire des engagements destinés à atténuer les effets de la concentration sur la concurrence.
La décision de rejet de la concentration peut faire l'objet d'un recours devant le Conseil d'Etat.

Art.20.- Pendant la durée requise pour la décision du Conseil de la concurrence, les auteurs de l'opération de concentration ne peuvent prendre aucune mesure rendant la concentration irréversible.

Art.21.- Lorsque l'intérêt général le justifie, le Gouvernement peut, sur le rapport du ministre chargé du commerce et du ministre dont relève le secteur concerné par la concentration, autoriser d'office ou à la demande des parties concernées, la réalisation d'une concentration rejetée par le Conseil de la concurrence.

Art. 21 bis. - Sont autorisées, les concentrations d'entreprises qui résultent de l'application d'un texte législatif ou réglementaire.
En outre, ne sont pas soumis au seuil prévu à l'article 18 ci-dessus, les concentrations dont les auteurs peuvent justifier qu'elles ont notamment pour effet d'améliorer leur compétitivité, de contribuer à développer l'emploi ou de permettre aux petites et moyennes entreprises de consolider leur position concurrentielle sur le marché.
Toutefois, ne peuvent bénéficier de cette disposition que les concentrations qui ont fait l'objet d'une autorisation du conseil de la concurrence dans les conditions prévues par les articles 17, 19 et 20 de la présente ordonnance.

Art.22.- Les conditions et modalités de demande d'autorisation des opérations de concentration sont déterminées par décret.

Titre 3 - Conseil de la concurrence

Art. 23. - Il est créé une autorité administrative autonome, ci-après dénommée "Conseil de la concurrence", jouissant de la personnalité juridique et de l'autonomie financière, placée auprès du ministre chargé du commerce.
Le siège du conseil de la concurrence est fixé à Alger.

Art. 24. - Le conseil de la concurrence est composé de douze (12) membres relevant des catégories ci-après :
1- six (6) membres choisis parmi les personnalités et experts titulaires au moins d'une licence ou d'un diplôme universitaire équivalent et d'une expérience professionnelle de huit (8) années au minimum dans les domaines juridique et/ou économique et ayant des compétences dans les domaines de la concurrence, de la distribution, de la consommation et de la propriété intellectuelle ;
2- quatre (4) membres choisis parmi des professionnels qualifiés titulaires d'un diplôme universitaire exerçant ou ayant exercé des activités de responsabilité et ayant une expérience professionnelle de cinq (5) années au minimum dans les secteurs de la production, de la distribution, de l'artisanat, des services et des professions libérales ;
3-deux (2) membres qualifiés représentant les associations de protection des consommateurs.
Les membres du conseil de la concurrence peuvent exercer leurs fonctions à plein temps.

Art. 25. - Le président, les deux vice-présidents et les autres membres du conseil de la concurrence, sont nommés par décret présidentiel.
Il est mis fin à leurs fonctions dans les mêmes formes.
Le président du conseil de la concurrence est choisi parmi les membres de la première catégorie, et ses deux vice-présidents sont choisis respectivement parmi les membres de la deuxième et troisième catégories prévues à l'article 24 ci-dessus.
Le renouvellement des membres du conseil de la concurrence s'effectue tous les quatre (4) ans, à raison de la moitié des membres composant chacune des catégories visées à l'article 24 ci-dessus.

Art. 26. - Il est désigné auprès du conseil de la concurrence, un secrétaire général, un rapporteur général et cinq (5) rapporteurs nommés par décret présidentiel.
Le rapporteur général et les rapporteurs doivent être titulaires au moins d'une licence ou d'un diplôme universitaire équivalent et disposer d'une expérience professionnelle de cinq (5) années au minimum, en adéquation avec les missions qui leur sont conférées par les dispositions de la présente ordonnance.

Le ministre chargé du commerce désigne par arrêté son représentant titulaire et son suppléant auprès du conseil de la concurrence. Ils assistent aux travaux du conseil de la concurrence sans voix délibérative.

Chapitre 1 - Fonctionnement du conseil de la concurrence

Art.27.- Le Conseil de la concurrence adresse un rapport annuel d'activité à l'instance législative, au Chef du Gouvernement et au ministre chargé du commerce.
Le rapport d'activité est publié au bulletin officiel de la concurrence prévu à l'article 49 de la présente ordonnance. Il peut, en outre, être publié en totalité ou par extraits sur tout autre support d'information approprié.

Art.28.- Les travaux du Conseil de la concurrence sont dirigés par le président ou le vice-président qui le remplace en cas d'absence ou d'empêchement.
Le Conseil de la concurrence ne peut siéger valablement qu'en présence de huit (8) de ses membres au moins.
Les séances du Conseil de la concurrence ne sont pas publiques.
Les décisions du Conseil de la concurrence sont prises à la majorité simple ; en cas de partage égal des voix, celle du président est prépondérante.

Art.29.- Aucun membre du Conseil de la concurrence ne peut délibérer dans une affaire dans laquelle il a un intérêt ou s'il a un lien de parenté jusqu'au quatrième degré avec l'une des parties ou, s'il représente ou a représenté une des parties intéressées.
Les membres du Conseil de la concurrence sont tenus au secret professionnel.
La fonction de membre du Conseil de la concurrence est incompatible avec toute autre activité professionnelle.

Art.30.- Pour les affaires dont il est saisi, le Conseil de la concurrence entend contradictoirement les parties intéressées qui doivent présenter un mémoire. Les parties peuvent se faire représenter ou se faire assister par leurs avocats ou par toute personne de leur choix.
Les parties intéressées et le représentant du ministre chargé du commerce ont droit à l'accès au dossier et à en obtenir copie.
Toutefois, le président peut refuser, à son initiative ou à la demande des parties intéressées, la communication de pièces ou documents mettant en jeu le secret des affaires. Dans ce cas, ces pièces ou documents sont retirés du dossier. La décision du Conseil de la concurrence ne peut être fondée sur les pièces ou documents retirés du dossier.

Art.31.- L'organisation et le fonctionnement du conseil de la concurrence sont fixés par décret exécutif.

Art.32. - Le système de rémunération des membres du conseil de la concurrence, du secrétaire général, du rapporteur général et des rapporteurs est fixé par décret exécutif.

Art. 33. - Le budget du conseil de la concurrence est inscrit à l'indicatif du budget du ministère du commerce et ce, conformément aux procédures législatives et réglementaires en vigueur.
Le président du conseil de la concurrence est ordonnateur du budget.
Le budget du conseil de la concurrence est soumis aux règles générales de fonctionnement et de contrôle applicables au budget de l'Etat.

Chapitre 2 - Attributions du conseil de la concurrence

Art. 34. - Le conseil de la concurrence a compétence de décision, de proposition et d'avis qu'il exerce de sa propre initiative ou à la demande du ministre chargé du commerce ou de toute autre partie intéressée, pour favoriser et garantir par tous moyens utiles, la régulation efficiente du marché et arrêter toute action ou disposition de nature à assurer le bon fonctionnement de la concurrence et à promouvoir la concurrence dans les zones géographiques ou les secteurs d'activité où la concurrence n'existe pas ou est insuffisamment développée.
Dans ce cadre, le conseil de la concurrence peut prendre toute mesure sous forme notamment de règlement, de directive ou de circulaire qui est publié dans le bulletin officiel de la concurrence prévu à l'article 49 de la présente ordonnance.
Le conseil de la concurrence peut faire appel à tout expert ou entendre toute personne susceptible de l'informer.
Il peut également saisir les services chargés des enquêtes économiques notamment ceux du ministère chargé du commerce pour solliciter la réalisation de toute enquête ou expertise portant sur des questions relatives aux affaires relevant de sa compétence.

Art.35.- Le Conseil de la concurrence donne son avis sur toute question concernant la concurrence à la demande du Gouvernement et formule toute proposition sur les aspects de concurrence.
Il peut également être consulté sur les mêmes questions par les collectivités locales, les institutions économiques et financières, les entreprises, les associations professionnelles et syndicales, ainsi que les associations de consommateurs.

Art. 36. - Le conseil de la concurrence est consulté sur tout projet de texte législatif et réglementaire ayant un lien avec la concurrence ou introduisant des mesures ayant pour effet notamment:

1. de soumettre l'exercice d'une profession ou d'une activité, ou l'accès à un marché à des restrictions quantitatives ;
2. d'établir des droits exclusifs dans certaines zones ou activités ;
3. d'instaurer des conditions particulières pour l'exercice d'activités de production, de distribution et de services ;
4. de fixer des pratiques uniformes en matière de conditions de vente.

Art. 37. - Le conseil de la concurrence peut entreprendre toutes actions utiles relevant de son domaine de compétence notamment toute enquête, étude et expertise.
Dans le cas où les mesures initiées révèlent des pratiques restrictives de concurrence, le conseil de la concurrence engage toutes les actions nécessaires pour y mettre fin de plein droit.
Lorsque les enquêtes effectuées concernant les conditions d'application des textes législatifs et réglementaires ayant un lien avec la concurrence révèlent que la mise en œuvre de ces textes donne lieu à des restrictions à la concurrence, le conseil de la concurrence engage toute action adéquate pour mettre fin à ces restrictions

Art.38.- Pour le traitement des affaires liées aux pratiques restrictives, telles que définies par la présente ordonnance, les juridictions peuvent saisir le Conseil de la concurrence pour avis.
L'avis n'est donné qu'après une procédure contradictoire, sauf si le Conseil a déjà examiné l'affaire concernée. Les juridictions communiquent au Conseil de la concurrence, sur sa demande, les procès-verbaux ou les rapports d'enquête ayant un lien avec des faits dont le Conseil est saisi.

Art. 39. - Lorsque le conseil de la concurrence est saisi d'une affaire ayant un rapport avec un secteur d'activité relevant du champ de compétence d'une autorité de régulation, il transmet immédiatement une copie du dossier à l'autorité de régulation concernée pour formuler son avis dans un délai n'excédant pas 30 jours.

Dans le cadre de ses missions, le Conseil de la concurrence développe des relations de coopération, de concertation et d'échange d'informations avec les autorités de régulation.

Art.40.- Sous réserve de réciprocité, le Conseil de la concurrence peut, dans les limites de ses compétences, et en relation avec les autorités compétentes, communiquer des informations ou des documents en sa possession ou qu'il peut recueillir, à leur demande, aux autorités étrangères de concurrence, dotées des mêmes compétences, à condition d'assurer le secret professionnel.

Art.41.- Sous les mêmes conditions que celles prévues à l'article 40 ci-dessus, le Conseil de la concurrence peut, à la demande d'autorités étrangères de concurrence, conduire ou faire conduire des enquêtes liées à des pratiques restrictives de concurrence.
L'enquête est menée sous les mêmes conditions et procédures que celles prévues dans les attributions du Conseil de la concurrence.

Art.42.- Les dispositions des articles 40 et 41 ci-dessus ne sont pas applicables dans le cas où les informations, les documents ou enquêtes demandés portent atteinte à la souveraineté nationale, aux intérêts économiques de l'Algérie ou à l'ordre public intérieur.

Art.43.- Le Conseil de la concurrence peut, pour la mise en oeuvre des articles 40 et 41 ci-dessus, conclure des conventions organisant ses relations avec les autorités étrangères de concurrence ayant les mêmes compétences.

Art.44.- Le Conseil de la concurrence peut être saisi par le ministre chargé du commerce. Il peut se saisir d'office ou être saisi par toute entreprise ou, pour toute affaire dans laquelle ils sont intéressés, par les institutions et organismes visés à l'alinéa 2 de l'article 35 de la présente ordonnance.
Le Conseil de la concurrence examine si les pratiques et actions dont il est saisi entrent dans le champ d'application des articles 6, 7, 10, 11 et 12 ci-dessus ou se trouvent justifiées par application de l'article 9 ci-dessus.
Il peut déclarer, par décision motivée, la saisine irrecevable s'il estime que les faits invoqués n'entrent pas dans le champ de sa compétence, ou ne sont pas appuyés d'éléments suffisamment probants.
Le Conseil de la concurrence ne peut être saisi d'affaires remontant à plus de trois ans, s'il n'a été fait aucun acte tendant à leur recherche, leur constatation et leur sanction.

Art.45.- Dans le cas où les requêtes et les dossiers dont il est saisi ou dont il se saisit relèvent de sa compétence, le Conseil de la concurrence fait des injonctions motivées visant à mettre fin aux pratiques restrictives de concurrence constatées.
Il peut prononcer des sanctions pécuniaires applicables soit immédiatement, soit en cas d'inexécution des injonctions dans les délais qu'il aura fixés.
Il peut également ordonner la publication, la diffusion ou l'affichage de sa décision ou d'un extrait de celle-ci.

Art.46.- Le Conseil de la concurrence peut, sur demande du plaignant ou du ministre chargé du commerce, prendre des mesures provisoires destinées à suspendre les pratiques présumées restrictives faisant l'objet d'instruction, s'il est urgent d'éviter une situation susceptible de provoquer un préjudice imminent et irréparable aux entreprises dont les intérêts sont affectés par ces pratiques ou de nuire à l'intérêt économique général.

Art. 47. - Les décisions rendues par le conseil de la concurrence sont notifiées pour exécution aux parties concernées par huissier de justice.
Les décisions sont communiquées au ministre chargé du commerce.
Sous peine de nullité, les décisions doivent indiquer le délai de recours, les noms, qualités et adresses des parties auxquelles elles ont été notifiées.

L'exécution des décisions du conseil de la concurrence intervient conformément à la législation en vigueur.

Art.48.- Toute personne physique ou morale qui s'estime lésée par une pratique restrictive telle que prévue par la présente ordonnance, peut saisir pour réparation la juridiction compétente conformément à la législation en vigueur.

Art. 49. - Les décisions rendues par le conseil de la concurrence, la Cour d'Alger, la Cour suprême et le Conseil d'Etat en matière de concurrence sont publiées par le conseil de la concurrence dans le bulletin officiel de la concurrence.
Des extraits de ces décisions et toutes autres informations peuvent, en outre, être publiés sur tout autre support d'information.
La création, le contenu et les modalités d'élaboration du bulletin officiel de la concurrence sont définies par voie réglementaire.

Art. 49 bis. - Outre les officiers et les agents de police judiciaire prévus par le code de procédure pénale, sont habilités à effectuer des enquêtes liées à l'application de la présente ordonnance et à constater les infractions à ses dispositions, les fonctionnaires désignés ci-dessous :
- les personnels appartenant aux corps spécifiques du contrôle relevant de l'administration chargée du commerce ;
- les agents concernés relevant des services de l'administration fiscale ;
- le rapporteur général et les rapporteurs du conseil de la concurrence.

Le rapporteur général et les rapporteurs cités ci-dessus, doivent prêter serment dans les mêmes conditions et modalités que celles fixées pour les personnels appartenant aux corps spécifiques du contrôle relevant de l'administration chargée du commerce et être commissionnés conformément à la législation en vigueur.
Dans l'exercice de leurs missions et au titre de l'application des dispositions de la présente ordonnance, les fonctionnaires visés ci-dessus doivent décliner leur fonction et présenter leur commission d'emploi.
Les modalités de contrôle et de constatation des infractions prévues par la présente ordonnance interviennent dans les mêmes conditions et formes que celles fixées par la loi n° 04-02 du 5 Joumada El Oula 1425 correspondant au 23 juin 2004 fixant les règles applicables aux pratiques commerciales et ses textes d'application.

Chapitre 3 - Procédure d'instruction

Art. 50. - Le rapporteur général et les rapporteurs instruisent les affaires que leur confie le président du conseil de la concurrence.
S'ils concluent à l'irrecevabilité, conformément aux dispositions de l'article 44 de la présente ordonnance, ils en informent, par avis motivé, le président du conseil de la conrurrence.
Le rapporteur général assure la coordination, le suivi et la supervision des travaux des rapporteurs.
Les affaires relevant de secteurs d'activité placés sous le contrôle d'une autorité de régulation sont instruites en coordination avec les services de l'autorité concernée.

Art.51.- Le rapporteur peut, sans se voir opposer le secret professionnel, consulter tout document nécessaire à l'instruction de l'affaire dont il a la charge.
Il peut exiger la communication en quelque main qu'ils se trouvent, et procéder à la saisie des documents de toute nature, propres à faciliter l'accomplissement de sa mission. Les documents saisis sont joints au rapport ou restitués à l'issue de l'enquête.
Le rapporteur peut recueillir tous les renseignements nécessaires à son enquête auprès des entreprises ou auprès de toute autre personne. Il fixe les délais dans lesquels les renseignements doivent lui parvenir.

Art.52.- Le rapporteur établit un rapport préliminaire contenant l'exposé des faits ainsi que les griefs retenus. Le rapport est notifié par le président du Conseil aux parties concernées, au ministre chargé du commerce, ainsi qu'aux parties intéressées, qui peuvent formuler des observations écrites dans un délai n'excédant pas trois mois.

Art.53.- Les auditions auxquelles procède, le cas échéant, le rapporteur, donnent lieu à l'établissement d'un procès-verbal signé par les personnes entendues. En cas de refus de signer, il en est fait mention par le rapporteur.
Les personnes entendues peuvent être assistées d'un conseil.

Art.54.- Au terme de l'instruction, le rapporteur dépose auprès du Conseil de la concurrence un rapport motivé contenant les griefs retenus, la référence aux infractions commises et une proposition de décision ainsi que, le cas échéant, les propositions de mesures règlementaires conformément aux dispositions de l'article 37 ci-dessus.

Art.55.- Le président du Conseil de la concurrence notifie le rapport aux parties et au ministre chargé du commerce qui peuvent présenter des observations écrites dans un délai de deux mois. Il leur indique également la date de l'audience se rapportant à l'affaire.
Les observations écrites citées à l'alinéa 1 ci-dessus peuvent être consultées par les parties quinze jours avant la date de l'audience.
Le rapporteur fait valoir ses observations sur les éventuelles observations écrites citées à l'alinéa 1 ci-dessus.

Chapitre 4 - Sanctions des pratiques restrictives et des concentrations

Art. 56. -Les pratiques restrictives visées à l'article 14 de la présente ordonnance, sont sanctionnées par une amende ne dépassant pas 12 % du montant du chiffre d'affaires hors taxes réalisé en Algérie au cours du dernier exercice clos, ou par une amende égale au moins à deux fois le profit illicite réalisé à travers ces pratiques sans que celle-ci ne soit supérieure à quatre fois ce profit illicite ; et si le contrevenant n'a pas de chiffre d'affaires défini, l'amende n'excédera pas six millions de dinars (6.000.000 DA).

Art.57. - Est punie d'une amende de 2.000.000 DA, toute personne physique qui aura pris part personnellement et frauduleusement à l'organisation et la mise en oeuvre de pratiques restrictives telles que définies par la présente ordonnance.

Art. 58. - Si les injonctions ou les mesures provisoires prévues aux articles 45 et 46 de la présente ordonnance ne sont pas exécutées dans les délais fixés, le conseil de la concurrence peut prononcer des astreintes d'un montant qui ne doit pas être inférieur à cent cinquante mille dinars (150.000 DA) par jour de retard

Art. 59. - Le conseil de la concurrence peut décider, sur rapport du rapporteur, d'une amende d'un montant maximum de huit cent mille dinars (800.000 DA) contre les entreprises qui, délibérément ou par négligence, fournissent un renseignement inexact ou incomplet à une demande de renseignements conformément aux dispositions de l'article 51 de la présente ordonnance ou ne fournissent pas le renseignement demandé dans les délais fixés par le rapporteur.
Le conseil peut en outre décider d'une astreinte qui ne saurait être inférieure à cent mille dinars (100.000 DA) par jour de retard.

Art.60.- Le Conseil de la concurrence peut décider de réduire le montant de l'amende ou ne pas prononcer d'amende contre les entreprises qui, au cours de l'instruction de l'affaire les concernant, reconnaissent les infractions qui leur sont reprochées, collaborent à l'accélération de celle-ci et

s'engagent à ne plus commettre d'infractions liées à l'application des dispositions de la présente ordonnance.
Les dispositions de l'alinéa 1 ci-dessus ne sont pas applicables en cas de récidive quelle que soit la nature de l'infraction commise.

Art.61.- Les opérations de concentration soumises aux dispositions de l'article 17 ci-dessus et réalisées sans autorisation du Conseil de la concurrence, sont punies d'une sanction pécuniaire pouvant aller jusqu'à 7 % du chiffre d'affaires hors taxes réalisé en Algérie, durant le dernier exercice clos, pour chaque entreprise partie à la concentration ou de l'entreprise résultant de la concentration.

Art.62.- En cas de non respect des prescriptions ou engagements mentionnés à l'article 19 ci-dessus, le Conseil de la concurrence peut décider une sanction pécuniaire pouvant aller jusqu'à 5 % du chiffre d'affaires hors taxes réalisé en Algérie durant le dernier exercice clos de chaque entreprise partie à la concentration, ou de l'entreprise résultant de la concentration.

Art. 62 bis. - Dans le cas où chacun des exercices clos visés aux articles 56, 61 et 62 de la présente ordonnance ne couvre pas la durée d'une année, le calcul des sanctions pécuniaires applicables aux contrevenants est opéré par référence au montant du chiffre d'affaires hors taxes réalisé en Algérie au cours de la période d'activité accomplie.

Art. 62 bis 1. - Les sanctions prévues par les dispositions des articles 56 à 62 de la présente ordonnance sont prononcées par le conseil de la concurrence sur la base de critères ayant trait notamment à la gravité de la pratique incriminée, au préjudice causé à l'économie, aux bénéfices cumulés par les contrevenants, au niveau de collaboration des entreprises incriminées avec le conseil de la concurrence pendant l'instruction de l'affaire et à l'importance de la position sur le marché de l'entreprise mise en cause.

Chapitre 5 - Procédure de recours contre les décisions du Conseil de la concurrence

Art. 63. - Les décisions du conseil de la concurrence concernant les pratiques restrictives de concurrence peuvent faire l'objet d'un recours auprès de la Cour d'Alger, statuant en matière commerciale, par les parties concernées ou par le ministre chargé du commerce, dans un délai ne pouvant excéder un (1) mois à compter de la date de réception de la décision.
Le recours formulé contre les mesures provisoires visées à l'article 46 de la présente ordonnance est introduit dans un délai de vingt (20) jours.
Le recours auprès de la Cour d'Alger n'est pas suspensif des décisions du Conseil de la concurrence. Toutefois, le président de la Cour d'Alger peut décider, dans un délai n'excédant pas quinze jours, de surseoir à l'exécution des mesures prévues aux articles 45 et 46 ci-dessus prononcées par le Conseil de la concurrence, lorsque des circonstances ou des faits graves l'exigent.

Art.64.- Le recours auprès de la Cour d'Alger contre les décisions du Conseil de la concurrence est formulé, par les parties à l'instance, conformément aux dispositions du Code de procédure civile.

Art.65. - Dès le dépôt de la requête de recours, une copie est transmise au président du Conseil de la concurrence et au ministre chargé du commerce lorsque ce dernier n'est pas partie à l'instance.
Le président du Conseil de la concurrence transmet au président de la Cour d'Alger le dossier de l'affaire, objet du recours, dans les délais fixés par ce dernier.

Art.66.- Le magistrat rapporteur transmet au ministre chargé du commerce et au président du Conseil de la concurrence pour observations éventuelles copie de toutes les pièces nouvelles échangées entre les parties à l'instance.

Art.67. - Le ministre chargé du commerce et le président du Conseil de la concurrence peuvent présenter des observations écrites dans les délais fixés par le magistrat rapporteur.
Ces observations sont communiquées aux parties à l'instance.

Art.68.- Les parties en cause devant le Conseil de la concurrence et qui ne sont pas parties au recours, peuvent, se joindre à l'instance ou être mises en cause à tous les moments de la procédure en cours conformément aux dispositions du Code de procédure civile.

Art.69.- La demande de sursis à exécution, prévue à l'alinéa 2 de l'article 63 ci-dessus, est formulée conformément aux dispositions du Code de procédure civile.
La demande de sursis est introduite par le demandeur au recours principal ou par le ministre chargé du commerce. Elle n'est recevable qu'après formation du recours et doit être accompagnée de la décision du Conseil de la concurrence.
Le président de la Cour d'Alger requiert l'avis du ministre chargé du commerce sur la demande de sursis à exécution, lorsqu'il n'est pas partie à l'instance.

Art. 70. - Les arrêts de la Cour d'Alger, de la Cour suprême et du Conseil d'Etat en matière de concurrence sont transmis au ministre chargé du commerce et au président du conseil de la concurrence.

Titre 4 - Dispositions transitoires et finales

Art.71. - Le recouvrement des montants des amendes et des astreintes décidées par le Conseil de la concurrence s'effectue comme étant des créances de l'Etat.

Art.72.- Les affaires introduites devant le Conseil de la concurrence et la Cour d'Alger avant l'entrée en vigueur de la présente ordonnance continuent d'être instruites conformément aux dispositions de l'ordonnance n°95-06 du 25 janvier 1995 relative à la concurrence et aux textes pris pour son application.

Art.73. - Sont abrogées toutes dispositions contraires à celles de la présente ordonnance, notamment les dispositions de l'ordonnance n°95-06 du 25 janvier 1995, susvisée. A titre transitoire, demeurent en vigueur les dispositions relatives au titre 4, au titre 5 et au titre 6 de l'ordonnance n°95-06 du 25 janvier 1995 susvisée ainsi que les textes pris pour son application, à l'exception :

- du décret exécutif n°2000-314 du 14 octobre 2000 définissant les critères conférant à un agent économique la position dominante ainsi que ceux qualifiant les actes constituant des abus de position dominante ;
- du décret exécutif n°2000-315 du 14 octobre 2000 définissant les critères d'appréciation des projets de concentrations ou des concentrations, qui sont abrogés.

Art. 73 bis. - Les dispositions de la présente ordonnance sont précisées, en tant que de besoin, par voie réglementaire.

Art.74.- La présente ordonnance sera publiée au Journal officiel de la République algérienne démocratique et populaire.

Projet de jumelage dans le secteur de la concurrence[4]

Un appel à propositions de l'UE pour la réalisation d'un projet de jumelage pour le secteur de la concurrence dans le cadre des activités du P3A[5] en Algérie, a été adressé aux administrations et organismes mandatés[6] des États membres de l'Union européenne pour se jumeler avec l'autorité de concurrence du Ministère du Commerce algérien pour une durée maximale de dix huit (18) mois, le projet sera doté d'un budget de huit cent soixante-dix mille (870.000) euros. La reception des propositions cloturée fin septembre 2010 a donnée lieu à la notification des résultas le 7 Octobre[7] où le comité de sélection du programme a retenu la proposition présentée par un consortium des autorités de concurrence française (Team leader) , italienne et allemande. Le contrat de jumelage devrait être signé à la mis décembre 2010, permetant ainsi le démarrage du projet le 1er février 2011.

Ce projet de jumelage pour le secteur de la concurrence s'inscrit dans le cadre de la coopération économique prévue au titre de la mise en œuvre de l'Accord d'Association (article 49) ; technique prévue dans l'annexe 5 de l'Accord d'Association ; et administrative relative à la mise en œuvre des législations respectives en matière de concurrence, de facilitation des échanges entre l'Union européenne et l'Algérie et d'encouragement des échanges d'informations.

Il a comme objectif la mise en œuvre efficiente des règles de la concurrence pour contribuer :
1) à la consécration d'un marché concurrentiel et compétitif,
2) au renforcement de la protection des intérêts économiques des consommateurs,
3) à l'émergence d'opérateurs économiques performants.

Les résultats recherchés du projet sont:

1er Résultat : Mise à niveau, renforcement et développement des moyens humains en matière d'application du droit de la concurrence au niveau central du Ministère du Commerce, de ses services extérieurs, du Conseil de la Concurrence, des Autorités de régulation et des juridictions concernées. L'acquisition de bonnes pratiques dégagées du partage des expériences acquises au niveau de l'Union européenne dans la mise en œuvre de la politique de la concurrence permettra de mettre en œuvre concrètement certaines normes juridiques qui sont déjà en vigueur en Algérie mais dont l'application peut être améliorée. Mise en place d'un système de formation continue.

2ème Résultat : Renforcement des relations entre les institutions en charge de la concurrence, les autorités de régulation et les institutions judiciaires. Préciser la nature de leurs relations dans le traitement des dossiers et par là même de renforcer la sécurité juridique. Le principe de cohérence qui se traduit par le caractère de consistance des différentes actions menées par une Administration publique à différents niveaux et dans différentes branches d'activités tout en tenant compte des engagements pris au niveau international. Il est important de pouvoir anticiper sur les évolutions à terme du droit algérien de la concurrence au regard des expériences internationales notamment de celle de l'Union Européenne.

[4] EuropeAid/130364/D/ACT/DZ

[5] http://www.p3a-algerie.org/ - UGP - Unité de Gestion du Programme; Enceinte du CNRC; Route nationale 24 Le Lido, Mohammadia Alger - Algérie. Tel +213 21.20.30.38 / 44 +213 21.20.21.78; Fax +213 21.20.28.44

[6] Les administrations publiques et les organismes mandatés tels qu'ils sont définis dans le manuel de jumelage (section 3 Soumission et sélection des propositions) des États membres de l'Union européenne sont seuls autorisés à présenter une proposition via les points de contact nationaux des États membres de l'Union européenne (PCN).

[7] http://www.maghrebemergent.info/economie/63-algerie/1236-algerie-ue-le-projet-de-jumelage-pour-la-concurrence-finalise.html

3ème Résultat : Renforcement des moyens de communication et de sensibilisation en matière d'application des règles de concurrence. Une mise en œuvre efficiente des règles de concurrence repose en grande partie sur l'implication de l'ensemble des acteurs concernés ; des organismes en charge de faire respecter la concurrence aux entreprises et consommateurs.

Contexte du projet[8]

Il est important de noter que si le terme « autorité de concurrence » se réfère, selon les définitions de l'annexe 5 de l'Accord d'Association UE-Algérie, uniquement au Conseil de la Concurrence algérien, le terme est utilisé ici comme comprenant aussi l'Administration chargée de la concurrence telle que mentionnée dans la Feuille de route. Le projet s'inscrit dans un processus visant à renforcer les mécanismes propres à l'économie de marché en Algérie.

La Constitution de la République Algérienne Démocratique et Populaire, adoptée le 8 décembre 1996 consacre dans son article 37 le principe de la liberté de commerce et d'industrie qui doivent s'exercer dans le cadre de la loi. La Constitution ne mentionne pas de modèle économique applicable au pays. Le texte fondant le droit de la concurrence en Algérie est l'Ordonnance no. 95-06 du 15 janvier 1995 relative à la concurrence. L'Ordonnance de 1995 a été abrogée et remplacée par l'Ordonnance n° 03-03 du 19 juillet 2003 relative à la concurrence. Ce dernier texte a été, également, modifié et complété par la Loi no. 08-12 du 25 juin 2008.

La loi relative à la concurrence s'applique en Algérie aux activités de production, de distribution et de services y compris l'importation ainsi que celles qui sont le fait de personnes morales publiques, d'associations et de corporations professionnelles, quels que soient leur statut, leur forme ou leur objet. Le droit de la concurrence s'applique également aux marchés publics, de la publication de l'avis d'appel d'offres à l'attribution définitive du marché.

La liberté de prix est établie dans la loi. Toutefois des exceptions à la règle générale existent[9]. Elles sont du reste ancrées dans la loi relative à la concurrence. L'Etat peut restreindre la liberté des prix dans les conditions fixées par la loi. Les « biens et services considérés stratégiques par l'Etat » peuvent faire l'objet d'une règlementation des prix. Cette catégorie de biens n'est nullement définie dans la loi. Par ailleurs, peuvent être également prises, des mesures exceptionnelles de limitation de hausses des prix ou de fixation des prix notamment en cas de hausses excessives des prix, provoquées par une grave perturbation du marché, une calamité, ou des difficultés durables d'approvisionnement dans un secteur d'activité donné ou une zone géographique déterminée ou par des situations de monopoles naturels.

[8] Extrait de la Fiche du projet de jumelage - DZ10AAFI05. D'autres informations sur le cadre réglementaire sont disponibles dans le Rapport Final 091103- Evaluation de l'état d'exécution de l'Accord d'Association Algérie-UE. < http://trade.ec.europa.eu/doclib/docs/2010/may/tradoc_146120.pdf >

[9] Les prix réglementés s'appliquent aux semoules de blé dur ; au lait conditionné en sachet ; à la farine de panification et aux pains ; à l'eau à usage agricole ; aux tarifs de transport de voyageurs et marchandises assuré par la Société Nationale de Transports Ferroviaires (SNTF) ; à la tarification de transport des voyageurs par route (service ramassage) ; à la majoration des taux de loyers applicables aux locaux à usage principal d'habitation appartenant à l'Etat, aux collectivités locales et aux établissements et organismes en dépendant ; aux marges plafonds de gros et de détail applicables au ciment portland composé conditionné ; aux marges plafonds de gros et de détail applicables au ciment portland composé conditionné ; à la cession du pétrole brut entrée-raffinerie, au marge de raffinage, aux prix sortie-usine, aux marges de distribution et aux prix de vente des produits pétroliers destinés à la consommation sur la marche nationale ; aux prix de cession interne du gaz naturel ; à la marge de distribution de détail et le prix de vente du gaz naturel comprime (gnc)-carburant ; et aux marges plafonds applicables à la production, conditionnement et à la distribution des médicaments à usage de la médecine humaine.

Les pratiques restrictives de la concurrence et l'abus d'une position dominante sont interdites. Toutefois, les accords et pratiques qui résultent de l'application d'un texte législatif ou d'un texte réglementaire pris pour son application sont exempts de cette interdiction. Une attestation négative peut être octroyée dans les conditions fixées par la loi de la concurrence et le Décret exécutif no. 05-175 du 12 mai 2005, fixant les modalités d'obtention de l'attestation négative relative aux ententes et aux positions dominantes.

La loi relative à la concurrence précise, également, les conditions d'autorisation des concentrations d'entreprises. Les concentrations qui sont de nature à porter atteinte à la concurrence en renforçant la position dominante d'une entreprise dans un marché, doivent faire l'objet d'une autorisation préalable. L'autorisation préalable est requise quand la concentration vise à réaliser un seuil de plus de 40 % des ventes ou achats effectués sur un marché.

Lorsque l'intérêt général le justifie, le Gouvernement peut, sur rapport du Ministre du Commerce et du Ministre dont relève le secteur concerné par la concentration, autoriser d'office ou à la demande des parties concernées, la réalisation d'une concentration. Qui plus est, les concentrations d'entreprises qui résultent de l'application d'un texte législatif ou réglementaire sont autorisées par la loi de la concurrence sans plus.

En matière de concurrence, deux institutions sont principalement concernées:

Le Conseil de la Concurrence qui a compétence de décision, de proposition et d'avis qu'il exerce de sa propre initiative ou à la demande du Ministre du Commerce ou de toute autre partie intéressée, pour favoriser et garantir par tous moyens utiles, la régulation efficiente du marché et arrêter toute action ou disposition de nature à assurer le bon fonctionnement de la concurrence et à promouvoir la concurrence dans les zones géographiques ou les secteurs d'activité où la concurrence n'existe pas ou est insuffisamment développée. Dans ce cadre, le Conseil de la Concurrence peut prendre toute mesure sous forme notamment de règlement, de directive ou de circulaire qui est publié dans le Bulletin officiel de la concurrence. Il peut également saisir les services chargés des enquêtes économiques notamment ceux du Ministère du Commerce pour solliciter la réalisation de toute enquête ou expertise portant sur des questions relatives aux affaires relevant de sa compétence. Le Conseil de la Concurrence donne son avis sur toute question concernant la concurrence à la demande du Gouvernement et formule toute proposition sur les aspects de concurrence. Il peut également être consulté sur les mêmes questions par les collectivités locales, les institutions économiques et financières, les entreprises, les associations professionnelles et syndicales, ainsi que les associations de consommateurs. Le Conseil de la Concurrence est, également, consulté sur tout projet de texte législatif et réglementaire ayant un lien avec la concurrence économique. Le Conseil de la Concurrence[10] a compétence pour collaborer avec les autorités de concurrence étrangères. En plus, il lui est permis de conclure des conventions organisant ses relations avec les autorités étrangères.

Les services du Ministère du Commerce, notamment,

la Direction de la Concurrence dont les fonctions sont de proposer les instruments juridiques relatifs à la promotion de la concurrence sur le marché des biens et services, d'étudier et préparer les dossiers à soumettre au Conseil de la Concurrence, d'élaborer et mettre en place un dispositif d'observation des marchés, d'initier toutes études et actions de sensibilisation des agents économiques en vue du développement et de la consécration des principes et règles de la concurrence, de suivre le contentieux

[10] L'autorité administrative autonome qu'est le Conseil de la Concurrence est actuellement dans une situation particulière, car le renouvellement des membres du Conseil n'a pas été effectué dans sa totalité. De ce fait, le Conseil de la Concurrence n'est pas totalement opérationnel. Cette situation devrait toutefois se régulariser prochainement, selon les avis recueillis auprès de ses responsables.

relatif aux pratiques anticoncurrentielles et de coordonner la participation aux travaux des commissions des marchés publics ; et

la Direction du Contrôle des Pratiques Commerciales et Anticoncurrentielles, plus particulièrement, la Sous-direction du contrôle des pratiques anticoncurrentielles dont les fonctions sont de définir et orienter les programmes de contrôle, d'évaluer les résultats des actions de contrôle menées par les services extérieurs et de proposer toutes mesures destinées à améliorer l'efficacité des programmes et procédures de contrôle.

En définitive, trois institutions à différents niveaux de l'échelle administrative algérienne prennent part dans la gestion du droit de la concurrence. Les autorités de régulation ont des compétences en matière de concurrence mais celles-ci s'exercent principalement en étroite relation avec le Conseil de la Concurrence.

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

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

1. Introduction

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

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

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

2.1 Determination of dominance

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

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

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

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

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

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

a) The person's share in the relevant market and his/her position in comparison to the remaining competitors;
b) The conduct of the person in the relevant market in the previous period;
c) The number of competing persons in the relevant market and its relative impact on the structure of that market;
d) The ability of the person and his/her competitors to obtain the raw materials necessary for production; and
e) The existence of barriers facing other persons to enter the relevant market"[7]

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

[3] Article 4, Law No. 3 of 2005 promulgating the Law on Protection of Competition and Prohibition of Monopolistic Practices

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

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

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

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

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

2.2 Abusive practices: Exploring peculiarities in Egyptian Law

2.2.1 The lack of excessive pricing prohibition

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

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

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

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

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

[10] See Report of the Egyptian Competition Authority on the Cement Market.

[11] See Report of the Egyptian Competition Authority *"Study on the justifications behind the increase in prices of Steel Rebar in the Egyptian Market in light of the Law on Protection of Competition and Prohibition of*

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

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

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

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

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

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

[12] Article 4, Law No. 3 of 2005 Promulgating the Law on Protection of Competition and Prohibition of Monopolistic Practices

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

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

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

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

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

2.2.2 An effects-based approach to abuse of dominance

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

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

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

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

[17] Article 8(a), Law No. 3 of 2005 Promulgating the Law on Protection of Competition and Prohibition of Monopolistic Practices

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

[19] Article 8(b), Law No. 3 of 2005 Promulgating the Law on Protection of Competition and Prohibition of Monopolistic Practices

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

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

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

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

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

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

[22] See Report of the Egyptian Competition Authority on the Steel Rebar Market, pp.42-44

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

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

market or generate significant entry barriers, then the practice shall not be contemplated as abusive; even if the remaining elements were satisfied. The Egyptian legislator, similarly, imposes an effects-based approach to exclusive dealing abuses. Article 8(i) of Law No. 3/2005 prohibits a dominant firm from "obliging a supplier not to deal with a competitor"[25]. Article 13(i) of the executive regulations adds to such stipulation that: "[...] the non-dealing shall mean the refraining from dealing with a competing person, whether totally or reducing the size of dealing with him *to the extent that would drive it out of the market or prevent the potential competitors from entering the market*"[26]. This means that a dominant firm is not prohibited from obliging its supplier/distributor from dealing with its competitors *unless* such exclusivity drives the latter out of business or precludes market entry.

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

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

3.1 The lack of excessive pricing prohibition

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

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

[25] Article 8(i), Law No. 3 of 2005 Promulgating the Law on Protection of Competition and Prohibition of Monopolistic Practices

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

[27] See footnote 8 (above)

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

[29] See Monti, G. (2007) *"EC Competition Law"* First Edn., Cambridge University Press, pp.57-59; Peeperkorn, L. & Verouden, V. (2007) "The Economics of Competition" *The EC Law on Competition*, Second Edn., Faull & Nikpay (Eds.) Oxford University Press, p.6
Nevertheless, many Chicago School views remain sceptic about the pragmatism of such approach. For instance, see Demsetz, H. (1973) "Industry Structure, Market Rivalry and Public Policy" (3), *Journal of Law and Economics,* pp.1-9

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

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

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

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

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

[30] Consumer welfare may be defined according to Bork, a Chicago School observer, as "maximization of wealth or consumer want satisfaction". See Orbach, B. Y. (2010) "*The Antitrust Consumer Welfare Paradox*" Arizona Legal Studies, Discussion Paper No. 10-07, available from: (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1553226) accessed 28-07-2010, p.11
However, the framework of consumer welfare that will be employed in this paper does not only cover consumers; but also includes suppliers, distributors or retailers; depending on the position of the incumbent firm practicing excessive pricing (i.e. producer, distributor, etc.); although the direct effect is posed to consumers.
[31] Kirkwood, J. B. & Lande, R. H. (2008) "The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency" 84(1), *Notre Dame Law Review,* pp.192,197 For more detail on how allocative inefficiency is caused by high prices, see Mansfield, E. (1982) *"Microeconomics: Theory and Applications"* Fourth Edn., pp.277-292
[32] Bork, R. H. (1993) *"The Antitrust Paradox"* Second Edn., New York: Free Press, p.91
[33] See Orbach, B. Y. (2010) "The Antitrust Consumer Welfare Paradox" Arizona Legal Studies, Discussion Paper No. 10-07, available from: (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1553226) accessed 28-07-2010, p.10
[34] Bork, R. H. (1967) "The Goals of Antitrust Policy" (57), *American Economic Review*, p.245

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

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

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

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

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

[37] Attia, K. (2009) "Introducing Competition Law and Policy - The Case of Egypt" (1), *Mediterranean Competition Bulletin*, p.18

[38] See Annual Report of the Egyptian Competition Authority (2006-2007), p.15

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

[40] Article 10, Law No. 3 of 2005 Promulgating the Law on the Protection of Competition and the Prohibition of Monopolistic Practices

out in Article 10 of the Law regarding the determination of the selling prices of the essential products and prepares the reports on the opinion of the Authority on this matter"[41].

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

3.2 Employing an effects-based approach to abuse of dominance

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

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

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

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

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

[44] See *United States v. Topco Assocs.*, 405 U.S. 596, 609, n.10 (1972)

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

[46] Easterbrook, F. H. (1984) "The Limits of Antitrust" 63(1), *Texas Law Review,* pp.5, 8

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

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

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

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

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

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[48] See Whish, R. (2008) "Competition Law" Sixth Edn., Oxford University Press, p.190; McChesney, F. S. (2010) "Easterbrook on Errors" (10), *Journal of Competition Law and Economics*, Oxford University Press, p.5

[49] Easterbrook, F. H. (1984) "The Limits of Antitrust" 63(1), *Texas Law Review,* p.15
Note that the U.S. Supreme Court seems to adopt the same view. See *Verizon Communications Inc. v. Law Offices of Curtis V Trinko LLP,* 540 US 414 (2004)

[50] Mohieldin, M. (2002) *"On the Formulation and Enforcement of Competition Law in Emerging Economies: The Case of Egypt"*. OECD, Global Forum on Competition, Contribution from Egypt, p.3

[51] Ibid, p.5

[52] Mehta, P. S., Agarwal, M. & Singh, V. V. (2007) *"Politics Trumps Economics – Lessons and Experiences on Competition and Regulatory Regimes from Developing Countries"* Intergovernmental Group of Experts on Competition Law and Policy, CUTS International, available from: (http://www.unctad.org/sections/wcmu/docs/c2clp_ige8p11Cuts_en.pdf) accessed 05-05-2010, p.24

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

4. Methods to tackle peculiarities

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

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

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

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

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

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

[57] Ibid., pp.101-102

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

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

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

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

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

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

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

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

[62] South African Competition Appeal Court's decision dated 29th May, 2009, *Mittal Steel South Africa Ltd and Macsteel International B.V.* Complaint (Case 70/CAC/Apr07), para.32
The CAC then returned the case to the Tribunal for reappraisal in light of the mentioned four-step test. Later on, however, the case was privately settled.

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

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

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

5. Conclusion

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

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

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

[64] Particularly given that *Mittal* represents the first excessive pricing case in South Africa.

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

The Importance of South – South Competition Cooperation under the UFM: QIZ Case Study

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Table of Contents

Abstract
A. Introduction South-South Cooperation
B. The quantified Industrial Zones Protocol: Background Information
C. Problematic Indications
D Respenses to the Two Elements Raised by the Egyptian Governement
1) Is is normal to have a 20-30% increase in price imports?
2) Compettiveness of the Israeli economy
E. The Egyptian Competition Law (ECL)
1) Competence
2) Prohibition in the ECL
F. The Likehood of an Infringement
1) Relevant Product
2) Geographical area
3) Relevant Market
G. Market Characteristics and Facilitating Conditions
1) Number of competitors and concentration
2) Countervailing competitive power and entry barriers
3) Homogeneity of products & transparency
4) Countervailing buyers' power
H. Conclusion

Abstract

This article is intended to address the importance of South – South cooperation between partner countries as recommended by the Union for the Mediterranean policies and recommendations.

The importance of cooperation is highlighted through exploring the competition law concerns arising from the protocol of the Qualified Industrial Zones (concluded between Egypt, Israel and U.S.A). It was chosen as an example amid complains from the Egyptian importers regarding the significantly high prices of the Israeli imports.

With a closer look, the official figures of the Egyptian Authorities reveal that there is an increase in the prices of the Israeli imports around 20 – 30% than their international prices. The article also shows that the Israeli market can hardly be described as a 'free and competitive market' as stated by the Egyptian Government. Moreover, it identifies possible anticompetitive restraints that the Israeli importers might be involved in.

Although the study cannot specify a specific anticompetitive conduct on part of the Israeli exporters (due to lack of the data), it clearly indicates that there are concerns that needs to be addressed.

These concerns and this study can never be accomplished or fully scrutinized without a close cooperation between the Egyptian and Israeli Competition Authorities. It is for the benefit of both countries to address this issue which may have adverse effects on their trade relations.

A. Introduction to South-South Cooperation

In 2008 the Union for the Mediterranean (UFM) which was initiative was concluded. It is was launched for the purpose of reinforcing and supporting the prior efforts of neighbourhood policies and partnership agreements between the European Union (EU) on one hand and the Mediterranean partners (Non-EU member states) on the other hand.[66] One of the main purposes of these agreements and efforts is to bring the North – South and South – South partners of the Mediterranean into closer cooperation to ultimately create a Free Trade Area (FTA).[67]

It was assured in numerous occasions that the South – South cooperation is of significant essential value to ensure the success of this optimistic objective which is reaching a regional FTA. Lately in the 8th Ministerial UFM Conference the importance of South – South cooperation in various fields including competition was further stressed. It was described as a "key building block of the EuroMed Free Trade Area". [68] In the same conference the importance of Agadir agreement[69] has been highlighted as a leading example of South – South cooperation and stressed on the importance of its full implementation.[70]

More specifically, further cooperation is needed among partners where competition authorities should be in closer contact and cooperation. There has been a proposal to establish a Mediterranean competition authorities committee which would bring the competition authorities closer together and facilitate gathering and disseminating information.[71] Another proposal to attain this extent of cooperation was to launch a Mediterranean Competition Network (MCN) in line with the European Competition Network functions and objectives.[72] A useful attempt in this regard was the creation of two web sites which supports increasing the awareness of the objectives of the programme and enhances cooperation between the competition authorities of the partner countries.[73]

Furthermore, the importance of South – South cooperation is not only significant for attaining the FTA objective but it has importance regarding the competitiveness and efficiency of these emerging economies.[74] There is a substantial amount of trade between southern countries which may be

[66] Font Salvador, The EuroMed Market Programme: Towards the Free Trade Area, pp. 70 – 6, p. 74, Mediterranean Competition Bulletin, Issue 1, October, 2009.
[67] Zaafrane Hafedh & Azzem Mahjoub, The Euro – Mediterranean Free Trade Zone: Economic Challenges and Social Impacts on the Countries of the South and East Mediterranean, pp. 9 – 32, p. 11 – 12, *in*, Alvaro Vasconcelos & George Joffe, The Barcelona Process: Building a Euro – Mediterranean Regional Community, Frank Cass & Co. Ltd, 2000.
[68] 8th Union for the Mediterranean Trade Ministerial Conference, Brussels, December 9, 2009. *available at,* http://trade.ec.europa.eu/doclib/docs/2009/december/tradoc_145575.pdf (as visited May 9, 2010).
[69] Agadir agreement is a trade agreement concluded between Egypt, Jordan, Morocco and Tunisia which was signed in 2004 and finally entered into force in 2007. For further information on the agreement *available at*, http://www.agadiragreement.org/index.php?option=com_frontpage&Itemid=1 (as visited May 9, 2010)
[70] According to Article 2 (3) one of the main objectives of Agadir Agreement is (among other things) to coordinate and facilitate the implementation of objective competition between member states. There has been a Ministerial meeting in February 18, 2010 to assess the developments and they finally highlighted the mechanism by which the member states are going to further implement the agreement and to abolish any procedures that hinder its effective implementation. For the press release, *available at,* http://www.agadiragreement.org/images/Morroco2010.pdf (as visited May 9, 2010)
[71] Marti Juan, The EuroMed Market competition policy work, p. 123, Mediterranean Competition Bulletin, Issue 1, October, 2009.
[72] Bierwagen Rainer, Adapting competition enforcement tools to Mediterranean economic growth, pp. 90 – 4, p. 91, Mediterranean Competition Bulletin, Issue 1, October, 2009.
[73] The two web sites are still under construction to an extent, www.meda-comp.net and www.meda-comp.org. (as visited, May 8, 2010)
[74] Dabbah Maher, Competition Law and Policy in the Middle East, p. 327, Cambridge University Press, 2007.

restricted by anticompetitive practices reducing consumer welfare in the respective countries. One of the main problems is that competition regimes in the southern countries are still developing and need to be better "placed within stronger systems".[75] Hence, a sole competition authority will less likely be able to investigate a competition law infringement which is not taking place in its territory. In other words, it will be of significant hardship for any competition authority to extend its extra-territorial application of its national competition law to chase companies based in other countries even if it has the competence. Accordingly, cooperation with competition authorities in the other member states is of significant reciprocal value.

In the following a potential infringement of competition law shall be presented. It shall highlight the importance of regional cooperation in order to be able to improve the cooperation between the partners and the enforcement of competition law.

B. The Qualified Industrial Zones Protocol: Background Information

On December 2004, Egypt, Israel and USA signed a trilateral protocol on free trade.[76] This protocol created specific Qualified Industrial zones (QIZ). Only companies in these zones/areas can benefit from this protocol. The main benefit in this protocol is that it "allows Egypt to gain non-reciprocal, duty-free access to U.S. markets"[77] for products which contains at least 10.5% Egyptian and 10.5% Israeli components.[78]

The QIZ has come into force in early 2005. In the beginning there were seven qualified industrial zones. There were around 397 companies registered in these zones. This number increased significantly after there became more than 15 zones.[79] In addition, the number of companies registered in these zones reached 717 companies by the fifth of June 2008.[80] Finally, it was estimated that number of registered companies reached 740 in the first half of 2009.[81]

An aspect of significant importance is that the Egyptian producers are obliged to import certain amount of components from a list of registered Israeli exporters. Any import under this protocol should be imported under the scheme of the QIZ and to satisfy certain conditions as set by the Israeli QIZ authority to be able to benefit from the duty – free waiver.[82] The main imports from Israel are fabrics followed by chemicals, zippers, threads and other accessories and materials.[83]

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[75] *Id,* at, 328.
[76] It should be noted that although in a number of publications this protocol is referred to as "agreement" however, the author will stick to the term "protocol". This is because this is the term chosen by the Egyptian Government. Due to the sensitivity and complexity of the relations, it was chosen to avoid parliamentary scrutiny as agreements or treaties must be ratified by the parliament.
[77] Yadav Vikash, The Political Economy of the Egyptian – Israeli QIZ Trade Agreement, vol. 11, No.1, MERIA, March, 2007.
[78] This percentage has been reduced from the beginning of 2008 from 11.7% to 10.5%. *available at,* http://www.qizegypt.gov.eg/Media_Center.aspx (as visited, May 9, 2010).
[79] QIZ Egypt, About QIZ, Ministry of Trade and Industry, *available at,* http://www.qizegypt.gov.eg/About_QIZ.aspx (as visited, May 7, 2010).
[80] QIZ Egypt, Media Centre, Ministry of Trade and Industry, *available at,* http://www.qizegypt.gov.eg/Media_Center.aspx (as visited, May 8, 2010).
[81] Abdel Rehim Sherifah, Helim Al QIZ Yatabaddad Fi Masan' Al – Malabis (The QIZ dream is overthrown in the garments industry), p. 8, Majalit Al-Ahram Al – Iqtesadi, April 13, 2009.
[82] For further information on the conditions set by the Israeli Ministry of Trade and Industry, *available at,* http://www.israeltrade.gov.il/NR/exeres/86CEBA4D-6CB0-4589-9667-F841CEA11E8D.htm (as visited, May 8, 2010).
[83] QIZ Egypt, Frequently Asked Questions, Ministry of Trade and Industry, *available at,* http://www.qizegypt.gov.eg/About_FAQ.aspx (as visited, May 8, 2010).

The Protocol focuses on the procedures and conditions necessary to satisfy requirements to gain access to the U.S. market. It does not mention anything specific that refers to competition law. However, having specific articles would not have been of any relevance. This is because the Egyptian and Israeli national competition laws have the extra-territorial capacity and competence to monitor any contracts and/or agreements taking place in this field to ensure the freedom of competition.[84]

This case study is intended to strictly draw the attention on competition law aspects which arise from the application of this protocol and the importance of South – South cooperation between partners in the field of competition law. It is not intended to assess its success or failure. Furthermore, it is not intended to delve into its political righteousness in light of the Arab – Israeli conflict.

Moreover, it shall focus on the competition law concerns related to the textile industry and imports from Israel under this protocol. This is because, as shown earlier, "Egyptian companies working under QIZ Protocol primarily import fabrics."[85] This point will be elaborated in later sections.

C. Problematic Indications

After more than five years of enforcing this protocol some indications arose more clearly and hence should be put under scrutiny. The most lenient term to describe these indications is that they are "problematic".

First of all, the QIZ Egypt web site in the section of "frequently asked questions", the following question and answer are stated,

> "Q – Is it true that Israel suppliers charge higher prices than the market?
>
> A - Prices of Israeli products vary depending on the product. According to figures released by the Egyptian Readymade Garments Export Council, whose members are the top ready-made garment manufacturers; these prices range from more expensive to sometimes cheaper than those available in Egypt or elsewhere, depending on the product.
>
> While on average, Israeli products were found to be 20-30% more expensive than world prices, it is necessary to note that the Israeli market is a free and competitive market, which would make it difficult for a single supplier to raise prices to Egyptian buyers in order to exploit the QIZ Protocol. Moreover, Egyptian companies have a broad spectrum of products from which to buy, which again places competition pressures against raising prices."[86]

Secondly, there is a questionnaire on the same web address calling upon the Egyptian textile producers to indicate the percentage by which the prices of the Israeli imports are higher than the international prices.[87]

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[84] For further details on the extra-territorial capacities of the Israeli competition law, *See,* Gal Michal S., Extra-territorial Application of Antitrust – The Case of a Small Economy (Israel), Forthcoming in, Andrew Guzman, Cooperation, Comity, and Competition Policy, (ed., Oxford University Press, 2009).

[85] QIZ Egypt, Frequently Asked Questions, Ministry of Trade and Industry, *available at,* http://www.qizegypt.gov.eg/About_FAQ.aspx (as visited, May 8, 2010).

[86] QIZ Egypt, Frequently Asked Questions, Ministry of Trade and Industry, *available at,* http://www.qizegypt.gov.eg/About_FAQ.aspx (as visited, May 8, 2010).

[87] QIZ Egypt, Questionnaires, Ministry of Trade and Industry, *available at,* http://www.qizegypt.gov.eg/Data_Questionnaires.aspx (as visited, May 8, 2010).

Thirdly, in a number of national newspapers related to the government, independent and opposition, many Egyptian textile producers expressed, among other concerns, their discontent with the exploitative nature of the prices of the Israeli imports. For example, in an interview by Al – Ahram Weekly, an Egyptian producer described the prices of the Israeli imports to be "red hot".[88] In another report, the Israeli importers were accused of exploiting the protocol by raising their prices benefiting from the fact that the Egyptian producers are obliged to import from them.[89]

From the aforementioned, many points are worth noting, firstly, it is officially stated the prices of the imports from Israel are higher 20 – 30% than the international prices. Moreover, it is also evident that the Egyptian government noticed this increase and started doing questionnaires to gather data on the issue. However, there is no available data regarding the efforts it has done in this regard. In addition, it is obvious from the several reports in newspapers that there are many producers who are unsatisfied by the import prices. It increases their costs and accordingly has adverse effects on the competitiveness of their products in the U.S. market. Moreover, the Government, as shown above, claimed that there are no competition law concerns because the Israeli market is free and competitive. This contention needs to be further scrutinized.

D. Responses to the Two Elements Raised by the Egyptian Government

As shown earlier, the Government presented two arguments in its response to the increase of the prices of the Israeli imports under the QIZ. It basically sounded as if it is acceptable to have such an increase without having a reasonable justification. In the same time that this increase is not due to a competition law concern as the Israeli market is free and competitive. In the following, these two arguments shall be explored.

1) Is it normal to have a 20 – 30% increase in price of imports?

As mentioned earlier, on the official web site of the Egyptian government, they admit that the prices of the duty free Israeli imports are higher than the international prices a range of 20 to 30%. The Government does not provide any justification to this increase. Therefore, it is worth exploring, the average of price overcharges that usually occur due to the presence of cartels.

According to the amended estimation made by the U.S Sentencing Commission, cartels raise the retail price by an average of 20% than the normal competitive price.[90] As a result, the U.S. Commission created a presumption that the fine of any cartel should be 20% of the volume of commerce.[91]

On 2005 an interesting study was undertaken. It surveyed more than 800 cases of overcharges imposed by cartels during the preceding 250 years. The results were that the average of overcharges ranges between 19 to 29%.[92] Conner, summarized the findings of other key studies in the following table;[93]

[88] Loza Pierre, Patchy success in textiles, issue. 808, Al – Ahram Weekly, August, 17 – 23, 2006. available at, http://weekly.ahram.org.eg/2006/808/ec2.htm (as visited, May 7, 2010).
[89] Khedr Majdah, Saderat Mahdoodah lil Souq Al – Amreeki, (Limited Exports to the U.S. Market), Issue. 1195, Al – Arabi, May 24, 2009.
[90] The estimation was 10% in the beginning but was raised to 20% of the total volume of business.
[91] Veljanovski Cento, Cartel Fines in Europe: Law, Practice and Deterrence, p. 74 – 80, pp. 65 – 86, W. Comp., Vol. 30 (1), March 2007.
[92] Connor John M. & Yuliya Bolotova, Cartel Overcharges: Survey and Meta – Analysis, p. 5, pp. 1109 – 1137, p. 41, Int. J. of Ind. Organ. , Vol. 24, 2006.
[93] Id, Connor & Bolotova, at, 13.

Reference		Number of Cartels	Average Overcharge	
			Mean	Median
			Percent	
1	Cohen and Scheffman (1989)	5-7	7.7-10.8	7.8-14.0
2	Werden (2003)	13	21	18
3	Posner (2001)	12	49	38
4	Levenstein and Suslow (2002)	22	43	44.5
5	Griffin (1989), private cartels	38	46	44
6	OECD (2003), excluding peaks	12	15.75	12.75
Total, simple average		102-104	30,7	28.1
Total, weighted average		102-104	36.7	34.6

In more precise figures, it was revealed that the estimate of cartel overcharges in USA is within an average of 18% to 37%. As for the European overcharges it was estimated to be of 28% to 54%.[94] In a comprehensive table Conner put his estimates that were based upon 770 observations. This time it was based on the overcharges within the regions as shown in the following table;[95]

Average Overcharges by Cartel Headquarters Location			
Principal Location of Cartel Members	Number of Estimates	Average Overcharge	
		Median percent	Mean percent
USA and CANADA	234	20,25	28,53
Single Nations in W. Europe	136	16,95	47,98
Multiple Nations in W. Europe (EU)	126	42,70	53,66
Asia and Oceania	53	28,80	52,69
Global	248	28,00	50,24
Africa, So.America & E.Europe	23	18,80	23,89

Moreover, in a case of *James Richardson*, an Israeli company which "held a franchise to operate a duty – free store in the airport". It agreed with the perfume manufacturers to maintain "price margins of 30% between itself and other stores in Israel".[96]

From the aforementioned, it is clear that averages of overcharge vary from one place to another and from one study to another. However, it can be easily noticed that the 20 – 30% price increase in the Israeli import prices perfectly fits within all these averages. Moreover, in a clear cut case of price fixing in Israel the overcharge was 30% which is equivalent to the percentage of increase in the Israeli imports. Therefore, this increase should not be perceived as a normal increase or an increase that should not be closely scrutinized from a competition law perspective.

2) Competitiveness of the Israeli economy

[94] Connor John M. & Robert H. Lande, The size of cartel overcharges: Implications for U.S. and EU fining policies, p. 983. pp. 983 – 1022, Vol. 51, No. 4, Winter 2006.
[95] Id, Connor and Lande, at, 1012.
[96] Gal Michal S., Extra-territorial Application of Antitrust – The Case of a Small Economy (Israel), Forthcoming in, Andrew Guzman, Cooperation, Comity, and Competition Policy, (ed., Oxford University Press, 2009).

The Israeli competition law is called The Restrictive Business Practices Law 1988.[97] It has been developing throughout the years. So far around nine amendments took place since it was first promulgated.[98]

In the early days of competition law the Government was in favour of a more interventionist approach where most sectors were heavily regulated. As a result, this policy led to the creation of several monopolies and oligopolies within a number of markets which had anticompetitive effects. Among these affected sectors was that of agricultural products (e.g. cotton).[99]

It should be noted that politics highly influence competition law enforcement in Israel. Big businesses tend to exert pressure to stop the Israeli Antitrust Authority (IAA) from initiating or stopping the investigation or dropping the charges. A prominent example of the political influences is that the past prime minister in 2005 appointed a person who had no prior expertise in competition law to be the director general of the IAA. In the same time, the majority of the Israeli public still lack sufficient awareness about the importance of competition law and its benefits.[100]

There are several ways by which the law can be excluded from application. Although Section 2 of the law prohibits horizontal restraints, section 3 provides a long list of exemptions to it.[101] Most importantly, the fourth exception in that list excludes agricultural products including field crops from the application of the law. Of course it should be emphasized here that cotton is a field crop.

Another method of evading the law is that it grants the right to the Ministry of Industry, Trade and Labour to exempt anticompetitive agreements for purposes of foreign policy and national security. It is neither clear what are the foreign policy concerns that would justify this exemption nor those related to national security.

In addition, Article 10 gives the right to firms to apply for authorizing their anticompetitive agreements. This article provides a long list of situations where the competent entity may grant authorization. Subsection (7) in that article stipulates that an agreement can be authorized in case it would have an effect on, "Improving the balance of payments of the State by reducing imports or reducing the price of imports or by increasing exports and their feasibility." Finally, the director general of the IAA has the right to grant exemption after fulfilling certain criteria. From 1989 – 2006 there were 450 requests were 300 were unconditionally exempted while 110 were conditionally exempted.[102] In 2005 alone, the IAA dealt with 90 requests where they were all cleared with or without conditions.[103]

Finally, addressing the technical experience and abilities of the IAA it was noted that it is substantially limited. This is because the Government has not been in favour of a strong competition law therein. Moreover, Dabbah suggests that Israel should abolish its present system of competition law and to adopt a new modern competition law regime. He proposes that would better serve the modernization and liberalization efforts of the government.[104]

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[97] The author is aware that there was the law of 1959 however for the purposes of this paper there will be a focus on this more recent version. For a full version of the law, *available at,* http://www.antitrust.gov.il/Files/HPLinks/RTP%20Law.pdf (as visited, May 7, 2010).
[98] Dabbah Maher, Competition Law and Policy in the Middle East, p. 39, Cambridge Uni. Press, 2007.
[99] *Id,* Dabbah, at, 37 – 38.
[100] *Id,* Dabbah, at, 39 – 41, 72.
[101] For further information about these exceptions, *available at,* http://www.oecd.org/dataoecd/34/37/2488835.pdf(as visited, May 8, 2010).
[102] *Supra,* Dabbah, at, 48 – 49.
[103] Competition Committee, Annual Report on Competition Policy Developments in Israel: 2005 – 2006, p. 8, OECD, 2006.
[104] *Supra,* Dabbah, at, 59, 76 – 77.

From the previously mentioned it is quite obvious that the Israeli market is neither as free nor competitive as it was alleged by the Egyptian government on behalf of Israel. Israel suffers hardships due to prior and persistent monopolies and oligopolies. Moreover, the IAA appears to be marginalized within the economy due to the political influences, lack of experience and the presence of lots of exemptions throughout the law which reduces its powers. Finally, it seems to be that the agricultural sector which is heavily linked to the imported fabrics from Israel is not competitive sector in the economy.

E. The Egyptian Competition Law (ECL)

1) Competence

Article 1 of the Law 3 of 2005 on the Protection of Competition and the Prohibition of the Monopolistic Practices stipulates, "[e]conomic activities shall be undertaken in a manner that does not prevent, restrict or harm the freedom of competition…" This entails that the sole criterion that identifies those who are addressed by the law is whether they undertake an economic activity or not. In other words, any person who is undertaking an economic activity is subject to the provisions of this law.[105]

To serve this purpose, Article 2(a) provides a wide definition of what is a 'person'. It is defined as any,

> "Natural and juristic persons, economic entities, unions, financial associations and groupings, groups of persons, whatever their means of incorporation, and other related parties as set forth in the Executive Regulations concurrently with the objectives and provisions of this Law."

From the above, it is clear that it applies to any person disregarding its nationality or place of doing business. Accordingly, it is applicable on any market player even if it is not based in Egypt. Additionally, Article 5 addressed the issue of extra-territoriality where it stipulates,

> "The provisions of this Law shall apply to acts committed abroad should these acts result into the prevention, restriction or harm of the freedom of competition in Egypt and which constitute crimes under this Law."

From the above mentioned article it is clear that it expands the jurisdiction of the ECL through giving it extra-territorial powers. However, it sets an important limitation which is that these anticompetitive practices should be committed abroad. Moreover, they should amount to the prevention, restriction or harm of the freedom of competition in Egypt. Obviously, Egypt adopts an effects based approach as it requires the occurrence of an adverse effect on the Egyptian economy. Therefore, one can infer that ECL applies to any person undertaking an economic activity and engages in an anticompetitive practice that has an adverse effect on the Egyptian market.

Besides, article 11 of the ECL states that the Egyptian Competition Authority (ECA) has the right to receive complaints regarding anticompetitive practices affecting the national market and to undertake inspections on its own initiative without having to wait to receive a complaint or a request from any person.[106] This latter right gives more freedom and autonomy to the ECA to tackle various sectors in the economy.

[105] For the exceptions to this general rule *see,* Article 9 & 10 of the ECL.
[106] *See*, Article 11 of the ECL.

2) Prohibitions in the ECL

The ECL has three main articles prohibiting the different anticompetitive practices.[107] These articles cover horizontal, vertical restraints and abuse of dominance. It provides an exhaustive list of horizontal restraints that are prohibited *per se*. The law prohibits the presence of the contract or agreement even if it was not put into force. It is enough for the ECA to prove the presence of the anticompetitive contract or agreement without any need to prove its effect on the market.[108] In other words, all cartels are prohibited by their object and not effect.

As for the vertical restraints the law provided a benchmark by which agreements should be assessed. It stipulated in Article 7 that, "[a]greements or contracts between a Person and any of its supplier or clients are prohibited if they are intended to restrict competition." It is clear that in this case the ECA has the burden of proof of the illicit intention. It also has the burden to prove that this contract or agreement actually restricts competition. Article 12 of the Executive Regulations expands on the rule of reason (effects) approach. It stipulates that there are several considerations that should be taken into account when evaluating whether a contract or agreement is restricting competition. It brings up the effect of the agreement, whether there are benefits to the consumer, quality considerations and finally, the commercial customs in the respective sector. Finally, Article 8 provides an exhaustive list of actions that a dominant firm should refrain from engaging in.[109] Some of these acts are prohibited *per se* while others require rule of reason detailed analysis.

From the aforementioned it appears that the ECL and the ECA have the sufficient powers and capacity to tackle any anticompetitive practice taking place within Egypt or extra-territorially.

F. The Likelihood of an Infringement

In this section there will be an outline of a possible relevant product market for the purposes of assessing whether there is any potential anticompetitive practice therein. According to Article (3) of the ECL the relevant market consists of the relevant product and relevant geographical area. Article (6) of the Law provides a list of criteria that should be taken into consideration during the identification of the two former elements.

1) Relevant Product

It is defined as the products that can be considered, from the consumers' point of view, practical and objective substitutes to each other. In determining such products, the following criteria should be taken into consideration,

1. The resemblance of the products in the characteristics and usage.
2. The probability that the buyers shift from a certain product to another as a result of the relative change in price or in any other competitive factors.
3. If the sellers take their commercial decisions on basis of the shift of the buyers from the products to other products as a result to the relative change in prices or any other competitive factors.
4. The relative ease by which other persons can enter the market of the product.
5. The availability of the substitutive products before the consumer.[110]

[107] For detailed analysis of the Egyptian Competition Law, *see,* Dabbah Maher, Competition Law and Policy in the Middle East, Cambridge Uni. Press, 2007.
[108] ECA, Annual Report, p. 12, 2006 – 2007.
[109] *Supra,* Annual Report, at, 12.
[110] Article 6 of the Executive Regulations issued by the Prime Ministerial decree no. 1316 of 2005.

First of all, from the aforementioned list, it can be noticed that the imported fabrics are substantially homogonous regarding their characteristics and usage in creating apparel and readymade garments. Therefore, more likely it satisfies the first criterion. Secondly, Egyptian importers can not import these fabrics from other sources worldwide. This is because they are obliged to satisfy the 10.5% of the Israeli input to benefit from the QIZ protocol. Accordingly, their market becomes limited to the Israeli exporters. This has been evident since the importers resumed importing from the Israeli companies with prices which are higher than the international prices 20 – 30% given the availability of cheaper substitutes worldwide. Furthermore, there are clear requirements that the Israeli products that are exported to Egypt under this agreement can only pass under the scheme of QIZ. This makes it impossible for Egyptian producers to look for cheaper alternatives in the Israeli market so long as they are not on the list provided by the Israeli QIZ Authorities. This was even clearly mentioned in Article II (D) (2), where it is clearly stated that,

> "Only Israeli companies operating in areas under Israel's customs' control shall be recognized for the purposes of applying the Israeli contribution ..."

Thirdly, it seems quite obvious that the Israeli exporters are not threatened by any foreign competition which gives them the leverage to increase their prices to that extent without affecting their market shares. Fourthly, having a look on the QIZ protocol and the requirements set by the Egyptian and Israeli governments it will be noted that there are lots of procedural requirements that needs to be fulfilled before an exporter joins the market.[111] This is something that reduces the relative ease of a person to join the market of exporting fabrics to Egypt and hence constitutes substantially significant entry barriers. Fifthly, as mentioned earlier, there are no substitutes to these Israeli imports which are needed to satisfy the 10.5%. If there were substitutes then there would not have been a significant problem.

Finally, as noted earlier according to the data provided by the Egyptian QIZ authority, most of the imports from Israel are fabrics. Moreover, according to the list provide by the Israeli authorities' web page, there are 680 Egyptian companies listed. Only 90 companies from this list are not importing fabrics from Israel.[112] In other words, almost 87% of the importers import fabrics. The remaining 13% are divided among other different sectors.

Therefore, the relevant product is imported fabrics.

2) Geographical area

The Executive Regulations defines the geographical area as,

> "… the geographical area where the circumstances of competition are homogenous. In this regard, the potential probabilities of competition shall be taken into consideration and any of the following criteria,
>
> 1. The ability of the buyers to move between geographical areas as a result of the relative changes in prices or in other competitive factors.

[111] For a list of procedures needed by Israeli exporters to be registered under this protocol, *available at;* http://www.moital.gov.il/NR/exeres/86CEBA4D-6CB0-4589-9667-F841CEA11E8D.htm (as visited, May 7, 2010). for a list of the procedures needed by an Egyptian importer to be registered under the QIZ, *available at;* http://www.qizegypt.gov.eg/Procedures_Registration.aspx(as visited, May 7, 2010).

[112] For a complete list as provided by the Ministry of Industry, Trade and Labour, *available at,* http://www.moital.gov.il/NR/rdonlyres/36DBBBD2-672E-4D0B-AFFD-91F7E15588ED/0/QIZ_Companies_Details_Portrait_Overall.pdf (as visited, May 8, 2010).

2. Whether the buyers take their commercial decisions on basis of the movement of buyers between different geographical areas due to the relative changes in prices or in other competitive factors.
3. The relative ease that enables other persons to enter the relevant market.
4. The transportation costs between geographical areas, including the insurance costs and the required duration to provide the geographical area with the relevant product from other markets or geographical areas or from abroad.
5. The customs tariffs and the non-tariff barriers on both domestic and international levels."

However, none of these criteria is applicable in the context of this case. This is because the geographical areas are clearly defined in the protocol and its annexes. There are specified zones in Israel from which exports can be made. These exports are also imported into specified zones in Egypt. This makes the application of this criteria is not of great importance.

Even in case these criteria would be applied in this case the conclusion will remain limited to those areas specified in the protocol and its annexes. As for the third criterion regarding the relative ease of entering the relevant market, it has been discussed earlier in the context of the relevant product.

Therefore, the geographical area is the imports from Israel to the specified zones in Egypt.[113]

3) Relevant Market

Therefore, the relevant market is "fabrics imported from Israel to the specified zones in Egypt".

G. Market Characteristics and Facilitating Conditions

After defining the market it is important to consider the characteristics of this market. According to a competition literature there are certain market characteristics that facilitate and stabilize the occurrence of anticompetitive practices through influencing the strategies of companies.[114]

1) Number of competitors and concentration

According to this characteristic the fewer the number of suppliers the higher the probability that they may collude. This may be due to the increase in interdependence of suppliers. In addition, concentration of suppliers is an important detriment. Even there is a relatively big number of suppliers this number might not reflect the reality.[115] A limited number of suppliers 3 or 4 suppliers may be controlling a big market share and hence have market power and are dominant.[116]

In this case before hand there is no published information on the number of Israeli suppliers. However, given the previous data and indications it is not expected to be of a significant number and the probability of high concentration is more likely to be present.

[113] The 1) Alexandria , Greater Cairo Area; includes the following: 2) Nasr City, 3) Shoubra El Kheima, 4) South Giza, 5) 15th of May, 6) 10th of Ramadan, 7) 6th of October, 8) El Obour, 9) Badr, 10) City of Giza, 11) Kalioub, 12) Gesr Al Suez, Other areas in Cairo, Middle Delta Governorates: 13, Dakahleya 14) Damietta, 15) Gharbeya, 16) Monofeya, Suez Canal Area: 17) Ismailia, 18) Port Said, 19) Suez. As listed in, http://www.qizegypt.gov.eg/About_QualifiedLocations.aspx (as visited, May 8, 2010).
[114] Stroux Sigrid, US and EC Oligopoly Control, p. 17, Kluwer Law International, 2004.
[115] *Id,* at, 18 – 19.
[116] Under Section 19 of the Act against the Restraint of Competition in Germany firms may be found dominant if three or less undertakings reach a combined market share of at least 50 per cent; or if five or less undertakings have a combined market share of at least two-thirds.

2) Countervailing competitive power and entry barriers

This characteristic refers to the likelihood of competitors being able to exert competitive pressure on the other competitors who decide to raise their prices. In this situation the other competitors (who did not rise their prices) may choose to increase their output (if they have excess capacity) and benefit from their lower prices.[117]

Another important possible scenario is that if these undertakings raise their prices this may attract potential competitors who may be able to enter the market and produce on the lower prices and hence exerting competitive pressure on the other market players. However, many doubts were raised regarding this premise.[118] It was argued that high prices do not attract in and of themselves new entrants. This is because market players can immediately cut their prices once the potential competitor enters the market. The only possible scenario where high prices may attract new entrants is when the prices are high due to the inefficiency of the market players. Accordingly, high prices may attract potential rivals if the market players are inefficient but not otherwise.[119]

Moreover, there are significant entry barriers as has been shown above. According to the protocol exporters should satisfy detailed conditions to be qualified to export its products. These conditions are set by both the Egyptian and Israeli authorities. This creates a substantial entry barrier towards any entrant and thus limiting any "hit and run entry" if a more efficient potential exporter aims to benefit from the high prices of exports.[120]

3) Homogeneity of products & transparency

The more products are homogenous the higher the likelihood of collusion. According to the Israeli regulations the exporters have to submit the details and specifications of their exports and its prices. It is not clear the extent by which the Israeli authorities benefits from this information and whether it is disseminated among the exporters. In case information regarding specifications or costs or prices are redistributed this may increase market transparency and may facilitate collusion.[121]

4) Countervailing buyers' power

In situations where buyers are limited in number they are more likely to be able to arrange and agree on a certain buying strategy. This enables them a higher maker power to bargain and possibly force their conditions and lower purchasing prices harming the suppliers.[122] However, if they are dispersed this possibility will be less likely to occur as they will lose any "controlling purchasing power".[123]

H. Conclusion

In the previous discussion the importance of South – South cooperation in the field of competition law enforcement was highlighted. What followed is a case study where the QIZ protocol was scrutinized. The result was that there are indications that insinuate that there may be escalating competition law concerns. Firstly, it is stated on the Egyptian Government web site that the prices of the Israeli imports are higher than the international prices by 20 to 30%. It was also shown that the Government made questionnaires to know more about this increase but there is no evidence that any further efforts took place in this regard. In addition, it was mentioned that the Israeli market is free and competitive.

[117] *Supra*, Stroux, at, 23 – 4.
[118] Ezrachi Ariel & David Gilo, The Darker Side of the Moon: Assessment of Excessive Pricing, pp. 169 – 85, p. 173, *in*, Ariel Ezrachi, Article 82 EC: Reflections on its Recent Evolution, Vol. 12, Studies of the Oxford Institute of European and Comparative Law, Hart Publishing, 2009.
[119] For a detailed analysis of this argument, Ezrachi Ariel & David Gilo, Are Excessive Prices Really Self-Correcting?, pp. 249 – 268, Journal of Competition Law and Economics, Issue 5(2), 2009.
[120] *See generally*, *Supra*, Stroux, at, 22.
[121] Jones Alison & Brenda Sufrin, EC Competition Law: Texts Cases, and Materials, p. 863, 3rd ed., 2008.
[122] *Supra*, Stroux, at, 24.
[123] *Supra*, Jones, at, 864.

Moreover, there have been calls among the Egyptian importers complaining about the exploitative prices of the Israeli imports.

In the following section, the two elements raised by the Egyptian government were explored. The outcome was that the 20 – 30% increase in price falls within the normal average of the overcharges by cartels worldwide. It also resembles the overcharge fixed in one of the competition law cases in Israel at 30%. This implies that there are doubts regarding the true nature and reason behind this significant overcharge. As for the second element, it was revealed that the Israeli market can hardly be described as "free and competitive". It has a substantial history of monopolies and oligopolies and difficulties in enforcement. In the following section the competence of the Egyptian competition law was explored. It was shown that the practices of the Israeli exporters fall within the scope of jurisdiction of the ECL and that the ECA has competence and power to initiate such an inspection.

Then, the relevant market was presented where the relevant product and the geographical area were identified. It was reached that the relevant market is "fabrics imported from Israel to the specified zones in Egypt". It was shown that the relevant market has high entry barriers where it is limited to the lists of exporters exporting from a certain zone and registered with the Israeli government. This highly restricted market creates an atmosphere which increases the probabilities of the presence of anticompetitive practices. When it comes to market characteristics it was noted that there are few characteristics that may facilitate collusion.

However, without cooperation with the IAA the ECA will not be able to scrutinize the conduct of the Israeli exporters. This is because most of the presented data needs to be further studied before any decision may be reached. The ECA needs to obtain the lists of the Israeli exporters, their structure, and size and market shares. In addition, the ECA will not be able to get this information and others about the conduct of the market players unless it cooperates with the IAA.

Moreover, this cooperation is important for both the Egyptian and Israeli economies to their increase trade cooperation. According to the official publications of the U.S. Federal Trade Statistics, it was revealed that the U.S. imports from Egypt from 2004 to 2008 for Apparel and household goods – cotton, were as follows; after the protocol came into force exports rose 35% in 2006. However, the rate of increase became 4.23% in 2007 and 5.7% in 2008.[124] This shows a slow increase in exports that might not be satisfactory. Certainly, one of the causes is the high prices of the Israeli imports.[125] Furthermore, there were reports that there are 486 Egyptian producers who withdrew from the protocol due to their inability to export to the U.S. market.[126] Another reason also for studying this case is to increase the competitiveness of the prices of the Egyptian apparel and garments. This is because it is competing with countries such as China, Vietnam and Indonesia where they are attaining great progress and exporting on very competitive prices and high qualities.[127] A natural consequence of addressing this issue is that the prices of the Egyptian imports to the U.S. markets will be more competitive and hence Israeli exports will increase to Egypt as a backward linkage.

[124] For a full list of U.S. imports from Egypt from 2004 to 2008, available at; http://www.census.gov/foreign-trade/statistics/product/enduse/imports/c7290.html (as visited, May 8, 2010).
[125] Similar figures have been repeatedly published in newspapers and calls were made to address this problem.
[126] Further details *available at;* http://www.aleqt.com/2008/02/09/artcile_130787.html (as visited, May 8, 2010).
[127] Tolba Majdi, Hasilat Al-QIZ A'ar A'la Misr, (The Revenue from the QIZ is unacceptable to Egypt), Jareedit Al-A'lam Al-Youm, p. 1, April 6, 2009.

Jordan's New Draft Competition Law: Achievement Made, Improvement Required[1]

By
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MORITZ ADER
LÉA COLLET

1.- Objective of the International Workshop[3] on September 27th 2010

Jordan was one of the first Arab countries to pass a competition law in 2004[4] in order to foster the country's economic development and to adapt to international standards. Although its implementation seemed to be successful, the new law revealed in the course of its assessment several shortcomings. In 2009 KAS Amman and Talal Abu-Ghazaleh and Company International (TAGI) organized a first joint workshop on "National Strategy Towards a Modern Competition Law for Jordan" to define the substantial principles of a modern competition law and to develop an adequate law for Jordan according to international best-practice experiences. In the end of this workshop KAS and TAGI agreed on forming a joint working group of judicial and economic experts to continue working on possible amendments of the 2004 Jordanian competition law and its implementation. The workshop "Jordan's New Draft Competition Law: Achievement Made, Improvement Required" took place under the patronage of the Minister of Industry and Trade, HE Amer Al-Hadidi. High-ranking Arab experts from the political, economic, judicial and academic sector discussed during the workshop the new draft competition law for Jordan and possible amendments. The experts especially focused on a comparison between the Jordanian experiences and insights of other Arab states.

The Workshop had the following panel items:
I - Practical Needs for Amending Competition Law
II - The Jordanian Experience in Comparison with Other Countries in the Arab Region
III - Presentation of the Draft Competition Law by the Joint Working Group of Talal Abu-Ghazaleh Organization and KAS Amman Office

2. –Workshop Speakers presentations[5]

HE Amer Al-Hadidi, **Minister for Industry and Trade of the Hashemite Kingdom**, identified the significance of a sound competition law as a key factor for a sustainable economy. A modern competition law contributes contributes to improve the living standard, supports the economic activities of small and medium-sized companies and enables them to compete in the global market. He pointed out to the GDP increase of 7.8% in Jordan last year and emphasized Jordan's pioneering role in the Middle East regarding the implementation of the competition law. He furthermore

[1] 101007-Veranstaltungsbereicht TAGORG
[2] Konrad-Adenauer-Stiftung e.V. - Auslandsbüro Jordanien - October 04th, 2010 www.kas.de/Amman
[3] Under the patronage H.E. Amer Al-Hadidi, Ministry for Industry and Trade - Amman – Jordan, was organised an International Workshop on September 27th, 2010, at Talal Abu-Ghazaleh Forum in Talal Abu-Ghazaleh College of Business Amman, Jordan by KAS Konrad-Adenauer-Stiftung Amman Office Resident Representative PD Dr. Martin Beck and Talal Abu-Ghazaleh and Company International (TAGI), Mustafa Nasereddin, Senior Executive Director
[4] Law No. 33 of the Year 2004
[5] The press reports are available at: http://www.ameinfo.com/243299.html

indicated that there is an increasing need of training courses to acquire additional qualified employees in the Ministry and informed the participants that 280 competition cases were dealt with by the responsible institutions so far.

Mustafa Naserredin, **Senior Executive Director of Talal Abu-Ghazaleh Organization** opened the international workshop by pointing at the relevance of a suitable economic environment in the framework of a sustainable economic development to foster the competitiveness of the private sector. He stressed that expanding investments and promoting economic development are the key factors for enhancing economic progress. He underlined the importance of improving the competition law with respect to the realization of the Millennium Development Goals in Jordan.

Dr. Martin Beck Resident Representative of the KAS Konrad-Adenauer-Stiftung Amman Office, emphasized in his welcome speech the relevance of an effective competition law for the modernisation process in Jordan. An effective law adapted to international standards would increase direct foreign investment, cut monopolies and oligopolies and promote a fair price system. All Jordanians would therefore benefit from a modern competition law which is tailored to the needs of the country. That the workshop offers decision makers the opportunity to learn more about the amended competition law thereby improving its implementation.

Hussein Al-Hamadani, **Director of the Competition Directorate of the Ministry of Industry and Trade,** in the *first workshop panel, touched upon the issue of "Practical Needs for amending Competition Law"*. He explained the necessity to amend the competition law by highlighting the need to facilitate the tasks of judges, to promote the prosecution of infringements of the completion law and new provisions to the benefit of consumers. In the course of his lecture, he discussed in detail the revised articles of the new competition law. The amendment of Article 6, which for the first time considers price rigging as an illegal practice, was at the heart of his analysis. The ministry would strictly deal with price rigging and use comprehensive studies and foreign expert assistance. He then argued that an article to guarantee the forwarding of all required information for a competition case to the Ministry of Industry and Trade should be included in the draft competition law. Until now, all parties involved are not forced to transfer these data to the ministry. This new provision is closely linked to the general aim to accelerate the long-winded examination processes. According to Article 17 of the amended version the evaluation of the information should be based on a comprehensive legal study by the ministry, which will be supplemented by an economic study if a violation of the competition law is suspected. Although the ministerial study has no binding character, the parties involved should seek for the opinion of the ministry in reference to the competition case. The 2004 competition law requests the ministry in particular to conduct studies on monopoly building and distorting competition. The Court of First Instance is, however, the institution empowered to finally decide in competition cases. He closed his lecture informing the participants that the penalty following a proven violation of the law would now range between 5,000 JD to 100,000 JD (back than it was 1,000 JD to 50,000 JD).

Mohamed Ben Fraj, **Competition Expert and Senior Advisor to the Minister of Trade in Tunisia,** started the *second panel with a lecture on "The Jordanian Experience in Comparison with other Countries in the Arab Region"* and stressed that there is a lack of long-time experiences in the implementation of a sound competition law in the Arab region. At the end of the 1990s, Tunisia, Algeria and Mauritania were the first that implemented a competition law, followed by Morocco, Jordan, Egypt and Saudi Arabia between 2000 and 2005 as well as Syria and Qatar after 2005. In this context, he pointed at the common challenges these economies had to face. They feared negative effects of the transformation process to market economies, the integration into a regional trade association and price liberalization policies. In order to avoid monopolies and all kinds of violations of market power, structural market reforms had become necessary. As a country whose free and open economic system is based in large part on services Jordan should have a particular interest in implementing a comprehensive competition law. Both the Arab states in the Middle East and in the

Maghreb have in common that they strive for the adoption of international standards in competition law. However, it should not be ignored that terms differ from one country to another, such as for the definition of taking advantage of a dominant economic position, which is characterized as unlawful. Further differences exist with regard to the scope and implementation of competition laws. The competition law in the Maghreb, Jordan and Syria covers all sectors of the economy while the public utilities sector in Egypt, Saudi Arabia and Qatar is not covered. In respect of the institutional aspect, the countries of the Maghreb stood out by the fact that special organisations, empowered with advisory and jurisdictional competences, are involved in the decision- making process. Though the Jordanian competition law enjoys a good reputation on the international level, it now faces the challenges of optimising its implementation trough thorough regulation. He raised concerns about the limited time and resources of the Court of First Instance. Therefore, further reforms should aim at establishing mechanisms for legal consultation in competition cases. The competition directorate is not equipped with the resources necessary to guarantee a comprehensive prosecution of anticompetitive behaviour and is not an institution independent form the Ministry. On this account, future reforms should seek to create an independent body. His closing recommendation was to expand the capacities of the competition directorate and to carry out awareness campaigns in order to sensibilize both consumers and producers for the amended competition law.

General discussion. Several times attendees referred to Article 19, which authorizes the Minister for Industry and Trade to either transfer a potential violation of the competition law to the Court of First Instance or to address the matter itself. It was stated that the Ministry should transfer the competition case to the Court in any case. According to Mr. Al Hamadani this law reflects the international practice and allows corporations engaged in the violation of the competition law to correct their behaviour in a timely manner. If the Ministry was called to forward every competition case to the general prosecutor, the decision-making would be delayed. This would allow companies violating the competition law to continue their unlawful behaviour over a longer term without any penalty. 46 out of 51 competition cases were dealt with by the Ministry so far while 5 were forwarded to the Court of First Instance. Aside from these arguments, he clarified that the findings of the Ministry do not have any binding character. However, its opinion should be considered in all cases. Moreover, attendees of the workshop raised the concern that foreign companies could be discouraged to invest in Jordan as the Ministry requires the provision of comprehensive data to investigate a potential violation of the competition law. It should be ensured that the Ministry only gets access to those data that are required to assess if there was a violation. Hussein Al-Hamadani emphasized that the 2004 competition law already only guarantees the forwarding of data required by the Ministry for the purpose of investigating unfair competition. The implementation and functioning of the competition law is of utmost importance for foreign companies and investors. All information provided by the companies and investors will be treated confidentially. Hussein Al-Hamadani assured to carefully consider the staff training needs and to use the fees charged in connection with the violation of the competition law for financing training courses in competition law.

In the context of the third panel presentation "Presentation of the Draft Competition Law ", Dr. Amjad Al Schraideh, judge at North Amman Court, Dr. Qais Mahafzah, lawyer and Assistant Professor at the Faculty of Law at the University of Jordan, Omar N. Atout, Senior Partner of Nabulsi & Atout Law Firm and Tareq Abu Saleem, legal researcher of the Legislation and Opinion Bureau in Amman, presented the outcomes of the joint working group of TAGI and KAS Amman.

Dr. Amjad Al Shraideh, judge at North Amman Court underlined the fruitful cooperation within the joint working group, which has worked for the implementation of a modern competition law in Jordan for more than one year. The consultations about amendments of the competition law were geared to avoid limitations concerning the exchange of goods and individuals, to foster innovations and to support the local market in expanding the institutional capacities. He said that in order to protect small- and medium-sized enterprises, Article 4 of the competition law is of fundamental significance, it defines the conditions required to facilitate mergers between small- and medium-

seized enterprises, which in turn enables them to compete on an international level. Nevertheless, some sectors within the Jordanian economy, as for example the sector of telecommunication, energy and banking, are still controlled by only a few companies. The challenge at this stage is to find a balanced approach between the prosecution of competition violations and the support of local markets. Up to what extent is the Jordanian industry in a position to compete internationally and able to engage in competition with foreign companies? Does the process of economic opening in Jordan implicate a financial burden on the state, which could find itself in a situation where it has to veil the lack of competitive Jordanian products through state subsidies? These questions were at the centre of attention during the final discussion which was characterized by a highly active involvement of the participants. Several attendees expressed the fear that opening Jordan's economy could hit many national companies. The lack of competitiveness would put additional burdens on the fiscal scope of the state in the medium term. Dr. Amjad Al Shraideh argued that the Jordanian economy is actually able to compete in the sectors of medical provision and electronics.

Dr. Qais Mahafzah,lawyer and Assistant Professor at the Faculty of Law at the University of Jordan, spoke in favour of the adjustment of the Jordanian competition law to the WTO-agreements, Mohamed Ben Fraj emphasized the importance of a solid competition law with regard to the Jordanian policy of trade, investment and prices.

Mohamed Ben Fraj shared the concern about the fiscal burden and pointed out to the limited financial abilities Jordan disposes of to subsidize national companies. On the other side, small- and medium-seized enterprises partly would be excluded from the liberalization-process.

3.- Closing remarks

Mustafa Naserredin thanked all members of the joint working group for a great and successful cooperation. One should not ask if, but what industries should be supported through subsidies. This is also a common practice in both the EU and the US.

Dr. Martin Beck expressed his gratitude towards the participants of the workshop for a highly intensive and productive discussion. According to him, a sound knowledge among decision-makers both of law and economics would be crucial to assure a sustainable and efficient implementation of the competition law. In this respect, the workshop also revealed that politics are much more important than it seems to be at first sight. For instance, should Jordan protect its national industry against international competition? If so, up to what degree? Moreover, what does the law mean for the reputation of Jordan in the international context? He highlighted the importance of meeting global standards in competition law, which would be to the benefit of the Jordanian economy and people. Dr. Martin Beck thanked Talal Abu Ghazaleh Organization and Mustafa Nasereddin in particular for a very successful cooperation.

4.- Conclusion

The drafting and implementation of an efficient competition law for Jordan, which meets international standards, is of utmost importance to guarantee the functioning of market competitiveness. The joint workshop of TAGI and KAS Amman offered an opportunity for experts with political, economic, legal and academic background to read up on the amendments of the competition law and to bring in new ideas during the discussion. The very lively and productive exchange of opinions and thoughts revealed a great interest in additional information concerning the topic. Again, with the Minister of Industry and Trade, HE Amer Al-Hadidi, KAS Amman was able to win a high-ranking member of the Jordanian government for patronage of the event. This workshop made evident that KAS Amman succeeded in resuming the fruitful and intensive cooperation with Talal Abu-Ghazaleh Organization and could feed in expertise in the competition law. The media coverage of the event reflects the successful work of KAS Amman in the field of economic policy in Jordan. 17 Arabic and four English news sources reported.

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National Strategy towards a Modern Competition Law in the Hashemite Kingdom of JORDAN
Extracts of the Joint Working Group Report March 2010

International Workshop & Join Working Group. On June 22, 2009, and under an official patronage of his Excellency the Minister of Trade and Industry Eng. Amer Al-Hadidi, an international workshop on the competition law was convened in Talal Abu-Ghazaleh Forum at Talal Abu-Ghazaleh College of Business (the German Jordanian University). The event was arranged and sponsored by Konrad Adenauer Stiftung – Amman. The workshop elected five working groups mandated to present a strategy, studying the current competition law and rectifying some minor aspects in its main body. WG members: Dr. Amjad Shraydeh; Mr. Hussein Al-Hamadani; Dr. Sakher Khasawneh; Mr. Tarek Abu-Saleem; Lawyer Omar Al-Atout; Dr. Qais mahafza; Mr. Ahmad Alousaily; Lawyer Jwan Halassa The first provisional law no. 49-2002 and the current law no. 33-2004, were drafted after the European Communities competition rules.

Recommendations from the Working Group:

Market definition and classifications. The relevant market two-sided (product and geographic) classification system. To understand and even easily adopt up-t-date arguments and theories currently prevailing in the comparative competition laws – mainly the competition law of the continental Europe. Oligopoly markets are not regulated although several markets could be regulated under such a category as telecommunication, banking, air travel and electricity industries.

Anti-competitive conducts standards. The law does not fully take advantage of the varied standards used by modern competition laws such as – without exhaustion – the competition law of the continental Europe.A practical standard depending on the factual effect or harm which a given conduct/decision is likely to cause in the concerned market; such *rule of reason* is the one recommended to dilute the *per se* standards suggested or otherwise connoted by some provisions within articles 6 and 8 - concerning verification and oppression of anti-competition unilateral conducts made by dominant undertakings- in the current competition law.

Economic concentration schemes standard test according to which are approved/refused shall be very finely tuned to fit the characteristics of the local economy and to achieve the competition advancement in the market and the customer welfare.

The enforcement authority should be an independent body not following any administrative reference or ministry. To enhance independence, the chairman of the proposed entity shall either be appointed by a royal decree or by the head of the Judiciary Council.

To give individuals the right to directly invoke competition law before courts without the need to be approved or otherwise represented by the prosecution.

THE KONRAD ADENAUER STIFTUNG

Since 1982 the Konrad Adenauer Stiftung (KAS) has been represented in Amman. In addition to its responsibility in Jordan, the Amman office is also in charge of activities in Lebanon.

The Mediterranean Dialogue is of key significance for our work in the region. The cooperation, therefore, with the Mediterranean states should be strengthened to enhance stability, security and prosperity. There is an increasing interest of our office activities in the developments in Iraq and Syria. As a political foundation we foster economic, political and societal reform approaches in the countries of the region.

In particular we promote:

• Democratic institutions and the principle of Rule of Law
• Civil society, especially the media and non-governmental institutions
• Interreligious and intercultural dialogue
• The concept of Social Market Economy
• Security policy dialogue and the Mediterranean Dialogue
• Cooperation between Middle Eastern states and Europe

In doing so we are committed to the principle of partnership: We look for partners who share our aims and who are ready to carry out projects among the civil society, the government, universities, and the media etc.

Further information on the work of KAS Amman can be accessed through our homepage www.kas.de/amman in German, English and also in Arabic and French. Additionally, we provide information about our activities in a quarterly newsletter.

Promotion of the Concept of Social Market Economy

The international financial and economic crisis illustrated that the global economic and financial architecture lacks internationally binding rules. The Social Market Economy offers this kind of regulatory framework.
The concept of Social Market Economy is based on two principles:

- Solidarity: It is the basic principle of human association. Solidarity assures that the market economy is oriented towards the common welfare.
- Subsidiarity: It enables people to solve tasks and problems autonomously. Subsidiarity secures spaces of individual responsibility.

The concept of Social Market Economy therefore combines the achievements of the free market and the advantages of a responsible state regulation.
Outstanding academic institutions and NGOs campaign together with KAS Amman for the dissemination of the concept of Social Market Economy. They discuss with us and decision-makers possibilities of implementing the concept in the Arab World and develop suggestions for solving problems to face future challenges.

Promotion of the Principle of Rule of Law

Rule of Law is an imperative pre-requisite for a successful societal and economic development. The concept's focus is on the opti-mization of laws, constitutions and state institutions. It also raises awareness of the applicable law among the public, and actors of the judicial system.

Together with our partners we promote principles of good governance and the horizontal and vertical separation of powers, i.e.:

- The separation of the judicial, the legislative and the executive
- Enhancing decentralized structures and local self-government.

Our engagement is based on promoting and strengthening human rights. We focus on bringing together academic and field experts with decision-makers from the spheres of politics and the judiciary. We not only demand change, but seek to have it implemented.

Promotion of Cooperation and Dialogue

Sustainable economic and political development in the region implies freedom and security. Many decision-makers and citizens are therefore interested in stability. One major pillar of stability is a strengthened co-operation between the countries in the region and with Europe.
The growing demand in cooperation and dialogue extends to the entire spectrum of issues such as:

- Security policy issues and the Mediterranean Dialogue
- Fundaments of the coexistence of religions and cultures
- Realization of equality between men and women.

Through our events with our partners we aim at contributing to the re-conciliation of interests and at enhancing the spirit of cooperation

The Konrad Adenauer Stiftung (KAS) is a political foundation. In Germany, 16 regional offices and two conference centers offer a wide variety of civic education conferences and events. Our offices abroad are in charge of more than 200 projects in more than 120 countries. The foundation's headquarters are situated in Sankt Augustin near Bonn and in Berlin. There, an additional conference center, namely the Academy, was opened in 1998.

We are proud to bear the name of Konrad Adenauer. The first chancellor of the Federal Republic of Germany's name and principles are our guidelines, duty, and obligation. Established in 1955 as "Society for Christian-Democratic Civic Education", the Foundation took on the name of the first Federal Chancellor in 1964.

At home as well as abroad, our civic education programs aim at promoting freedom and liberty, peace, and justice. We focus on consolidating democracy, on the unification of Europe and the strengthening of transatlantic relations, as well as on development cooperation.

Five Years Enforcement of the Competition Law in the Republic of Macedonia -, Time for an Assessment

By Rozeta Karova and Marco Botta[1]

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1. Introduction

1.1. Scope of the Paper

The legal academic discussion in this field of the transposition of the EU competition law *acquis* within the enlargement process has mainly focused on the Central and Eastern European countries (CEEC),[2] while the literature on the countries of South East Europe (SEE)[3] is more recent and still quite scarce.[4] The aim of this paper is to provide a contribution to the discussion on the impact of the EU competition law model in the SEE countries. In particular, this paper analyzes the process of introduction of competition law in the Republic of Macedonia.

Similarly to the other former Yugoslav Republics, competition law was unknown in the Republic of Macedonia during the decades of the socialist regime. The first provisions against monopolistic behaviour were introduced in the Law for Trade in 1995[5] and in the Law for Market Inspection from 1997.[6] However, the first competition act was the Law against Limiting Competition of 1999,[7] which was repealed with the legislation currently enforced in the country, the Law on Protection of

[1] Rozeta Karova is a Ph.D. researcher in the Law Department of the European University Institute, Florence (Italy). Marco Botta, Ph.D. is a Research fellow in the Florence School of Regulation, Robert Schuman Centre, Florence (Italy).The authors would like to thank Alexandr Svetlicinii for his help in the collection of the materials related to the case law used in this paper. Every mistake remains the sole responsibility of the authors.

[2] The main books published on this subject are: OJALA M., The competition law of Central and Eastern Europe, Sweet & Maxwell (1999); GERADIN D., HENRY, D. (eds.), Modernisation and Enlargement: Two Major Challenges for EC Competition Law, Intersentia (2005); FINGLETON J., FRITSCH, M., HANSEN, H., (eds.), Rules of Competition and East-West Integration, Kluwer Law International (1997).
The main academic articles published on this subject are: HÖLSCHER J., STEPHAN J., *Competition* Policy in Central East Europe in the Light of EU Accession, 42, 2, ***Journal of Common Market Studies***, 321-345 (2004); DUTZ M., VAGLIASINDI M., Competition Policy Implementation in Transition Economies: an Empirical Assessment, EBRD Working Papers (1999); ESTRIN S., HOLMES P., *Competition Policy for Central and Eastern Europe: The Challenge of the Europe Agreements.* In ESTRIN S., HOLMES P. (eds), Competition and Economic Integration in Europe, Edward Elgar Publisher (1998).

[3] The term South East Europe is hereby used as a synonymous of the expression Western Balkans,a dn it covers the territories part of the former Yugoslav federation (Macedonia, Serbia, Bosnia and Herzegovina, Croatia, Montenegro) and Albania.

[4] BIEGUNSKI L., Adoption of European Competition Law by Countries in Transition: Problems and Solutions, 28, 9, *European Competition Law Review*, 501-510 (2007); DAJKOVIC I., Competing to Reform: an Analysis of the New Competition Law in Albania, 25, 12, *European Competition Law Review*, 734-740 (2004); DAJKOVIC I., Whither Competition Law in Montenegro: Current Status and Future Challenges, 28, 2, *European Competition Law Review*, 92-100 (2007); DAJKOVIC I., Comments on the New Serbian Competition Law, 31, 2, *European Competition Law Review*, 52-65 (2010); KAPURAL M., Competition Policy in Croatia,1, *Mediterranean Competition Bulletin,* 63-69 (2009).

[5] Law for Trade, Official Journal of RM 23/95, 30/95, 43/95, 23/99 and 43/99.

[6] Law for Market Inspection, Official Journal of RM 35/97 and 23/99.

[7] Law against Limiting Competition, Official Journal of RM 80/99, 29/2002 and 37/2004.

Competition enacted in 2005 (hereinafter, 2005 Competition Act).[8] The later was adopted with the objective to fully transpose the EU *acquis* in the field of competition law at national level. While the previous 1999 competition act remained *de facto* unenforced, the 2005 competition act established the *"Komisija za zaštita na konkurencijata"* (KZK, Commission for the Protection of Competition), which has actively enforced this legislation during the last five years. The KZK is also in charge of enforcing the Macedonian legislation on the control of State aids.[9] However, this paper voluntarilz limits itself on the analysis of the legislative provisions and the enforcement record of the 2005 Competition Act.

The aim of the paper is to go beyond the simple legislative analysis of the compatibility of the Macedonian 2005 Competition Act with the EU *acquis* in the field of competition law. Due to the fact that it is already five years since this legislation has been adopted, this paper aims at assessing the enforcement record of the 2005 Competition Act during those years. The analysis of the challenges faced by the KZK in enforcing this legislation may provide lessons for the other National Competition Authorities (NCAs) of the region, which are facing similar problems in enforcing the EU competition law *acquis* at the national level.

1.2. The Republic of Macedonia - a Small Concentrated Economy

The Republic of Macedonia is a small landlocked country, with a territory of 25.713 km.sq and a population of approximately 2 million inhabitants.[10] The country is located in the middle of the Balkan Peninsula.[11] As a small country, the Republic of Macedonia has a relatively open economy, and a great dependence on foreign trade.[12] It suffered negative economic shocks several times since it became independent after the break-up of Yugoslavia in 1991, which resulted in a deep fall of the gross domestic product (GDP) between 1990 and 1994. After the period of recession, the economy started to recover in 2000, but the GDP fell once again in 2001, due to the civil war which affected the country that year. Since 2007, the GDP has been growing to an average of +4% per year.[13] However, the GDP per capita remains low, amounting only to 26% of the EU-25 GDP average per capita.[14]

The Republic of Macedonia has been characterized by a stable macro-economic outlook during the last two decades. The country is, in fact, characterized by a low inflation rate and by a stable exchange rate of the national currency *Denar vis a vis* the Euro.[15] However, in spite of this macro-economic stability, the Republic of Macedonia remains behind the countries of the region in relation to the level of the foreign direct investments (FDI).[16] In particular, most of the FDIs are the result of the privatisation process of several former State owned companies during the last two decades, rather than "green-field" investments. The external perception of political instability in the country, its land-locked geographical position, the high unemployment rate, and the low level of competitiveness of the

[8] Law on Protection of Competition of the Republic of Macedonia, adopted on 11th January 2005. Official Journal of RM 04/05. An English translation of the legislation is available at: http://www.kzk.gov.mk/images/LawOnProtectionOfCompetition.pdf (27.9.2010).
[9] Law on State Aids of the Republic of Macedonia, adopted on 4th April 2003. Official Journal of RM 24/03. An English translation of this legislation is available at: http://www.kzk.gov.mk/eng/zapis1.asp?id=455&kategorija=7 (27.9.2010).
[10] Macedonian State Statistical Office, Macedonia in Figures 2009, at p.8.
The text of the report is available at: http://www.stat.gov.mk/Publikacii/MakBrojkiA2009.pdf (23.9.2010).
[11] The Republic of Macedonia has borders with two EU Member States – Greece in the South and Bulgaria in the East, and with three other countries – Serbia and Kosovo in the North, and Albania in the West.
[12] The country's trade balance has been in constant deficit during the last two decades. In 2007, the trade deficit amounted to 26.1% of the Macedonian GDP, Macedonian State Statistical Office,2009, *supra,* at p. 36.
[13] Macedonian State Statistical Office, 2009, *supra,* at p. 24.
[14] http://ec.europa.eu/enlargement/candidate-countries/the_former_yugoslav_republic_of_macedonia/economic_profile_en.htm (23.9.2010).
[15] *Ibid.*
[16] Macedonian State Statistical Office, 2009, *supra,* at p. 26.

local industry are factors which undermine the inflow of FDIs, and thus they slow down the economic growth of the economy.

These macro-economic indicators have important consequences in relation to the market structure of the country. Although the paper does not aim at carrying out an in-depth analysis of the consequences of the macro-economic outlook of the country on the degree of market concentration, it shall be underlined that the land-lock position of the country, the small size of its territory and of its population, as well as the low GDP per capita which reduces the per capita consumption, lead to the conclusion that from a competition law point of view the Republic of Macedonia can be considered a "small concentrated economy".[17]

1.3. The Relations between the Republic of Macedonia and the EU: from the Stabilization and Association Agreement to the Accession Partnership

Against the macro-economic background outlined above, the Republic of Macedonia since its independence pursued a policy aimed at strengthening its relationship with the EU, having the EU membership perspective as final goal of this partnership.

Similarly to the other countries from the SEE, Macedonia signed a Trade and Cooperation Agreement with the EU in 1997.[18] In June 2000, the European Council of Feira for the first time expressed the view that all countries from the SEE, including Macedonia, were potential candidates for the EU membership.[19] This political consensus was later confirmed in June 2003 by the European Council in Thessaloniki.[20] Since 1999, the rapprochement of the Western Balkans towards the EU was developed under the Stabilisation and Association Process (SAP).[21] The EU's "regional" approach towards the SEE is the main characteristic of the SAP. Through the Stabilisation and Association

[17] In 2003, Michal Gal published an interesting book concerning the market features of "small economies". In her book, Gal did not define precisely the meaning of "small economy"; she stated that "the definition of a small economy is arbitrary in the sense that there is no magic number that distinguishes a small economy from a large one". However, in general, the author defined as small economies countries with a small or dispersed population (e.g. Israel and Australia) or countries with limited geographical areas, such as small islands (e.g. Liechtenstein and Malta). According to Gal, these countries share a similar market structure, characterized by a high degree of market concentration in the majority of the industrial sectors, high entry barriers and below minimum efficient scale (MES) levels of production. MES is the level of production at which enterprises may minimize their average unit costs of production. In these small economies where internal demand is limited, only a certain number of enterprises may achieve MES, and thus they may profitably stay in the market. As a consequence, in small economies a high degree of market concentration in some sectors is often seen. Moreover, the impossibility for firms to achieve the minimum economies of scale necessary to remain in the market creates entry barriers to new competitors. In summary, the limited internal demand in a small economy restricts the number of competitors which may operate in the same market; this market structure leads to oligopolies, which may in the long term cause abuses of dominance or collusive practices. The approach followed by Gal in relation to small economies has been later generalized to the emerging economies by other authors who argue that emerging economies, due to their low internal GDP per capita, and thus due to low internal consumption, are characterized by more concentrated market structures than the developed economies. This hypothesis is well grounded, but it cannot be generalized to every economic sectors. In fact, in a number of relevant markets the international trade can replace the local demand. Therefore, a case by case analysis is always necessary.
Gal M., *Competition Policy for Small Market Economies*, Harvard University Press (2003).

[18] Cooperation Agreement between the European Community and the former Yugoslav Republic of Macedonia. **Official Journal L 348 , 18/12/1997 P. 0002 – 0167.**

[19] European Council in Santa Maria da Feira, 19-20.06.2000, Presidency Conclusions. The document is available at: http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/00200-r1.en0.htm (23.9.2010).

[20] European Council of Thessaloniki, 16.6.2003, Presidency Conclusions, Thessaloniki Agenda: Moving towards European Integration. The document is available at: http://ec.europa.eu/enlargement/enlargement_process/accession_process/how_does_a_country_join_the_eu/sap/thessaloniki_agenda_en.htm (23.9.2010).

[21] http://ec.europa.eu/enlargement/enlargement_process/accession_process/how_does_a_country_join_the_eu/sap/index_en.htm (23.9.2010).

Agreements (SAA) concluded by the EU with the SEE countries, the importance of strengthening the cooperation among the SEE countries at all levels (i.e. political, economic and at the level of the civil society) is underlined, in order to re-establish cohesion in the region after the wars of the 1990s.

The Republic of Macedonia was the first country of the SEE which signed a SAA in April 2001 that entered into force in April 2004.[22] In December 2005 the European Council officially granted the status of "candidate" EU Member State to the country;[23] decision which was followed by the adoption of an Accession Partnership for the Republic of Macedonia.[24] Though Macedonia is a candidate EU Member State since 2005, the EU has not opened the accession negotiations with this country.[25] Nevertheless, during the last years Macedonia has actively continued the process of adoption and implementation of the EU *acquis* at the internal level, including the competition law provisions.

The Trade and Cooperation Agreement of 1997 established a basic framework for cooperation, but it did not include any specific competition law rule. This agreement simply stated that the Republic of Macedonia "shall endeavor to ensure that its legislation would be gradually made compatible with that of the Community" for which "the Community shall provide appropriate technical assistance." On the other hand, a clear obligation to transpose the EU competition law model can be found in the SAA of 2001. Under Article 68 of the SAA, the Republic of Macedonia was required "…to ensure that its laws will be gradually brought in line with those of the Community". Therefore, under Article 68 SAA, the Macedonia was required to transpose at the national level not only the EU Treaty provisions, but also the EU secondary legislation and the case law of the Court of Justice. In addition, Article 69 of the SAA specifically provided the obligation for the Republic of Macedonia to introduce a legislation which sanctioned anti-competitive agreements, forms of abuse of dominance and public aids which could distort competition among the economic operators. These rules represented a clear transposition of Article 101, 102 and 107 of the Treaty on the Functioning of the European Union (TFEU) into the Macedonian legal framework.[26] The SAA did not provide any legally binding obligation for the Republic of Macedonia to introduce a system of merger control. On the other hand, it established an annual mutual system of notification between the EU and the Republic of Macedonia of the aid schemes granted by the public authorities to the local companies.[27]

The development of the relationship between the EU and the Republic of Macedonia, and in particular outlining the provisions stemming from the agreements between them, are relevant. In fact, they represent the first legally binding obligation for Macedonia to transpose the EU *acquis* in the field of competition law at national level, even before receiving the official status of candidate EU Member State. In particular, the entry into force of the SAA in 2004 was one of the factors which encouraged the Macedonian Parliament to pass the new competition act in 2005; legislation which will be analyzed in greater details in turn.

2. Legislative Analysis

2.1. The 2005 Competition Act: "Copy and Paste" the EU Competition Law

[22] The Stabilization and Association Agreement between the European Communities and their Member States, of the one part, and the former Yugoslav Republic of Macedonia, of the other part was signed in Luxemburg in 2001 and entered into force in April 2004. The text of the SAA is available at: http://eur-lex.europa.eu/JOHtml.do?uri=OJ:L:2004:084:SOM:EN:HTML (23.9.2010).

[23] EU Presidency Conclusions – European Council, 15-16.12.2005, 15914/1/05 REV 1

[24] Council Decision of 30 January 2006 on the principles, priorities and conditions contained in the European Partnership with the former Yugoslav Republic of Macedonia and repealing Decision 2004/518/EC, **OJ L 35, 7.2.2006, p. 57–72.**

[25] European Commission, Communication to the European Parliament and the Council, The Former Yugoslav Republic of Macedonia, Progress Report 2009. Published on 14.10.2009, SEC(2009) 1335. The text of the report is available at: http://www.nrc.nl/redactie/Europa/voortgangsrapporten2009/macedonie.pdf (23.9.2010).

[26] Consolidated Version of the Treaty on the Functioning of the European Union. OJ 2009 C-115/49; entered into force on 01.12.2009.

[27] SAA Republic Macedonia, *supra,* Article 69(3)(b).

The link between the SAA and the introduction of the revised Competition Act in 2005 is evident in Article 3(3) 2005 Competition Act. This provision, by referring to Article 69 SAA, provides that in assessing anti-competitive practices which affected the bilateral trade between the EU and the Republic of Macedonia, the Macedonian authorities will refer to "the criteria arising from the proper application of the rules regulating competition in the European Communities…" Taking in consideration the dependence on the bilateral trade with the EU, Article 3(3) 2005 Competition Act had a broad scope of application, as well as a large number of addressees. In fact, from a practical point of view, this provision required the KZK to periodically update its guidelines, in order to implement the same type of interpretation of the competition law expressed by the European Commission in its guidelines and notices, and by the Court of Justice in its case law. Furthermore, its vague language also required the Macedonian legislative and executive powers to adopt new legislation and new regulations in compliance with the latest developments of the EU law.

2.1.1. Provisions Concerning Anti-Competitive Agreements

The high degree of approximation of the 2005 Competition Act with the EU competition law is manifested in several provisions of this legislation, which have clearly "copied and pasted" the relevant EU law provisions. In relation to anti-competitive agreements, this is the case for Article 101 TFEU, reproduced in Article 7 2005 Competition Act, but also in relation to the other notices and guidelines adopted by the European Commission in this area. For instance, Article 9 of the 2005 Competition Act introduced an automatic system of exemption for the agreements of minor importance, mentioning the same market shares of reference for horizontal and vertical agreements provided by the European Commission's *De Minimis* Notice.[28]

The 2005 Competition Act provided for an optional system of notification of agreements, in order to obtain an individual exemption from the KZK.[29] In addition, it introduced an obligation for the Macedonian Government to adopt by-laws equivalent to the Block Exemptions Regulations adopted by the European Commission.[30]

2.1.2. Provisions on Abuse of Dominance

The text of Article 102 TFEU was reproduced in Article 13 and 14 of the 2005 Competition Act. In addition, these articles also incorporated some of the most relevant aspects of the case law of the Court of Justice in the field of abuse of dominance. In particular, after having listed the main factors usually relied upon by the European Commission in order to determine the existence of a dominant position (e.g. high entry barriers in the relevant market), Article 13 introduced a rebuttable presumption of dominance if a single undertaking owned 40% market shares, and of joint dominance if a group of undertakings had 60% market share. This provision derives from the practice of the European Commission, and from the case law of the Court of Justice. For instance, in *AKZO III* the Court of Justice held that there is a presumption that a company enjoys a dominant position in the

[28] When the joint market shares of the parties members of an agreement is below 10% of the relevant market for the horizontal agreements, and less than 15% of the relevant market for vertical agreements, the agreement is considered *prima facie* not to be anti-competitive. European Commission's Notice on Agreements of Minor Importance Which Do Not Appreciably Restrict Competition under Article 81(1) of the Treaty Establishing the European Community (*de minimis*). Official Journal C 368, 22.12.2001, p.13-15
The text of the Notice is available at:
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52001XC1222%2803%29:EN:NOT
(23.9.2010).

[29] 2005 Macedonian Competition Act *supra,* Article 11

[30] Under Article8 of the 2005 Competition Act, the Macedonian Government should adopt by-laws to introduce block-exemption regulations to the following categories of agreements: vertical agreements; horizontal R&D agreements, agreements for the transfer of technology and know-how, agreements for the distribution of motor vehicles and insurance agreements. The by-laws were progressively adopted by the Government during the following years, copying and pasting the European Commission block exemption regulations in these sectors. The list of the block exemption regulations adopted by the Macedonian Government is available at: http://www.kzk.gov.mk/eng/zapis.asp?id=5 (23.9.2005).

relevant market when it owns 50% market share.[31] Finally, the refusal to grant access to an essential facility, example of exclusionary practice elaborated by the Court of Justice in the *Bronner* case and in its following judgements, was included in Article 14(2)(6) of the 2005 Competition Act with the list of other abuses mentioned by Article 102 TFEU.[32]

The exigency to comply with the Court of Justice's case law in the area of abuse of dominant position derives from Article 3(3) of the 2005 Competition Act. However, if the reference to the essential facility doctrine is understandable, that could hardly be said for the presumption of dominance based on the market share of the undertaking because it could generate false negative presumptions. In an economy which is naturally highly concentrated in several relevant markets due to its macro-economic structure, this provision could broaden the scope of application of the provisions on abuse of dominance.

2.1.3. Provisions on the Control of Economic Concentrations

Although the 2001 SAA did not require the introduction of a system of merger control, the 2005 Competition Act included a system of control of the economic concentrations very similar to that one defined in the Regulation 139/2004.[33] In addition, during the last years the KZK has also adopted guidelines in the field of merger control which transpose those ones adopted by the European Commission. For instance, in April 2007 the KZK adopted Guidelines on the Definition of the Relevant Market identical to the European Commission's Notice of 1997, and Guidelines on Horizontal Mergers which transposed the 2004 Guidelines of the European Commission in this area,[34] In November 2008, KZK adopted Guidelines on the Assessment of Vertical and Conglomerate Concentrations, which transpose the European Commission's Guidelines on Non-Horizontal Mergers adopted in October 2008.[35] If on the one hand, the adoption by the KZK of Guidelines on the definition of the relevant market and on horizontal mergers is understandable, the adoption of

[31] Case C-62/86, *AKZO Chemie BV v Commission of the European Communities* [1991] ECR I-03359, para. 60.

[32] Refusal to grant access to a competitor to "essential facilities" to perform its business is an abuse of dominance if the company refusing to grant access enjoys a dominant position. Bronner concerned this kind of abuse: Mr Bronner asked Mediaprint to get access to its network of home delivery distribution; both Mediaprint and Mr. Bronner published the same newspaper, but Mr. Bronner's publishing house was too small to establish a similar network of distribution. The Court of Justice rejected Mr. Bronner's request due to the following reasons (para.42-44):

a. There were other methods to distribute newspaper outside of home delivery, like in the shops or by post. Therefore, the facility must be "essential" indeed, in order to consider the refusal to its access as an abuse of dominant position.

b. There were not legal or economic reasons which made "impossible" for Mr. Bronner, alone or in cooperation with other suppliers to develop its own network of newspapers home distribution, rather than by relying upon Mediaprint network (impossibility requirement).

Though Mr. Bronner's request was not accepted, the Court of Justice recognized the validity of the essential facility doctrine when the two conditions mentioned above are satisfied. See: Case C-7/97, *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG* [1998] ECR I-07791.

The Court of Justice and the General Court have applied this theory in a number of occasions, especially in the area of IP rights. For instance, in the Microsoft case, the judgment of the General Court which upheld the Commission's decision which sanctioned Microsoft for having refused to provide to its competitors a number of inter-operability information in relation to the functioning of its work group server operating systems. See: Case T-201/04, *Microsoft Corp. v Commission of the European Communities* [2007] ECR II-03601.

[33] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation). OJ L 24, 29.1.2004, p. 1–22.

[34] European Commission Notice on the Definition of Relevant Market for the Purposes of Community Competition Law, OJ C 372 , 09/12/1997 P. 0005 – 0013.

Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 5.2.2004, p. 5–18.

[35] European Commission Guidelines on the Assessment of Non-Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings, OJ C 265, 18.10.2008, p. 6–25.

The text of the KZK's Guidelines is available at http://www.kzk.gov.mk/eng/zapis.asp?id=6 (27.9.2010).

Guidelines on non-horizontal mergers by the KZK could be seen as not necessary, due to the difficulties for a newly established NCA with limited human resources to assess the anti-competitive effects of these types of transactions.

The 2005 Competition Act incorporated the substantial lessening of competition (SLC) test,[36] and the same criteria to determine the change of control in the acquired undertaking provided by the Regulation 139/2004.[37] Furthermore, it also introduced the same period of merger review granted by the Reg. 139/2004 to the European Commission to review the notified concentrations.[38] Finally, similarly to Article 2 of the Reg. 139/2004, Article 16 of the 2005 Competition Act introduced a worldwide turnover threshold of notification of 5 million Euros, in addition to a threshold 2.5. million Euros referred to the aggregate turnover of the merging parties in the Republic of Macedonia, and a joint market share threshold of 40%.[39]

[36] Article 2(2) of the Reg. 139/2004 introduced the SLS test, replacing the previous strengthening of dominant position test provided by the Reg. 4064/89. The Regulation 139/2004 introduced the SLS test in order to catch the economic concentrations which caused anti-competitive concerns, but which did not result in a strengthened dominant position. However, due to reasons of legal certainty, Article 2 of the Reg. 139/2004 also points out that a concentration which causes a strengthening of dominant position is also sanctioned under the SLS test. In the Macedonian 2005 Competition Act the SLS test is implemented in Article 17(4).

[37] Under the well-accepted principles of competition law, an economic concentration takes place when there is a "change of control" in the acquired company. Article 3 of the Regulation 139/2004 lists a number of transactions where a change of control takes place, and which have to be notified to the European Commission. Not only mergers and acquisitions, but also the acquisition of assets, rights, or contracts which grant to the acquiring company a "decisive influence" over the acquired company must be notified. This is a broad definition, which aims at identifying cases of *de facto* change of control. In addition, there is change of control only when the control is exercised on a stable and long term basis (for instance, through the appointment of the majority of the directors on the board of the acquired company). As a consequence, agreements of cooperation between undertakings, agreements establishing not full-functional joint ventures, the acquisition of minority shareholdings, and the acquisition of shares by investments funds which do not influence the management of the target company are usually exempted from the duty of notification. Even though some of these agreements may facilitate, in the long term, forms of collusions between the parties, these transactions do not have an impact on the number of players in the market or on the degree of market concentration. The 2005 Macedonian Competition Act incorporates the EU notion of change of control in Article 18.

[38] In order to guarantee legal certainty to merging parties, Article 10 of the Regulation 139/2004 provides a clear time frame that the European Commission has to respect in order to complete the process of merger review. The European Commission is expected to adopt a decision on the notified concentration in 25 working days from the moment that the concentration is notified. However, the concentrations which substantially increase the degree of concentration in oligopolistic markets are usually subject to a deeper analysis during a second phase of investigation. This is to be completed in 90 working days from the date of notification. In addition to the information provided by the merging parties in the notification form, the European Commission may ask for additional information from the undertakings, which is necessary to conduct the investigations (this is done in particular during the second phase of investigation). However, such a request does not suspend the time of merger review. Article 23 of the 2005 Macedonian Competition Law fixes the same amount of days for the first and second phase of the merger review, with a possibility of one extension of addition 20 days if the merging parties so require.

[39] Article 1 of the Regulation 139/2004 provides a number of thresholds based on the value of the turnover of the merging parties during the previous financial year. The notification is due if the worldwide turnover of the merging parties exceed €5 billion and if the Community turnover of the merging parties exceeds €250 million. Alternatively, the notification is due if the global turnover exceeds €2500 million, the cumulative turnover in at least three EU Member States exceeds €100 million and €25 million in each of the three Member States, and finally the aggregate Community turnover exceeds €100 million. Therefore, the EC Merger Control Regulation provides two notification thresholds, which rely on different combinations of the turnover of the merging parties calculated at the global Community and Member State level.
By reading the text of Article 16 of the 2005 Macedonian Competition Act it is evident that Art.1 Reg.139/2004 is the source of inspiration of the turnover thresholds of merger notification. Article 16 provides 3 thresholds of notification:

If the reference to the SLC test and to the EU concept of change of control on a lasting basis is reasonable, due to the worldwide acceptance of these concepts, less comprehensible is the reference to the same period of merger review granted to the European Commission and to a worldwide turnover threshold of notification. In fact, the worldwide turnover threshold could generate an excessive number of notifications of international concentrations which had only a minor impact on the Macedonian market. In particular, the worldwide turnover of 5 million Euros did not indicate the minimum amount of sales in the Macedonia which would trigger the notification. Meanwhile, the tight deadlines of merger review provided for the European Commission risked paralyzing the activities of KZK, in the light of its limited human resources, if it was expected to review the large number of notifications.

2.1.4. Institutional arrangements

In relation to the institutional arrangements provided by the 2005 Competition Act, the Macedonian legislator opted for an administrative enforcement of the competition law by a newly established independent authority, the KZK. In spite of the lack of EU provisions in the area of institutional design, the Macedonian legislator was inspired by the organizational structure of the European Commission which provides for a clear division between the cabinet of the Commissioner, and the civil servants in charge of conducting the investigations under the authority of the Director General. Similarly, the KZK is headed by a President and four Commissioners,[40] which take their decisions on the basis of the investigations conducted by the civil servants of the Department of Qualified Personnel.[41] However, under Article 25(3) of the 2005 Competition Act, only the President and one of the Commissioners are full-time employed in the institution, while the other Commissioners only participate and express their vote during the monthly sessions of the KZK.[42] Taking in consideration the fact that the total number of civil servants of the KZK is still below thirty,[43] the decision not to involve all Commissioners on a full-time basis in the investigations of the

- The aggregate worldwide turnover threshold of the merging parties is at least 5 million euros in the previous financial year (instead of 5 billion euros provided by Reg. 139/2004), and one of the participants realizes sales in the Republic of Macedonia.
- The aggregate turnover of the merging parties in the Republic of Macedonia is above 2.5. million euros in the previous financial year (instead of the 250 million Euros provided by the Reg. 139/2004).
- The joint market share of the merging parties is 40%.

[40] Under Article 25(2) of the 2005 Macedonian Competition Act, the President and the four Commissioners are appointed for a period of 5 years with possibility of reappointment by the Macedonian Parliament, which can also dismiss them under the list of reasons mentioned in Article 25(8).

[41] Article 27 of the 2005 Macedonian Competition Act provides that the Department of Qualified Personnel is headed by a Secretary General appointed by the President and the Commissioner. The Department conducts investigations on anti-competitive behaviours and reviews the notified mergers; afterwards, it submits an opinion to the plenary session of the Commissioners, where the decisions are adopted. Similarly, it also prepares studies and draft guidelines for the approval of the plenary session of the Commissioners.

[42] Under Article 27(3) of the 2005 Macedonian Competition Act, "the President and at least one member of the Commission, upon proposal by the Commission for Appointment and Dismissal Matters of the Assembly of the Republic of Macedonia, shall be professionally engaged in the Commission's operations."

[43] According to the 2010 KZK's Annual Report for the year 2009, in that year the KZK counted 25 employees, including the President and two full time Commissioners. Out of the 22 employees of the civil servants of the Department of Qualified Personnel, 20 were officers, and 2 were secretaries. The situation has been improving slowly during the last years. For instance, the 2009 European Commission's Progress Report on the Republic of Macedonia pointed out that the number of civil servants in KZK increased of two units, but its institutional capacity was still too weak, especially taking in consideration that the KZK is also in charge to enforce the Macedonian Law on State Aids. See: European Commission Staff Working Document, the Former Yugoslav Republic of Macedonia – 2009 Progress Report. Published on 14.10.2009, SEC(2009) 1335. The text of the report is available at http://ec.europa.eu/enlargement/pdf/key_documents/2009/mk_rapport_2009_en.pdf (27.9.2010).
The text of the 2007 KZK's Annual Report is available at http://www.kzk.gov.mk/eng/zapis.asp?id=17 (27.9.2010).

Department of Qualified Personnel does not seem particularly wise, and it could undermine the enforcement record of the KZK.

The two areas where the Macedonian Competition Act was more distant from the EU competition law model concerned the judicial review of the KZK's decisions and the procedure to impose fines. Under Article 40 of the 2005 Competition Act, the appeals against the decisions of the KZK should be presented before a specialized Commission for Appeals. This administrative body carried out the first instance review of the decisions. On the other hand, in relation to the imposition of fines, Article 46 of the 2005 Competition Act did not provide the possibility for the KZK to directly impose fines. After having determined the existence of an infringement of the law, KZK started a separate procedure (misdemeanour procedure), whereby it determined the amount of the fine. However, KZK was required afterwards to bring the case before one of the national courts, which would order the imposition of the fine. This system applied for all types of fines, both related to sanctioning anti-competitive behaviours, as well as to sanction the late merger notification.[44] Moreover, the pecuniary fines could be imposed both on the undertakings committing an anti-competitive behaviour, and on the manager of the undertaking.[45] The complex procedural system provided by the 2005 Competition Act clearly undermined the effectiveness of the enforcement of the competition act. In particular, the need to bring a case to a national court undermined the ability of the KZK to impose fines, and thus it decreased the deterrence effect of the fines.

2.2. The Amendments to the Competition Act in 2006 and 2007

Some of the concerns mentioned in the previous pages have been addressed by two legislative amendments to the 2005 Competition Act. According to the 2007 KZK's Annual Report, the aim of these amendments was to bring the 2005 Competition Act fully in line with the EU *acquis* in the field of competition law.[46]

The Law 70/06 made two modifications to the text of the 2005 Competition Act which are worth mentioning.[47] First of all, it modified the thresholds of merger notification, by increasing the value of the worldwide turnover threshold from 5 to 10 million Euros,[48] and by introducing a joint market share threshold of 60%, in addition to the 40% market share threshold applicable to the single merging parties.[49] From an institutional point of view, the Law 70/06 amended Article 25 of the 2005 Competition Act, by requiring that two rather than one Commissioner would be full time employed in the KZK together with the President.[50]

These modifications had the objective to decrease the scope of application of the Macedonian system of merger control, and to strengthen the institutional capacity of the KZK by requiring the full-time appointment of an additional Commissioner. These amendments went into the right direction, but they did not fully achieve the aims they were intended to. In fact, the worldwide turnover threshold should be abolished, rather than simply being amended. Similarly, the market share threshold should also be abolished, like in the majority of the jurisdictions in the world due to the fact that in this early stage of the merger review the definition of the relevant market can easily be manipulated by the merging parties in order to avoid the burden of the notification. Furthermore, in a small concentrated

[44] *Supra,* Article 47 of the 2005 Macedonian Competition Act.
[45] "A fine amounting from 100.000 to 600.000 Denars shall be imposed on the person responsible in the legal entity for committing the misdemeanour stated in paragraph 1 of this Article.", Article 47(3) of the 2005 Macedonian Competition Act
[46] 2007 KZK's Annual Report, s*upra*, at p.4.
[47] Law Amending the Law on Protection of Competition, entered into force on 1st June 2006, Official Journal RM 70/06. An English translation of text of the legislation is available at: http://www.kzk.gov.mk/images/Law%20Amending%20the%20Law%20on%20Protection%20of%20Competition.pdf (27.9.2010).
[48] *Ibid,* Article 1(1).
[49] *Ibid,* Article 1(3).
[50] *Ibid,* Article 2.

economy like the Republic of Macedonia, a market share threshold is more likely to cause the notification of acquisitions of small competitors by the dominant company; transactions which do not raise competition concerns, but which could undermine the institutional capacity of the NCA. Finally, as already stressed above, all Commissioners should be permanently employed in the KZK, and they should also be involved in the investigations conducted by the Department of Qualified Personnel.

To sum up, the 2006 amendments improved the text of the 2005 Competition Act, but they were not sufficient to strengthen the institutional capacity of the KZK, by increasing its human resources and by focusing the resources of the institution on a smaller number of notified concentrations which could have potential anti-competitive effects.

In 2007, the Law 22/07 amended for the second time the 2005 Competition Act. This legislation brought two relevant amendments. First of all, it modified the procedure to impose fines, the misdemeanor procedure. Under the new legislation, the KZK could directly impose fines, without the need to bring a case to the competent court. On the other hand, the misdemeanor procedure was kept as a separate procedure. Consequently, even today the KZK adopts a first decision in which it shows the existence of an infringement of the competition law, and it orders the companies involved to cease the anti-competitive behavior. Few months later the KZK adopts a second decision, where the fine is imposed. Although the 2007 amendment simplified the proceedings to impose fines, the maintenance of the misdemeanor procedure as a separate procedure increased the time needed by the KZK to impose a fine, by thus undermining its deterrence effect.

The second amendment brought by the Law 22/07 concerned the system of judicial review. The 2007 legislation abolished the Commission for Appeals. The appeals against the KZK's decisions should be addressed to a single Administrative Court. This reform, adopted in the framework of a broader reform of the Macedonian administrative law, was positive. As it will be shown in the following paragraphs, the Administrative Court has conducted an active review of the KZK's decisions during the last years, which has trigerred improved quality of its decisions.

In conclusion, the legislative amendments adopted in 2006 and in 2007 have improved some aspects of the 2005 Competition Act (e.g. the judicial review of the KZK's decisions), while in other areas (e.g. thresholds of merger notification, human resources of the KZK and misdemeanor procedure) these modifications do not seem sufficient to allow an effective enforcement of the competition law.

3. Five Years Enforcement of the Macedonian Competition Act

3.1. Anti-Competitive Agreements

In the light of the limited human resources of the KZK it is not surprising that the provisions of the 2005 Competition Act on anti-competitive agreements are the least enforced ones among the substantive provisions of this legislation. One of the first cartels sanctioned by the KZK in 2007 involved in 2007 the drivers' association Sotir Naumovski and the auto school Gorgi Naumov.[51] Both companies were established in the municipality of Bitola and, where they were the only providers of the service of registration of auto-vehicles there. KZK sanctioned the two competitors because they had fixed together the amount of the registration fee of the auto-vehicles, a classical example of price-fixing cartel. Two aspects are worth to be noted: on the one hand, the proceedings started after the KZK received a complaint from the State Market Inspectorate after a notification by a private citizen. The latter probably was not aware of the existence of the KZK, as it did not contact this institution directly to which he did not immediately address his complaint. Secondly, it is interesting to notice how easily the KZK could prove the existence of a price-fixing cartel. During an inspection in the premises of the companies, KZK found a number of written documents which proved the existence of

[51] KZK against the Drivers' Association Sotir Naumovsk - Bitola and the Avto-moto Company Gorgi Naumov - Bitola (administrative procedure), Decision No. 07-57/12 adopted on 20.4.2007. The English translation of the decision is available at:
http://www.kzk.gov.mk/eng/zapis1.asp?id=573&kategorija=9 (27.9.2010).

the cartel. This shows the environment in which KZK had to operate during its first years of activities: a country where the idea of competition among market players was still unknown, where price-fixing agreements among the local operators were a common practice. At the same time, private citizens hurt by these practices were not aware of the existence neither of the competition law nor of the KZK. Moreover, in spite of the amendments introduced in 2007, the misdemeanor procedure remains a lengthy and complex procedure. For instance, in this case the KZK adopted a decision to sanction the cartel in April 2007, but only at the end of June 2007 it adopted further decisions to fine the parties of the agreement, Sotir Naumovski and Gorgi Naumov,[52] as well as separate decisions to fine their managers.[53]

Recently the KZK has started to investigate a larger number of cartels. For instance, in July 2010 the KZK sanctioned a cartel involving the driver's association of the majority of the municipalities in the country.[54] The latter agreed to fix the prices for the services of technical inspections to the auto-vehicles. This shows that the KZK has focused on more detailed examination of certain sectors throughout the country, thereby making its activities more visible to the business sector and adding to development of competition culture in the country.

However, the lack of human resources of the KZK, and the lack of a leniency program are factors which still undermine the enforcement efforts of the KZK against anti-competitive agreements, by preventing the KZK to start undertaking more complex investigations.

3.2. Abuse of Dominance

The majority of the enforcement efforts of the KZK during the last years focused on the abuse of dominance. The decisions in this area are characterized by two common denominators: the addressees of the decisions were usually companies which managed a State concession in a certain economic area. Secondly, the KZK sanctioned mostly exploitative, rather than exclusionary abuses (e.g. unfair prices, unfair contractual clauses).

These two tendencies are evident in the majority of the decisions adopted by the KZK in the area of abuse of dominance since the entry into force of the Competition Act. For instance, in October 2005 the KZK adopted two similar decisions to sanction the companies Pazari-Bitola[55] and Skopski

[52] KZK against Drivers Association "Sotir Naumovski" – Bitola (misdemeanor procedure), Decision No.09-227/13, adopted on 28.6.2007. An English translation of the decision is available at: http://www.kzk.gov.mk/eng/zapis1.asp?id=574&kategorija=20 (27.9.2010).
KZK against Avto-moto Company "Gorgi Naumov" – Bitola (misdemeanor procedure), Decision No. 09-227/13, adopted on 28.6.2007. An English translation of the decision is available at: http://www.kzk.gov.mk/eng/zapis1.asp?id=570&kategorija=20 (27.9.2010).

[53] KZK against the responsible person in Avto-moto Company "Gorgi Naumov" - Bitola (misdemeanor procedure), Decision No. No.09-227/13, adopted on 28.6.2007. An English translation of the decision is available at: http://www.kzk.gov.mk/eng/zapis1.asp?id=575&kategorija=20 (27.9.2010).
KZK against the responsable person in the Drivers' Association "Sotir Naumovski" – Bitola (misdemeanor procedure), Decision No. 09-227/16, adopted on 28.6.2007. An English translation of the decision is available at: http://www.kzk.gov.mk/eng/zapis1.asp?id=586&kategorija=20 (27.9.2010).

[54] KZK against Avto Moto Sojuz na Makedonija and local Avto Moto associations (drustva) prohibited agreement (administrative procedure), Decision No. 08-195/25, adopted on 19.7.2010. An English translation of the decision is available at:
http://www.kzk.gov.mk/eng/zapis1.asp?id=877&kategorija=9 (27.9.2010).
See also: SVETLICINII A., The Macedonian Competition Authority Finds the Existence of Anticompetitive Practices on the Market for Mandatory Technical Certification of Motor Vehicles (Macedonian Drivers Union), Published on 4.5.2010, e-Competitions n°32449.
http://www.concurrences.com/abstract_bulletin_web.php3?id_article=32449 (28.9.2010).

[55] KZK against JP Pazari-Bitola (administrative procedure), Decision No. 07-56/27, adopted on 25.10.2005. An English translation of the decision is available at: http://www.kzk.gov.mk/eng/zapis1.asp?id=379&kategorija=9 (28.9.2010).

pazar.[56] Both companies received concessions from the municipalities of Bitola and Skopje to manage the division of the space available for the stands in the open market of the two cities. The KZK sanctioned the companies because they imposed unfair prices: the tariffs requested to the local retailers to rent a stand in the market were considered "too high", and not cost reflective.[57] It is well known that the majority of the NCAs in the world do not sanction exploitative abuses, and in particular unfair prices, because it is difficult to determine when a price is "too high". The idea of sanctioning excessive prices goes, in fact, against the basic principles of competition law as prices shall be determined by the market forces. As a consequence, a price is "never too high", if there is still demand for the product. These decisions were adopted few months after the entry into force of the 2005 Competition Act and the only justification provided by the KZK was that the tariffs were not cost reflective. However, the KZK decision lacks an analysis of the amount of the costs or the profit margin charged by the dominant companies.

There are also other decisions which are quite similar to the decisions about the market stands. For instance, in December 2005 the KZK sanctioned the company Rule Tours for abuse of dominance.[58] The latter was granted a State concession to manage the services provided within the central bus station in Skopje. Rule Tours applied different tariffs to the different bus companies which paid a fee in order to be able to park their busses in the bus station. Due to the fact that Rule Tours was not a bus operator, but only the manager of the bus station, the different tariffs did not have any exclusionary objective.

These decisions are examples of the early attempts of the KZK to enforce the provisions of the 2005 Competition Act on abuse of dominance. It seems that through its enforcement action against exploitative abuses the KZK aimed at directly protecting consumers against discriminatory/unfair prices, rather than sanctioning exclusionary practices which hampered the competition dynamics in the market. In addition, it is interesting to notice that these types of abuses were the result of a regulatory gap, rather than a competitive problem in the market. Both, the market stands' decision as well as Rule Tours could abuse their dominant position because the terms of the concession that they had received from the State authorities allowed such conduct. In other words, it can be presumed that that the terms of the concessions granted to the companies in question allowed an excessive margin of discretion to these companies in relation to the calculation of the fee applicable. Therefore, the KZK intervened through its enforcement action in order to compensate this regulatory gap.

In its early decisions the KZK did not clearly indicate the length of duration of the infringement. In its decision taken in misdemeanour procedure the KZK usually argued that under Article 47(1)(2) of the 2005 Competition Act it could impose a fine on the dominant company up to 10% of its annual turnover during the previous financial year. The KZK stated that in its assessment it took in consideration the gravity of the infringement, but it never referred to the length of time of the infringement. Therefore, the calculation of the amount of the fine during the misdemeanor procedure was quite arbitrary. Good examples of this approach are the decisions adopted in 2007 by the KZK in the telecom and electricity sectors. The KZK sanctioned Elektrostopanstvo, the electricity distributor system operator in the Republic of Macedonia, because in the monthly bills sent to its customers added a fee of 6 Denars for issuing of the bill.[59] After having consulted the Macedonian Energy

[56] KZK against Skopski pazar (administrative procedure), Decision No. 07-56/26, adopted on 19.10.2005. An English translation of the decision is available at: http://www.kzk.gov.mk/eng/zapis1.asp?id=378&kategorija=9 (28.9.2010).

[57] The KZK considered that tariffs of 650 Denars in Bitola, and 640 to 2400 Denars in Skopje were too high in comparison to the service provided.

[58] Euroturing Skopje against Rule Turs Skopje, Decision No. 07-179/12, adopted on 25.12.2005. An English translation of the decision is available at: http://www.kzk.gov.mk/eng/zapis1.asp?id=380&kategorija=9 (28.9.2010).

[59] KZK against AD Electrostopansvo na Makedonija Skopje, Decision No. 07-242/7, adopted on 7.9.2007. An English translation of the decision is available at: http://www.kzk.gov.mk/eng/zapis1.asp?id=631&kategorija=9 (28.9.2010).

Regulatory Authority, the KZK decided that this fee was unjustified, and it should be included within the cost of the KWh of electricity consumed. Similarly, the KZK also sanctioned T-Mobile[60] and Cosmofon,[61] the two main mobile phone operators in the country, because they charged the external callers with an extra-fee when the mobile phone user did not pick up the phone, and thus the voicemail started. The KZK sanctioned the fact that the fee was charged from the moment the automatic voice message started, rather than from the moment the caller left a message in the voicemail. In addition, the caller was not warned of the existence of the fee, while the mobile phone user could not deactivate the voicemail service.

The three decisions involving Cosmofon, T-Mobile and Elektrostopanstvo were appealed to the Macedonian Administrative Court, which annulled the decisions.[62] Though the existence of these extra-charges was quite easy for the KZK to prove from a factual point of view, the KZK omitted in its decision to indicate the period in which the infringements took place. Consequently, the calculation of the fines was arbitrary.

After a second investigation however, the KZK adopted new decisions specifying the periods in which these exploitative abuses of dominance took place. The decisions have been once again appealed to the Administrative Court and in December 2009 they were upheld.[63] The voicemail and the extra-charge in the electricity bills are relevant cases in the institutional development of the KZK. The Administrative Tribunal has shown the intention to conduct an active review of the KZK's decisions, though it did not enter in a detailed review of the substance of the decision. Nevertheless, the court's review has influenced the KZK to include a more detailed calculation of the fine, specifying the period of duration of the infringement.

As mentioned at the beginning of this section, besides sanctioning exploitative abuses, the KZK has focused its investigations on abuses committed by companies which have been granted a State concession. This was the case for the market stands decision and Rule Tours, but also for later decisions. For instance, in March 2007 the KZK sanctioned Butel, a company which was granted the concession to manage the cemeteries of the city of Skopje.[64] Butel was accused for committing two types of infringements: an exploitative[65] and an exclusionary abuse.[66] Similarly to the previous decisions, the KZK did not face any difficulty in defining the dominance of Butel. Due to the concession granted by the municipality of Skopje, Butel was a monopolist, rather than a company enjoying a simple dominant position. As a consequence, the appropriate definition of the relevant

[60] KZK against T-Mobile Macedonia, Decision No. 07-8/13, aopted on 7.9.2007. An English translation of the decision is available at: http://www.kzk.gov.mk/eng/zapis1.asp?id=629&kategorija=9 (28.9.2010).
[61] KZK against Kosmofon Mobile Telecommunication Services AD-Skopje, Decision No. 07-82/7, adopted on 7.9.2007. An English translation of the decision is available at: http://www.kzk.gov.mk/eng/zapis1.asp?id=628&kategorija=9 (28.9.2010).
[62] SVETLICINII A., The Macedonian Administrative Court Upholds the NCA's Decisions Establishing Abusive Charges on the Mobile Telecommunications Market (T-Mobile), Published on 17.12.2009, E-Competitions, n°30925. http://www.concurrences.com/abstract_bulletin_web.php3?id_article=30925 (28.9.2010).
SVETLICINII A., The Macedonian Administrative Court upholds the NCA's decision establishing abusive charges on the electricity distribution market (Elektrostopanstvo), Published on 10.12.2009, E-Competitions, n°30927. http://www.concurrences.com/abstract_bulletin_web.php3?id_article=30927 (28.9.2010).
[63] *Ibid.*
[64] Natural persons against BUTEL JSC, Decision No. 07-140/1,adopted on 9.3.2007. An English translation of the decision is available at: http://www.kzk.gov.mk/eng/zapis1.asp?id=497&kategorija=9 (28.9.2010).
[65] Butel applied a tying practice, whereby it sold to its customers the marble coverage of the grave only if the customers also purchased the funeral services from Butel.
[66] Butel demanded the payment of a fee to the companies which had to restore graves inside of the cemeteries that it administered. Butel was also present in the market for building and restoring graves through one of its subsidiaries. Butel applied more favorable payment conditions to its subsidiary, rather than to the competing undertakings (i.e. while the other companies had to pay the entry fee to the cemetery on the spot, the subsidiary of Butel paid a cumulative fee periodically).

market was not the priority of KZK: being evident the monopolist position of the undertaking, it was not necessary to undertake any in-depth analysis of the definition of the relevant market.

In view of the preference of the KZK to investigate only cases of evident "absolute dominance", the presumption of dominance at 40% market share mentioned by Article 13 of the 2005 Competition Act has never caused any real problem in the application of the law during the first five years of enforcement. In fact, in none of the decisions adopted so far by KZK in the area of abuse of dominance, the definition of the relevant market and the market share of the dominant company have been challenged. The choice of the KZK to investigate only cases of "absolute dominance" is a strategic one. It should be understood in the light of the very limited human resources of the KZK, which do not allow any enforcement action in oligopolistic sectors where the relevant market should be better defined, in order to assess the exact market share of all the economic operators active present in that relevant market. However, being a new institution operating in an environment lacking competition culture, this approach allows to the KZK to progressively improve its activities and undertaking more complex cases.

3.3. Merger Control

As anticipated in the section above, the broad turnover thresholds of notification provided by the 2005 Competition Act have triggered notifications of several concentrations which did not raise any competitive concern in the Republic of Macedonia. Following the imposition of fines by the KZK on a number of concentrations which had not been duly notified to the KZK, the number of notified concentrations has increased year by year.[67] On the other hand, the KZK has not carried out any detailed analysis of the competitive effects of the notified concentrations, and it has only exceptionally imposed remedies on the notified transactions.

A good example of the under-enforcement of the system of merger control in the Republic of Macedonia is the acquisition of Germanos by Cosmote.[68] Cosmote was part of the OTE group, the holding company of Cosmofon, the second mobile phone operator in the country. Meanwhile, Germanos was one of the main chains selling at the retail level electronics products, including the provision of contracts with mobile phone operators. The transaction could generate vertical anti-competitive effects: due to the large market share of the parties, it could foreclose the market for the distribution of new mobile phone contracts at the downstream level. In its decision, KZK recognized the possibility that following the implementation of the transaction Germanos would start selling only mobile phone contracts with Cosmofon, but it did not adopt any remedy to prevent this behaviour.

Cosmote and Germanos were two companies established in Greece, but they also had subsidiaries in Macedonia. The case Cosmote-Germanos is a typical example of the concentrations notified to the KZK. Due to the small size of the Macedonian economy, the majority of the concentrations notified to the KZK are multi-jurisdictional mergers: concentrations notified to the NCAs of different countries. In the case of Macedonia, several concentrations notified during the last years to the KZK involve Greek, Austrian and German companies, which invested in the country during the last two decades, during the period of privatization of the former State-owned companies. Due to the lack of jurisdiction on the holding companies, and in order not to undermine the in-flow of FDIs in the country, the KZK often clears these concentrations without any detailed analysis of the case, like in the case Cosmote-Germanos.

[67] See, for instance, KZK against Zegin DOO Skopje (misdemeanor procedure), Decision No. 09-195/18, adopted on 7.9.2007. An English translation of the decision is available at: http://www.kzk.gov.mk/eng/zapis1.asp?id=661&kategorija=20 (28.9.2010).

[68] Concentration between COSMOTE S.A. and GERMANOS S.A. (administrative procedure), Decision No. 07-185/9, adopted on 28.7.2006. An English translation of the decision is available at: http://www.kzk.gov.mk/eng/zapis1.asp?id=492&kategorija=9 (28.9.2010).

So far, the only concentration in which the KZK has imposed remedies worth mentioning was the acquisition of OTE by Deutsche Telekom.[69] In the 1990s, Deutsche Telekom purchased the former State-owned Macedonian telecom operator after its privatization. Afterwards, it also established the first mobile phone network in the country under the brand T-Mobile. OTE was the Greek State-owned telephone operator, which controlled the second mobile phone operator in Macedonia, Cosmofon. Similarly to the case Cosmote-Germanos the main acquisition took place in Greece. However, the anti-competitive effects of the concentration were felt mainly in the Republic of Macedonia, where it would have implied an indirect horizontal merger between T-Mobile and Consmofon. A third mobile operator, Vip, was also present in the market. However, Vip had started its business activities only one year before the concentration of Deutsche Telekom-OTE..Though Vip was an aggressive competitor, at that time it controlled less than 5% of the mobile phone subscribers in the country.

In spite of the clear impact of this horizontal concentration on the level of competition in the Macedonian mobile phone market, the economic analysis of the KZK in its decision was quite superficial. In particular, the KZK identified a single relevant market for mobile phone calls, instead of opting for a more segmented definition of the relevant market. In its decision the KZK mentioned that a further segmentation of the relevant market, depending on the type of mobile phone users (pre-paid v. post-paid), category of clients (personal use of the mobile phone v. corporate customers) and in relation to the technology used (2G v. 3G) was necessary and the KZK did not undertake this type of analysis. The poor quality of the analysis conducted by KZK in Deutsche Telecom-OTE shows once again the limited human resources of this institution, which clearly needs economists to carry out econometric analysis in order to define the size of the relevant market and the degree of market concentration.

Unlike the case Cosmote-Germanos, in Deutsche Telecom-OTE the KZK negotiated commitments with the merging parties. Instead of blocking the transaction, which had already been cleared by foreign NCAs and which took place outside of the territory of the Republic of Macedonia, the KZK agreed with the merging parties a full divestiture of Cosmofon. Cosmofon was later divested to Slovenia Telecom, and thus the previous market structure was preserved. Through this solution the KZK prevented a concentration which would have serious negative effects on the mobile phone market in the country. The full divestiture solution shows on the one hand, the limits of the KZK's territorial jurisdiction to review concentrations which usually take place abroad. But on the other hand, it is a positive outcome in the given circumstances, taking into consideration that newly established NCAs in emerging economies usually refrain from taking structural remedies in order not to affect negatively the FDIs in the country.[70]

4. Concluding remarks: Improvements throughout the Five Years of Enforcement and Challenges Ahead

The introduction of the competition law in the Republic of Macedonia is an example of "legal transplantation" of the EU competition law model in a small, highly concentrated, emerging economy. Several authors have been critical *vis a vis* the possibility to export competition law to countries characterized by week State institutions and by a large informal economy.[71] However, in the light of the privatization and liberalization reforms carried out in Macedonia during the last two decades, and

[69] Concentration between Deutsche Telekom AG Germany and Hellenic Telecommunications Organization (OTE S.A.) Republic of Greece (administrative procedure), Decision No. 07-342/21, adopted on 16.10.2008. An English translation of the decision is available at: http://www.kzk.gov.mk/eng/zapis1.asp?id=721&kategorija=9 (28.9.2010).

[70] This was one of the conclusions in: BOTTA M., Multi-Jurisdiction M&As in an Era of Globalization, the Case Telecom Italia-Telefónica, Vol. 1, *Global Antitrust Review*, 97-116 (2008).

[71] This is the view, for instance, expressed in a recently published book by RODRIGUEZ A., MENON A., *The Limits of Competition Policy: The Shortcomings of Antitrust in Developing and Reforming Economies*, Kluwer Law International (2010).

in view of the progressive integration of the country towards the EU, this choice seems legitimate. However, a number of doubts have been raised in this article in relation to the effectiveness of a full "copy and paste" approach of the EU competition law model in the candidate states like the Republic of Macedonia.

In particular, the introduction of a presumption of single dominance with 40% market share, the adoption of a worldwide turnover threshold of merger notification, the adoption of merger guidelines and block exemption regulations identical to those ones issued by the European Commission are examples of a "blind" transplantation of the EU competition law model at the national level, without questioning the effects of such legislative choices when implemented at the national level.

The analysis of the enforcement record of the KZK in the last five years showed the challenges faced by a "small" and newly established NCA in enforcing the competition law in a country where the idea of competition culture is still absent. The preference for investigations on exploitative abuses of dominance rather than cartels prosecution should be understood in the light of the limited human resources of this institution. The KZK, in fact, focused its investigations on the abusive practices carried out by companies which benefited from State concessions, and which were thus monopolists in the market. Consequently, the exact determination of the size of the relevant market and of the market share of the companies was never an important issue.

An interesting development analyzed in this paper concerned the establishment of the Administrative Court. The annulment of a number of decisions adopted by the KZK shows the importance of the establishment of this new institution. In reaction to these judgments, the KZK has improved the quality of its decisions. Therefore, in an emerging economy it is essential to establish a specialized court/specialized chamber with exclusive jurisdiction to review the NCA's decisions, as argued elsewhere by one of the authors of this article.[72] Even though the court will not undertake a full review of the substance of the NCA's decisions in the first years after its establishment, it will ensure the compliance of the due process by the NCA.

The cases analyzed in the area of merger control show the under-enforcement of this branch of the competition law by a newly established NCA of the emerging economies. The latter have to review often multi-jurisdictional concentrations involving the local subsidiaries of the foreign investors in the country. The NCAs of the emerging economies often do not have jurisdiction on the holding companies of the merging parties, and they are also reluctant to impose remedies which could undermine the inflow of FDIs to the country.

In spite of its limited human resources, the KZK has enforced the 2005 Competition Act in a number of decisions, and the quality of its enforcement record has progressively improved. However, many challenges remain ahead. So far, the KZK has conducted investigations where the anti-competitive conduct was evident. In the future, KZK should focus its investigations also on collusive practices, and on exclusionary forms of abuses of dominance. In addition, with the exception of the decision on the Deutsche Telekom-OTE concentration, the KZK's decisions have always concerned economic sectors of minor importance. The welfare of the Macedonian consumers has not sensibly increased because Elektrostopanstvo does not apply anymore the extra-fee of 6 Denars on the electricity bills, nor because T-Mobile and Cosmofon do not charge anymore an extra-fee to the callers when they hear the automatic message of the voice mail. One of the challenges ahead of the KZK is to broaden the number of economic sectors subject to its investigations. For instance, flights, international phone calls, the electricity tariffs for household customers and a number of consumers' goods are still today more expensive in the Republic of Macedonia than in other European countries. This is due to the concentrated structure of the economy, which facilitates collusive practices among the market participants, rather than due to the additional costs faced by the economic operators in this

[72] BOTTA M., El Poder Judicial y la Ley 25.156: Conflictos de Jurisdicción y Falta de Comprensión a una Década de la Aprobación de la Ley, forthcoming in the *Boletín Latinoamericano de Competencia*.

country. Only by targeting anti-competitive practices which clearly affect the consumers welfare, the KZK will increase its credibility *vis a vis* the State authorities and the public opinion, and it will thus improve the level of competition culture in the country. Following the situation in the telecommunication, energy and banking sector by the KZK in 2008,[73] and the signed Memoranda of understanding with the NRA for energy[74] and for telecommunications,[75] could be seen as steps in this direction. The exchange of information, cooperation during case assessments shall add to improving and strengthening the activities of the KZK.

KZK will not be able to complete this mission only by relying on its enforcement action. Additional legislative and reforms aiming at achieving a further liberalization of the economy will have to be undertaken. In relation to the first issue, further legislative changes are taking place at the moment.[76] New draft legislation for protection of the competition is pending for adoption at the Parliament, which increases the degree of compliance with the EU model on substance and procedure. In particular, under the draft legislation the KZK can determine the existence of an infringement and to impose a fine in the same decision, instead of relying on the separate misdemeanor procedure. This modification should speed up the process of imposing a fine on an anti-competitive practice, making the enforcement of the competition law more effective. Finally, the draft legislation includes rules on evidence (information and investigation rights) the calculation of fines and introduces leniency procedure.

In relation to the second proposal related to the reforms during the further liberalisation of the economy, better forms of regulation of the liberalized markets should counterbalance the impact of the liberalization reforms. As this paper has shown, the majority of the forms of abuse of dominance sanctioned by the KZK were carried out by companies which were granted a State concession. These abuses would be avoided if the terms of the concession had limited the discretion of the economic operator benefiting of the concession. Secondly, the Macedonian economy needs to be further integrated with the neighboring countries in terms of regional trade and cross-border investments. This is the only way to "de-concentrate" a small economy, by thus increasing the level of competition in several relevant markets.

[73] 2009 KZK's Annual Report for the year 2008, p.24-29

[74] Memorandum of understanding in the area of the protection of competition in the energy market, January 2007, Skopje

[75] Memorandum of understanding in the area of the protection of competition in the market for electronic communications, January 2007, Skopje

[76] Draft Law for protection of the competition, September 2010, Skopje, available at: http://www.sobranie.mk/ext/materialdetails.aspx?Id=6818487d-f3e1-4d7a-996a-ed39ded5f1a2 (12.10.2010) in Macedonian language

La politique de la concurrence au Maroc et son appui par l'Union européenne

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I. Introduction
II. La législation en vigueur
III. Les institutions en charge de la concurrence
La Direction de la Concurrence et des Prix
Le Conseil de la concurrence
Les tribunaux
IV. La mise en œuvre de la politique de la concurrence au Maroc
V. Le projet de jumelage institutionnel
VI. Les grands chantiers
1) La réforme de la Loi n° 06-99 et la création d'une autorité de la concurrence indépendante
2) Absence des mécanismes de coopération entre les autorités de concurrence et de la régulation sectorielle
3) Réforme de la justice
4)Améliorations en matière d'information et de transparence
5) Manque d'une visibilité aux plans national et international
6) Futur appui de la recherche et de formation en matière de concurrence
VII. Perspectives

I. Introduction

Avec l'adoption de la Loi n° 06-99 sur la liberté des prix et de la concurrence en tant que point de départ, la politique marocaine de la concurrence vient de fêter ses dix ans cette année. Depuis son entrée en vigueur en juillet 2000 et l'achèvement de la mise en place des institutions compétentes au cours des années suivantes, la politique de la concurrence n'a pas manqué de prendre de l'ampleur et commence bel et bien à s'imposer sur le plan national. Jouant en sa faveur, l'arrivée du nouveau gouvernement fin 2007 a donné un nouvel élan stimulant l'intérêt, parmi les consommateurs et les opérateurs économiques, aux avantages qu'une concurrence saine et respectée offre pour le développement de l'économie nationale. Ainsi les efforts du gouvernement, qui a déclaré dès le début de faire de la politique de la concurrence une des priorités de son mandat, se sont concentrés, en premier lieu, à rendre opérationnelles les autorités en charge de sa protection et de renforcer leur visibilité aux plans national et international. En même temps, les autorités de la concurrence se sont engagées dans une vaste campagne de sensibilisation pour faire respecter les règles de concurrence, jusqu'ici peu connues parmi une grande majorité des acteurs économiques et encore très rarement appliquées par les tribunaux compétents. Ces efforts commencent désormais à porter leurs premiers fruits, bien que du début la tâche d'introduire au Maroc une véritable politique de la concurrence s'est avérée très complexe et avait obligée le gouvernement marocain à faire face à de nombreux obstacles.

[1] Conseiller résident de jumelage au Ministère des Affaires Economiques et Générales du Maroc entre 2007 et 2010. Toutes les opinions exprimées sont l'avis personnel de l'auteur et ne représentent ni le point de vue de l'Union européenne ni du Ministère fédéral de l'Economie et de la Technologie.

Afin d'appuyer les multiples efforts et d'accompagner la préparation de la réforme de la législation en vigueur qui s'est avérée nécessaire au fil des années, le Maroc a bénéficié, entre octobre 2007 et juillet 2010, d'un large projet de jumelage institutionnel visant à renforcer ses autorités de la concurrence. Entièrement financé par l'Union européenne et mis en œuvre sous la coresponsabilité du Ministère fédéral de l'Economie et de la Technologie en tant que l'administration partenaire d'Allemagne, ce projet a permis de mobiliser un grand nombre d'experts du domaine, tous intervenant dans le but d'appuyer ses nombreuses activités. A l'occasion de l'achèvement du projet de jumelage, la présente contribution a pour but de présenter le cadre législatif et institutionnel en matière de concurrence, de renseigner sur l'état actuel de la politique de la concurrence au Maroc, de dresser un premier bilan du projet de jumelage et d'indiquer les chantiers et défis majeurs du domaine pour les années à venir. Enfin, l'occasion est toute trouvée pour attirer l'attention sur quelques mesures utiles dans le but d'apporter un futur appui pour faciliter au gouvernement marocain la tâche de réformer ses institutions afin de pleinement accomplir ses obligations en matière de concurrence, telles que stipulées par l'Accord d'Association et indispensables pour la création de la zone de libre échange à l'échelle de 2012.

II. La législation en vigueur

Entrée en vigueur le 6 juillet 2000, la Loi n° 06-99 sur la liberté des prix et de la concurrence[2] constitue la base législative de la politique de la concurrence au Maroc. Accompagnée par un décret d'application[3], cette loi est fondée sur le principe de la libre concurrence de tous les biens et services, à l'exception de 15 produits et services réglementés qui font l'objet d'un traitement spécial[4]. Dans son volet concurrence, comme toutes les législations modernes du domaine, la Loi n° 06-99 prévoit des règles à l'encontre des ententes anticoncurrentielles (les articles 6, 8 et 9) et de l'exploitation abusive (les articles 7 – 9) et elle introduit des règles s'appliquant aux opérations de concentration économique (les articles 10 – 12). Du fait que ces articles s'orientent, dans une large mesure, sur le modèle des mêmes règles dans les lois de concurrence des pays industrialisées et correspondent en large mesure aux articles 101 et 102 TFUE et au Règlement (CE) n°139/2004 relatif au contrôle des concentrations entre entreprises[5], il convient de se limiter à attirer l'attention sur les principales particularités de la législation marocaine, afin d'illustrer la nécessité de sa réforme qui a fait l'objet des travaux de l'équipe de jumelage. Celles-ci peuvent être résumées comme suit :

Il n'existe aucune législation secondaire en matière d'*ententes anticoncurrentielles*. Bien que les dispositions des articles 6 et 8 de la Loi n° 06-99 correspondent à l'acquis de l'Union européenne, leur champ d'application est visiblement sans limite. De ce fait, en principe, toute entente appliquée

[2] Dahir n° 1-00-225 du 5 juin 2000 ; Bulletin Officiel du 6 juillet 2000. Le texte intégral de la Loi n° 06-99 et le Décret d'application sont publiés sur le site du Ministère des Affaires Economiques et Générales (www.affaires-generales.gov.ma) et sur le site du projet de jumelage (www.jumelage-concurrence.eu).

[3] Décret n° 2-00-854 du 17 septembre 2001 pris pour l'application de la loi n° 06-99 sur la liberté des prix et la concurrence ; Bulletin Officiel du 4 octobre 2001.

[4] Conformément à l'Arrêté du Ministre délégué auprès du Premier ministre chargé des affaires économiques et générales n° 1309-06 du 4 juillet 2006 fixant la liste des produits et services dont les prix sont réglementés, il s'agit de la farine nationale du blé tendre, le sucre, le tabac manufacturé, l'électricité, l'eau potable, l'assainissement liquide, les combustibles liquides et gazeux, le transport routier des voyageurs, le transport urbain des personnes, les produits pharmaceutiques et à usage vétérinaire, les actes et services médicaux dans le secteur médical privé, les actes pratiqués par les sages-femmes, infirmiers et infirmières du secteur privé, les livres scolaires, les actes des huissiers de justice et les actes hébraïques. La fixation des prix est censée de prendre fin en 2014.

[5] Journal Officiel de l'Union européenne du 29 janvier 2004, n° L 24, page 1.

sur le sol marocain qui affecte la concurrence est prohibée par la loi, sans que son effet réel sur un marché soit pris en compte. Ainsi les autorités compétentes ne disposent pas des moyens pour exempter les pratiques insignifiantes, leur permettant à se focaliser sur les cartels « *hard-core* » et autres cas d'importance majeure. Ce constat s'applique en premier lieu aux accords verticaux et aux accords entre les petites et moyennes entreprises qui, d'habitude, n'englobent pas des effets négatifs signifiants.

A l'égard des pratiques d'*abus de position dominante* par une entreprise ou un groupe d'entreprises, la loi marocaine permet de manière explicite d'appliquer également les exemptions prévues pour les accords anticoncurrentielles. Selon l'article 8 alinéa 2 de la Loi n° 06-99, toute pratique abusive peut être justifiée au cas où celle-ci *contribue au progrès économique et que ses contributions sont suffisantes pour compenser les restrictions de la concurrence et qu'elles réservent aux utilisateurs une partie équitable du profit qui en résulte, sans donner aux entreprises intéressées la possibilité d'éliminer la concurrence pour une partie substantielle des produits et services en cause*. Heureusement, à notre connaissance, cette exception n'a jamais encore été appliquée par les autorités compétentes.

Enfin, selon l'article 10 de la Loi n° 06-99, les *concentrations économiques* doivent être notifiées pour autorisation préalable au cas où les entreprises ont *réalisé ensemble plus de 40% des ventes, achats ou autres transactions sur un marché national de biens, produits ou services* (…). Ainsi l'obligation de notification ne dépend pas du chiffre d'affaires comme c'est le cas dans la plupart des législations nationales des Pays membres de l'UE, mais elle est basée sur les parts de marché des entreprises concernées et ainsi sur un critère qui n'est pas évident et dont la détermination fait habituellement l'objet des divergences entre les autorités de la concurrence et les parties à la concentration. De ce fait, ces dix dernières années il n'y a eu qu'un nombre négligeable de projets de concentration notifiés au Maroc, tandis qu'il y a eu plusieurs cas dans lesquels les parties ont contesté d'avance avoir atteint le seuil de 40% des parts de marché et, ainsi, de devoir soumettre leur projet à une autorisation préalable. Sans avoir les pouvoirs nécessaires d'exiger auprès de ces parties une notification en bonne et due forme[6] pour être en mesure d'examiner le projet de concentration et, le cas échéant, de prouver le contraire en établissant d'office les parts de marché, le gouvernement marocain a toujours été contraint d'accepter leur point de vue parfois douteux. En pratique, ce critère pose également problème dans le cas de chaque notification, car on peut estimer que tout projet de concentration des entreprises ayant déjà ensemble plus de 40% des parts de marché contient le risque de porter atteinte à la concurrence par la création ou le renforcement d'une position dominante et, de ce fait, devrait être prohibé par les autorités compétentes. En prenant en considération cette hypothèse et les moyens très limités des autorités de la concurrence décrites ci-dessus, la réticence manifeste des entreprises à notifier leurs projets de concentration est bien compréhensible.

D'autres particularités de la législation marocaine concernent la procédure en matière d'infraction des règles s'appliquant aux pratiques anticoncurrentielles, caractérisée par un rôle essentiel des magistrats. En effet, l'autorité de la concurrence (la DCP) a uniquement pour tâche de déterminer toute infraction au cours d'une enquête « simple » (articles 61 à 64) ou « sous contrôle judiciaire » (article 65). Une fois convaincue de la présence d'une infraction à la loi, elle doit saisir le Procureur du Roi qui, ensuite, instrumente une procédure devant le tribunal de première instance compétent. En l'absence des sanctions administratives prévues dans la Loi n° 06-99, ce sont les magistrats qui se prononcent sur le bien-fondé de la poursuite et, le cas échéant, déterminent et imposent les sanctions pénales. Ainsi l'article 67 de la Loi n° 06-99 prévoit pour toute personne physique impliquée dans l'application d'une pratique anticoncurrentielle l'emprisonnement d'une

[6] Bien qu'ils aient été élaborés avec l'appui de l'équipe de jumelage, ils n'existent ni un formulaire relatif à la notification des projets de concentration ni des notes explicatives qui seraient mis à la disposition des entreprises concernées par les autorités compétentes. Une énumération des informations et documents à fournir se trouve à l'article 7 du Décret d'application n° 2-00-854 du 17 septembre 2001.

durée de deux mois jusqu'à un an et, alternatif ou cumulatif, des sanctions pécuniaires. Tandis qu'une peine de prison constitue toujours une sanction redoutée, les amendes allant de 10.000 à 500.000 Dirhams[7] sont visiblement trop modestes pour avoir un effet dissuasif.

Depuis 2001, la législation marocaine en matière de concurrence est renforcée par le Décret n° 2-00-854 pris pour l'application de la Loi n° 06-99 qui traite, entre autres, de la composition du Conseil de la concurrence (articles 1 à 5), des procédures en matière des pratiques anticoncurrentielles (article 6) et des opérations de concentration économique (article 7). D'ailleurs, la Loi n° 06-99 n'a été modifiée qu'une seule fois depuis son entrée en vigueur, à savoir en 2010 par la Loi n° 30-08[8]. Cet amendement n'affecte pas directement le volet de concurrence de la Loi n° 06-99, mais prévoit le maintien du système de réglementation des prix pour les 15 produits et services pendant une période transitoire de quatre ans et, en même temps, introduit des changements par rapport aux sanctions, notamment la revue à la hausse des amendes visant les contrevenants sur les produits dont les prix sont réglementés et ceux qui s'adonnent à des pratiques illicites telles que la vente liée, l'absence de factures ou le non affichage des prix.

III. Les institutions en charge de la concurrence

A la lecture de la Loi n° 06-99, son application par la voie des décisions et sanctions en la matière est strictement réservée aux deux autorités publiques – le Premier ministre et les tribunaux. Tandis que les magistrats sont en fin de compte les seuls responsables pour toute sanction des infractions aux règles de la concurrence, le rôle du *Premier ministre* tel quel statué dans la Loi n° 06-99 en lui confiant, en premier lieu, la compétence d'autoriser les projets de concentration économique, ne reflète pas pleinement la pratique administrative du Maroc. En effet, toutes les compétences du Premier ministre en matière de concurrence sont habituellement transférées – par décret – au Ministre délégué auprès du Premier ministre, chargé des affaires économiques et générales[9]. C'est ainsi au sein du Ministère des Affaires économiques et générales que sont traités toutes les affaires de concurrence et la Direction de la concurrence et de prix (DCP) y incorporée, créé pour accomplir ces tâches[10], a été *de facto* la seule instance en charge de la concurrence jusqu'à la réactivation du Conseil de la concurrence en début 2009. Malgré les dispositions dudit décret, les autorisations des projets de concentration sont, en majorité, prises directement par le Premier ministre. Néanmoins, en pratique, les projets sont auparavant toujours examinées et validées par le Ministre délégué, chargé des affaires économiques et générales. Cette ambiguïté porte parfois à la confusion et elle est souvent à l'origine de problèmes pratiques : une partie souhaitant notifier un projet de concentration est toujours bien conseillé de le faire auprès de la primature afin d'éviter tout risque d'une éventuelle déclaration d'irrecevabilité de la part du Ministère des affaires économiques et générales. Pourtant, ce dernier est ensuite sollicité par la voie officielle par la primature, ce qui provoque une importante perte de temps précieux (en pratique entre 4 et 6 semaines) pour le traitement du dossier. De cela résulte l'urgence de clarifier les procédures et de mettre à la disposition des entreprises concernées des formulaires et notes explicatives relatifs à la notification des projets de concentration.

[7] Ce montant correspond à une somme entre 900 et 45.000 € environ.

[8] Loi n° 30-08 modifiant et complétant la loi n° 06-99 sur la liberté des prix et de la concurrence, Bulletin Officiel n° 5814 du 18 février 2010.

[9] Décret n° 2-07-1277 du 15 novembre 2007 portant délégation d'attributions et de pouvoirs à M. Nizar Baraka, Ministre délégué auprès du Premier ministre, chargé des affaires économiques et générales, Bulletin Officiel n° 5584 du 6 décembre 2007.

[10] Auparavant, il existait une Direction des prix relavant du Premier ministre, instituée par Décret n° 2-72-089 du 4 février 1972. Celle-ci a été transformée en la DCP actuelle.

La Direction de la Concurrence et des Prix

Comme il a été signalé ci-dessus, en pratique, la mise en œuvre de la politique de la concurrence demeure la tâche de la Direction de la Concurrence et des Prix (DCP) installée au sein du Ministère des Affaires Economiques et Générales et c'est ainsi la DCP qui doit être considérée comme étant l'autorité marocaine de la concurrence. Il est pourtant assez étonnant et porte souvent à la confusion de constater, à la lecture de la Loi n° 06-99, que la DCP n'y est pas mentionnée, tandis qu'un titre entier – faisant presque un tiers de l'ensemble des articles de cette loi (!) – est exclusivement consacré au Conseil de la concurrence (articles 14 à 46). Placée directement sous son autorité par Décret en 2009[11], le Premier ministre a confié à la DCP la mission de *veiller à la régulation et au bon fonctionnement des marchés en assurant l'application des dispositions législatives et réglementaires régissant le domaine de la concurrence* et lui attribue, de manière expresse, les principales tâches et compétences en la matière. Ces dernières englobent : (1) L'élaboration des projets de textes législatifs et de textes réglementaires relatifs à la concurrence et aux pratiques restrictives de la concurrence, leur mise en oeuvre et le contrôle de leur application ; (2) La détection et l'analyse des pratiques anticoncurrentielles ; (3) Le contrôle des opérations de concentration ; (4) La programmation et la réalisation des enquêtes nationales et sectorielles relatives à la concurrence et (5) La préparation des dossiers de saisine du Conseil de la concurrence, et le cas échéant, des dossiers de saisine des autorités judiciaires. Sur la base de « l'Arrêté créant les divisions et services relevant de la direction de la concurrence et des prix et fixant leurs attributions »[12], la DCP est organisée en trois divisions: (1) la division de la réglementation, (2) la division des études et enquêtes économiques et (3) la division de la concurrence, chargée de la mise en œuvre et du suivi de la politique de la concurrence. La division de la concurrence est composée de 3 services, celui (a) des pratiques anticoncurrentielles ; (b) des pratiques restrictives de la concurrence et (c) des opérations de concentration économique.

Malgré ses vastes attributions et le nouvel organigramme qui évoque une autorité de taille, la DCP est restée depuis son institution une petite entité avec, au total, seulement 13 fonctionnaires qui sont responsables de toutes les tâches du domaine de la concurrence et, en outre, également du domaine du contrôle de prix. Au quotidien, ce dernier champ d'action est prédominant dans la répartition des dossiers à traiter. Cette pénurie manifeste des ressources humaines contraste visiblement avec les missions de la DCP et la place distinguée qui lui a été réservée en tant que service directement placé sous l'autorité du Premier ministre. Elle est aussi à l'origine du très petit nombre des décisions en matière de concurrence adoptées jusqu'à présent. Ainsi il est peu probable que le gouvernement marocain puisse mettre en œuvre une politique de la concurrence efficace sans que le nombre des cadres soit considérablement augmenté.

Enfin, le changement de statut juridique de la DCP cité en-dessus avait impliqué la nomination de son (ancien) directeur par Dahir royal, comme il est stipulé pour un tel service par la Constitution marocaine et le statut de la fonction publique. Il ne peut désormais être révoqué de sa fonction par la hiérarchie ministérielle, ce que lui garantit une certaine autonomie vis-à-vis le Premier ministre et le Ministre délégué, chargé des affaires économiques et générales, en tant que responsables de la mise en œuvre de la politique de la concurrence. Bien qu'il soit tout à fait positif que le directeur ait gagné plus d'autonomie dans la mise en œuvre des actions de la DCP, il n'est pas sans risque de limiter ainsi les moyens d'action du gouvernement, demeurant le responsable en fin de compte, au cas où les résultats réalisés par la DCP ne sont pas satisfaisants dans le futur. En même temps, la DCP, en tant que service bénéficiant d'une certaine autonomie, peut désormais à tout moment être enlevée du

[11] Décret n° 2-08-516 portant création d'une direction de la concurrence et des prix sous l'autorité du Premier ministre, Bulletin Officiel n° 5752 du 16 juillet 2009.

[12] L'arrêté est entré en vigueur le même jour que le décret, le 16 juillet 2009.

Ministère des affaires économiques et générales et incorporée dans une autre administration gouvernementale.

Le Conseil de la concurrence

Le Conseil de la concurrence (Conseil) constitue la deuxième autorité en charge de la concurrence au Maroc. Depuis son entrée en vigueur en 2000, la Loi n° 06-99 prévoit dans son titre V des règles détaillées concernant la composition, les tâches et la procédure devant le Président du Conseil. Malgré l'importance qui lui est accordée manifestement dans le système marocain de la protection de la concurrence, le Conseil est resté en veille pendant plus de huit ans (!) et c'est seulement en janvier 2009 qu'il fut réactivé par le Premier ministre, suite à la nomination de son Président par le Roi Mohammed VI à l'occasion de la commémoration de la révolution du roi et du peuple le 20 août 2008. Pendant ces huit ans d'inactivité, le Conseil a uniquement existé « sur le papier » et ses membres, bien que nommés par décret, n'ont jamais exercé leurs fonctions. Suite à une courte période d'inexistence complète entre novembre 2007 et janvier 2009, pendant laquelle le Conseil était résolu et ses tâches confiées par décret[13] au Ministre délégué auprès du Premier ministre, chargé des affaires économiques et générales[14], le Conseil a été mis en fonction par le Premier ministre le 6 janvier 2009. Conformément à la loi, il est composé de son Président et de 12 membres non permanents, dont 6 représentant l'administration gouvernementale[15], 3 élus en raison de leurs compétences en matière de la concurrence et de la consommation et 3 représentant des fédérations et des chambres professionnelles. Selon l'article 30 de son règlement intérieur[16], la préparation des avis du Conseil par les rapporteurs sous l'égide d'un rapporteur général est effectuée au sein de trois commissions permanentes en charge de (1) produits de consommation de base ; (2) productions économiques courantes et (3) services et finances. En son sein, le Conseil de la concurrence est organisé autour de deux directions – la direction des instructions et la direction des études – et, par rapport à la DCP, mieux équipé en termes de ressources humaines : malgré ses compétences limitées, le Conseil dispose actuellement d'une vingtaine de cadres, dont 11 rapporteurs (y compris deux aide-rapporteurs et un rapporteur général adjoint) directement impliqués dans le traitement des dossiers de concurrence.

L'importance accordée manifstement au Conseil de la concurrence dans la Loi n° 06-99 contraste également avec ses compétences limitées. Malgré tout autre apparence le Conseil est un organe purement consultatif, sans avoir de pouvoir d'agir d'office (auto saisine) et ainsi privé de la possibilité d'action directe face aux pratiques illicites dans ce domaine. A ceci s'ajoute le fait que la loi ne permet pas une saisine directe du Conseil – contrairement à la DCP et aux tribunaux – par les entreprises victimes de pratiques anticoncurrentielles. A l'égard de son rôle spécifique, l'article 16 de la Loi n° 06-99 stipule la consultation obligatoire du Conseil dans les cas qu'un projet de loi ou de

[13] Décret n° 2-07-1277 du 15 novembre 2007 portant délégation d'attributions et de pouvoirs à M. Nizar Baraka, Ministre délégué auprès du Premier ministre, chargé des affaires économiques et générales, Bulletin Officiel n° 5584 du 6 décembre 2007.

[14] Dans le temps, ce décret a fait l'objet de critique pour avoir remis en cause la Loi n° 06-99 en confiant ses attributions à une autre autorité, voir *Farid El Bacha*, « Le Conseil de la concurrence enterré », dans l'Economiste du 23 mai 2008, p. 43.

[15] Décret n° 2-08-556 du 15 octobre 2008 portant la nomination du Président et des membres du Conseil de la Concurrence. Les six membres nommés sur proposition des autorités gouvernementales dont ils relèvent représentent le Ministre de la justice, le Ministre de l'intérieur, le Ministère de l'économie et des finances, le Secrétaire général du gouvernement, le Ministre des affaires économiques et générales et le Haut commissariat du plan.

[16] Le règlement intérieur du Conseil a été adopté en 2009 et n'a pas nécessité d'être publié au bulletin officiel. Son texte intégral peut être consulté sur le site du Conseil www.conseil-concurrence.ma.

texte réglementaire instituant un régime nouveau ou modifiant un régime en vigueur (1) soumets l'exercice d'une profession ou l'accès à un marché à des restrictions quantitatives ; (2) établit des monopoles ou d'autres droits exclusifs ou spéciaux ; (3) impose des pratiques uniformes en matière de prix ou de conditions de vente ou (4) octroie des aides d'Etat. Néanmoins, le Conseil doit, en principe, être consulté par la DCP sur toutes les questions portant sur des pratiques anticoncurrentielles, les concentrations et les prix réglementés. En outre, il peut être consulté pour toute question concernant la concurrence par le gouvernement marocain et, dans la limite des intérêts dont ils ont la charge, par les Conseils de régions, les communautés urbaines, les chambres d'agriculture, d'artisanat, de pêches maritimes, les organisations syndicales et professionnelles et les associations de consommateurs reconnues d'utilité publique[17]. En outre, le Conseil peut être consulté par les commissions permanentes du Parlement pour les propositions de lois couvrant une dimension relative à la concurrence ainsi que par les juridictions compétentes sur les pratiques anticoncurrentielles et relevées dans les affaires dont elles sont saisies (article 15 de la Loi n° 06-99).

En exerçant ses fonctions, le Conseil doit se limiter à émettre des avis qui ne sont pas rendus publics. A l'égard des décisions en matière des pratiques anticoncurrentielles et des concentrations économiques, la Loi n° 06-99 prévoit seulement la possibilité de publier, au bulletin officiel, l'avis du Conseil au même temps que la décision finale rendue au nom du Premier ministre. Accentuée par le fait que, depuis sa mise en fonction, aucune décision du domaine n'a pas été publiée au bulletin officiel, cette disposition empêche le Conseil de fournir la preuve de son travail en dehors de l'administration gouvernementale et, par là, d'améliorer sa visibilité parmi les opérateurs économiques et les consommateurs marocains. De ce fait, la vision globale du Conseil et des résultats de son travail restent toujours assez flous au plan national, malgré un travail considérable, effectué au cours de bientôt deux ans d'existence. A l'heure actuelle, la principale activité du Conseil consiste à suivre des études sur la concurrence dans six secteurs de l'économie nationale, lancées en 2009 et confiées à des cabinets privés[18]. Bien que leurs résultats – attendues avec une certaine impatience et désormais annoncées pour la fin de l'année 2010 – soient incluses dans le rapport actuel du Conseil[19], il est à espérer qu'au moins ces études ou leurs résumées pourront être rendues public.

Les tribunaux

Le rôle fondamental des tribunaux dans le système marocain de la protection de la concurrence a déjà été mentionné ci-dessus. Ce rôle contraste avec la pratique des tribunaux car, jusqu'à présent, aucun jugement en matière de concurrence, ayant pour objet d'annuler une décision du Premier ministre ou d'imposer une sanction pour l'application d'une pratique illicite, n'a pas été rendu par les tribunaux marocains. En l'absence d'une juridiction spécialisée en matière de concurrence, dont la future introduction à travers la création d'une chambre spécialisée fait désormais l'objet des considérations dans le cadre de la future réforme, les compétences en la matière sont divisées entre les juridictions du droit commun et du droit administratif. Ainsi toute sanction – amende et incarcération – d'une pratique anticoncurrentielle relève de la compétence exclusive des

[17] Jusqu'à présent, aucune association de consommateurs n'a pas été reconnue d'utilité publique au Maroc, cette disposition est ainsi sans valeur.

[18] Les six études concernent la téléphonie mobile, les grandes surfaces, les huiles de table, le crédit à la consommation, le ciment et l'industrie pharmaceutique et ainsi plusieurs secteurs qui ont, dans le passé, fait l'objet d'une enquête par la DCP ou relève de la compétence des autorités de régulation sectorielle. Le choix des secteurs constitue ainsi le principal reproche qu'on fait au Président du Conseil par rapport à la réalisation de ces études, dont l'utilité est parfois mise en question. Pour 2011, le Conseil a programmé la réalisation de futures études, notamment concernant les produits réglementés.

[19] C'est uniquement le Conseil de la concurrence qui est tenu de publier un rapport annuel et non la DCP.

magistrats[20]. Leur jugement est rendu suite à la procédure – instrumentée par le Procureur du Roi sur la base d'une décision motivée du Premier ministre qui prend en compte les recommandations du Conseil de la concurrence – devant les tribunaux du droit commun (Article 39 de la Loi n° 06-99). En outre, la légalité de toutes les démarches au cours d'enquêtes de concurrence est soumise au contrôle juridique par la jurisprudence administrative. De même, les recours contre les décisions du Premier ministre et du Ministre délégué, chargé des affaires économiques et générales, en matière des pratiques anticoncurrentielles ordonnant de mettre fin aux pratiques anticoncurrentielles (article 40 de la Loi n° 06-99) et en matière des concentrations économiques, doivent être portés devant la juridiction administrative compétente (article 46 de la Loi n° 06-99). Conformément à la Loi n° 41-90 instituant les tribunaux administratifs, tout litige concernant le recours pour excès de pouvoir contre les décisions du Premier ministre y est jugé en annulation[21].

IV. La mise en œuvre de la politique de la concurrence au Maroc

Tout d'abord, il est à constater que tout essai de décrire la politique de la concurrence au Maroc au cours des dernières années a dû se limiter à donner une description de son encadrement par les accords internationaux et du fonctionnement des institutions compétentes ainsi qu'à fournir une analyse des bases juridiques[22]. Il est à craindre que cette contribution n'échappera pas à cette règle, car l'application du dispositif légal pour combattre les pratiques illicites, pourtant l'aspect le plus important et intéressant de chaque analyse politique en la matière, reste toujours en suspens. En effet, les dix dernières années, les tribunaux compétents n'ont pas prononcé une seule sanction, imposée pour infraction des articles 6 et 7 de la Loi n° 06-99 suite à une procédure instrumentée sur la base d'un rapport d'enquête[23]. En plus, il est peu probable qu'un premier jugement pourra enfin marquer l'émergence d'une doctrine de la concurrence dans les mois à venir, car jusqu'à présent, ni les ententes anticoncurrentielles ni les pratiques d'abus de position dominante n'ont fait l'objet d'une enquête sous contrôle judiciaire. Pourtant, c'est la procédure qui prévoit la perquisition et la saisie des documents et par cela constitue le seul moyen efficace pour obtenir des preuves indispensables d'une pratique illicite. Les enquêtes dites « simples »[24], pratiquées habituellement par les enquêteurs de la DCP, n'ont relevé que quelques pratiques illicites, mais sans qu'il y ait eu un véritable remède à la situation par la suite[25]. En même temps, cette situation joue au détriment du Conseil de la

[20] Cette répartition des compétences entre l'autorité de la concurrence et les tribunaux empêche d'ailleurs la DCP d'adopter un programme de clémence.

[21] Voir *Amal Lamniai*, « Le rôle du juge en matière de régulation de la concurrence » dans la Revue Marocaine de Droit Economique (RMDE), n° 1 (2007), p. 17 – 31.

[22] Voir p. ex. l'étude réalisée par *François Souty* « Les règles de concurrence dans le partenariat euro-méditerranéen » publiée dans l'ouvrage « Vers la Zone de Libre Echange – le Programme EuroMed Marché mai 2002 – avril 20009 », EIPA 2009.

[23] Voir l'introduction du *Manuel des procédures*, édité avec l'appui des experts européens au profit des magistrats et auxiliaires de justice par le Ministère des Affaires économiques et générales et le Ministère de la Justice en mars 2010.

[24] Conformément à l'Article 61 de la Loi n° 06-99, les enquêteurs ont le droit d'accéder librement et sans aucune autorisation judiciaire à tous les locaux à usage professionnel, de demander la communication des livres, des factures et tous autres documents professionnels et d'en prendre copie ainsi que de recueillir sur convocation ou sur place les renseignements et justifications. Voir aussi *Hassan Dabzat*, « Le droit marocain de la concurrence et la protection économique du consommateur à travers la loi n°06-99 sur la liberté des prix et de la concurrence » dans la Revue Marocaine de Droit Economique (RMDE), n° 3 (2010), p. 93 – 100.

[25] Une exception à la règle est la décision du Ministre délégué auprès du Premier ministre, chargé des affaires économiques et générales n° 2-15du 26 décembre 2006 à l'égard des entreprises Savola Maroc et Société

concurrence, dont la tâche principale consiste à émettre des avis sur les infractions constatées au cours des enquêtes menées par la DCP. En l'absence de preuves de pratique illicite et ainsi de « sérieuses » affaires de concurrence lui soumises, le Conseil ne pourra pas pleinement accomplir ses tâches et restera littéralement sans travail.

Néanmoins, il y a des signes que la situation décrite ci-dessus est en train de s'améliorer : comme il a été reporté par l'hebdomadaire *La Vie Eco* en mai 2010[26], un des principaux magazines économiques au Maroc, *« Le Premier ministre a donné son feu vert pour l'ouverture d'une enquête lourde sur le marché du beurre importé »*. Cette révélation, à la première lecture bien dérangeante à cause de sa nature contreproductive et son risque imminent de mettre en péril tout succès de l'opération prévue, donne une idée de la pression sous laquelle se trouve le gouvernement marocain d'agir enfin et de mettre fin aux pratiques anticoncurrentielles détectées au Maroc. De ce fait, actuellement tous les indices d'une application imminente de la loi font l'objet d'un intérêt particulier au Maroc comme à l'étranger.

Tandis que la situation à l'égard des pratiques anticoncurrentielles reste insatisfaisante comme c'est le cas pour le moment, il est à noter que plusieurs projets de concentration économique ont été notifiés pour autorisation du Premier ministre récemment, malgré les insuffisances du dispositif légal mentionnées ci-dessus. Dans le passé, tous ces projets ont été autorisés par la suite, sans faire l'objet d'une analyse approfondie ni d'une décision motivée et publiée au bulletin officiel en bonne et due forme, comme il est pourtant stipulé par l'article 46 de la Loi n° 06-99. Désormais, la situation à l'égard des projets de concentration semble également s'améliorer : en début 2010, la fusion à l'échelle mondiale des entreprises anglo-américaines *Kraft Foods* et *Cadbury* a fait l'objet d'une notification au Maroc et, pour la première fois, d'une saisine du Conseil de la concurrence dans ce domaine. Après avoir élaboré un avis détaillé sur les conséquences attendues sur le marché marocain des produits de biscuiterie, chocolaterie et confiserie (biscuits, gaufres chocolatées, chewing-gum etc.), le Conseil de la concurrence a adopté son premier avis sur un projet de concentration, en lui donnant son approbation comme il a été fait sans exception par toutes les autorités de la concurrence du monde entier qui ont dû se prononcer sur les effets de cette concentration. Selon l'avis du Conseil de la concurrence – malheureusement non-publié –, le Premier ministre a finalement autorisé ledit projet.

V. Le projet de jumelage institutionnel

Un bref aperçu du projet de jumelage avec les autorités marocaines de la concurrence et son état des lieus ainsi qu'une présentation de cet instrument mis à la disposition, dans le cadre de la politique européenne de voisinage, pour accompagner les réformes institutionnelles dans les pays associées à l'Union européenne, ont été inclus dans le premier numéro du présent bulletin[27]. Pour rappel, les projets de jumelage constituent une forme de coopération étroite entre l'administration d'un pays membre de l'UE et d'un pays bénéficiaire, dans le but d'améliorer les institutions concernées de ce dernier par le biais de formations, de réorganisations ainsi que de la rédaction des textes législatifs sur la base de l'acquis de l'Union européenne. A l'issue du projet, le nouveau système ou le système amendé doit fonctionner sous la seule responsabilité et avec les seuls moyens

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Industrielle Oléicole, relative à des pratiques de vente dans le secteur des huiles de table. En résultat, la pratique de prix abusivement bas appliquée par les deux entreprises a été interdite sur la base de l'article 7 de la Loi 06-99, mais sans qu'il y ait eu une sanction dudit comportement. La décision intégrale a été publiée dans la Revue Marocaine de Droit Economique (RMDE), n° 1 (2007), p. 101-102

[26] Voir l'article « Mafia du beurre, la justice saisie » dans La Vie Eco du 17 mai 2010 (www.lavieeco.com).

[27] Voir le Bulletin Méditerranéen de Concurrence p. 39 – 42 (Exemple de projet de jumelage institutionnel) et p. 130 – 134 (Jumelage institutionnel).

du pays bénéficiaire. L'instrument des projets de jumelage existe depuis les années 90 et il a été initialement créé dans le but de permettre aux pays de l'Europe de l'Est candidats à l'adhésion à l'Union européenne d'accélérer les réformes nécessaires. En raison de sa grande efficacité, il est depuis également mis à la disposition des pays voisins associés qui ne cherchent pas de devenir pays membres de l'Union européenne[28].

Représentant un pilier essentiel du marché intérieur de l'UE, la concurrence est une politique fortement appuyé par la Commission européenne à travers des projets de jumelage. Hormis le Maroc, plusieurs autres pays du pourtour méditerranéen ont déjà bénéficié d'un tel appui ou sont en train de préparer un projet dans ce domaine. Au cours des dernières années, plusieurs projets ont été réalisés avec succès – notamment avec la Tunisie (jumelage avec les autorités françaises de la concurrence en 2006 et 2007) et la Jordanie (la concurrence étant une composante signifiante dans le cadre d'un projet avec les autorités allemandes et françaises réalisé entre 2006 et 2008) – , tandis que les premiers projets en la matière avec l'Albanie (jumelage avec l'Italie, la Grande Bretagne et la Hongrie), la Moldavie (jumelage avec la Roumanie et la Lettonie) et l'Arménie (jumelage avec l'Allemagne et la Lituanie) viennent de démarrer ou sont en cours de préparation. Enfin, l'Algérie a retenu la proposition présentée par un consortium des autorités de concurrence française, italienne et allemande pour entamer, parmi ses premiers jumelages, un projet dans le domaine de la concurrence.

Lié depuis l'an 2000 à l'Union européenne par un Accord d'Association exigeant un rapprochement dans la mise en œuvre des règles de concurrence (ses articles 36, 37 et 38)[29], le Maroc poursuit avec détermination sa politique d'ouverture de ses marchés au commerce international. En appui de l'adoption des conditions nécessaires pour la création de la zone de libre échange prévue pour 2012, les relations entre le Maroc et l'UE ont été encore renforcées et le Maroc bénéficie depuis octobre 2008, en tant que le premier pays voisin de l'Union européenne, du Statut avancé. En accord avec cette politique visant le rapprochement du régime européen, le Ministère des affaires économiques et générales (MAEG) a sollicité, en 2006, un projet de jumelage institutionnel dans le but d'appuyer le processus du renforcement des autorités de la concurrence[30]. La réalisation du projet intitulé « *Appui au renforcement des autorités de la concurrence au Maroc* » (MA06/AA/FI08) à été confiée aux partenaires allemands dont la proposition du Ministère fédéral de l'économie et de la technologie a été retenue. Le projet a démarré le 1er octobre 2007 et s'est achevé, suite à une période prolongée de mise en œuvre des activités de 34 mois, le 31 juillet 2010. Plus précisément, le projet consistait à apporter un soutien direct au renforcement des institutions bénéficiaires du projet – la DCP, le Conseil de la concurrence et les tribunaux – par le biais (1) de rapprocher les bases législatives avec l'Acquis de l'UE dans le domaine de la concurrence ; (2) de renforcer les autorités de la concurrence sur le plan opérationnel ; (3) de mettre en œuvre un vaste programme de formation dans l'application des règles de la concurrence et des techniques d'enquête, destiné aux cadres des autorités de la concurrence et des magistrats et (4) de sensibiliser les décideurs politiques, les opérateurs économiques et les consommateurs aux avantages qu'englobe la mise en œuvre d'une politique de la concurrence efficace à travers de multiples événements de communication (ateliers,

[28] Voir aussi *François Souty*, « A new frontier », Competition Law Insight du 05.06.2007, page 13 (1e partie) et du 03.07.2007 (2e partie).

[29] Accord Euro-méditerranéen établissant une association entre les Communautés européennes et leurs Etats membres, d'une part, et le Royaume du Maroc, d'autre part, Journal officiel des Communautés européennes du 18.3.2000, n° L 70, p. 2. Voir aussi la Décision n° 1/2004 du Conseil d'Association UE-Maroc du 19.4.2004 portant adoption des réglementations nécessaires à la mise en œuvre des règles de concurrence, Journal officiel des Communautés européennes du 25.6.2005, n° L 165, p. 10, la base pour l'introduction des mécanismes de coopération entre les autorités de concurrence.

[30] Le fiche signalétique du projet est disponible sur le site du Ministère des affaires étrangères et de la coopération à l'adresse : http://www.maec.gov.ma/paaa/documents/projets/FI08.pdf.

conférences) et la préparation à la création d'un centre de recherche, d'étude et de formation en matière de concurrence.

A la fin du projet, le bilan est globalement très positif : hormis l'appui à l'élaboration des textes législatifs et réglementaires et à la mise en œuvre des structures institutionnelles qui font l'objet de plus amples informations ci-dessous, le jumelage a permis, en premier lieu, de réaliser un vaste programme de formation au profit des cadres des autorités de la concurrence, portant sur toutes les aspects de l'application des règles de concurrence et comprenant un important transfert de savoir-faire concernant les techniques d'enquête. En addition, le projet a appuyé, à travers un grand nombre de séminaires, ateliers et conférences nationales comme internationales, le débat émergent au Maroc sur les enjeux de la politique de la concurrence. Au total, la réalisation des activités du projet a impliqué 620 jours de travail des experts du domaine, tous des fonctionnaires au sein des autorités nationales de concurrence ou experts de la coopération technique allemande GTZ. En tout cas, la réalisation d'un tel programme ambitieux n'aurait pas donné des résultats aussi bons sans le vigoureux soutien de la part des autorités de concurrence de nombreux pays européens qui, sans être prévus dans le contrat initial, ont été prêtes à appuyer les efforts du gouvernement marocain dans les différents stades du projet, en manifestant ainsi un véritable esprit communautaire. Outre le Bundeskartellamt, l'autorité principale dans la réalisation des activités du projet, des remerciements sont dus aux autorités d'Allemagne, de Pologne, de la France, de la Hongrie, de l'Espagne et du Portugal qui ont toutes participé aux activités de jumelage en détachant des experts ou – comme les autorités polonaises, françaises et espagnoles – ont accueilli des délégations marocaines lors des visites d'études.

VI. Les grands chantiers

Au cours de la réalisation, les actions du projet de jumelage ont permis de faire un état des lieux complet et d'identifier les principaux obstacles qui empêchent le gouvernement marocain d'appliquer une politique de la concurrence efficace. En se focalisant, en premier lieu, sur les défaillances de la législation en vigueur déjà mentionnées en bref ci-dessus, l'équipe de jumelage a ainsi procédé à l'élaboration des solutions pour remédier la situation actuelle. Néanmoins, à l'issue du projet, bon nombre des problèmes – bien qu'ils étaient déjà connus par les experts marocains – continuent d'exister bel et bien, tandis que les solutions proposées aux partenaires marocains attendent toujours d'être mises en œuvre, ce qui est, en partie, dû à la complexité et à la lenteur du processus législatif. De ce fait, les principaux chantiers du projet restent pour la plupart d'actualité et, comme le Maroc est loin d'être un cas unique où l'introduction d'une véritable politique de la concurrence s'est avérée être une tâche d'Hercule, ils peuvent servir d'exemple pour d'autres pays sur le point d'adapter leur politique nationale en la matière aux standards internationaux.

1) La réforme de la Loi n° 06-99 et la création d'une autorité de la concurrence indépendante

Comme il a été déjà mentionné ci-dessus, les défauts de la législation marocaine constituent le principal frein à l'application efficace des règles de concurrence. De ce fait, en début du projet de jumelage, un projet de réforme a été élaboré et soumis au Ministère des affaires économiques et générales. Selon ce projet, la vaste réforme que nécessite ainsi la Loi n° 06-99 doit impérativement modifier les institutions en charge de la protection de la concurrence et comprendre à la fois des amendements indispensables par rapport aux règles procédurales et matérielles de concurrence, s'appliquant aux pratiques anticoncurrentielles et aux concentrations économiques.

La mesure fondamentale qui s'impose au gouvernement marocain est la création d'une autorité de la concurrence indépendante des instructions gouvernementales et de toute autre institution publique ou privées, munie de tous les pouvoirs exécutifs nécessaires. Ainsi cette future autorité de concurrence indépendante doit avoir tous les pouvoirs nécessaires, lui permettant d'agir d'office et, le cas échéant, d'être saisi directement par les entreprises concernées. Ceci implique qu'elle ait à sa disposition un corps d'enquêteurs de concurrence, soumis exclusivement aux ordres de son Président,

une solution qui permettait d'abandonner la – peu efficace – répartition des tâches et compétences entre une autorité exécutive (la DCP) et une autorité consultative (le Conseil de la concurrence) et ainsi éliminer son grand défaut : en pratique, chaque demande d'ouvrir une enquête, adressée à la DCP par le Président du Conseil, peut être refusée pour de multiples raisons ou menée sans prendre en considération les aspects indiqués, surtout quand l'objet de l'enquête est une entreprise soutenue. Par ailleurs, il a été indiqué la nécessité de renforcer les pouvoirs de la future autorité indépendante en matière de procédures d'enquête dans la mesure qu'elle puisse octroyer des sanctions administratives à l'égard des entreprises qui refusent de coopérer. A présent, les enquêteurs ont souvent des difficultés à recueillir toutes les informations nécessaires pour bien fonder les résultats de leur enquête, car la législation actuelle n'oblige ni les entreprises, ni les personnes tiers disposant des informations utiles aux fins de la procédure ni les administrations, à répondre aux sollicitations des autorités de la concurrence.

En même temps que l'instauration au Maroc d'une autorité indépendante de la concurrence, les règles concernant sa composition et son fonctionnement doivent être révisées. Afin de préserver son indépendance, il est tout d'abord nécessaire que ses membres ne soient pas des hauts fonctionnaires représentant des administrations gouvernementales, liées par les orientations de leur propre hiérarchie ministérielle, comme c'est actuellement le cas pour la moitié des membres du Conseil. En addition, la future autorité indépendante doit préserver son caractère d'administration technique. Ceci lui impose de baser ses décisions exclusivement sur le droit de la concurrence et non sur un « bilan économique » qui englobe d'autres considérations de nature économique, financière et sociale et ainsi relève du domaine de la politique. Autrement, il est à craindre que les habituelles tentations, de la part des différents groupes concernées, d'influencer les décisions politiques et d'attribuer à la future autorité indépendante toute responsabilité pour les répercussions négatives de ses décisions, finiront par paralyser son travail. Au cas où le gouvernement serait convaincu de la nécessité de lui réserver « le dernier mot » concernant l'autorisation d'un projet de concentration, auparavant interdit par l'autorité de la concurrence, il serait envisageable d'établir un recours devant lui contre les décisions « négatives », comme ceci est pratiqué dans différents pays, notamment l'Allemagne avec la fameuse « *Ministererlaubnis* ».

Enfin, la réforme de la Loi n° 06-99 est également indispensable afin de réviser les règles matérielles en matière des pratiques anticoncurrentielles et des concentrations économiques. Il est urgent d'établir des critères clairs pour garantir un travail efficace et d'assurer la sécurité juridique pour les entreprises concernées. Notamment, il est indispensable de baser l'obligation de notification des projets de concentration économique sur les chiffres d'affaires réalisés par les entreprises concernées – et non sur le critère des parts de marché comme c'est actuellement le cas – et d'adopter une législation secondaire – par voie des arrêtées – permettant d'exempter des pratiques insignifiantes comme les accords verticaux et les accords entre petites et moyennes entreprises qui, d'habitude, n'englobent pas des effets négatifs signifiants.

2) Absence des mécanismes de coopération entre les autorités de concurrence et de la régulation sectorielle

Au Maroc, plusieurs autorités de régulation sectorielle disposent des compétences dans le domaine de la concurrence ou sont appelées à coopérer étroitement avec les autorités de la concurrence : l'Agence nationale de la réglementation de la télécommunication (ANRT), la Banque nationale (Bank Al-Maghrib – BAM), la Haute Autorité de communication audiovisuelle (HACA), le Conseil déontologique des valeurs mobilières (CDVM) et la Direction des assurances et de la prévoyance sociale du Ministère des finances (DAPS), en train de devenir une autorité individuelle elle-même. En revanche, la pratique est marquée par l'absence quasi totale de procédures et autres mécanismes de coopération et de coordination entre les autorités de la concurrence, d'une part, et les autorités de la régulation sectorielle de l'autre part. Ce défaut est à l'origine d'un risque pertinent de l'adoption, par les différentes autorités intervenantes dans le domaine de la concurrence, de décisions incohérentes qui s'appliquent aux importants secteurs de l'économie. Afin d'éliminer ce risque, une

coopération étroite et continue entre les différentes autorités, tout en respectant leurs propres compétences, devrait être instituée dans les meilleurs délais, soit sur la base d'une charte de coopération, dont un modèle a été préparé par l'équipe de jumelage, soit sur la base d'un amendement des textes législatifs.

Dans un premier temps, une telle coopération devrait avoir pour but d'installer un forum de discussion permanent entre les cadres des différentes autorités afin de renforcer l'échange sur les différents concepts de concurrence et ses aspects à prendre en considération et ainsi de favoriser l'adoption des décisions cohérentes par les différentes autorités. En particulier, la nécessité d'une convergence est évidente quand il s'agit p. ex. du secteur de la télécommunication où le régulateur sectoriel (l'ANRT) est libre d'adopter une définition du marché pertinent différente de celle adoptée par la DCP ou de se baser sur d'autres critères que cette dernière pour qualifier une pratique comme étant abusive en termes de concurrence[31]. En outre, le but d'une coopération entre les autorités devrait permettre de définir les champs d'action des différentes autorités et leurs domaines d'intervention, une tâche particulièrement délicate quand il s'agit du secteur bancaire régi par la BAM qui continue à refuser toute sorte de coopération concernant la concurrence dans le secteur financier. Bien que la nécessité soit reconnue par tous les experts et qu'elle soit réclamée par le Président du Conseil de la concurrence[32], le résultat est loin d'être satisfaisant : à la fin du projet de jumelage, aucune des autorités de régulation sectorielle n'était prête à s'engager dans une telle coopération mutuelle sur la base d'une charte, sans qu'il y ait une forme précise de coopération définie par la loi.

3) Réforme de la justice

En début 2010, le Ministère de la justice a accéléré la préparation des vastes réformes qui devraient changer le tissu juridique du Maroc dans un avenir proche. En vue de cette réforme, il a été recommandé par l'équipe de jumelage d'instaurer une juridiction spécialisée en matière de droit de la concurrence qui permettra de capitaliser le savoir-faire assez complexe et technique en la matière au sein d'un seul tribunal, lui permettant d'être à la tête de l'émergence d'une doctrine de la concurrence au Maroc. Une telle réforme semble de plus judicieuse en vue de la réforme législative qui devrait être accomplie en parallèle. Cette dernière devrait avoir pour effet d'augmenter, au fil des années, le nombre des décisions de l'autorité de la concurrence et le nombre des procédures civiles entamées par des personnes physiques ou morales. En même temps, cette solution permettra d'éviter des décisions mal-fondées, adoptées par des tribunaux de différentes instances et juridictions qui habituellement n'ont pas l'occasion de se prononcer sur ce sujet.

Il est également à considérer d'abandonner le système des sanctions criminelles actuellement en vigueur au profit de l'introduction des sanctions administratives, imposées directement par l'autorité de la concurrence, tout en préservant la voie de recours devant les tribunaux compétents. En plus de ses avantages de solution plus pratique permettant d'arriver à la sanction dans un plus bref délai, elle offre en même temps à l'autorité la possibilité d'opérer un tel programme de clémence et ainsi d'appliquer l'instrument qui a prouvé d'être le plus efficace dans le combat des pratiques illicites. Sans un changement législatif dans ce sens, un programme de clémence – qui à l'heure actuelle n'aurait pas de grande valeur en raison d'absence de sanctions imposées par les tribunaux – serait uniquement envisageable en l'introduisant dans la Loi n° 06-99.

4) Améliorations en matière d'information et de transparence

[31] Pour plus d'informations voir *Amina El Fatihi*, « Les pratiques anticoncurrentielles dans le secteur des télécommunications : comment prévenir et remédier ?» dans la Revue Marocaine de Droit Economique (RMDE), n° 1 (2007), p. 74 – 77.

[32] Voir le interview accordé par le Président du Conseil de la concurrence au quotidien l'Economiste, intitulé « Le Conseil de la concurrence se cherche de la visibilité », l'économiste du 22.09.2010, page 6.

La mise en œuvre d'une politique de la concurrence nécessite des efforts en continu pour renseigner à la fois les consommateurs sur les avantages de la concurrence pour l'économie nationale ainsi que pour rappeler aux entreprises concernées leurs obligations par rapport à certaines pratiques et la notification des projets de concentration. Les expériences faites par les « jeunes » autorités de concurrence, créées il y a à peine 20 ans dans les pays de l'Europe de l'Est comme par exemple en Pologne[33], ont bien démontré l'importance fondamentale d'une bonne stratégie de communication et d'information pour se faire respecter et développer sa reconnaissance. En outre, les décisions finales des autorités de la concurrence doivent être accessibles afin de permettre aux personnes concernées de suivre l'évolution du droit de la concurrence à travers les différents interprétations et concepts appliqués. C'est, en premier lieu, fondamental pour préserver les droits des concurrents des entreprises fusionnées qui doivent avoir la possibilité de prendre connaissance des motifs adoptés en faveur d'un projet de concentration et, le cas échéant, d'organiser leur propre défense devant la juridiction compétente.

Bien que ces aspects soient tous évidents, la transparence est plutôt rarement assurée et la politique de l'information demeure toujours en chantier : les décisions adoptées ne sont pas dûment motivées et, avec une exception à notre connaissance[34], habituellement elles ne sont pas publiées au bulletin officiel – bien que cela soit clairement stipulé par article 46 de la Loi n° 06-99. En matière de concentrations économiques, les entreprises n'ont aucun moyen de s'assurer d'avance que leur notification de projet soit complète, car le décret d'application[35] contient seulement des informations rudimentaires et le gouvernement n'a pas mis à leur disposition ni une note explicative, ni un formulaire pour leur notification. Ainsi la réception des notifications incomplètes est un problème sérieux pour toutes les parties concernées qui pourrait être éliminé très facilement pourtant, d'autant plus que la DCP dispose, d'ores et déjà, de ces documents en question.

En ce qui concerne la politique de l'information, le constat est également alarmant : le Conseil de la concurrence, depuis sa mise en fonction très engagé dans les activités de la communication, est la seule autorité à disposer de son site Internet[36] et son équipe a élaboré une brochure renseignant sur l'organisation, les tâches et compétences du Conseil. Malheureusement, il n'est pas autorisé à profiter de cet outil de communication pour rendre public ses avis et – en outre les études à publier qui ne sont pas encore réalisées – le site est d'avance privé d'un principal contenu. Par contre, la DCP est en train d'élaborer son propre projet de site web, depuis deux ans maintenant, bien que le projet de jumelage ait élaboré et mis à sa disposition un site modèle. A ce jour, les seuls informations, limitées aux textes juridiques et une brève description des attributions à cette direction qui est pourtant le principal service en charge de la concurrence au Maroc, peuvent uniquement être trouvées sur le site du Ministère des Affaires économiques et générales, où la concurrence y figure parmi d'autres directions[37]. En dehors de cela, la DCP n'a publié aucune brochure sur les aspects de la concurrence destinée à renseigner les consommateurs et les opérateurs économiques.

[33] Voir l'excellent site web mis en ligne par l'Office de la protection de la concurrence et des consommateurs (UOKiK) à l'adresse www.uokik.gov.pl (en anglais).

[34] Décision du Ministre délégué auprès du Premier ministre, chargé des affaires économiques et générales, n° 2-15 du 26 décembre 2006 à l'égard des entreprises Savola Maroc et Société Industrielle Oléicole, relative à des pratiques de vente dans le secteur des huiles de table.

[35] Voir article 7 du Décret n° 2-00-854 du 17 septembre 2001 pris pour l'application de la loi n° 06-99 sur la liberté des prix et la concurrence ; Bulletin Officiel du 4 octobre 2001.

[36] Le site du Conseil est disponible à l'adresse : www.conseil-concurrence.ma

[37] Le site du Ministère des affaires économiques et générales est disponible à l'adresse :

5) Manque d'une visibilité aux plans national et international

Le grand nombre d'événements organisés par le Conseil de la concurrence depuis sa mise en fonction ainsi que les nombreuses interventions de son Président et de ses cadres dans les médias nationales ont visiblement contribué à faire grandir l'intérêt pour la concurrence au Maroc. Désormais, les avantages d'une réelle politique de la concurrence ainsi que la nécessité des réformes appuyées par l'équipe de jumelage ne sont plus des sujets abstraits. Ces actions ont stimulé un débat sur le plan national, qui depuis ne cesse pas de prendre de l'ampleur. Afin de renforcer ce débat et d'appuyer l'émergence d'un climat d'affaires et des conditions favorables pour une application efficace des règles de la concurrence, les autorités devraient encore renforcer leur politique de communication, notamment à travers la publication des brochures et l'emploi d'autres outils de communication mentionnés ci-dessus. Celle-ci doit impérativement englober la DCP, car depuis la mise en fonction du Conseil de la concurrence, la perception des autorités de la concurrence au plan national a été brouillée. Tandis que le Conseil continue à s'engager dans une vaste campagne de communication, lors de laquelle il prend également des positions qui ne sont pas accordés avec la DCP et parfois vont même à l'encontre de certains positions prises par le gouvernement, il est à observer que ni le Premier ministre ni le Ministère des affaires économiques et générales ne présentent un plan stratégique global qui aurait pour but d'encadrer les actions de tous les acteurs du domaine. Ce constat s'applique également à la vision de la politique marocaine de concurrence au plan international qui semble parfois manquer de coordination. Un seul exemple suffit pour illustrer les brouilles en pratique : alors que c'est la DCP qui est en charge de représenter le Maroc à l'international, un plan d'action pour le futur développement de la politique marocaine de la concurrence à été présenté, par le Président du Conseil de la concurrence, en 2008 au forum global de l'OCDE[38] – sans une concertation au préalable de son contenu avec le gouvernement marocain. Depuis, ce document figure parmi les contributions officielles et il rappelle à chacun souhaitant se renseigner sur la concurrence au Maroc les jolies ambitions de l'époque pour sa rapide dynamisation…

6) Futur appui de la recherche et de formation en matière de concurrence

Dans la situation actuelle, le Maroc ne dispose ni d'une doctrine du droit de la concurrence établie par les tribunaux, ni d'une véritable pratique administrative en la matière. En même temps, bon nombre de concepts techniques faisant partie de la législation en vigueur manque toujours de définitions claires, bien fondées et acceptées par tous les intervenants du domaine. Afin d'accélérer les efforts pour remédier à cette situation, le gouvernement marocain envisage, depuis plusieurs années, d'installer un centre de recherche, d'étude et de formation en matière de concurrence (CREF). Le CREF aura pour tâche principale d'accompagner le futur développement de la politique de la concurrence et d'appuyer l'élaboration des conceptions juridiques adaptées aux besoins de l'économie marocaine. En même temps, il pourra jouer un rôle important dans l'organisation de la formation continue des cadres et, le cas échéant, des magistrats et auxiliaires de justice.

Suite à l'élaboration d'un concept détaillé pour la création du CREF sur la base des multiples expériences faites avec des centres de ce genre dans différents pays, bon nombre des institutions internationales, gouvernementales et universitaires du domaine de la concurrence ont manifesté leur intérêt vis-à-vis de ce projet ambitieux et se sont dits prêts à coopérer dans la réalisation des activités

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www.affaires-generales.gov.ma.

[38] La contribution, soumise par le Maroc au titre de la session III du Forum Mondial sur la Concurrence, intitulée « les défis que doivent relever les jeunes autorités de la concurrence », document n° DAF/COMP/GF/WD(2008)52, est publiée sur le site www.ocde.org.

communes. Selon ce concept, le CREF devrait devenir une institution publique directement impliquée dans toutes les actions qui visent le futur développement dans le domaine de la concurrence. Il a été favorisé de ne pas intégrer le futur centre dans une structure gouvernementale déjà existante, mais d'établir – dans un premier temps - une structure légère, appuyée par les institutions universitaires au Maroc. Cette structure devrait gérer un vaste réseau de coopération[39] et permettrait à la fois de réduire considérablement les coûts de son établissement et de préserver sa crédibilité qui présuppose une institution objective et donc nécessairement indépendante du gouvernement pour pouvoir accomplir les tâches qui lui sont confiées. Muni d'une telle structure, le Centre serait prédisposé à jouer, en outre, un rôle fondamental dans la sensibilisation.

A la fin du projet de jumelage, la création du CREF n'a pas encore eu lieu en raison de l'absence de fonds nécessaires pour assurer son démarrage et le projet entier reste à réaliser. A cet égard, le Conseil de la concurrence avait récemment manifesté en public son intérêt à établir, sous son propre égide, une structure quasiment similaire sous le nom « CEFDEC »[40].

VII. Perspectives

Au moment ou le projet de jumelage a pris fin, il est évident que la route poursuivie par le Maroc vers l'ouverture de ses marchés au commerce international n'est pas encore acheminée. Outre les grands chantiers indiqués ci-dessus, il y en a bien d'autres qui ne pouvaient pas tous figurer dans cette contribution. S'agissant, en premier lieu, de la protection des consommateurs et des marchés publics, ils relèvent, en partie, d'autres domaines de la politique et ont également besoin d'une harmonisation urgente avec les règles de concurrence. Tous ces aspects, qui devront permettre au gouvernement marocain d'achever rapidement les réformes nécessaires dans ce domaine, sont inclus dans un plan d'action élaboré par le Chef de projet allemand dans l'optique de dresser une feuille de route pour le développement de la politique de la concurrence au Maroc dans les 5 ans à venir. Avec ce document – qui a été remis aux autorités de la concurrence et à la Commission européenne – existe désormais une feuille de route précise, comprenant également une proposition de calendrier pour la réalisation des actions indiquées. Néanmoins, au cours de la réalisation du projet de jumelage, les experts marocains et européens se sont souvent interrogés sur la question de savoir, pourquoi au Maroc, pendant les dix dernières années, la politique de la concurrence a eu tant de mal à décoller, même en comparaison avec d'autres pays du pourtour méditerranéen. En spéculant, de nombreuses raisons ont été évoquées : le tissu économique – traditionnellement caractérisé par des fortes structures oligopolistiques sur les marchés principaux et un rôle signifiant de l'économie informelle – ; l'insuffisance des capacités administratives ; une justice imprévisible pour faute de doctrine et d'une pratique confirmée par la Cour Suprême ; les défaillances de la loi sur la concurrence, comprenant des règles sur les concentrations économiques et menaçant les chefs d'entreprise de la peine d'emprisonnement. Bien qu'il soit fort possible que chaque aspect évoqué ci-dessus contribue à la situation actuelle, ce n'est certainement pas une seule cause qui est à son origine. La réponse à la question de départ est donc loin d'être évidente.

Comment alors mieux appuyer le Maroc au delà du projet de jumelage ? Il est évident qu'un futur appui sera nécessaire, car la tâche principale pour la mise en œuvre de la politique de la

[39] En tant que partenaires du réseau ont été envisagés : la DCP, le MAEG et le Conseil de la Concurrence en tant que des autorités de la concurrence ; les universités marocains Mohammed V de Rabat-Agdal et de Rabat-Souissi, le Centre du droit des obligations de l'université de Fès et l'université Al Akhawayn d'Ifrane ; les organismes internationaux comme l'OCDE, la Commission de l'Union européenne et la Banque mondiale ; plusieurs autorités et institutions universitaires dans les pays membres de l'UE et les fondations politiques allemandes actives au Maroc.

[40] Pour plus amples informations, voir l'article « Conseil de la concurrence : projet d'un centre de formation en droit et économie de la concurrence », publiée le 28.04.2010 sur le site www.maroceco.ma.

concurrence reste toujours à renforcer : l'application des règles de concurrence. En attendant que le nombre des affaires traitées par les autorités de la concurrence va augmenter dans un futur proche, il sera avantageux d'accompagner les cadres et de prévoir à leur profit d'autres formations ciblant les aspects les plus pratiques. En outre, il serait judicieux de renforcer – et par cela de le prévenir de perdre son ampleur – le débat déjà bien installé au Maroc sur les avantages d'une politique économique basée sur la concurrence, qui sinon risquerait de perdre son ampleur. Ceci pourrait mieux être effectué par des mesures individuelles (conférences, publications etc.), par exemple dans le cadre du programme TAIEX. En fin de compte, un autre projet de jumelage devrait être envisagé parce qu'il s'agit d'un outil efficace, approprié et déjà bien connu par les autorités marocaines. Néanmoins, un tel projet devrait être réalisé sous la stricte condition que le Maroc ait, entre temps, mis en œuvre la réforme de la législation en vigueur et instauré une autorité indépendante de la concurrence. Ou, pour le dire avec les mots de la représentante de la Délégation de l'Union européenne à l'issue de la conférence de clôture du projet de jumelage : « *La Commission européenne a investi 1,5 millions d'€ dans le cadre du présent projet de jumelage dans le but de renforcer la concurrence au Maroc et attend tout d'abord un retour sur l'investissement avant d'y mettre encore plus d'argent…* ». Il reste à espérer que la Commission n'oubliera ses mots et continuera à veiller sur le bon développement de la politique marocaine de la concurrence !

COMPETITION POLICY ON MOROCCO AND ITS SUPPORT BY THE EUROPEAN UNION

Summary of the article in French

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I. Introduction

Ten years since the adoption of the competition act in July 2000, competition policy is on its way towards becoming a sound pillar of Moroccan economic policy. Things accelerated with the arrival of the new government in late 2007, who declared at the very beginning its intention to give priority to the enforcement of competition policy. In the first place, the government gave support to capacity building within the competition authorities and to strengthen their visibility in Morocco and abroad. At the same time, the Moroccan competition authorities have started a large campaign designed to promote the respect of competition rules, the knowledge of which still remains somehow unsatisfactory and which are to these days only very rarely applied by the Moroccan courts. Since, the overall advantages of a fair competition for the national economy have solicited much interest among both consumers and businesses. Although the ambitious task of making competition policy work effectively in Morocco has not failed to demonstrate its difficulties and forced the government to face numerous obstacles, all the efforts made show first positive results. In order to support the government and to take part in the preparation of a large scale reform of the legislation in force, a large twinning-project designed to support the competition authorities has been carried out in Morocco between October 2007 and July 2010. Entirely funded by the EU and carried out under the co-responsibility of the Federal Ministry of Economics and Labour as the German partner administration, this project put a large number of competition experts from Germany and various other EU Member States at the disposal of the Moroccan partner institutions for different purposes. At the occasion of the projects' completion, this article gives an overview of the legal and institutional framework for competition enforcement in Morocco, provides first statements on the accomplished twinning project and highlights focal points of the proposed reforms.

Legislation in force

Based on the principle of the free competition of all goods and services – with the exception of 15 products – the Law 06-99 on the freedom of prices and competition of 6 July 2000 constitutes, together with a decree on its application, the legal basis for competition policy enforcement in Morocco. Likewise all modern competition legislations, the law contains provisions on anticompetitive practices (articles 6, 8 and 9), the abuse of dominant position (articles 7 to 9) and merger control (articles 10 to 12) which have been drafted on the model of parallel competition provisions adopted by industrialised countries. As these provisions are in line with the corresponding EC provisions, it is worth concentrating on some particularities of the Moroccan legislation which are at the origin of the necessity for a thorough reform:

First, there exists no secondary legislation in the scope of anticompetitive practices and, hence, the strict prohibition applies - without any exception - to any agreement which effects competition, without taking into consideration its distortive effects. There is no possibility of exempting traditionally less distortive agreements – such as vertical agreements or those concluded between SMEs - which would allow the competition authorities to focus on hard-core cartels and other agreements of greater importance.

Second, in principle, the abuse of dominant position by an enterprise or a group of enterprises can be exempted if it contributes to economic progress.

And *third*, merger projects need to be authorised in case the parties to the merger have generated jointly more than 40% of the sales, acquisitions or other transactions on a respective national market. Hence, the obligation does not depend on the overall turnover of the enterprises concerned, like in all EU countries, but on market shares which always need to be determined by the authority first. This provision is therefore also at the origin of the only very few notifications which the Moroccan authorities have had to deal with over the last years. On the other hand, there have been some cases in which the enterprises contested the fact of having together 40 % of the market share and, hence, only declared not to be under obligation to notify their project. As, in addition, the competition authorities are not equipped with the necessary competencies to require such reluctant parties to comply with all the notification obligations, in the past they always had to accept the point of view presented by the enterprises concerned, irrespective of whether they had serious doubts on the exact market share. In practice, this threshold is furthermore not very suitable for control purposes as one should have serious doubts on a merger not strengthening or creating a dominant position on a market in case the parties already have at least 40 % thereof. Accordingly, the unwillingness of enterprises to notify merger projects in Morocco is somehow comprehensible.

As there are no administrative sanctions foreseen in the Law 06-99, the predominant role of the judiciary in competition proceedings comes into play. In fact, the competition authority, i. e. the directorate responsible for competition and price control (DCP) within the Ministry of economic and general affairs, has only the task of establishing the existence of competition restricting practices, whereas it is left to the judiciary to adopt criminal sanctions – imprisonment up to three years and relatively modest fines from 10.000 to 500.000 MAD (approximately 900 to 45.000 €).

II. Authorities in charge of competition protection

In practice, competition enforcement is a task traditionally assigned by decree to the Minister responsible for economic and general affairs, although the Law 06-99 clearly states that it is the Prime minister who is responsible for competition enforcement and one third of its provisions focus on the role and the functioning of the Competition council. Accordingly, it is within the Ministry – more precisely at the Directorate of Competition and Price Control (**Direction de la concurrence et des prix – DCP)** – where all competition proceedings are administered in the first place. Although the DCP has been recently enforced by a decree placing it under the direct authority of the Prime minister and its head is now appointed directly by the King by way of a "Dahir royal", giving him more autonomy with regard to the DCP's enforcement policy, it remains a rather small directorate with only 13 officials who are simultaneously responsible for competition and price control, the latter being dominant in its daily work. This is also one of the reasons why, until these days, there have been only a few decisions adopted.

After a quite long period of almost eight years without any activity, a new Competition council – **Conseil de la concurrence** – has been installed by the Prime minister in the beginning of 2009 as the second authority foreseen in the Law 06-99. Although the law seems to put the council in the heart of the Moroccan system of competition protection, it has only a consultative role and does not have any powers of investigation or competencies to adopt decisions in competition cases. Composed of 12 non-permanent members, of whom 6 are representatives of governmental bodies, the role of the Council is limited to give its opinion on drafts of legislative acts which affect the competition rules in force and on any other question submitted by the government and, as far as they are directly concerned, other public bodies. Nevertheless, in practice, any competition case administered by the DCP should be submitted to the Council for opinion before any final decision is adopted. The opinions of the council are not published and the Law 06-99 only provides for the possibility of their publication at the official journal together with the final decision. Unfortunately, no such decision has been published since the installation of the Council, and it is also for this reason that the results of its daily work somehow lack the necessary visibility. At present, the council is monitoring the elaboration of six studies on competition issues within selected branches. Carried out by external consultants, their results are awaited at the end of 2010 and we hope that at least the content of those

studies or their summaries will be published, even though the results will definitely figure in the Councils' annual report.

Finally, the major role of **the judiciary** contrasts with the practice of the courts where competition cases are almost inexistent. In fact, until now, there has been no decision adopted that would annul a decision taken by the Prime minister or impose sanctions for anticompetitive behaviour. As there is no specialised jurisdiction for competition cases, any criminal court has in principle the power to impose sanctions in competition cases. On the other hand, it is left for the administrative courts to rule upon decisions on anticompetitive practices and mergers, taken by the Prime minister or the Minister in charge of Economic and General Affairs.

III. Moroccan competition policy enforcement

Until now, all essays on competition enforcement in Morocco including this article had to be limited to giving an overview of the legislation in force and the main institutions in charge of competition protection as there is no real enforcement practice with regard to cartel and abuse cases. In fact, since the entry into force of the Law 06-99 ten years ago, there has been no judgement adopted by any of the Moroccan courts, sanctioning an anticompetitive behaviour. Additionally, it seems to be quite unlikely that a first judgement will soon mark the end to this situation as the DCP did not yet engage its first procedure under judicial control, giving its officials the necessary powers to carry out searches and to seize convincing proofs to be presented to the courts. At the same time, this situation is at the disadvantage of the Competition council who does not have the opportunity to give its opinion on the ongoing procedures and, due to this fact, remains unable to fulfil its tasks. Nevertheless, there are first signs for an improvement of the actual situation: As it has been reported by one of Morocco's most important economic journal a few months ago, the Prime minister had authorised the first procedure under judicial control after suspicious facts indicating the existence of anticompetitive practices on the market for butter had been detected. Even if such an announcement in the press is putting at risk all success of the planned operation, at the same time it shows the government under pressure to finally put an end to a cartel by fully applying the law. In the scope of merger control, despite the legislation in force, a few projects have been notified for the authorisation of the Prime minister. Until now, all these projects have been cleared without any detailed analysis and none of the respective decisions has been published in the official journal as it is stipulated by the law. Nevertheless, this situation recently improved with the merger between *Kraft Foods* and *Cadbury* being the first one on which the Council had issued a fully motivated opinion, on the basis of which the project had been finally approved by the Prime minister.

IV. The twinning-project on competition

An overview of twinning as an instrument provided in the framework of the European neighbourhood policy as well as a description of the present twinning project has been included in the first issue of the Mediterranean Competition Bulletin. To recall, twinning projects are designed for institution-building and focus on various measures such as training, advocacy and, where appropriate, also legal drafting. Set up by the EC Commission in the 1990s as a tool for EU candidate countries undergoing necessary reforms, they are since also carried out on the basis of respective Association agreements with third countries in the framework of the European neighbourhood policy. Accordingly, projects with Tunisia and Jordan have been carried out successfully whereas other projects on competition are actually implemented or under preparation in Albania, Moldova and Armenia. Furthermore, Algeria recently selected a joint proposal by the French, Italian and German competition authorities and will soon target competition issues as one of its first twinning projects. In view of establishing a free trade zone in 2012, the Moroccan Ministry of Economic and General Affairs had asked for the twinning-project "*Appui au renforcement des autorités de la concurrence au Maroc*" (MA06/AA/FI08) back in 2006 and selected the German proposal submitted by the Federal Ministry of Economics and Labour for its implementation. The project started in October 2007 and expired after an implementation

period of 34 months on 31 July 2010. Aiming at bringing direct support to the process of strengthening the Moroccan competition authorities and the judiciary, the goals of the project were: (1) to bring Moroccan competition legislation in line with the relevant Acquis of the EU; (2) to strengthen administrative capacities of the competition authorities; (2) to train officials and judges in the application of competition rules and the carrying out of searches and (4) to promote competition policy and its benefits for the national economy among politicians, businesses and consumers by way of numerous seminars and conferences as well as the support in establishing a competition centre in Morocco with the future tasks of research, studies and training on competition issues. All these goals have been accomplished successfully with the most valuable help of a large number of competition experts, in the first place officials from the Federal Competition Authority (Bundeskartellamt) – the main partner institution for the projects' implementation – and other German administrations as well as the competition authorities of further EU Member States such as Poland, France, Hungary, Spain and Portugal and employees of the German Agency for Technical Cooperation (GTZ). In total, the experts involved have spent 620 working days in Morocco and, besides supporting activities in the scope of legal drafting, they have participated in an intensive training programme and took part in numerous seminars and conferences on both national and international level.

V. What still needs to be done

In three years, the twinning project made an overall inventory and identified the principle obstacles which hinder the government to efficiently enforce its competition policy. Although remedies to most urgent problems concerning the legislation in force have been elaborated and proposed to the Moroccan partners, they have not yet been implemented for reasons linked to the lengthy legislative process. In addition, the following issues appear to be obstacles to competition policy enforcement. They might be of particular interest also for the other countries which are currently adapting their competition policies to international standards.

1) **Reform of the competition legislation and the creation of an independent competition authority.** Moroccan competition legislation urgently needs a thorough reform, applying to both competition rules and the institutions in charge of competition protection. In the first place, the goal of such a reform of the Law 06-99, which could be accomplished on the basis of the respective draft proposal submitted by the twinning team, is the establishment of an independent competition authority with all necessary powers of investigation. The future competition authority must be free of any influence from both public and private bodies regarding its decisional practice and should have the powers to act ex officio. This implies that the authority will have the powers to carry out searches by its own competition officials put at the exclusive disposal of its President. At the same time, this would put an end to the – in practice not very effective – division of tasks between a consultative body (the Competition council) and an executive one (the DCP) which, in practice, at any time can refuse to engage the proceedings it has been asked for. Furthermore, the authority needs to have the powers to impose administrative sanctions on those enterprises which refuse to cooperate. Such an amendment is indispensable in order to enable the competition authority to collect all necessary information, as the rules actually in force neither oblige the enterprise concerned nor any third party to give answers to official enquiries. At the same time, the composition of the future competition authority must be reviewed, as at present, half of its members are simultaneously high ranking officials of other governmental bodies and, accordingly, bound by instructions of the latter. What is more, the decisional basis of the competition authority should be limited to competition aspects by giving up the so-called "*bilan économique*", a concept consisting not only of competition issues but also of various other aspects of economic, financial and social nature. This change would allow the competition authority to focus on its tasks without having to face pressure from different groups or even being made responsible at any time its decisions have negative consequences. As this concern applies in particular to merger control, it might be considered at the same time to introduce a mechanism by which the final decision on any merger project raising competition concerns is let to the government – various other countries have opted for such a solution, amongst them Germany with its famous "*Ministererlaubnis*". Finally, it is also urgently necessary to amend the existing rules on

anticompetitive practices – by introducing secondary legislation providing for exemptions of vertical agreements and such concluded between SMEs – and on merger control by stating a clear notification obligation based on the annual turnover and not on the market shares of the enterprises concerned.

2) Lack of cooperation between competition authorities and regulatory bodies. In Morocco, there are at least five independent authorities with particular obligations and/or competencies related to competition. Accordingly, there is an urgent need of introducing mechanisms of cooperation and coordination in order to prevent all the authorities involved from adapting incoherent or even contradictory decisions. According to the proposals submitted by the twinning team, at least in the beginning, such a cooperation could mainly consist of regular meetings in which information on different competition concepts and other actual developments is exchanged, and hence without any attempt to interfere into the competencies of the other authorities. Its introduction is of particular concern in the telecommunications sector where the respective regulatory agency (ANRT) is free to adopt its own market definitions different from those defined by the DCP or to base its decisions in abuse cases on other criteria than the latter. At the same time, such cooperation would provide for a clear delimitation of competencies – a particularly delicate issue when it comes to the National Bank which does not tolerate any intervention of the competition authorities in the banking sector. At the end of the project, unfortunately, any of the regulatory bodies did not agree to cooperate on the basis of a memorandum of understanding, claiming that a clear legal basis for this had to be adopted first.

3) Judicial reform. With regard to the ongoing reform of the judiciary, the twinning team suggested the creation of a specialised jurisdiction for competition cases. This step would provide for qualified judges with specific knowledge on competition issues who would be at the origin at the emergence of a respective doctrine in Morocco. At the same time, it has also been considered to abandon the criminal sanctions and, in exchange, to introduce administrative sanctions, while entirely preserving the possibility of challenging those decisions before the courts. Such an option would have at least two advantages: first, it would make the procedures faster and allow the authority to sanction anticompetitive behaviour in a shorter lapse of time and, second, it would give the competition authority the option of operating its own leniency programme. At present, such a programme would necessarily stipulate an amendment of the Law 06-99.

4) Need for more information and transparency. In order to be globally accepted, all implementation of competition policy needs to be accompanied by regularly providing information on its benefits for consumers and the national economy. At the same time, all enterprises concerned must be informed of their obligations with regard to both the restraint from anticompetitive practices and the notification of intended mergers. Therefore, the respective authorities have the task to ensure a high level of transparency. This includes the publication of their decisions which are indispensable especially for competitors and other third parties concerned who whish to challenge a decision before the courts. Furthermore, the authorities should adopt a communication strategy as one of their priorities. At present, it is hard to say that transparency really is ensured: in practice, the adopted decisions do not contain a sufficiently detailed reasoning and – with one exception – are not published in the official journal. At the same time, the parties to a merger do not have any possibility to fully ensure that their notification is complete before it is filed to the authorities. The respective decree to the Law 06-99 only contains rudimentary information and the government has to this date neither put at their disposal any specific templates nor an explicatory note, although these documents have been prepared by the twinning team. The same applies to the absence of a communication strategy. It is only the Competition council – traditionally more engaged in promoting competition issues than the DCP – who has published a leaflet on competition and runs its own website, although the latter cannot be used for the publication of its opinions and, hence, lacks the principal information. On the other hand, the DCP is not providing any information on competition policy and basic information on the missions and the functioning of the most important service in the field of competition in Morocco can only be found on the web page of the Ministry of Economic and General Affairs, hidden amongst those on the other directorates of the Ministry.

5) Strengthening the perception on both national and international levels. The quite impressive number of events hosted by the Competition council over the last two years as well as the various interventions of its President in the national media definitely contributed to stimulate a debate on competition related issues in Morocco. Nevertheless, it is indispensable for the DCP to take a more active role in these events as, at present, many have the impression that it is the Competition council who is the main competition authority in Morocco. In this respect, the absence of a governmental strategy for competition enforcement that would provide for a global vision and the necessary coherence is hard to cope with. Its absence has also been at the origin of some confusion at the international level, in particular with regard to the representation of Morocco in various competition forums: although representation is a task assigned to the DCP, it is often the Competition council who presents its own vision of competition policy in Morocco – unfortunately, sometimes without a former consent with the Ministry of Economic and General Affairs like at the 2008 OECD global forum on competition. At this forum, an impressive development strategy for Morocco had been presented, although it was not fully accepted by the Moroccan government.

6) Further strengthening of research and training on competition issues. As there is neither a competition doctrine established by the courts nor a confirmed administrative practice in Morocco, the strengthening of research and training on competition issues remains one of the last priorities. The tasks of accompanying the competition authorities in their elaboration of technical concepts in the field of competition as well as providing further training of competition officials and judges should be assigned to a specialised competition centre (CREF). Established as a public institution, the CREF would have to work very closely with the competition authorities and other governmental bodies as well as scientific institutes of Moroccan universities. Although a detailed concept for the establishment of the CREF has been prepared by the twinning team at the request of the Moroccan partners and the project has raised the interest of different international organisations and public institutions from the EU member states in carrying out jointly various activities, the project has not yet been realised for the lack of public funds.

VI. Perspectives

The enumeration of the obstacles to effective competition policy enforcement is far from being exhaustive and there are other aspects which could not all figure in this article. In particular, other policy domains which are not fully covered by the competencies of the competition authorities – such as consumer protection and public procurement procedures – and urgently need to be brought in line with competition law. All these aspects, as well as a timetable for their realisation, are part of a "Strategy for development for the next five years" ("*Plan stratégique sur 5 ans*") which has been presented to the Moroccan government by the German project leader at the final conference. This document, being a roadmap for the actions to take, has also been submitted to all partner institutions in Morocco and the EC Commission who now will have the task to ensure that competition policy is on the right track in Morocco. To achieve this goal, further support by the latter will certainly be necessary and, besides individual measures which might be supported in the framework of the TAIEX programme, it is highly recommended to set up another twinning project to further strengthen the Moroccan competition authorities. Nevertheless, the beginning of a new twinning project should be put under the strict condition that the government brings on its way the necessary reform of its competition legislation and establishes an independent competition authority with all necessary powers. Or, to quote the representative of the EC Commission at the projects' final conference: "*The European Commission has invested 1.5 million € in the framework of this project in order to strengthen competition in Morocco and we wait for a return on investment before putting more money…".* We hope that the Commission will remember its own words and take good care of the positive developments to come!

RECENT DEVELOPMENTS IN THE SERBIAN COMPETITION LAW

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Serbia has recently taken several significant steps towards harmonising its competition rules with relevant EU legislation and modernising its competition law regime. The Serbian Government adopted regulations governing fines for competition law infringements, while the Commission for the Protection of Competition (the "Commission") supplemented those regulations with detailed guidelines. The introduced rules are intended to strengthen the fine-setting powers of the Commission conferred to it by the new 2009 Protection of Competition Act (Official Gazette of RS, no. 51/09; the "2009 Competition Act"). In line with this legislative focus on enforcement of competition rules, the Commission also stepped-up its activities in practice. Thus, the Commission recently initiated several proceedings for alleged abuse of dominance in the food sector.

1. Regulations governing fines for competition law infringements

On 23 July 2010, the Serbian Government adopted two regulations governing fines for competition law infringements: the Fines Regulation [*Uredba o kriterijumima za određivanje visine iznosa koji se plaća na osnovu mere zaštite konkurencije i procesnog penala, načinu i rokovima njihovog plaćanja i uslovima za određivanja tih mera*] (Official Gazette of the RS no. 50/2010) and the Leniency Regulation [*Uredba o uslovima za oslobađanje od obaveze plaćanja novčanog iznosa mere zaštite konkurencije*] (Official Gazette of the RS no. 50/2010). Both Regulations are effective as of 31 July 2010.

1.1 The Fines Regulation

The Fines Regulation provides several criteria to be taken into account when determining the amount payable on the basis of a measure for the protection of competition and procedural penalty: (i) the intent of the undertaking to commit an infringement of competition, (ii) the severity, consequence and duration of the infringement of competition, (iii) recidivism of undertakings, (iv) enticement of other undertakings to undertake acts whose purpose or consequence is/could be to significantly restrict, distort or prevent competition, (v) the time during which the acts representing an infringement of competition were suspended, (vi) the measures undertaken to remedy the consequences of infringements of competition, and (vii) the undertakings' level of cooperation during the proceedings to establish infringements of competition.

Notwithstanding the foregoing criteria, a further criterion to be taken into account when determining the amount of a procedural penalty relates to the significance of the ordered action for the outcome of proceedings being conducted and repetition of the same or similar behaviour by the undertaking in the same or another proceeding.

The deadline for payment of fines may not be less than three months or longer than a year from the day of receipt of the decision. The deadline for payment is to be determined depending on the financial capacity of the undertaking against which the measure or procedural penalty has been issued. Exceptionally, payment of the amount in instalments may be granted at an undertaking's request. However, the undertaking has to prove the existence or certainty of occurrence of significant and lasting financial difficulties in its business that could as a consequence result in bankruptcy or a longer interruption of business.

The Fines Regulation is supplemented by the Guidelines on the Implementation of the Fines Regulation [*Smernice za primenu Uredbe o kriterijumima za određivanje visine iznosa koji se plaća na osnovu mere zaštite konkurencije i procesnog penala, načinu i rokovima njihovog plaćanja i*

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uslovima za određivanja tih mera], which stipulate in more detail the economic aspects of the determination of fine amounts.

1.2 The Leniency Regulation

The importance of the recently adopted Leniency Regulation shall be assessed in light of the developments on the market in Serbia at the end of 2009, right before the new 2009 Completion Act was about to start with its application.

Namely, at the end of October 2009, just before the 2009 Competition Act replaced the 2005 Competition Act (Official Gazette of the Republic of Serbia, no. 79/05; the "2005 Competition Act"), an avalanche of leniency applications on distribution agreements containing RPM was filed before the Commission. Numerous manufacturers, wholesalers, retailers in Serbia reported on their distributors, who in turn reported on their own distributors proving that RPM practice was widely spread on the market. The applications were lodged with a sole aim to benefit from the full immunity provided under 2005 Competition Act. As the 2009 Competition Act entered into force on 1 November 2009, all leniency applications were submitted before the begging of November.

In summary, Art 71 of 2005 Competition Act that applied until 1 November 2009, only briefly provided that a party to a restrictive agreement (as well as a responsible person), should not be levied with a fine if it alerted the Commission about (i) the existence of such agreement, and (ii) its participants, prior the Commission issued the decision on the initiation of the proceedings against such undertaking. There was no room for a fine reduction; only full immunity was available. However, under the 2009 Competition Act the leniency rules have changed. Article 69 of the 2009 Competition Act provides that a party to a restrictive agreement that was the first to provide evidence on the basis of which the Commission made an antitrust decision shall be relieved from monetary fines, provided that the Commission did not have information about the restrictive agreement. However, if a party to the restrictive agreement that does not meet the above mentioned leniency conditions, and yet over the course of the proceedings before the Commission provides evidence that was not available until that moment and would lead to the antitrust decision, may be levied with a reduced fine. Contrary to the 2005 Competition Act, 2009 Competition Act provides that a party that was the driving force behind the restriction cannot benefit from immunity.

It is still to be seen how the Commission will cope with hundreds of leniency applications especially now after the Leniency Regulation is adopted.

Namely, the Leniency Regulation provides that a participant to a restrictive agreement shall be exempt if four conditions are met: (i) it has to be the first to report an agreement of which the Commission had no awareness or sufficient evidence to initiate proceedings, (ii) it has to submit disposable evidence about the restrictive agreement and/or point out to the Commission the place or entity where that evidence can be found, (iii) it must not have incited or coerced other undertakings to conclude or implement the restrictive agreement, and (iv) the undertaking must not be the initiator or organiser of the restrictive agreement.

Notwithstanding these conditions, a participant to a restrictive agreement may also be exempt if it: (i) signs a statement undertaking to fully and continuously cooperate in good faith with the Commission until a decision issuing a measure for the protection of competition has become final and binding, (ii) submits all evidence in its possession or available to it, including documents and other evidence related to the notified agreement, and (iii) without delay ceases further participation in the restrictive agreement, except at the approval or request of the Commission, for the purpose of conducting the investigation and collection of evidence. By issuing a statement, the notifying party undertakes not to act in a way that might jeopardise the procedure, and in particular not to reveal data or content from the statement or destroy or conceal evidence.

In early September 2010, the Commission issued guidelines which regulate in more detail the conditions under which leniency is to be granted, and the relevant procedure. A leniency applicant may either notify the Commission of a restrictive agreement anonymously or request exemption from any fines that may be payable.

In case of an anonymous notification, the Commission will assess whether it has sufficient information on the notified agreement and adequate evidence to initiate proceedings. Depending on these factors, the Commission will advise the notifying party to apply for either an exemption or a fine reduction.
The first participant in a restrictive agreement to notify the Commission can apply for a fine reduction of between 30% and 50%, the second participant to notify the Commission can apply for a reduction of between 20% and 30%, and participants notifying the Commission thereafter can apply for a reduction of up to 20%.

2. Enforcement activities of the Commission

During its review and analysis of the food sector (i.e. the ice cream and frozen foods markets and alcoholic and non-alcoholic beverages markets) and based on data supplied to it by the market players in the sector, the Commission found that Frikom AD, a producer of frozen foods, and the Coca Cola Company, allegedly abused their respective dominant positions by concluding contracts which contain provisions laying down potentially anti-competitive rebates. Based on its findings, the Commission initiated investigation proceedings for alleged abuse of dominance and called upon persons in possession of relevant data or information to submit such data or information.

In addition to its antitrust activities, the Commission was also active in regard to merger control. On 30 June 2010, the Commission issued an opinion regarding the obligation to notify a concentration in case of bankruptcy proceedings. Although the 2009 Competition Act does not hold that a concentration has occurred when a bankruptcy trustee acquires control over an undertaking, the Bankruptcy Act provides that bankruptcy proceedings performed through restructuring cannot be implemented without a prior decision of the Commission to that end. Restructuring is performed in case it will lead to better debt settlement to creditors than regular bankruptcy proceedings.

3. Conclusion

It can be concluded that Serbia has taken significant steps towards modernising its competition rules and bringing them in conformity with relevant EU legislation. New rules place emphasis on enforcement of competition rules and allow for significant tools to be used for uncovering and punishing restrictive agreements, but also other competition law violations. In line with the legislative focus, the Commission also greatly increased its activities in practice by initiating several investigations for alleged abuse of dominance in the food sector.

Law n° 7 of 2008 Act of Competition Protection and Prevention of Monopoly

Chapter 1: Definitions and scope of law enforcement
Article 3: Scope of enforcement:

Chapter 2: Freedom of prices and competition
Article 4: Prices of commodities and services

Chapter 3: Practices in breach of competition
Article 5: Practices and agreements that are in breach of competition:
Article 6: Abuse of a dominant market situation:
Article 7: Exceptions

Chapter four: Practices that are in breach of commercial impartiality
Article 8: Practices that are in breach of commercial impartiality:

Chapter five: Economic concentration
Article 9: Economic concentration:
Article 10: Completion applications of economic concentration:

Chapter 6: Commission and Council of Competition
Article 11: Commission of the Protection of Competition and Monopoly Prevention
Article 12: Departments of the Council of Competition
Article 13: Powers of the Commission
Article 14: Council's decisions concerning Economic Concentration
Article 15: The Judicial brigade and pursuits
Article 16: Information confidentiality
Article 17: Considering violations
Article 18: The Council's Ministry Representative
Article 19: Right of appeal decisions
Article 20: Acceptation or rejection of the complaint
Article 21: Decisions of the council of competition
Article 22: Budget

Chapter seven: penalties and compensation
Article 23: Council of Competition penalties
Article 24: penalty for disclosure of confidential information .
Article 25:Prevention of commercial relations
Article 26: Compensation:
Article 27: Guarantees

Chapter eight: transitional provisions
Article 28:Activities previous to the Law entering into force
Article 29:Executive panel
Article 30: Publicationand enter into force

Law n°7 of 2008 Act of Competition Protection and Prevention of Monopoly

The President of the Republic
Pursuant to the provisions of the Constitution and to the People's Assembly decisions in its session dated 31/3/2008, issues the following:

Chapter 1: Definitions and scope of law enforcement

Article 3: Scope of enforcement:

First – This law shall be enforceable on the following:
1. All establishments, according to their above-mentioned definition, concerning all their agreements, procedures or commercial transactions related to commodities, services or intellectual property rights.
2. It shall be enforceable on every natural person who personally as an owner of the establishment, manager or employee thereof undertakes participating or assisting in law-prohibited practices that restrict competition.
3. Production, trading and service activities inside the Syrian Arab Republic taking intellectual property rights into consideration.
4. Any economic activities that take place outside the Syrian Arab Republic and are deemed to have harmful effects inside.
Second - Excluded of the enforcement of this law shall be the following:
1. The sovereignty works of the state itself.
2. Public utilities either owned or managed by the state for the purpose of providing citizens with products or services such as drinking water, gas, electricity, oil, public transportation and mail and communications and it shall be identified pursuant to a decision issued by the Prime Minister.

Chapter 2: Freedom of prices and competition

Article 4: prices of commodities and services

The prices of commodities and services shall be determined pursuant to market rules, and to the principles of free competition with exception of the following:
1. Prices of the basic materials and services, to be determined by virtue of a decree.
2. Prices of the materials and services that are related to the sectors or areas in which competition is limited according prices either because of the market monopoly, continuous difficulties of the supply process or to the legislative/ organizational provisions for they are organized by virtue of a decision issued by the Prime Ministry based on the minister suggestion subsequent to consultation with the Council of Competition. This decision will determine the specific materials and services related thereto and the conditions of cost and sale price determination.
3. Prices determined by virtue of the resolution of the Cabinet pursuant to provisional procedures, for the purpose of facing exceptional circumstances, emergency cases, or natural catastrophes, provided that such procedures would be reconsidered within no later than six months starting from their enforcement date.

Chapter 3: Practices in breach of competition

Article 5: Practices and agreements that are in breach of competition:

A) Agreements, practices and alignments between the competing establishments or between any establishment and its suppliers or clients shall absolutely be deemed null when they breach, limit or prevent competition, the subject /objectives of which would be specially as follows:

1) Obstruct the process of price fixing based on the natural progress of competition in the market through fixing, increasing or decreasing prices, or other conditions of sale and purchase including international trade.
2) Collude in awarding or bidding for tender/auction while joint offers in, which their parties proclaim that since the beginning, shall not be considered as collusion provided that their objective would not be anti-competition in any way whatsoever.
3) Share markets and sources of supply on the bases of geographic areas, quantities of sales/purchases, agents or on any other basis that might have a negative influence on competition.
4) Impose restrictions on production, sales, investment or technological advancement including what is based on shares.
5) Agree on refusing purchase from a certain party.
6) Agree on refusing to grant supply to a certain party.
7) Take the procedures necessary for obstructing any establishments' entry into the market, excluding them or limiting the free competition.
8) Collectively refuse to make joining an arrangement or league of significance to competition possible.

B – 1) Without violating any special text mentioned in any other Act and related to the Intellectual Property, each text/condition set forth in a licensing contract relating to any one of the rights of Intellectual Property, which abuse the rights of Intellectual Property, and might have negative influence on competition, preclude the transference and spread of technology shall be deemed null:
A) Obliging the licensee not to transfer the improvements made thereby on the technology included in the licensing contract except to the licenser (reversible transfer of improved technology).
B) Preventing licensee from administrative or judicial dispute in the right of Intellectual Property that had been licensed.
C) Obliging the licensee to accept the license with a set of rights instead of one right.
2) The Intellectual Property set forth in paragraph /a/ of this article includes in particular the following:
− Author's rights and the rights adjacent thereto.
− Trademarks
− Industrial drawings and modals
− Patents and benefit modals
− Designs of integrated circles
− Commercial confidentialities
− New plant brands

C) The provisions of paragraphs (a & b) of this article shall not be applicable to the agreements of poor effect specified in the executive list when the agreement/practice as a whole produces public benefit or it is proved to be necessary to ensure technological or economic progress. These agreements shall abide by the following:
1) Total share of its establishments does not exceed a percentage specified in instructions to be issued by the Minister for this purpose; provided that such percentage would not be over (10%) out of the total of market operations.
2) Exclusions of price level fixing and market sharing conditions.

Article 6: Abuse of a dominant market situation:
Any establishment which has a dominating situation in the market or in a significant part thereof shall be prohibited to abuse, by its own or in conjunction with other establishments, this situation in order to limit possible accessibility to the market, to breach competition, limit or prevent it, which has or might have harmful effects on the market or economic development including the following:
A) Fixing or imposing the prices or resale conditions of commodities or services.
B) The action/behaviour that might obstruct other establishments entry into the market, excluding, or making them subject to great losses, such as selling less than the cost price.

C) Discrimination between agents in similar contracts with respect to the prices of commodities and services fees or the conditions of their sale/purchase.
D) Forcing its agents to refrain from dealing with one of its competitors.
E) Seeking to monopolize certain resources that are necessary for a competitive establishment to practice its activities or purchase a certain commodity/service as to increase its price in the market or avoiding the possible decrease.
F) Rejecting to deal, without an objective justification, with a certain agent under the usual trading conditions.
G) Suspending the sale of a commodity or rendering of service by purchasing another commodity/other commodities, by purchasing a specific quantity or by demanding the rendering of other service.

Article 7: Exceptions
A) Practices arising from enforcement of an applicable law and the practices arising within the provisional procedures decided by Cabinet for the purpose of facing exceptional circumstances, emergency cases or catastrophes shall not be considered as a breach of competition in the sense intended in both the above mentioned articles 5 and 6 provided that such procedures would be reconsidered within no later than six months of the date of putting the same into force including the extension right for an additional period.
B) The practices and arrangements that the Council excludes from the application of the provisions of both article /5/ and /6/ by virtue of a justifiable resolution if they lead to results of public benefit, the accomplishment of which would not be possible without this exception, including their positive effects on the improvement of the competitive capability, production and distribution regulations or to achieve specific benefits for the consumer or prove to be necessary to ensure a certain desirable technological progress shall not be considered as a breach of competition.
C) The Council may enforce the exceptions mentioned in paragraph /b/ of this article on a type of contractual practices, arrangements or conditions of certain establishments provided that these establishments would demand such exception in accordance with a form accredited by the Council for this purpose.
D) The applicant of exception set forth in paragraph /c/ of this article shall be granted a slip note of the completion of the application and the Council should decide on this application within no later than ninety days as of the date of the slip note, provided that the exception resolution/part thereof would be published in the official Gazette.
E) The Council may determine the duration of the exception of those practices or make them subject to periodic review and it may withdraw the exception in case the establishment violates the granting conditions.

Chapter four: Practices that are in breach of commercial impartiality

Article 8: Practices that are in breach of commercial impartiality:
A) Every producer, importer, distributor, wholesaler or service provider is prohibited from performing the following:
1) Impose, directly or indirectly, a minimum resale price level for a commodity or service.
2) To impose, or obtain special unjustifiable prices, sale/purchase conditions from another party in a way that would lead to supporting its competition or causing it damage.
3) Stop market supply in a way that may harm the market or the consumers.
B) 1) any establishment is prohibited from reselling a commodity or service as it is, for a price less than its overall cost in order to breach competition or dominate the market.
2) For this paragraph, the real purchase price is intended to be the price fixed in the invoice after deducting the discounts mentioned therein; this prohibition does not include the quickly spoiled products and the licensed sales of any clearance, or stock renovation for lower prices.

Chapter five: Economic concentration

Article 9: Economic concentration:
A) Every action resulting in a complete/partial transfer of an establishment's ownership or usufruct of property, stocks, shares or commitment to another, which would enable an establishment/set of establishments to directly/indirectly control an establishment/set of establishments.
B) As to complete the economic concentration process that would have influence on the level of market competition, as a realization or support of a dominating situation, the relevant establishment / establishments should have a written consent signed by the Council, in case their shares surpasses 30% of total market operations.
C) Despite what has been mentioned in any other legislation, the agencies concerned with licensing economic concentration processes in any sector must take into account, before taking their final decision, the written opinion of the Council about the extent of these operations influence on the level of competition in that sector.
D) Any normal / legal person must notify the Council of whatever economic concentration processes, it might get to know, which are subject to the provisions of paragraph (b) of this article.

Article 10: Completion applications of economic concentration:
A) Establishments that would like to complete any of the economic concentration processes set forth in paragraph (b) of Article 9 hereof must submit an application to the Council, pursuant to the adopted form, within no later than thirty days from concluding the Draft/Final agreement of economic concentration process, to which the following should be attached:
1) The partnership deed and Articles of association of relevant establishments.
2) The draft of concentration contract or agreement.
3) Provide a description of the most important commodities and services with which the establishments concerned with economic concentration deal, along with their shares therein.
4) Provide a report about the economic dimensions of the process, particularly its positive effects on market.
5) Provide financial statements for the last three fiscal years for any of the establishments concerned with economic concentration process along with their branches properly endorsed and audited.
6) Provide a statement of the shareholders or partners of the concerned establishments and the share of every shareholder therein.
7) List of the names of its board of directors, managers/manager.
8) Statement of the branches of each establishment.
B) Establishments may attach to the application a statement of what it may see as necessary commitments/proposals in order to limit the possible negative effects of the economic concentration process on market.
C) a. Not withstanding the provisions of paragraph (c) of Article 14 hereof, the Council might, only once and in writing, request any additional information or documents about the Economic Concentration Agreement and its parties. Thereafter, it should issue a note announcing the completion of information and documents, provided that this would not lessen the right of asking for additional information or practice of the control powers.
b. The durations and the procedures of notes issuance set forth item (a) of this paragraph as well as all issues related thereto in the list issued by the Council are defined in paragraph (e) of Article 11.
D) The Council shall announce in two local newspapers the application for economic concentration submitted pursuant to the provisions of paragraph (a) of this article, at the expense of the applicant, provided that the announcement would include a summary of the subject of application, and an invitation for whoever has an interest in providing his/her opinion within no later than 30 days of announcement date.
E) Following the consultation with the relevant parties, the Council may take any reservation procedures until a decision is made concerning the application submitted pursuant to paragraph (a) of this Article.

Chapter 6: Commission and Council of Competition

Article 11: Commission of the Protection of Competition and Monopoly Prevention

A) Pursuant to a Decree issued by the Cabinet an independent body called "Commission for the Protection of Competition and Monopoly Prevention" shall be created with the main office being in Damascus; the commission shall undertake the tasks and powers defined in this Act. It shall act as artificial body and enjoy financial and administrative autonomy. The Commission personnel and the administrative and financial structures shall be determined pursuant to a decree, and it shall refer to the Prime Minister. The board of directors, or the Council of Competition, shall undertake management in addition to the Director General.

B) The Council of Competition consists of 11 members appointed each for 4-four years that can be renewed one time only pursuant to a decree decision by the Prime Minister according to the following:

1) Three judges, two of ordinary courts and one of the State Council (appeal or equivalent), based on the Minister of Justice and head of the State Council suggestion.

2) Two members from the Central Authority of Financial Control of whom one should occupy the position of a manager in the economic field based on the suggestion of the head of the Central Authority of Financial Control.

3) Three members experienced in economic affairs, competition and consumer protection issues based on the suggestion of the Minister of Economy and Trade.

4) Three elected members representing commercial and industrial activities nominated by the unions of the chambers of trade, industry and handicraftsman, and two members representing the General Union of Peasants and the General Union of Workers.

5) Members of the Council of Competition, except judges, shall take the following oath before starting their works: (I swear to rule justly and respect laws). This oath shall be taken in front of the first civil court of appeals.

C) The chairman of the Council of Competition shall be appointed out of the stipulated members in Paragraph (b-1). The chairman degree shall not be less than a head of a court of appeal/equivalent. The deputy chairman shall be appointed out of the members of the State Council. The chairman and his deputy shall fulfil their duties on the basis of full time.

D) The Director General shall be appointed pursuant to a decision issued by the Prime Minister. The Director General shall refer to the Cabinet, represent the Commission in front of other and the judiciary and attend the meetings of the Competition Council without enjoying the right to vote.

E) The Council of Competition shall issue its by-laws and the list of rules of the followed procedures, provided that they would be subject to ratification by the Prime Minister, the chairman of the Council shall submit an annual report about its activities to the Prime Minister.

Article 12: Departments of the Council of Competition

A) The council shall met on the call of the chairman once every 30 days at a minimum and whenever needed. At least 9 members, including the chairman or the deputy chairman, shall attend the meetings to satisfy the legal quorum. Decisions shall be taken by majority of the attendees and in case votes were equal, the chairman side shall be considered predominant. No member shall have the right to participate in deliberations or voting concerning an issue brought before the council in which he/she bears any personal interest or he/she has family relations with any party down to the fourth degree or in case he/she is representing any party.

B) The council shall have the right to call any specialist it deems necessary to attend meetings without enjoying the right to vote.

Article 13: Powers of the Commission

A. the Council undertakes, in coordination with the relevant parties, to perform the following tasks and powers:

1. Contribute in elaborating the general plan of competition, the legislations and any studies related thereto.

2. Manage to spread, protect and encourage the culture of competition.

3. Investigate the information to detect the practices that are in breach of the rules of competition in collaboration with the competent parties pursuant to the provisions of the laws in force.
4. Investigate the detected practices according to the received complains, and raise the reports/proposals to the bodies concerned.
5. Receive and follow up the applications related to economic concentration process provided for in Article 10 of this Act.
6. Issue explanatory comments related to its activities by its own or upon the application of establishments.
7. Hire external experts/consultants to carry out any of the activities within its powers.
8. Cooperate with similar parties outside the Syrian Arab Republic for the purposes of information and statements exchange, and the issues related to the implementation of competition rules, within what is allowed by international treaties taking the provisions of article 16 of this law as regards information confidentiality into considerations.
B. An annual report shall be raised to the Cabinet explaining the situation of competition.
C. Governmental agencies and sectoral organizational bodies in which control of any economic concentration process is vested pursuant to the legislations related thereto must depend on the written opinion of the Council within the limits of its specialty provided for herein.

Article 14: the Council's decisions concerning Economic Concentration
A) The Council may take a decision with respect to the applications submitted pursuant to Article 10 hereof as follows:
1) Approve the economic concentration process if it does not negatively affect competition, or if it has positive economic effects that would lead to the reduction of service, commodities prices, creation of job opportunities, encouragement of export, attraction of investment or support of the capability of national establishments on international competition or if they are necessary for a desirable technological progress, or to improve service and commodities quality or place new products on the market.
2) Approve the economic concentration process, provided that the concerned establishments would undertake the implementation of the conditions determined by the Council for this purpose.
3) Disapprove the economic concentration process and issue a resolution of their nullification and bring the situation back as it was.
B) In all the cases mentioned in paragraph (a) of this article a brief statement of the economic concentration process and its effects on competition in the market including the economic effects therein, the conditions and the commitments of the establishments if any must be attached to the resolution of the Council. The resolution/part thereof shall be published in at least two local daily newspapers.
C) The Council shall issue its resolution with regard to the economic concentration process within no later than one hundred days starting from the date of issue of the slip note of the completion of application.
The establishments concerned with the economic concentration process must not do, during this period, any thing that would lead to consolidating the economic concentration process or changing the market structure, otherwise these acts or procedures would be null pursuant to a resolution by the Council, if no reply was made within the defined period this would be considered as a consent.
D) The Council may nullify its previous consent in one of the following two cases:
1) If the concerned establishments violate any of the conditions and commitments pursuant to which the approval is issued.
2) If the information pursuant to which the approval was issued prove to be illusive.
The Council may take procedures it sees appropriate to face any economic concentration process for which no application is submitted or which contradicts the provisions of this Act.

Article 15: The Judicial brigade and pursuits
A) The chairman of the Council shall name and entrust any of the personnel of judicial brigade to perform the following:

1) To enter, during the working hours, the following places: Stores, show rooms, commercial shops and offices, plants, vehicles, trucks used for commerce, Warehouses, slaughterhouses and their subsidiaries, vegetable supplies' markets, exhibitions, stations and arrival and departure ports and free zones for inspection purposes and specification of criminal matters, their inventory, control and sample taking.
2) Perusing the documents, records and files including computer files and keeping and copying any one of them against a receipt; provided that whatever is kept would be confirmed in a minutes and returned after being audited.
3) Review of all records and files kept by the official departments related to companies Trade Register, Administration of Free Zones, exporters and importers records, General Administration of Customs, Taxes Department and any governmental agency authorized to issue licenses of any type that allow dealing with commodities and services. Those agencies may not interrupt the work of any of the Council employees in this connection for the reason of confidentiality or any other reason.
4) Conducting the necessary detections and hearing of the affidavit of any person suspected to be violating the provisions of this Act.
5) The personnel of judicial brigade shall take the following oath before starting their entrusted work in front of the court of first instance: (I swear to perform my job with honesty and integrity).
B) Employees must disclose their identities and provide the concerned party with a copy of the written authorization.
C) By virtue of the entitling powers pursuant to the provisions hereof, the Council may call upon any person who has or is suspected to have or information related to the violation of the provisions hereof, either to hear his/her testimony or to provide whatever statements/documents that may be in his/her possession.
D) The personnel of judicial brigade may have the authority to administratively close the shops, plants, warehouses and subsidiaries with red wax in case of resistance or obstruction for the implementation of tasks mentioned in the former paragraphs for three days, while the issue shall be raised to the Council which has the authority to cancel the closure or extend it to 30 days maximum.
E) The personnel of judicial brigade mentioned in article /a/ above shall have the authority to seek police assistance in performing their tasks.
F) Set up investigation results in any violation of this Act's provisions into reports provided that such reports would include a precise analysis of the situation of competition and its effect on the market balance.

Article 16: Information confidentiality

1. The Council, its personnel, any person who becomes familiar with the Council work pursuant to his profession and law suite parties including experts and witnesses must maintain the confidentiality of information, records and documents it might obtain through the investigations conducted, or that might be provided by the establishments whose activities are being investigated, by complainers/witnesses who provide their testimony during investigation. They might not be disclosed or publicly handled or delivered to any party other than the aforesaid establishments even if they are parties in the same investigation. Neither might they be disclosed/ delivered to the Councils of Protection of Competition in other countries before the approval of the parties concerned and nor can information, records and documents be used for any other purpose other than the investigation conducted by the Council pursuant to the provisions hereof under the penal and vocational and accountability.
2. The chairman of the Council of Competition may deliver the documents that are in breach of the confidentiality of the issues in case the delivery/perusing of such documents is necessary for the parties to practice their rights in front of the judicial or official bodies based on their request. The provisions of paragraph /a/ of this article shall be considered before these bodies which became familiar with the confidential information.

Article 17: Considering violations
The council considers the violations automatically, or when they are set forth to it by the minister or according to a request by the government, economic establishments, vocational associations, syndicates, consumer committees or chambers of commerce, industry or agriculture.

Article 18: The Council's Ministry Representative
The minister appoints his representative at the Council, who is in charge of defending public interest in the issues related to the set forth, competition violating practices.

Article 19:Right of appeal decisions
Issued decisions by the Council can be appealed in front of the higher administrative court in the State Council within 60 days of the decision notification date, and the court shall consider the appeal without delay.

Article 20: acceptation or rejection of the complaint
When the council decides the rejection of the complaint, the decision shall include if facts are not within its competency or if it is not supported by proving means. In the event of acceptance of the complaint, the Council decision shall include the statement if the practices presented for consideration by the Council entail/do not entail penalty and sentence the infringers according to the penalties included in Article 23/ of this law.

Article 21: decisions of the council of competition
The Council of Competition may, if necessary:
Address written orders to the concerned dealers to stop the breaching practices for a certain term or impose special conditions on them while practicing their activities.
Announce the nullification of the practices that are in breach or the prohibited activity and the invalidity of any of their effects.
Announce temporary closure of the condemned establishment/s for no longer than three months while it is to be understood that such said establishments can be reopened only after an end is put to the practices subject of their condemnation.
Refer the file to the Attorney General office in order to follow up the penal course after identifying the violation.
If it finds out a case of over exploitation of a dominating center as a result of a concentration case, the Council of Competition may oblige the concerned establishment/s to modify, complete or cancel all agreements/contracts on the basis of which concentration took place and out of which violations were committed.

Article 22: Budget
The Commission shall have an independent budget included in the state budget, and the financial resources shall consist of the following:
A) Designated appropriations in the state budget.
B) Donations, grants and domestic and foreign loans pursuant to the laws and regulations in force.
C) Service fees charged by the Commission pursuant to the provisions of this law and its regulations.
D) Fund returns.

Chapter seven: penalties and compensation

Article 23: Council of Competition penalties
In addition to the stipulated penalties in the effective laws, the Council of Competition shall penalize whoever:
Practices the activities prohibited herein.
Violates the resolutions of the Council stipulating the ceasing of activities.
Undertook or participated in an economic concentration process with which the Council must have been notified, but he/she has not done so and continued the procedures of economic concentration

subsequent to notification, before the resolution was issued by the Council, or continued the procedures after the Council's resolution of concentration prevention was issued.
Undertook or participated in an economic concentration process which violates the conditions stipulated in the resolution of the Council issued for approval on concentration.

Provided false information to the Council, refused to provide information thereto or deliberately obstructed the work of the Council:
A) With a fine at the rate of no less than 1% and not more than 10% of the total annual sales of the commodities /revenues of services for the breaching party, which shall be calculated as follows:
1) On the basis of his/her total annual sales of commodities/total revenues of services in the market as included in the financial statements for the previous fiscal year due to commitment of breach.
2) On the basis of his/her total annual sales related to the products subject of breach if the activity of the infringer covers many products and the breach is restricted to some of them.
3) On a basis to be determined by the Council if the activity of the infringer covers many products and the breach is restricted to some of them and if it is not possible to determine the total sales related to the products subject of breach.

B) With a fine of no less than 100.000 Syrian pounds and not more than 1000.000 Syrian pounds if sales or revenues are undetermined.

Article 24: penalty for disclosure of confidential information without violating any more strict penalty set forth in any other law, whoever discloses any confidential information which he/she had obtained as a result of the enforcement of the provisions of this Act, from any source whatsoever, including ordinary persons or the employees of the establishment and its subsidiary, shall be subject to imprisonment from three months to three years and fined no less than 100,000 and no more than 1,000,000 Syrian pounds, and sentenced to three month to three year imprisonment or to one of those penalties.

Article 25: Prevention of commercial relations
In addition to the before-mentioned penalties, The council might sentence the establishments breaking articles 5 and 6 of this Act, by preventing them from one to three years from starting commercial relations what so ever with the public bodies.

Article 26: Compensation:
Those who were subject to the damage caused by the activities, deemed forbidden by this Act, shall have the right to appeal to the civil court of first instance as to get a compensation from the infringing company. The damaged parties' right to raise compensation law suits shall lose effect after three years of the date of the forbidden activities occurrence.

Article 27: Guarantees
The assets of the fined company are the guarantees for paying the fees imposed on it.

Chapter eight: transitional provisions

Article 28:Activities previous to the Law entering into force
This Act shall be applied for the activities conducted before the coming into force of this Act, if these activities continued to be conducted after that date, then each establishment shall have to reorganize its activities in accordance with the provisions of this act within six months as of the validity date, including the elimination of each practice, deal or arrangement that had been started before the Act was enforced, or else they should ask for the exception mentioned in Article 7. Regardless to all this, in theses cases, the council can't impose fines for the activities conducted before such period.

Article 29:Executive panel

After establishing the Commission of Protection of Competition and Monopoly, the Prime Minister shall issue the executive panel of this Act.

Article 30: Publication and enter into force
The Act shall be published in the gazette, and shall be put into effect within six months of publishing date.

Damascus 27 March 2008

President of the Republic

Bashar Al Assad

Published: Sunday, 6/4/2008[1]

[1] http://www.competition.gov.sy/index.php/en/competition-low/46--7.html

Conclusions from the draft study "Competition Law and Policy in Tunisia[1]"

The Arab Center for the Rule of Law and Integrity[2] (ACRLI) is a regional, non-governmental and non profit organization that works to strengthen the rule of law and integrity in the region through research, capacity building and advocacy. With the support of the Middle East Partnership Initiative[3] (MEPI) , ACRLI has implemented the MENA Commercial Law Strengthening Project (MENA-CLS) during the period 2008-2010. In the case of Tunisia, the study and the survey was on "competition". The following pages are the conclusions chapter of the draft study bringing to English speaking readers a vision of Tunisian competition enforcement.

The analysis of the report highlighted the importance of competition policy and laws in achieving the targeted growth rate, vitalizing the business climate and strengthening economic competitiveness so as to achieve greater efficiency, ensure better protection of consumer interests and reinforce the national economy against practices that may impede development and harm the economy.

Over the past twenty years, Tunisia took important steps towards establishing a climate that is competition enabling. It has gradually applied an economic reform package including in particular the enactment of the Competition Law in 1991 and the establishment of specialized agencies responsible for the enforcement, development and support of the legal and institutional framework on an ongoing basis to keep pace with development of the economic structure, overcome shortcomings and provide opportunities ensuring implementation success.

While analyzing the activity of various agencies intervening in the law enforcement including the Public Administration of the Ministry of Trade, the Competition Council and the judicial system, both at the Judicial and administrative levels, **significant implementation progress** has been tracked making the Tunisian experience a pioneer in the Arab and African region in this area:

- It has reserved an excellent position for the competition policy within the economic policy
- It has enriched the national jurisprudence in this area
- It has gained an important status and a good reputation in the framework of national competition authorities both at the national and international levels
- It has combined the legal and institutional framework with the enforcement policy so as to protect the national economy from anti-competitive practices that may disrupt market balance.
- It has gained an excellent rating in the field of competition in the context of peer review that was conducted in 2006 under the Intergovernmental Working Group on competition law and policy of the United Nations Conference on Trade and Development (UNCTAD).

The survey conducted in the framework of the current study highlighted **the importance of competition law in vitalizing the business environment** and accelerating the growth pace as well as the Government's intention to implement this law without reluctance even in periods of economic decline. The survey also highlighted the satisfaction on the performance of the competition agencies and the degree of the actual implementation of the law.

It is worth mentioning that the debate at the National Workshop[4] to discuss the study highlighted some of the findings contained in this survey and relating to:

[1] http://www.arabruleoflaw.org/files/pdf2010/MENACLS-ThematicStudy-Tunisia-En.pdf (full text 119 pages)
[2] http://www.arabruleoflaw.org/
[3] http://mepi.state.gov/
[4] 17 December 2009.

- The feasibility of accelerating the process of privatization to vitalize competition
- The feasibility of including a prison sentence against any violation to the competition laws and policies since Tunisia tend to abandon penalties that deprive economic freedom

According to this study, the current legal framework is considered in general developed and matching with international standards in force, even though it requires further development and improvement. Moreover, enforcement agencies enjoy competence and capacities to successfully progress in the implementation of the law.

On the other hand, this analysis highlighted **certain obstacles** to the implementation particularly:

- The small size of the market and its control by some operators with their growing market power that has an impact on prices.
- The concession contracts that characterize some economic sectors
- Some sectoral legislations apply rules that do not strengthen competition.
- The structure of many markets is characterized by the oligopolies which facilitate the exchange of information and collusive behavior
- The protectionist trends in many professions that do not apply the principles of competition
- The importance of the state intervention in some economic sectors, despite the adoption of liberalization policies
- Low awareness of the provisions of the law and lack of knowledge on the protection against anti-competitive practices it provides to enterprises which is particularly important to small and medium enterprises.
- Non-experienced lawyers in the specificities of the competition law
- The reluctance of many enterprises affected by anti-competitive practices to raise complaints with the Competition Councils
- Weak resources of the competition authorities and especially the General Directorate of Competition in the context of its growing functions.

Accordingly, the **study produced a number of recommendations** aimed at strengthening the economic climate of competition, further developing the legal framework for competition, enhancing the activity of competition authorities and finally increasing the degree of coordination between these authorities on the one hand and between them and the rest of the official bodies especially the regulatory agencies. The study also identified certain areas and sectors that are considered a priority for the activity of the competition authorities.

In the area of **structural reforms** aimed at enhancing the level of competition in the national economy, the study's recommendations included in particular:

- Further facilitating access to economic activities through continuing efforts to simplify procedures ad reduce cost as well as opening certain sectors granted to puwan institutions in the form of concessions taking into account the social dimension and maintaining the amending role of the state in strategic sectors.
- Promoting competition in certain sectors that are still framed or characterized by a weak level of competition, such as the free professions.
- Benefiting from the underway legislative diagnosis on the services sector for the development of competition rules.
- Promoting freedom of trade and continuing efforts to reduce the level of tariff and non-tariff protection.
- Progressing in the liberalization of prices in certain sectors that are still framed and that meet the necessary conditions of competition.
- Further activating the role of consumers in raising competitiveness and taking advantage of which is provided by the National Institute of Consumption which was finally established.

With regard to the development of the **legal and ordinal framework** of competition policy to ensure greater compatibility with European legislation and the requirements of the next stage, the recommendations included the introduction of a number of amendments to improve the formulation of law and develop its content especially in relation to:

- The development of a vertical agreement processing system by granting bloc exemptions to selective distribution contracts in line with the trend to encourage these types particularly franchise in accordance with Chapter 6 of the Competition Law.
- Expanding the field of mandatory counseling of the Competition Council to cover ordinal texts as well as draft laws that have an impact on competition.
- Expending the resort to the Competition Council's jurisprudence by authorizing the gathering of a certain number of consumers, to appeal to the Council without the necessity of being affiliated to the Consumers Association.
- Strengthening the independence of the investigation body of the Council (reporters).
- Calling on the government's representative automatically in cases of appeal and cassation to the decisions of the Competition Council and empowering him to make notes and observations
- Requiring the Council's reporters and non-judge members to take the oath as is the case for the Directorate General for Competition and the judges.
- Enriching the legal drafting with certain concepts developed by the Council's jurisprudence such as the concept of the institution, the reference market, components of a dominant position and of an economic dependency and the concept of predatory pricing (extremely low prices)
- Requiring the exemption of agreements with weak impact

In the framework of developing procedures related to processing files of economic concentration, recommendations included in particular:

- Avoiding the duplication of authorization procedures for economic concentration operations by better coordinating the review of these operations by the agencies involved
- Requiring the motivation of the decision to grant or reject approval for a concentration operation which will enable the parties concerned, or parties who have an interest in this matter to challenge the decisions
- Requiring the publication of a newspaper announcement to inform the public of the concentration operations submitted for authorization and to invite interested parties to provide competition authorities with their observations in respect thereof
- Establishing a special official magazine to publish the decisions and opinions of the Competition Council and the decisions of the Minister in authorization procedures relating to economic concentration or exempting practices justified by economic progress
- Determining the term to respond to requests for authorization of economic concentration processes as of the date of completion of the file while developing a mechanism for requests to complete e the documentation

With regard **to support for the practical and operational aspect of competition law**, the recommendations focused on:

- Promoting the development of a competition culture and activating the the contribution of all operators and parties to the process
- Enhancing the interaction between the various actors intervening in the implementation of the law and between economic agents.
- Developing monitoring and information systems on the status of competition in various sectors of the economy, drawing on the work of the National Observatory for the Supply and Prices and the cooperation with the university (researches and studies).

- Strengthening programs on developing national capacities for the implementation of the law and benefiting from all available mechanisms and international cooperation.
- Enhancing the teaching of competition and consuming laws in Tunisian universities.

The study also recommended the **promotion, strengthening and reorganization of competition authorities and their resources** focusing on:

- Strengthening the composition of the Council and its rapporteurs in the field of economic competence and resorting to external expertise, in the context of short-term contracts
- Strengthening the Directorate General for Competition by human capacities and establishing a special department focused on conducting researches in the field of competition.

As for the **recommendations on future work priorities at the level of competition organs**, they emphasized in ¡particular the need to pay more attention to addressing certain intricacies of competition that characterize the current economic activity, particularly those relating to the following aspects:

- Devote greater attention to the practice of major distribution channels and their relationship with producers
- Pay attention to concentration trends among large retailers to prevent anti-competitive practices
- Contribute to the elaboration of a strategy to address the growing phenomenon of parallel trade and its negative repercussions on the evolution of the organized sector
- Continue the study of standards for economic activity to ensure they do not include conditions limiting competition.
- Study the status of competition in major economic sectors and activities.

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Note from the draft study[5] *(page 3/119)*

The national team in Tunisia conducted this study including:

- Mohammad Ben Freij: national writer and national team coordinator
- Lotfi Bouzaiane: economic university professor – economic consultant
- Ahmed Worfali: judge/researcher at the Legal and Judicial Studies Center – legal consultant
- Roshdi AL Mohamadi: First Deputy Chairman of the Competition Council –national assistant
- Khalifa Al Tunekti: Director General of Competition and Economic Surveys at the Ministry of Commerce and Traditional Industries – national assistant

The National team relied on the guiding methodology set by the regional team and benefited from the valuable comments and observations made by public, professional and economic parties who responded positively with the project.

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[5] http://www.arabruleoflaw.org/files/pdf2010/MENACLS-ThematicStudy-Tunisia-En.pdf

Tunisie Projet de Jumelage léger[6] :
" Appui à la modernisation du Tribunal Administratif[7]"

I – Objectifs. Appui à l'amélioration de la qualité du travail au sein du T.A. Renforcement des capacités humaines au sein du T.A et mise en œuvre d'une stratégie de leur développement. Appui au renouvellement organisationnel des structures de recherche et à la modernisation de l'infrastructure informationnelle du T.A.

II - Contribution à la mise en œuvre de l'Accord d'Association, du Plan d'Action Voisinage et du XVIème plan national de développement :

Le rôle du Tribunal Administratif est essentiel, de par sa fonction consultative, le T.A participe à l'élaboration des différents textes juridiques qui constituent le moyen de mise en œuvre de ces objectifs (réglementation en matière de commerce et d'industrie, exercice des professions libérales, normes fiscales, gestion administrative…) et ce, essentiellement, à travers sa consultation obligatoire à propos des décrets à caractère règlementaire. Sa fonction contentieuse garantit l'application des différents textes adoptés et permet d'assurer la soumission de l'administration aux règles de droit. Ceci est valable pour les différents contentieux administratifs (en matière fiscale, en matière d'autorisations Administratives, en matière de marchés publics, en matière d'exercice des libertés publiques…). Le T.A s'est vu confier, par ailleurs, le rôle de la juridiction de contrôle des décisions rendues par diverses autorités en matière de régulation de certains secteurs économiques. C'est le cas, notamment, des décisions de la Commission Bancaire, du Conseil de la Concurrence, du Comité Général des Assurances, et de la Commission de Services Financiers prévue par le code de prestation des services financiers aux non- résidents.

De plus, certains membres du T.A font partie de la composition de différents organismes et institutions. A ce titre, le Premier Président du T.A est membre es-qualité du Conseil Constitutionnel. La loi prévoit, en outre, qu'un membre du T.A occupe le poste du vice-président du Conseil de la Concurrence. De même, la composition du Conseil du Marché Financier, du Comité Général des Assurances, de l'instance nationale de protection des données à caractère personnel, ainsi que d'autres organismes compétents en matière douanière, en matière de conciliation des différends relatifs à l'exécution des marchés publics et autres, inclut un ou plusieurs membres du T.A.

Le T.A est ainsi, directement ou indirectement et à divers niveaux, associé, aux actions qui peuvent être engagées suite aux négociations dans le cadre de la politique de voisinage entre la Tunisie et l'UE, concernant, notamment, la libéralisation du commerce, des services et du droit d'établissement, ainsi que la libéralisation des produits agricoles.

Les notions d'Etat de Droit et de bonne gouvernance entraînent une rationalisation du contrôle de L'administration dont le T.A constitue l'un des principaux protagonistes. En effet, le juge administratif est de plus en plus confronté aux mutations considérables touchant la relation dministration/administrés qui sont principalement dues au développement des nouvelles technologies de l'information et de la communication et à l'apparition de nouveaux secteurs d'activité.

Ces mutations ont conduit à la prolifération, des textes juridiques ce qui a engendré des difficultés de maîtrise de ces textes de la part des acteurs fondamentaux de la société, à savoir l'administration, les administrés, les professionnels du droit et notamment le juge administratif, dans sa double fonction consultative et contentieuse.

[6] Extraits de la fiche du jumelage – 2010.
[7] République Tunisienne - Ministère du Développement et de la Coopération Internationale
Programme d'Appui à la mise en œuvre de l'Accord d'Association TUNISIE-UE (P3A- II)

Par ailleurs, et s'inscrivant dans la politique générale de l'Etat tunisien visant à renforcer le rapprochement du service public du citoyen, l'organisation du T.A. est appelée à se développer dans le sens d'une plus grande proximité géographique. A ce titre, cette réforme garantit la proximité et, par voie de conséquence, une meilleure accessibilité de la justice administrative en plus du raccourcissement des délais de résolution des affaires.

III - Description du volet jumelage

A) Contexte et justification. La Tunisie s'est engagée depuis plusieurs années dans un effort continu de modernisation du système juridictionnel, tant au niveau des structures de formation du personnel qu'au niveau du développement de nouvelles lois visant aussi bien l'ordre administratif que celui judiciaire. Les objectifs des autorités sont notamment de promouvoir l'Etat de Droit, de consolider les libertés fondamentales, d'améliorer l'accès à la Justice et de développer et renforcer le cadre législatif et réglementaire.

B) Activités pour le Tribunal Administratif, les efforts nationaux de modernisation se sont intensifiés dès le début des années 90 avec des réformes qui ont été opérées par l'adoption de trois lois organiques :
La loi organique n°96-38 du 3 juin 1996 relative à la répartition des compétences entre les tribunaux judiciaires et le tribunal administratif et à la création d'un conseil des conflits de compétence ;la loi organique n°96-39 du 3 juin 1996 relative au Tribunal Administratif; et la loi organique n°96-40 du 3 juin 1996 modifiant et complétant la loi n°72-67 du 1er août 1972 relative au fonctionnement du tribunal administratif et au statut de ses membres. Ce réaménagement substantiel a permis la consolidation et le renforcement de la justice administrative érigée désormais en ordre juridictionnel quasi achevé[8].

C) Coopération avec l'Union européenne: Le T.A a bénéficié, dans le cadre de la première phase du P3A, d'un jumelage léger qui s'est achevé le 31 décembre 2009 visant le renforcement de ses capacités institutionnelles (diagnostic, procédures, formation) d'un budget de l'ordre de 250.000 EUR. Les résultats de ce projet de jumelage sont: a) organisationnels, b) les méthodes et techniques de travail, et c) les manuels de procédure d'enregistrement des requêtes et de suivi des affaires; et des procédures d'étude des dossiers consultatifs et d'élaboration des avis.

Le T.A a également réalisé une session de formation pour les magistrats dans le domaine du droit de la concurrence et ce par le biais de l'instrument TAIEX. Une deuxième requête TAIEX a été acceptée ayant pour objet l'organisation d'un atelier portant sur la mise en œuvre du droit de la concurrence[9].

D) Résultats (134h/j):

1. La méthodologie de fonctionnement d'une unité de documentation juridictionnelle
2. Le plan de formation des magistrats et des greffiers
3. Un noyau de formateurs est constitué au sein du T.A.
4. L'étude relative à la mise en place d'un système d'information approprié.
5. Les capacités professionnelles des magistrats du T.A se sont développées.

IV- Cadre Institutionnel[10]

Les activités du présent jumelage permettront de consolider les structures de recherche et de documentation au sein du T.A, ainsi que la modernisation de l'infrastructure informationnelle du T.A en le dotant d'un système d'information lui permettant d'optimiser le suivi des affaires contentieuses et des

[8] La loi organique n°2001-79 du 24 juillet 2001 modifiant et complétant certaines dispositions de la loi n°72-40 du 1er juin 1972
[9] 22 et 23 juin 2010
[10] Budget 250.000 € (P3AII) - Appel à Proposition : Août 2010; Début janvier 2011 – Fin juin 2011

dossiers consultatifs se basant sur des procédures modernes, et de gérer efficacement ses ressources matérielles et humaines. Elles permettront, également, d'améliorer la qualification des ressources humaines du T.A.

Modalités de mise en œuvre :
Le jumelage rentre dans le cadre du Programme d'Appui à la mise en œuvre de l'Accord d'Association (P3A), qui est un programme convenu entre le Gouvernement tunisien et l'Union européenne en vue de soutenir les efforts de l'administration et des institutions publiques tunisiennes impliquées dans la mise en œuvre de l'Accord d'association dans tous ses volets : économiques, sociaux, commerciaux et de services. Les activités du programme portent essentiellement sur l'amélioration de l'efficacité et le renforcement des capacités aux niveaux organisationnel, humain et matériel, des structures administratives responsables de la mise en œuvre de l'Accord à travers le recours aux différents instruments de coopération à savoir l'expertise technique privée, l'expertise publique (jumelage institutionnel traditionnel ou léger), les études, la formation, les visites d'étude et l'acquisition d'équipements.

Les autorités de tutelle du programme sont la Commission Européenne et le Ministère du Développement et de la Coopération Internationale "MDCI", coordonnateur national des projets financés dans le cadre IEVP. La gestion de ce programme est assurée par une Unité de Gestion[11] (UGP3A-II), qui agit sous la responsabilité du Responsable National du Programme (RNP), haut cadre du MDCI, et dirigée par un Directeur. Institution responsable dans le pays bénéficiaire : L'autorité contractante Ministère du Développement et de la Coopération Internationale[12] , et l'institution Bénéficiaire le Tribunal Administratif

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13 et 14 octobre 2010 a eu lieu un Séminaire sur la mise en œuvre du droit de la concurrence[13], organisé en coopération avec le Tribunal Administratif.

Depuis la promulgation de la loi n°2003-47 du 11 novembre 2003 qui a attribué au tribunal administratif la compétence pour statuer sur les recours interjetés contre les décisions du Conseil de la Concurrence en matière des pratiques anticoncurrentielles, le juge administratif se trouve confronté à une analyse économique à laquelle il n'était pas familiarisé. Dans cette perspective, le Tribunal Administratif sollicite l'assistance de l'Union Européenne en vue de développer et d'approfondir les connaissances de ses magistrats dans le but d'appréhender les méthodes et les outils de décomposition et d'étude de la réalité économique.

<u>Les thèmes des présentations au séminaire</u>
Le marché pertinent, la notion d'entreprise,
L'abus de position dominante,
La dépendance économique et les ententes,
Les sanctions des pratiques anticoncurrentielles,
Le contrôle des concentrations,
Marchés publics et concurrence,
L'atteinte à la concurrence par des actes administratifs,
Professions réglementées et concurrence.

[11] L'UGP3A-II : L'Unité de Gestion du Programme assure la gestion administrative de l'ensemble des activités du P3A, y compris les projets de jumelage, dans le respect des procédures communautaires.
[12] Responsable National du P3A- II : 98, avenue Mohamed V - 1002 Tunis Belvédère – Tunisie
[13] Hôtel Africa, 50 Av Habib Bourguiba, Tunis. - INT MARKT 42328

Toward Independent Competition Advocacy in the Mediterranean World: Learning from the AAI Model

By Albert A. Foer[1]

I. Introduction
II. Competition Law and Policy in the Mediterranean Region
III. Benefits of Competition Culture
IV. The Vital Role of NGOs in Shaping National Competition Policy
Education, Research and Advocacy as Vital Elements for a Competition NGO
V. Learning from the AAI's Model
i) AAI today
ii) Education, Research and Advocacy at AAI
iii) Funding
VI. The Need for Similar NGOs World-Wide
VII. Range of Possible Competition NGOs
VIII. Actions and Proposals
Benefits of Private Enforcement of Competition Law

I. Introduction

In June, 2010, the American Antitrust Institute, known around the world as "AAI", celebrated its twelfth anniversary as a not-for-profit independent education, research, and advocacy organization. The booklet we created in 2008 to commemorate our first decade of existence summarized our experience as a leading advocate of activist antitrust policy.[2] For those in the Mediterranean region who might be contemplating the creation of a pro-competition Non-Governmental Organization ("NGO") in the rapidly developing field of competition policy, we welcome you to review this booklet on our homepage, www.antitrustinstitute.org.

Let us be clear at the outset: we do not claim that the AAI model is appropriate in all circumstances, but something similar to AAI, very much customized to local needs, would seem potentially beneficial in every Mediterranean nation that has adopted a competition policy.

We understand that the audience in the Mediterranean region is mixed.[3] We know, for example, that the north of Africa and the Middle East have very different economies than the south of Europe. Similarly, the concept of "competition NGO"—a term generally associated with a private independent competition advocacy organization—could be something new and difficult to establish if only because few people have sufficient expertise to participate. In addition, some governments in this region may be less familiar with civil society supervision and the role of private organizations that may take oppositional positions on some issues. Last but not least, the Muslim world and its Islamic

[1] President, American Antitrust Institute, aai@antitrustinstitute.org. The author is grateful to AAI Research Fellow Ignacio Baron, who adapted this article from an earlier one that appeared in the February 2009 issue of Boletín Latino-Americano de Competencia, available at http://www.antitrustinstitute.org/Archives/BLN.ashx.

[2] Recognizing that the rest of the world sometimes tends to speak of "competition policy" rather than "antitrust", we will nevertheless use the American term frequently in this article.

[3] The ten countries of the Euro-Med Partnership are Algeria, Egypt, Israel, Jordan, Lebanon, Morocco, The Palestinian Authority, Syria, Tunisia, and Turkey.

law may possibly configure a particular scenario for the incorporation of new competition policy devices, and religious aspects may perhaps influence some of the concepts and rules common to markets and consumers. In this context, potential competition NGOs will have a difficult start.

Our objectives with this article are multiple. Our first objective is to urge the importance of establishing a competition culture, of engaging in pro-consumer advocacy and of fomenting Private Enforcement of Competition Law. Secondly, we intend to inform the Mediterranean countries about the salient features of the AAI and suggest why similar organizations are needed to support an affirmative role for antitrust as a way to maintain competition and thereby benefit consumers and businesses. And thirdly, we will comment on some lessons we have learned that might be useful to new Mediterranean competition NGOs

We are hopeful that our fairly unique experience in focusing directly on policy supervision and improvement, as well as our advocacy of policy matters for the benefit of civil society can guide those NGOs in the Mediterranean world that are moving in a comparable direction.

II. Competition Law and Policy in the Mediterranean Region

Competition law and policy in the Mediterranean countries reflects a mix of the European Union's administrative civil law approach and the US approach that combines criminal and civil approach under the common law. Whatever the mix or model in a particular country, competition law and policy institutions are expected to play a major role in the North African and the Middle Eastern countries in the context of a free-trade zone that is still in process of construction.[4] Countries may join the Euro-Med Partnership by ratifying the so-called "Euro-Med Agreements"—or "Association Agreements"—without taking on a commitment to have an EC-compatible domestic competition law. As a result, the Mediterranean Partners have followed different options at the domestic level, but based on such options, these countries have been traditionally divided into different categories.[5]

What is clear is that it has been generally recognized under the frame of the European Neighbourhood Policy and its bilateral Action Plans that any serious intent to implement a free-trade

[4] See Francois Souty, "Competition Rules in the Euro-Mediterranean Partnership", (EuroMed Market Programme – Towards the FTA 2009). This work helped us understand the brief history of the Mediterranean integration that has started to take place some decades ago and which are the Mediterranean countries participating (the "Mediterranean Partners"); the competition law enforcement institutions and the institutional organization of the concerned countries; the actual competition law enforcement in the concerned countries; and the content of some commendable recommendations.

[5] See Francois Souty, Id. and Damien Geradin, "Competition Law and Regional Economic Integration: An Analysis of the Southern Mediterranean Countries", World Bank Working Paper No. 35, 2004. According to the referred papers, there would be four categories of Mediterranean Partners. The first one would be composed of Israel and Turkey which have set up a modern competition regime that shares analogies with the EC competition law regime, but also rely on concepts that appear derived from the U.S. antitrust law (in the case of Israel) and the German competition law (in the case of Turkey). The Israeli competition law, for example, is supposed to be subject to a high degree of enforcement by the Israeli Antitrust Authority, which has adopted a large number of decisions prohibiting anticompetitive practices. Moreover, this authority has played an important role in promoting pro-competitive reforms in a variety of fields, such as telecommunications and natural gas. The second category would include the Maghreb countries (i.e., Algeria, Morocco, and Tunisia). These countries have adopted national competition laws that are patterned on the French model. But given the conceptual proximity between the French model and the EC competition law, some observers consider that the competition laws adopted by the Maghreb countries are in line with EC law. A third category of Mediterranean Partners would be composed of countries that have just not long ago adopted domestic competition legislation. This would be the situation of Jordan and Egypt. Nevertheless, Morocco, Tunisia, Jordan and Egypt would be in a similar level of development of their competition law enforcement. Algeria seems to follow the same pattern of institution building as Tunisia and Morocco, although less developed. Finally, developments would be taking place in Lebanon, Syria and in the Palestinian Authority.

zone in the aforementioned region will require, among other initiatives, progressing in the level of competitiveness *"with a view to achieving sustainable economic growth, in particular, through the development of the private sector and strengthening the socio-economic balance."*[6]

While we are aware of the correlation between competition law and economic integration in the Euro-Mediterranean Partnership Area, we are also conscious of the important role that public policy can play in the implementation of competition law regimes in the Neighbourhood.

Indeed, in a regional study prepared by the joint World Bank-European Commission Programme on Private Participation in Mediterranean Infrastructure ("PPMI"),[7] it was suggested as a way to strengthen competition policy in the Mediterranean zone that the Mediterranean Partners, the European Commission and other relevant international organizations in the field of competition law *"inform all stakeholders of the benefits that can be derived from successful implementation of a competition law regime through the involvement of professional organizations as well as consumer organizations."*[8]

In the same line, the participants of the Final Conference of the EuroMed Market Programme of the European Commission, with an intent to reinvigorate the existing structures at legal and institutional levels, agreed *"*[to] *reinforce competition advocacy in the Euro-Mediterranean societies."*[9]

These conclusions seem to confirm what many observers perceive as one of the main problems in the Mediterranean area: the relatively low enforcement level of competition rules in many of the countries. This is a problem attributed to a variety of causes, but more recurrent explanations rest on elements such as the lack of resources—or resource austerity—, the inability of the competition authorities to attract sufficient expertise, weak professional associations and consumer groups, deficient judicial systems, the granting of inadequate powers to the competition authorities, strong opposition to domestic reforms, and insufficient access to business data.

Nevertheless, the idea that *"competition authorities in the MPs should devote resources to competition advocacy, which can be a very effective mode of intervention in developing economies"* has been widely promoted in this part of the world.[10]

III. Benefits of Competition Culture

In AAI we strongly endorse the idea that establishing a competition culture founded on sound economic principles benefits each society. The aforesaid is even truer with respect to countries that have just not long ago adopted market-based principles and/or competition-based economic systems. This is because competition culture and competition enforcement actions help consumers—and the

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[6] Francois Souty, Id.

[7] The PPMI is a joint World Bank–European Commission program based in Brussels. The PPMI's mandate is to promote infrastructure sector reform and provide expertise to the countries belonging to the Euro-Mediterranean Partnership and to its parent institutions. Its activities focus on the introduction of competition, the modernization of regulatory frameworks, and the creation of an environment conducive to private participation.

[8] Damien Geradin, Id.

[9] Final Conclusions, Final Conference of the EuroMed Market Programme, Barcelona, 28-29 April, 2009.

[10] See Damien Geradin, Id. Israel's competition program appears to be the most highly developed in the region. For a study of the particular antitrust concerns of smaller economies, see Mical Gal, Competition Policy for Small Market Economies (Harvard University Press 2003).

public at large—to become aware of, and therefore demand, the gains and benefits of competitive markets.

As nations create market institutions, they almost universally recognize that the government must set some rules for how competition should operate within a free market and must have the ability to intervene from time to time to assure that markets are operating as intended. Cartels apparently occur everywhere where they can be formed and maintained without effective government intervention and they inevitably have the effect of taking money from the consumer's pocket and transferring it to companies that are acting anticompetitively. Private monopoly is common in nations around the world. Sometimes monopoly is the necessary structure in a small economy or the result of uncommonly large economies of scale. Every so often monopoly is the creation of privatization that transfers public monopoly power to private hands. Monopoly usually leads to higher prices and less innovation than would be found in a more competitive structure. Governments themselves regularly (sometimes knowingly, sometimes unintentionally) create anticompetitive situations that end up harming both small and medium-sized businesses and consumers. Recurrently, it is the poorest and least powerful members of a community who are most disadvantaged by anticompetitive activity. A well-run antitrust regime should bring four values to any market-oriented economy: (i) lower prices, (ii) better service, (iii) more choice, and (iv) innovation leading to growth in the economy.[11]

Nonetheless, given the differences in laws, politics, cultures and economic systems in the Mediterranean region, it is unrealistic to expect that all the countries involved in this endeavor will evolve identical competition programs. However, some convergence may be possible.

In fact, international initiatives devoted to competition law enforcement—such as the International Competition Network ("ICN")—encourage, voluntary actions toward convergence. The ICN, for instance, generates and disseminates "best practices," promotes the advocacy role of antitrust agencies, and seeks to facilitate international cooperation. The ICN provides competition authorities with a specialized yet informal venue for maintaining regular contacts and addressing practical competition concerns. This allows for a dynamic dialogue that serves to build consensus and convergence towards sound competition policy principles across the global antitrust community.[12] Six of the ten Euro-Med Partners are currently members of the ICN.[13]

The ICN's members are the competition authorities of approximately 100 nations. But competition policy cannot rest on the competition authorities by themselves. If consumers and civil society do not really recognize and comprehend what competition is and why it is beneficial not only to the economy in general but to citizens in their role as consumers, any effort made by the authority to stimulate competition, consensus and convergence will probably be unsuccessful in the long run. In this regard, involvement of civil society is crucial.

This point has increasingly been recognized by the ICN. As stated in a 2003 working paper: *"consumers* […] *and civil society at large are not directly engaged or involved in the competition enforcement process"* due to the fact that *"consumers generally do not fully understand the implications of competition enforcement, tend to be poorly informed and are unaware of their rights"*. This is particularly true in connection with transition economies *"where a long tradition of government intervention in the economy, price fixing by inefficient entrepreneurs, lack of effective*

[11] See the introductory chapter of the AAI's report, "The Next Antitrust Agenda", at www.antitrustinstitute.org for further discussion on the value of competition and antitrust.

[12] See International Competition Network webpage at http://www.internationalcompetitionnetwork.org.

[13] Six of the ten are members of the International Competition Network: Egypt, Israel, Jordan, Morocco, Tunisia, and Turkey.

individual rights-based enforcement and absence of a consumer empowerment culture pose a cultural challenge to effective competition law and policy implementation."[14]

Fortunately, it can be noted that some countries in the region have been very proactive in strengthening competition culture, advocacy work and the formulation of pro-competitive reforms.[15]

IV. The Vital Role of NGOs in Shaping National Competition Policy

By competition policy we refer to a national commitment to relatively free, decentralized private markets working within a framework of some economic regulation of key sectors or natural monopolies and subject generally to restrictions on abuse of a dominant position, collusion, and anticompetitive mergers. Even in countries with deep cultural commitments to the entrepreneurial spirit, today's dominant pattern of mixed economies does not have much tradition behind it.

To generalize, the popular political support tends to be small, with only a small portion of the citizenry understanding why these policies exist or caring how they are administered. On the other hand, the opposition to such policies typically consists of the strongest economic entities, that is, those who are most threatened by government intervention. With their vast financial resources and intense interest in specific interventions, they can usually direct substantial legal, economic, and public relations expertise to gain outcomes favorable to their interests.

These generalizations also apply to the United States, where the tradition of antitrust goes back even before the passage of the Sherman Act in 1890. When AAI was founded in 1998, the first thing we did was to make visits to the head of our Justice Department Antitrust Division and the chairman of our Federal Trade Commission. We told them that in our opinion they needed a group outside of government that could criticize them for not doing enough and could provide support for them to be more aggressive in the public interest. Why would this be in their interest? Because they are continually under pressure from critics—i.e., much of the business community—to do less rather than more.

Accordingly, pressure from a competition NGO to do more would allow them greater latitude to do what in their independent expert judgment ought to be done. It would help level the political playing field. Their reactions were nearly identical: that this would be very welcome -- but they also

[14] Beatriz Boza, "The Standing of Competition Authorities vis-à-vis Civil Society", Merida ICN, June 2003.

[15] For example, the Egyptian competition authority responsible for the enforcement of competition laws ("ECA") has an explicit legal mandate to "organize training and educational programs with a view to creating awareness about the provisions of the Competition Law and free market principles in general". In the case of Israel, Professor Francois Souty remarks that IAA, the Israeli Antitrust Agency, has long been playing an active role—both formally and through advocacy work—in shaping and facilitating pro-competitive government reforms and privatizations. In the case of Jordan, the same author highlights Competition Directorate's mission of preparing an "annual report" on its activities and on the state of competition in the country. This report is intended to comply with several objectives, such as introducing the provisions of the law, spreading the culture of competition and the awareness thereof, and informing the public of the various facets of its activities and of the complaints, consultations and other cases presented to it. The publication and dissemination of this report also provides a mechanism for the publication of the decisions, placing them at the disposal of researchers and reviewers—and Arab and international organizations seeking to avail themselves of the Jordanian experience in view of its precedence in the region. The report is published and distributed through the various communities that are concerned by competition law enforcement. Finally, it is worth noting the conclusions arrived at in the Final Conference of the EuroMed Market Programme with respect to competition advocacy in the Euro-Mediterranean region, principally, the suggestion of publishing a Mediterranean Competition Bulletin—half-yearly or at least periodically—, ensuring the Arabic edition of this bulletin—thanks to financial support that could be sought from a regional or international donator and the technical support proposed inter alia by the Egyptian and Moroccan Competition Authorities—, and organizing every year a Mediterranean Competition Day following the model of the European Competition Day.

predicted with pessimistic certainty that we would never find the funding to make it happen. As we will see shortly, the AAI has found the funding. They were right, however, that developing a successful business model would be critical to any competition NGO's capacity to make a difference.

Education, Research and Advocacy as Vital Elements for a Competition NGO

In our view, a competition NGO should be an entrepreneurial proponent of the position that competition serves the most vital interests of the public at large by (i) assuring competitive prices, (ii) fostering innovation and efficiency, so that consumers get the choices that a free market should provide to them, (iii) protecting opportunities for small and medium-size businesses to compete on the merits in ways that do not undermine efficiently operating markets, and (iv) promoting growth of the economy so that there will be a larger pie that can be distributed to citizens. To achieve this mission, a competition NGO should:

- Educate the public about the benefits of competition and the ways in which fair and effective competition can be enhanced in the interest of consumers;
- Generate and facilitate research and multidisciplinary approaches to a national and international competition agenda; and,
- Advocate competition-oriented policies in all the branches or sectors of government, and internationally, as an essential element of civil society.
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In the next sections, we summarize some of the conditions that contribute to the design of the AAI model, but which may not necessarily be present in the Mediterranean countries. Each Mediterranean country, we stress, must design its own model.

V. Learning from the AAI's Model

i) AAI today

Perhaps it is useful to say what it is that the AAI actually does, to provide a better picture of what we mean by the term "competition NGO." We call ourselves an "education, research, and advocacy" organization. We are not-for-profit and independent. We do not have members as such. We have four professionals on payroll, scattered around the country and working from their own homes and offices. Our decision-making governing board consists of five directors, whose combined experience includes private law practice, former government positions, economics, academics, consumer advocacy, and business management. We rely heavily on an advisory board now numbering more than 110. We communicate almost exclusively via e-mail. Indeed, we describe ourselves as a "virtual network of experts", the experts being principally lawyers and economists, both practitioners and academics. There is no strict ideological test to become an Advisory Board member or a loosely-connected supporter of AAI—i.e., a person who chooses to be on our email list—, although our positions on issues tend to draw people who are sympathetic to a centrist but activist orientation.

Our efforts serve not only to provide the public with a more balanced view of competition issues, but also to provide a useful check on the overwhelming pro-business advocacy that legislators, administrative policy-makers, and law enforcers persistently receive from major corporations and their advocates.

ii) Education, Research and Advocacy at AAI

In the area of education, we post a great many materials on our website; we talk to the media about competition issues, and respond to their questions; we conduct seminars, symposia and major conferences, and provide speakers for public forums; and we have even produced a high-grade movie,

called "Fair Fight in the Marketplace," which showed on public television and won two national awards.[16]

In the area of research, we have generated a large number of papers and articles, usually published in law review articles and often deriving from our conferences. We have also edited three books, "Network Access: Regulation and Antitrust," "The Next Antitrust Agenda," and the forthcoming "International Handbook of Private Enforcement of Competition Law."

Finally, in the area of advocacy, we publish so-called White Papers and Commentaries taking positions with respect to on-going investigations and policy issues; we produce formal public comments to agencies on various regulatory issues; we speak with or testify before members of Congress and their staffs, as well as officials at the agencies; and we write amicus briefs as friends of the court in appellate decisions.[17]

Our website, www.antitrustinstitute.org, contains our easily researchable entire work product, as well as full background on who is involved and how we are organized.[18] Additionally, a research section provides links to a wealth of information about antitrust.

iii) Funding

The question always arises: how does AAI obtain its funding? First of all, none comes from a federal agency that we may wish to criticize or influence. Interestingly, we have benefitted substantially from grants from courts under the doctrine of cy pres.[19] Cy pres grants are distributions of funds left over in class actions, where the members of the class who have filed qualified claims have already received payments, or where it is not feasible to distribute funds in another way. This is something that can only happen where there are consumer class actions.

We also raise funds through the sponsorship of tables—primarily by law firms and economics consulting firms—at our annual conference.[20] We receive donations to our general treasury from corporations, trade associations, law firms—both plaintiff- and defense-oriented—,[21] individuals, and individually-directed foundations. So far, we have not received grants from public foundations. We make available on request a list of all contributors of $1,000 or more, cumulatively from the beginning. The list now contains over 150 separate entities.

VI. The Need for Similar NGOs World-Wide

[16] See our secondary website, www.fairfightfilm.org, which provides enrichment material for the award-winning movie we produced about antitrust. This material is available for use by competition NGOs and others. It includes translations of the transcript of the film into many languages.

[17] Nevertheless, it is possible for a competition NGO to limit its advocacy to the more general level, staying out of particularistic controversies. This is the route to a larger following and may be especially important in the Mediterranean countries where the antitrust community is small and the laws new.

[18] In order to receive periodic e-mail updates on our activities, visit the website and click on the button for "e-bulletin".

[19] See Working Paper 07-11: Albert A. Foer, Enhancing Competition Through the Cy Pres Remedy: Suggested Best Practices, http://www.antitrustinstitute.org/Archives/WP07-11.ashx.

[20] See fn 43 below for more on "selling tables".

[21] In the US, certain lawyers specialize in representing businesses and consumers who allege they have been injured by antitrust violations. Others (a much larger number) tend to specialize in representing businesses that are defending themselves against governmental investigations or private lawsuits. Some law firms and individual lawyers represent both plaintiffs and defendants.

The AAI model has proven itself for over a dozen years in the US context. A virtual network does not require a large paid staff or expensive facilities, so operating costs can be kept low. This is likely to be true in most Mediterranean countries as well, provided there is widespread use of the Internet within the antitrust community. Funding is possibly more easily available in the US, however, through a variety of sources, without need to rely on the government, whose financial contributions might reduce the independence of the NGO. With a mature antitrust system in place in the US, a large and diverse base of experts is available because—with private enforcement accounting for 90 percent or more of cases—so many people earn a living in the antitrust industry and so many have a viewpoint that is to a large degree shared. Independent "think tanks"—of which the AAI is one example—are well-established in the US and their role is accepted and even generally appreciated as a part of democratic governance. We are quite aware that these conditions would not apply in all or even most of the Mediterranean countries. It may take many years for comparable conditions to evolve, if ever, in countries with new competition regimes.[22] This does not in the least diminish the need for public interest NGOs focused on competition policy; it simply suggests that each one will have to be designed to reflect the local context.

When we created the AAI, our focus was strictly domestic. It did not take long, however, to realize that the antitrust field was so tied to globalization that we had to become knowledgeable about how other jurisdictions were enforcing—or not enforcing—competition policies. We began to recruit international experts to our Advisory Board and to reach out to an increasingly international network, including having foreign experts participate in our programs and our traveling abroad to speak face-to-face with competition officials and experts. As a result of all of this, we have become convinced that something like the AAI model would be beneficial in every Mediterranean nation that has adopted antitrust laws.

In most of the Mediterranean jurisdictions, antitrust is still a fairly new idea. The basic institutions are in the process of being molded. The number of experts is limited. Enforcement efforts in some nations may be feeble, garnering little attention or support from the public. The public at large has minimal understanding of and perhaps little natural sympathy for this somewhat arcane subject. Even in mature market economies, institutions continue to evolve—in the US, with all of its educational advantages and experience with markets, few members of the public have a sophisticated understanding of basic economics, much less antitrust. Those who support antitrust will need to work together to educate the public at large and to increase the sophistication of the emerging antitrust community.

VII. Range of Possible Competition NGOs

Perhaps the most common type of competition NGO is the grouping of antitrust specialists, both practitioners and in-house counsel, within a bar association. In the US, the American Bar Association's Antitrust Section—which, by the way, includes economists—plays a huge role in supporting the antitrust enterprise, through a variety of conferences, journals, books, telephonic brown-bag lunches where recent cases are discussed, and formal public comments on various pending legislative and regulatory events.[23] In the US and elsewhere, defense-oriented lawyers are likely to

[22] There is a chicken-and-egg problem here. Having a mature antitrust regime may be a condition precedent for developing a sturdy competition NGO. But a sturdy competition NGO may be necessary to facilitate development of a sturdy antitrust regime. Both need to be brought into being conjunctively and they can be expected to grow and evolve conjunctively. Without effective enforcement of competition laws that are on the books, it is likely to be especially difficult to motivate people to participate in or fund a competition NGO. It may take the active participation of a strong current or former enforcement official to jump-start a nation's first competition NGO.

[23] See http://www.abanet.org/antitrust.

dominate the bar associations, giving the pro-antitrust organization a pro-defendant perspective. While in AAI we don't consider an antitrust bar organization to be sufficient, we think it is a good starting point.

A second category of NGOs includes the organized consumer groups, such as, in the US, the Consumers Federation of America, the Consumers Union, and the National Consumer League. These often have a pro-labor, pro-regulation perspective, but can sometimes be counted on to be active in antitrust cases where the consumer benefit or harm is clear.[24] The Consumer Association, UK, now known as Which?, has frequently intervened in European antitrust matters,[25] just as several consumer organizations in the US have advocated their own antitrust positions in US courts and agencies.[26]

A third category consists of centers and institutes affiliated with universities. But, even though they are generally supportive of antitrust, they are typically more oriented toward academic research than to issue advocacy.[27]

We are not aware of many NGOs similar to the AAI. The leading example may be the Consumer Unity & Trust Society ("CUTS"), an economic policy research, advocacy and networking organization established in India—but not limited exclusively to India or to antitrust. Of particular interest is its Institute for Regulation & Competition (CUTS "CIRC") together with its Centre for Consumer Action, Research & Training (CUTS "CART").[28] IBRAC is an independent NGO in Brazil that does not deal with current cases, but has a journal, conducts workshops and an annual international event.[29] A recent entry on the scene is StopCartel, a Greek NGO.[30] Another non-governmental model that is developing is that of the FIPRA Group, an international but Brussels-based independent for-profit network of senior public policy and regulatory affairs advisors specializing in strategic government relations.[31] FIPRA employs several well-known consumer advocates and increasingly represents corporate interests within the European Union that coincide with consumer interests.

The AAI model is distinct from these other models in that it is not-for-profit and focuses solely on antitrust and competition policy issues, always from a consumer-driven perspective. Competition

[24] In some Mediterranean countries consumers associations have the ability to activate the intervention of the competition authorities. In Tunisia, for example, consumers associations may consult the Competition Council on competition issues. Similarly, in Algeria, the Competition Council can act upon consumer associations' request. In Israel, the Antitrust Tribunal is able to hear cases brought by consumer organizations. And in Morocco, the Competition Council can be consulted by consumers associations for matters relating to competition.

[25] See http://en.wikipedia.org/wiki/Consumers%27_Association.

[26] The author is informed that the Dutch, Danish, French, Polish, Slovene, Italian consumer protection organizations—among others—have all had domestic influence in competition discussions. BEUC, the European Consumers Organization, http://www.beuc.org, has sporadically intervened in European competition cases. Thus a European model may be said to exist, in which established consumers organizations to a greater or lesser degree become involved in competition policy issues as an extension of their consumer protection focus. Often, the activities of these organizations are funded by governments.

[27] Some notable examples: Loyola University Chicago Institute for Consumer Antitrust Studies; the Competition Policy Center at University of California, Berkeley; George Washington University's Competition Law Center; the Centre for Competition Law and Policy at University of Oxford; the Jevons Institute for Competition Law and Economics at University College London; the Centre for Competition Policy at East Anglia University; the British Institute for International Comparative Law's Competition Law Forum; College of Europe's Global Competition Law Centre; the Center for Laws of Innovation, Competition and Regulation at Korea University; Centro de Libre Competencia at Catholic University of Chile; and the Competition Law Research Centre at Pázmány Péter Catholic University–Hungary.

[28] See http://www.cuts-international.org; http://www.cuts-ccier.org; and http://www.cuts-international.org/cart/.

[29] See http://www.ibrac.org.br.

[30] See http://www.stopcartel.org.

[31] See http://www.fipra.com.

regimes will vary by objectives, maturity, budget, staffing, cultural attitudes toward markets and government, and in many other ways. We do not suggest that the AAI model is superior to or should be adopted ahead of alternative models, especially where competition policy is relatively new and it is deemed more important to develop an initial sense of community among its supporters than to espouse a particular perspective on how policy should be directed. The AAI is an example, but only one example and not one that would be easy or necessarily desirable to replicate.

Our purpose, rather, is to encourage the development of competition NGOs in each nation with an antitrust regime, as an initial step. Secondarily, we urge the linkage of such NGOs in some fashion so that they will communicate with each other and eventually work cooperatively in support of common goals. A start has been made by the International Network of Civil Society Organizations ("INCSOC"),[32] whose driving force has been Pradeep Mehta of CUTS and Alan Asher of EnergyWatch, UK. Although INCSOC has individual members in a number of countries who have met several times in Geneva and elsewhere, the organization has been hampered by the difficulty in finding funds and seems to be languishing at the moment.[33]

This is the stuff out of which a community can be built by one or more competition NGOs within a nation.

VIII. Actions and Proposals

The initial mission of a competition NGO should be to identify and bring together a self-identifying antitrust community which can provide part of the infrastructure for making antitrust succeed. Where does one start? The central characters in "the antitrust community" will likely include the following: high enforcement officials and staffers at the competition authority; lawyers and economists who practice in the field; professors who teach competition policy; journalists who cover business and legal developments; consumer and public interest advocacy organizations—the NGOs we are addressing; legislators and their staffs who have oversight responsibility or general interest in competition policy; and businesses and trade associations that can benefit from enforcement or recognize the strategic benefit to themselves of high quality professional enforcement.

A second mission is strengthening the local antitrust enterprise. In particular, private enforcement of competition law is at best severely limited in most countries. The lack of treble damages removes a strong incentive for gifted trial advocates to develop a specialization in competition law, and the "English Rule" requiring losing plaintiffs to pay attorneys' fees provides a strong deterrent to action. Thus, the pro-corporate bias of the private bar is likely to be even more pronounced outside of the US. Developing a workable private enforcement component would seem to be a high priority. Similarly, it may be appropriate to support larger budgets for the antitrust authorities, more stringent fines and other sanctions for violators, and perhaps criminalization of certain hard-core cartel activities.

One domestic role a competition NGO can play is to help overcome *regulatory capture*, a problem that might be even more important in developing economies. Regulatory capture refers to the not uncommon situation where the industry being regulated gains effective control or undue influence over the government agency assigned to do the regulating. By providing a voice for consumers—a task which normally would be that of the antitrust authority, but which benefits from external

[32] See http://www.cuts-international.org/incsoc.htm.

[33] The author takes some responsibility for this as co-chair of INCSOC's capacity building committee, which has thus far failed in its efforts to raise funds for additional international meetings.

support—the NGO can help curb anticompetitive political influences, both directly and indirectly—for example, by educating a large consumer body who are also voters.[34]

If the first mission of self-identification and the second mission of enhancing the domestic antitrust effort are both local in nature, the third mission is international. International developments will be moving ahead during the next period of time toward consensus on best practices and eventually, perhaps, toward new institutions for harmonizing the different national approaches to both substantive and procedural law. NGOs can learn from each other and can work together both to improve their national systems and to influence the consensus that will drive international developments. At the ICN, where much of the informal harmonization work is proceeding, the principal players have been the national competition authorities and a group of defense-oriented lawyers, mostly from the US. The ICN is now reaching out to find Non-Governmental Advisors who represent a broader constituency. The national competition authorities must hear from consumer and public interest advocates as well, or the consensus that emerges will be overly-influenced by the well-funded defense lawyers and their large multinational clients, without the counterweight of consumer concerns.[35] The third mission, therefore, should be to assure that both in domestic and international policy-making, the voice of civil society proponents of vigorous antitrust policies is heard.

Benefits of Private Enforcement of Competition Law

If national law makes certain anticompetitive acts illegal, it seems to follow logically and as a matter of justice that individuals who are injured by illegal anticompetitive acts should have a right to be remedied. This is currently a hot issue in Europe, where the EU has been attempting to establish minimal standards for member states in the provision of antitrust remedies. We see private enforcement as a very important issue for competition NGO's.[36]

First, to help citizens understand the value of antitrust in their own lives, it is not enough that anticompetitive behavior is prosecuted by the government; there also should be a remedy for people and businesses injured by such behavior. A remedy that victims can put into a wallet is a concrete proof that competition is not just a vague idea or some economist's ideology but a civil right worth supporting.

Second, governmental resources directed against cartels and other anticompetitive activities that harm the public are rarely adequate to achieve optimal levels of deterrence. When corporate decision-makers contemplating a course of behavior have to consider –in addition to corporate fines and other sanctions by the government, if they are caught—that they may be held liable for private remedies, this increases the likelihood that they will not undertake the legally dubious course of action.

Third, there needs to be a community of experts who have a personal stake in antitrust. In the US, for example, which some people think has too much litigation, the private antitrust cases outnumber the public ones by at least 10 to 1. This means that there are a lot of lawyers and economists on both

[34] It might be useful if the NGO be granted official standing in regulatory bodies. In Israel, for example, the consumers have such standing in antitrust matters. In fact, the Competition Matters Committee ("CMC"), an advisory body set up to give opinion to the Minister of Industry and Trade, includes a representative of the consumers—currently the President of the Consumer Protection Association. And one of CMC's most important functions is "the assessment of the role of the Business community, Consumers' associations, professional and Unions associations."

[35] Donors both multilateral and bilateral have funded ICN participation of officials—including NGOs—from developing countries but such funding has been sporadic and not sufficient.

[36]See the forthcoming AAI volume, Albert Foer and Jonathan Cuneo (eds.), The International Handbook of Private Enforcement of Competition Law (Edward Elgar Publisher, 2010). The chapter on Israel describes a Middle Eastern system that has made large strides toward creating effective private remedies.

the plaintiffs' and the defendants' side, and these individuals and their firms can carry a lot of political weight in support of the institutions and laws. Thus, private enforcement helps build a constituency for competition policy. At the same time, it may make possible a funding source for competition NGOs. Thus, there seems to be a kind of chicken-and-egg problem: while competition NGOs may have a stake in the creation of private enforcement, without private enforcement it is very difficult to find the funding sources that will sustain competition NGOs.

Fourth, to the extent that a competition NGO has a role in providing remedies to consumers, its own salience and relevance to the society will be increased. In some nations, where there is pressure to not adopt the device of the consumer class action generally, there is movement toward allowing certified consumer organizations to bring private suits on behalf of their members.

The AAI has created an international outreach committee for the purpose of working with international competition NGOs that seek our assistance.[37] At this point in time, such assistance is limited to information and advice via our website and e-mail communications. Alas, we have no funding to offer. We would be pleased to provide links from our website to others' sites and we are prepared to participate in the future to help coordinate linkages between international competition NGOs. Individual AAI committee members may be assigned to be responsive to particular NGO's inquiries.

[37] Communications may be directed to aai@antitrustinstitute.org.

The European Ombudsman: Resolving Complaints, Promoting Good Administration

Article by the European Ombudsman,
P. Nikiforos Diamandouros

Table of contents

The evolution of the institution of ombudsman
The Ombudsman's investigations
Content of complaints
Complaints from outside the EU
The Ombudsman - complementary to the courts
The Code of Good Administrative Behaviour
The Lisbon Treaty and the right to good administration
The European Network of Ombudsmen
Conclusion

The European Ombudsman investigates complaints about maladministration in EU institutions and bodies, such as the European Commission or the European Parliament. Maladministration encompasses all kinds of poor or failed administration, from late payment for EU projects to refusal to give access to a document, or a European civil servant's lack of courtesy on the telephone.

Every year, the Ombudsman receives between 3000 and 4000 complaints from companies, citizens, lawyers, associations, and other organisations. Any EU citizen or any natural or legal person residing or having its registered office in an EU Member State can lodge a complaint in any of the 23 EU official languages. However, the Ombudsman also deals with complaints from outside the European Union, if he deems it necessary to open an investigation. An electronic complaint form is available on the Ombudsman's website at: www.ombudsman.europa.eu

The evolution of the institution of ombudsman

The world's first parliamentary ombudsman was established in Sweden in 1809 to check the legality of public officials' behaviour. Not until 1919 was the Swedish model adapted to the needs of another country, Finland. Then, nearly half a century passed before a third Ombudsman was established, in 1955, this time in Denmark.

In the 1960s and early 1970s, a first wave of global expansion began when older democracies, such as Norway, New Zealand, the UK and France, adopted the ombudsman institution as a way of tackling citizens' problems with the public administration, which expanded greatly and took on new roles, as the social role of the state grew dramatically after the Second World War.

From the mid-1970s onwards, ombudsmen were established in post-authoritarian states, such as Greece, Portugal and Spain, as well as in many countries of Latin America. After 1989, the transition from communism to democracy in Central and Eastern Europe resulted in a large increase in the number of ombudsman institutions in this region.

Today, there is a national ombudsman in 25 of the 27 EU Member States. It was in the context of the EU enlargement to include the Scandinavian countries, as well as in the discussions concerning a

Citizens' Europe, that the idea of creating a European Ombudsman was first brought up. The Maastricht Treaty established the European Ombudsman in 1993 to enhance relations between citizens, companies and associations and the EU level of governance.

The European Ombudsman is elected by the European Parliament. The first Ombudsman, Mr Jacob Söderman, the former national ombudsman of Finland, was elected by Parliament in 1995. Mr P. Nikiforos Diamandouros, the first Greek Ombudsman, was elected European Ombudsman in 2003 and re-elected twice, in January 1995 and again in January 2010.

The Ombudsman's investigations

On average, the Ombudsman closes 300 to 400 inquiries per year. Around two-thirds of inquiries each year concern the Commission. This is not surprising, given that the Commission represents the biggest part of the EU administration. In 2009, it was followed by the European Parliament, the European Personnel Selection Office, the Council and the Court of Justice of the EU.

The Ombudsman aims to achieve friendly solutions. This gives him the opportunity to ensure a win-win outcome, satisfying both the complainant and the institution involved. In 2009, in more than half of the cases, the institution concerned accepted a friendly solution or settled the matter. In the previous year, this percentage was 33%.

The Ombudsman also issues recommendations where maladministration can still be remedied or, at times, closes cases with critical remarks. When an institution does not comply with his recommendations in cases which raise fundamental questions of principle, he may choose to submit a special report to the European Parliament.

Regarding the origin of complaints, Germany and Spain were the source of the greatest number of complaints in 2009, followed by Poland and France. But relative to the size of their population, most complaints came from smaller Member States, such as Luxembourg, Malta, Cyprus and Belgium.

In almost 80% of all cases, the Ombudsman is able to help complainants. He does so by opening an inquiry into the case, transferring it to a competent body, or giving advice on where to turn.

It is important to point out that the European Ombudsman cannot deal with complaints about national or regional administrations, even when the complaints concern EU matters. Such complaints should normally be addressed to the national or regional ombudsmen, who, taken together, make up the European Network of Ombudsmen, or to other problem solving mechanisms, such as SOLVIT.

As of January 2009, the Ombudsman introduced an interactive guide on his website, which is accessible in all 23 EU languages. This guide aims to direct complainants to the body best placed to help them. Since 2009, more than 40 000 individuals received advice through the guide.

Content of complaints

In 2009, by far the most common allegation examined by the Ombudsman was lack of transparency in the EU administration. This allegation arose in 36% of all inquiries and included refusal of information or access to documents. The Ombudsman remains concerned about the consistently high number of complaints alleging lack of transparency. After all, an accountable and transparent EU administration is key to building citizens' trust in the EU.

In a very recent case, the Ombudsman received a complaint from an Irish citizen, whose son had committed suicide after taking an anti-acne medicine. The boy's father asked the European Medicines Agency (EMA) for access to adverse reaction reports linked to this medicine. EMA initially refused access, arguing that EU access to documents rules do not apply to adverse reaction reports.

The Ombudsman disagreed and called on EMA to reconsider its refusal. EMA accepted the Ombudsman's recommendation and announced the release of the reports. EMA also announced that it

would overhaul its transparency policy.

Other types of alleged maladministration concerned late payments for EU projects, unfairness, abuse of power, discrimination, and procedural errors. To give an example related to the latter: The Ombudsman criticised the Commission for failing to make a proper note of a meeting with computer manufacturer Dell during an antitrust investigation of the chip producer Intel. This followed a complaint from Intel arguing that the meeting directly concerned the subject-matter of the investigation. The Ombudsman stated that he hoped his decision would help the Commission to improve its administrative procedures by ensuring that its future antitrust investigations are fully documented.

Complaints from outside the EU

Every year, the Ombudsman receives a substantial number of complaints from outside the European Union. In 2009, he received 157 non-EU complaints, compared to 221 in 2008. When the Ombudsman deems it necessary to investigate such a complaint, he can choose to open an investigation on his own initiative.

To give one example: The government of Mozambique organised an international tender for the rehabilitation of a major road. The work was funded by the European Development Fund and monitored by the Commission's Delegation in Maputo.

The successful tenderer sub-contracted part of the work to a construction company but was later unable to fully pay it for the work it had carried out. In situations such as this, sub-contractors can turn to the national authorities and ask for direct payment, which the Delegation also has to approve.

The company turned to the Ombudsman, alleging that the Delegation had failed to take action so as to guarantee that it received the sum of 288 000 EUR which was still due for its work. The Commission settled the complaint and paid the company the outstanding amount.

The Ombudsman - complementary to the courts

The decisions of the European Ombudsman are not legally binding. There are, however, several advantages to the Ombudsman's services, when compared with court proceedings. To begin with, there is no cost to the complainant. This is very important, for example, for citizens, small- and medium-sized companies or NGOs, which often do not have the means to go through lengthy court cases.

Secondly, the Ombudsman is quicker than the courts. The time taken to complete inquiries fell from an average of 13 months in 2008 to nine months in 2009. This figure of nine months includes cases that were resolved very quickly, usually by telephone. The Ombudsman aims to reduce even further the time taken to achieve results through inquiries.

Thirdly, the Ombudsman can be more flexible than the courts. To give an example: a complainant does not have to be personally affected by maladministration to be able to submit a complaint. In practice, this means that a Chamber of Commerce could lodge a complaint on behalf of one or more companies affected by maladministration.

The Ombudsman's power lies in the strength of his arguments and in his ability to persuade the institutions about the correctness of his views, whenever he finds maladministration. In spite of the fact that the Ombudsman's decisions are not legally binding, the institution's rate of compliance is very high.

Furthermore, the Ombudsman has the power to start inquiries on his own initiative, for example, if he receives complaints from outside the EU or if he thinks there is evidence of systemic maladministration in the EU institutions and bodies.

To give an example: A big area of concern relates to the problems the Commission encounters in paying on time its bills to third parties, such as contractors. In recent years, the Ombudsman received dozens of late payment complaints from companies, research centres, associations and other organisations. The Ombudsman, therefore, launched an own-initiative inquiry which is still ongoing but which has already led to improvements.

The Code of Good Administrative Behaviour

The Ombudsman plays a crucial role in promoting good administration and in embedding a culture of service in the EU administration. Important guidance in this respect can be found in the "European Code of Good Administrative Behaviour", drafted by the European Ombudsman and adopted by the European Parliament. The Code is a proactive instrument designed to help civil servants to apply the fundamental right to good administration on a daily basis and in a practical way. It is accessible in 23 languages on the Ombudsman's website.

The Code contains the classic principles of administrative law, such as non-discrimination, proportionality, fair procedure, impartiality and reasonableness. It also contains provisions safeguarding greater transparency. It states, for instance, that officials shall be service-minded and accessible in their relation with the public and that, when replying to correspondence; they shall try to be as helpful as possible and respond as completely and accurately as they can to questions asked.

Regarding requests for information, the Code requires officials to provide the public with the details they have asked for in a clear and understandable way. It specifically warns against abuse of power by officials and urges them to act impartially and independently. Decisions must be taken within a reasonable time frame. Moreover, citizens have to be made aware of the appeal possibilities – most notably their right to go to court or to the European Ombudsman.

When the European Parliament adopted the Code, it called on the Ombudsman to apply it in his investigations. It has proved to be an excellent tool in examining cases of alleged maladministration. Equally, it is a valuable resource for civil servants in their everyday work. Requests for copies of the Code have come from national administrations and local authorities, schools and universities, training centres and public libraries, as well as from individual citizens. The last country which adopted a Code on Good Administration, based on the European Code, was Serbia earlier this year.

The Lisbon Treaty and the right to good administration

The entry into force of the Treaty of Lisbon and the decision to grant the Charter of Fundamental Rights equal legal value to the treaties mark a crucial stage in the long process of empowering European citizens and other stakeholders. The section of the Charter entitled ‘Citizens’ Rights’ contains, of course, the right to complain to the Ombudsman. It also contains the right to good administration, a right which is at the heart of what the European Ombudsman does. Elements of the right to good administration which are specifically mentioned in the Charter include:

- the right to have one’s affairs handled "impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union";
- the right of every person to be heard;
- the right of every person to have access to his or her file;
- the obligation of the administration to give reasons for its decisions;
- the right to have the Union make good any damage caused by its institutions;
- the right to write to the institutions of the Union in one of the Treaty languages and to be provided with an answer in the same language.

The Lisbon Treaty also strengthens the right of citizens and associations to participate in the democratic life of the Union. It requires the Union institutions to maintain an open, transparent and regular dialogue with representative organisations and civil society.

It is important to highlight that a "regular dialogue" - as laid down in the Treaty - implies a genuine debate on policy, with representative organisations and civil society, which may criticise and oppose the institutions' initiatives as well as support them.

Thanks to the "European Citizens' Initiative", one million citizens from a significant number of Member States will have the possibility to call on the Commission to bring forward new legislative proposals. This Initiative should make a vital contribution to the empowerment of European citizens. The Ombudsman participated in the public consultation concerning this initiative, with a view to making sure that it will function in the most transparent way possible and with a minimum of bureaucracy.

A range of other articles in the Lisbon Treaty provide for greater openness and transparency in the activities of EU institutions, bodies, offices, and agencies. They include a provision for the Council to meet in public when it deliberates and decides on draft legislation. But the Treaty also requires other Union institutions, bodies, offices and agencies to conduct their work as openly as possible, in order to promote good governance and ensure the participation of civil society.

The Treaty extends the right of access to documents to cover not only documents of the European Parliament, Council and Commission but of all EU institutions, bodies, offices, and agencies. This improvement, written into Article 42 of the Charter of Fundamental Rights and Article 15(3) of the Treaty on the Functioning of the EU, is especially important for the Ombudsman's work.

All of these new Treaty provisions are geared to making the EU administration more open, accountable and citizen-friendly. It is the European Ombudsman's task to ensure that a commitment to a "culture of service" will indeed be the guiding principle for the EU institutions.

The European Network of Ombudsmen

The European Network of Ombudsmen plays an important role in helping European citizens to make their EU rights an everyday reality. The European Network of Ombudsmen consists of over 90 offices in 32 European countries. The Network includes the national and regional ombudsmen and similar bodies of the Member States of the European Union, the candidate countries for EU membership, and certain other European countries, as well as the European Ombudsman and the Committee on Petitions of the European Parliament.

The Network serves as an effective mechanism for co-operation on case handling and in sharing experiences and best practice. Many complainants turn to the European Ombudsman when they encounter problems with a national, regional or local administration. When possible, the European Ombudsman transfers cases directly to his national and regional colleagues or gives suitable advice to the complainant on where else to turn.

To give an example: The European Ombudsman received a complaint from a French citizen against a French Regional Health Insurance Office concerning difficulties with his claims for pension payments. The European Ombudsman contacted the French Ombudsman to ensure that he could deal with this matter. With the agreement of the complainant, the French Ombudsman investigated the complaint and confirmed that the complainant's pension payments would be paid to him with retroactive effect.

The European Ombudsman co-operates with several international ombudsman associations, including the International Ombudsman Institute (IOI). The European Ombudsman institution has attended each of the meetings of the Association of Mediterranean Ombudsmen (AOM) since it was created in 2008 and intends to become a full member of the Association in 2011.

Conclusion

Improving the quality of the EU administration for the benefit of citizens and other stakeholders has been at the centre of the Ombudsman's work for the past 15 years. It remains one of his key priorities fully to inform citizens about their rights and of how to best exercise those rights. During his new term in office, the Ombudsman will continue to strive for a more open, accountable, service-minded, and citizen-centred EU administration. Doing so contributes not only to the deepening of the rule of law in the EU but also enhances the quality of democracy in the European legal order.

September 2010

THE ROLE OF PUBLIC SERVICES IN "EUROPE 2020"[1]

By Joaquín Almunia
Vice-President of the European Commission responsible for competition policy

Minister, President of the CEEP[2], Ladies and Gentlemen,

It is a pleasure for me to be able to come to Madrid, my own country and city, and to address a sector of activity on which the quality of life and standard of living of Europeans depend so much.

You represent the majority of public service providers in Europe. Public and private, regional and local operators are assembled here today, representing virtually all sectors, from transport to social housing, to energy, to water supply, to waste management, to telecommunications, etc.

I would like to take advantage of this excellent opportunity to speak to you directly to present here my ideas about one of the priorities I have set myself as Commissioner in charge of competition policy: aiming for services of general economic interest or SGEIs - a very important part of public services as a whole - to be provided under optimum conditions in terms of access, quality and efficiency, in line with the rules of the Lisbon Treaty.

Some fundamental features of public services

Public services - as long as their quality and the efficiency with which they are provided is adequate - play a key role in our model of society.

It is obvious that certain areas of economic activity cannot be left to market forces alone. In particular, certain services (such as hospitals, education, social housing, but also communications, energy or transport) require Member States to be in a position to guarantee them to all citizens at affordable conditions. Apart from other reasons, this is because public services contribute to social and territorial cohesion in the EU by ironing out differences between parts of society and in individual and regional terms.

This said, we must immediately add a second consideration, namely that an efficient allocation of public services, and thus of the public money spent on them, also helps contribute to the competitiveness of the EU, and to economic cohesion between the countries it comprises. Public services must not be seen as just a burden on the public purse: in fact effective and high quality public services actually support and underpin growth and jobs across the EU.

Both these aspects are particularly visible and important at the present time, when Europe needs to deploy significant efforts in order to recover its growth potential. All our countries and the EU as a whole face at the same time very severe budgetary constraints and the need to stimulate growth as well as social cohesion.

Public services are key to the success of this strategy: they can at the same time help develop an economy based on knowledge and innovation (through education and training), a more resource-efficient and competitive economy (through the competitive and thus efficient allocation of resources in key industries such as telecoms, energy and transport), and a high-employment economy that delivers social and territorial cohesion (through high quality and effective public services).

But priorities, preferences and conditions are not identical across the EU Member States. It is essential to recognise from the outset that there is a second fundamental feature of public services that

[1] SPEECH/10/276- XVIIIth CEEP Congress - Madrid, 31 May 2010
[2] CEEP- European Centre of Employers and Entreprises providing public services < www.ceep.eu >

we should not forget: public services are not uniform across the EU. On the contrary, they profoundly reflect national traditions and national situations.

Public service in the EU "architecture"

The EU Treaty recognises and protects both the fundamental role played by public services in our model of society as well as the differences existing between Member States.

Thus, while public services are of fundamental importance to the EU as a whole, Member States are left a wide margin of discretion in establishing which services will be considered as public services. The only restriction lies in the existence of certain sectors where European rules harmonise public service objectives (e.g. electronic communications, energy, transport and postal services).

Apart from that, it is clearly up to the public authorities and governments at national, regional and local level to define which public services should be delivered and how. The Commission will clearly not decide how many post offices should be maintained in a specific country or if a train connection to a rural area should be kept open. The task of the Commission is only to ensure that there is no manifest abuse regarding the definition of SGEI.

This twin approach – recognising the importance of public services to the EU as a whole, while acknowledging the diversity in those services – is reflected in the Lisbon Treaty's new provisions including the new Article 14 and the dedicated Protocol in the annex to the Treaty.

Article 14 provides a new legal basis for the European Parliament and the Council to establish the principles and conditions on the basis of which "services of general interest" should operate.

In light of this provision, some sectors have asked for a horizontal legislative instrument (be it directive or regulation) in the field of services of general interest. The Commission is planning a general discussion on this subject which has not yet started in these first four months in office.

However, in the recent report on the internal market, commissioned by President Barroso, Professor Monti discusses the place of public services within the single market. With regard to Article 14, he concludes that a proposal for a framework regulation would have limited added value – at best – and that its chances of being adopted would be very small. Instead, Professor Monti suggests that the Commission should consider proposing, on the basis of Article 14, regulations ensuring access to basic services when there are gaps in the universal service provision, such as – for instance – by extending universal service in electronic communications to the provision of broadband access.

In due course, the Commission will examine this issue and will make a decision. For the time being, what is clear is that Article 14 specifically foresees a continued role for competition policy in the shaping of SGIs. This point, which I know is of interest to you all, deserves a few clarifications.

Competition and Services of General "Economic" Interest

How can competition policy instruments be used to tackle public service issues?

First of all, it has to be clarified that competition policy does not apply to all public services, but only to those that are "economic" in nature – i.e. services of general economic interest. Non-economic activities are in fact excluded from the scope of application of the Treaty (protocol 26, Article 2).

The law of the European Union Courts describes as "economic" activity any activity consisting in offering goods and/or services on a given market. This is why some public services are considered to be economic (for instance postal services, energy services, broadcasting and broadband services, the management of transport infrastructure), whereas others are not considered to be economic (for instance activities linked to the exercise of State prerogatives such as air navigation safety, or activities of a purely social nature such as the management of compulsory employers' liability insurance functioning under the principle of solidarity).

By the same token, national systems of compulsory education or systems of compulsory health care might be excluded in the future.

One of my priorities in this area to reflect further on the definition of what should be an "economic" service and in particular on the limits of this concept, so as to provide predictability and legal certainty both for the Member States and for you all, providers of these services.

But let's go back to the Treaty rules on SGEIs and to competition policy. Under Article 106 of the Treaty on the Functioning of the EU, undertakings entrusted with providing a public service that is economic in nature are subject to the EU competition rules, as long as these rules do not prevent them carrying out their public service tasks. This means that in relation to services of general economic interest, the EU rules on state aid apply, as do the EU rules on anticompetitive agreements and abuse of dominance.

State aid

With regard to the first of the tools of competition policy, state aid, it is worth recalling that not all state funding, even for services in the general "economic" interest, is regarded as state aid under the Treaty on the Functioning of the EU.

As long as certain conditions are met (laid down in the Altmark judgment by the Court of Justice of the European Union), there is no state aid where (1) the public service obligations are clearly defined; (2) the parameters used to calculate the compensation are established in an objective and transparent manner; (3) compensation for the public service merely covers costs and a reasonable profit; and (4) the compensation is determined, where the undertaking is not chosen by a public procurement procedure, on the basis of an analysis of the costs of a typical undertaking in the sector concerned.

If these conditions laid down in the Altmark judgment are not met, then – and only then – the state intervention may be regarded as state aid and has to be notified to and assessed by the European Commission.

It was precisely following this Altmark ruling that the Commission adopted in 2005 a package of measures, seeking to provide increased clarity, easy delivery and legal certainty.

The package comprises

- a framework setting out the conditions under which public service compensation deemed to be aid, can be compatible with the Treaty;
- a decision exempting small services from notification, upon the fulfilment of some requirements;
- a reinforced transparency directive to facilitate compliance and strengthen discipline.

In particular, the Decision exempts from the obligation of notification a large amount of public service compensation. Compensation up to 30 million Euros per beneficiary per year and compensation unlimited in amount for hospitals and social housing can be granted without notification being obligatory.

Of course, the conditions set out in the Decision, in particular a clear entrustment, no over-compensation and transparency of accounts, have to be met.

For larger amounts of aid, a notification is necessary to allow the Commission to check in more detail that the aid does not lead to unacceptable distortions of competition.

Under this package of measures, the Commission has authorised a number of state subsidies in the form of public service compensation.

The Commission is now going to undertake an evaluation of these measures. This evaluation is to be based on wide consultations conducted by the Commission on the basis, notably, of the reports

provided by the Member States on the implementation of the 2005 decision. To this end, a questionnaire will be published on the Commission's website in the coming month.

In this exercise, I am certain that your contributions, both as individuals and through the CEEP, will be enormously useful to us.

From our point of view, we in the Commission attach great importance to identifying as concretely as possible the benefits brought by the 2005 measures, but also of course the difficulties you might have encountered when using it.

My priority is to ensure that the EU rules applicable to services of general economic interest are such that they satisfy the different types of stakeholders:

- the citizens by allowing the provision of good quality, accessible, affordable and efficient public services,
- the national and local authorities by respecting the principles of subsidiarity and proportionality,
- and you, the SGEI providers, by ensuring legal certainty and a level playing-field.

EU antitrust rules

I shall now turn to the antitrust rules applicable to restrictive competition practices.

Our objective is to ensure that service providers are not able to use their public service obligations as a way of preserving an historical position of dominance.

Under Article 106 of the Treaty, restrictions on competition by other economic operators are allowed in so far as they are necessary in order to enable the undertaking entrusted with the service of general economic interest to carry out its task under economically acceptable conditions.

But this must be clearly justified: the specific obligations imposed by the Member State on the company in question must contribute directly to the public interest objective and must be proportionate to it. In essence, public service obligations may well be legitimate but they should not be used as a pretext for abusing a position of dominance.

You will remember that in the past in most countries one could not purchase a telephone set on the open market and plug it into the telephone socket at home. At a certain point, the European Court ruled that the exclusion or the restriction of competition in the market for telephone equipment cannot be regarded as justified by a task of a public service of general economic interest. In order to ensure that the equipment meets essential requirements for the safety of users, the safety of those operating the network and the protection of public telecommunications networks against damage of any kind, it was sufficient to lay down specifications for the equipment and to establish a procedure for type-approval to check whether those specifications are met.

In recent years, the Commission has made the monitoring of the restrictions imposed on other undertakings to protect SGEI, one of its priorities. Phasing out disproportionate restrictions has been one of its major achievements.

Indeed, in a number of cases, Member States had granted exclusive rights to specific companies arguing that without the benefit of the monopoly, competition would allow new entrants to target profitable customers (so called ‘cherry picking’ or ‘cream skimming’), while leaving unprofitable customers to the incumbent (leading to higher prices being charged to those customers or the incumbent having to rely on state subsidies).

The Commission has been instrumental in the adoption of Directives phasing out exclusive rights that were no longer justified; for instance in the energy sector or in electronic communications. Alongside the phasing out of these rights, independent regulators have been entrusted with the task of supervising public service objectives in these liberalized markets.

Conclusion

I believe that competition policy, together with regulation when this proves necessary, is essential to ensure that public services are provided efficiently; in other words: high quality services linked with efficient allocation of public resources.

Let me go back to the example of telecoms, which is probably the best example of how we have used both competition and public services in order to achieve both quality public services and an efficient and competitive industry. Telecommunications is a sector that has been very successfully opened up to competition in recent years – to the benefit of business as well as consumers.

As a consequence of liberalisation and technological change, the price businesses in Europe paid for international telephone calls went down 45 per cent between 1998 and 2003. At the same time, it was ensured that a universal public service was maintained and public money allocated efficiently so there was a smooth transition from public enterprises to privately run companies. While we are gradually moving from regulation to the sole application of the competition rules in the telecommunications sector; this does not mean that there is no role for the State. For instance, the roll-out of next generation broadband access may require state funding, and the Commission published guidelines last year on how we will assess state support for such projects.

Air transport is another sector where increased liberalisation has led to very concrete benefits for business and consumers, since the frequency of flights has gone up by 78 per cent, while the standard cost of flights has gone down by 66 per cent. At the same time, SGEIs are allowed for connections to islands or remote territories.

To conclude:

Let me repeat that both SGEIs and competition policy are a key part of Europe's model of society. And in these current times, they also form part of our exit strategy from the financial and economic crisis.

It is our responsibility and our commitment to make the best use of both. We must ensure the provision of services in the public interest for the benefit of citizens; and we must guarantee that this is done in a consistent fashion within the framework of the rules on competition established in the EU, thus limiting to the minimum necessary the burden on Member State budgets in a period when budgetary consolidation is an essential condition if we are to overcome the crisis and have the best possible expectations for success in the future.

Thank you very much for your attention.

PUBLIC SERVICES SHAPING THE EUROPEAN UNION 2020

XVIIIth CEEP[3] CONGRESS DECLARATION

CEEP held its XVIIIth Congress to discuss the role of public services in shaping the Europe 2020 strategy. The panel discussions circled around how to shape Public Services to support business growth and citizens' prosperity for the future smart, sustainable and inclusive growth.

The findings of the Congress supported strongly CEEP's claim to include Public Services, or Services of General Interest, in the Europe 2020 strategy. Especially the Europe 2020 headline targets need sound public services to be addressed effectively: challenges such as increasing employment, especially youth employment, improving education, fighting poverty and delivering social and territorial cohesion will not be produced "automatically" by the market.. Public services provide the core infrastructure for the functioning of the economy and civil society. They are key investors in the economy. Moreover, public services acted as stabilisers in time of crisis.

Providers of Public services contribute directly to more than 26% of the EU 27 GDP. More than 500.000 enterprises - private, public, mixed-owned - serve the citizens in Europe. All together they employ more than 64 million people in Europe who provide services to about 500 million Europeans.

Public employers play a stabilising factor in European labour markets, also in time of crisis and without bail-outs or subsidies. They also are "pioneers" in the creation of green jobs and invest in the new set of skills necessary to prepare the green revolution on the labour market, as a contribution to sustainable growth.

For all those reasons CEEP calls for:

- Explicit reference being made in "Europe 2020" to the role of Services of General Interest in achieving its goals and targets. We ask that this role is now taken into account when developing the flagship initiatives.
- Reflection, in the Europe 2020 Strategy, that it is the public services that will respond, amongst other, to the demographic challenges Europe faces.
- Continued investment in Services of General Interest, in order to ensure economic recovery.
- Recognition by EU and national policy makers that any private sector growth is dependent upon strong and efficient public services.
- Acknowledgment that the achievement of climate change and energy targets is dependent upon the leadership of the public services and the structures and environments which they create.
- Guarantee that further steps to increase competition in network industries should only be taken when it is clearly assessed that social and economic progress would be favoured by such measures. Social and territorial cohesion, or solidarity, is not an automatic result from well functioning markets.
- Development of a specific policy approach to SGEIs in relation with the internal market and competition policies, which takes into account the significant changes brought by the Lisbon Treaty, its article 14, Protocol 26 and article 36 of the Charter of Fundamental Rights

Done in Madrid, 1st of June 2010

[3] European Centre of Employers and Entreprises providing Public Services. < www.ceep.eu >
Congress - 31st of May – 1st of June 2010

CYPRUS COMMISSION FOR THE PROTECTION OF COMPETITION:

The Commission imposes € 42.904.000 in fines for fixing of fuel prices

On September 24, 2009, the Commission for the Protection of Competition of Cyprus (C.P.C.) fined ExxonMobil Cyprus Ltd, Hellenic Petroleum Cyprus Ltd, Petrolina (Holdings) Public Ltd and Lukoil Cyprus Ltd a total amount of €42 904 000 for breach of article 3 of the Protection of Competition Law Number 13(I)/2008, the highest fine ever imposed by the C.P.C.

The Commission concluded unanimously that ExxonMobil Cyprus Ltd, Hellenic Petroleum Cyprus Ltd, Petrolina (Holdings) Public Ltd and Lukoil Cyprus Ltd, during the period from 1/10/2004 until 22/12/2006, had operated on the basis of a concerted practice and indirectly set retail prices for unleaded petrol of 95 octanes, unleaded petrol of 98 octanes and diesel LS, without reaching the stage of an agreement but by consciously replacing the risks of competition with cooperation.

The Commission also unanimously concluded that during the same period, each of the four companies had operated separately on the basis of vertical agreements with their petrol stations through circulars of recommended or maximum prices.

The Commission for the Protection of Competition of Cyprus considered the infringements to be very serious as by definition they fell within the hard core infringements which overturn the basic operations of a healthy competition system and affect the mechanism of price determination. In fixing the fine, the Commission took into account the significance and the duration of the infringement and its real impact in the Cypriot market as well as the fact that none of the four companies had previously been sanctioned for the same infringements. The Commission also took into consideration the fact that the products for which the ex-officio investigation was conducted, that is, unleaded petrol of 95 octanes, unleaded petrol of 95 octanes and diesel LS, constitute mass consumption products and, by nature, they directly and intrinsically affect the whole of the economy with chain repercussions on economic activity. The Commission concluded that the social damage caused is huge and in the absence of other lawful means that may exist in other legal systems, its reinstatement is not possible in any other way other than the imposition of a fine of a deterrent nature.

By artificially restricting competition, either through a concerted practice or the establishment of a vertical agreements system for price fixing, enterprises avoid healthy competitive pressures which should normally exist between them, ending in distorted prices at the burden of the unprotected consumers.

As a result, the Commission imposed the following fines: ExxonMobil Cyprus Ltd €13 366 000, Hellenic Petroleum Cyprus Ltd €14 269 000, Petrolina (Holdings) Public Ltd €12 562 000 and Lukoil Cyprus Ltd €2 707 000.

EURO-MEDITERRANEAN REGIONAL AND LOCAL ASSEMBLY

Conclusions of the inaugural meeting

We, the local and regions' representatives of the Euro-Mediterranean partnership, who came together to establish the Euro-Mediterranean Regional and Local Assembly / Assemblée Régionale et Locale Euro-Méditerranéenne (ARLEM):

1 Underline the longstanding commitment of regions and local authorities from around the Mediterranean, the EU Committee of the Regions and the associations representing regions and local authorities to foster peace, democracy, social and cultural understanding, sustainable growth and prosperity in this region;

2 Take as guiding principles the commitment expressed by the Heads of State and Government at the Paris Summit of July 2008 "to strengthen democracy and political pluralism by the expansion of participation in political life and the embracing of all human rights and fundamental freedoms" and to address "common challenges facing the Euro-Mediterranean region, such as economic and social development". These principles are deeply rooted and find their first expression in local and regions' governance as well as in the cooperation between different governance levels;

3 Propose that the ARLEM would represent the Euro-Mediterranean regions' and local authorities' dimension in order to enhance the sub-national contribution to the reinvigorated Euro-Mediterranean partnership, as formulated at the Paris Summit on 13 July 2008 and in accordance with the Marseilles Declaration of the Ministers of Foreign Affairs of the Union for the Mediterranean (UfM);

4 Are convinced that national approaches in dealing with initiatives from either side of the Mediterranean need to be enhanced to achieve sustainable solutions with the participation of regions and local authorities in shaping and implementing relevant policies for citizens and cooperation between regions and towns within the Euro-Mediterranean region;

5 Commit ourselves to promote and enhance cooperation and work in partnership in an inclusive process; agree that common challenges directly affecting citizens and regions or local levels should be addressed through concrete actions by all partners involved;

6 Are ready to put our long-standing experience in dealing with projects on the ground at the service of the Euro-Mediterranean projects directly involving the regions and the local level;

7 Aim, through the creation of ARLEM, to bring citizens closer to the Euro-Mediterranean dialogue and to channel the information on the mutual benefits that the UfM can assure, beyond the existing instruments of cooperation; aim to bring regions and local actors in direct contact with the EU and UfM institutions in order to better tuning requests with proposals for the general interest;

8 Underline that while framing and implementing strategies and projects, the real needs of citizens need to be put first; therefore suggest that human, technical and academic resources from the regions and the local level be mobilised when implementing projects and that public-private partnership be maximised;

9 Stress that it is necessary to mobilise in order to ensure credits and funding by donors and that there is no unique solution that could unlock credits and financials instruments in all countries; but, at the same time and despite the apparent abundance of projects, there is a lack of coordination between the current development initiatives.

Therefore:

I. Call on the co-presidency of the Union for the Mediterranean to invite the ARLEM as observer to the UfM meetings;

II. Announce that in 2010 the ARLEM will particularly deal with urban and territorial[1] sustainable development, the decentralisation process, information society, small and medium enterprises, local water management, cultural cooperation as well as migration and integration; in this context its members and their regions' or local administrations will foster twinning and decentralised cooperation for projects dealing with these topics;

III. Call on the Spanish presidency of the EU to enlarge its ministerial meeting on territorial development in March 2010 to the UfM representatives for regional and urban development and to the ARLEM co-presidents;

IV. Ask the ARLEM co-presidents to forward these conclusions to the co-presidency of the Union for the Mediterranean, the Heads of State and Government meeting at the bi-annual summit in June 2010 in Barcelona, and the European Union institutions.

Nominate: the co-presidents and the members of the Bureau as listed in annex I.

For the purpose of these conclusions, territorial development is economic and social development of a specific territory. The purpose of territorial development is to achieve the regions' and municipalities' potentialities in order to reach a harmonious and sustainable development of each territory.

Take note: that the members of the Assembly are as listed in annex II and that two committees of no less than 32 and no more than 43 members will be established in the near future and will deal with selected topics as referred to in point II here above.

Barcelona, 21 January 2010

ARLEM - EMUNI

On the margins of the Commission for Economic, Social and Territorial Affairs (ECOTER) of the Euro-Mediterranean Regional and Local Assembly, ARLEM, which was held in Brussels on 2 July 2010, the President of EMUNI, Joseph Mifsud, held a number of meetings in Brussels vis-a-vis EMUNI activities.

President Mifsud had a meeting with the Vice President of the European Parliament and Chair of the EMPA group for EMUNI, Ms. Rodi Kratsa on joint efforts to financially reinforce the position of EMUNI. It was agreed that joint missions, organised by the EMUNI UNIVERSITY and the office of Vice President Kratsa, will be held in the Gulf in Qatar and the UAE on fund raising opportunities for EMUNI.

Further discussion was held about a joint session of the Senate in Ankara with European and Mediterranean parlamentarians. Rodi Kratsa also received a number of proposals to be put to EMPA, specifically calling for a Marie Curie Programme as an ENPI initiative, the setting up of ERASMUS for the Mediterranean, a Jean Monet-like programme for the Mediterranean, and a visa waiver or a special multiple entry visa for young researchers or academics coming from the Mediterranean region into the EU.

President Mifsud also had a cordial meeting at the European Commission with Jose Jimenez Sanchez, the EU Scientific Officer, on the ENPI service contract with DG EuropeAid. The discussion focused on procedures and work which has been carried out regarding the expert selection and development of the project. During this discussion a further amplification of the project to the Western Balkans and training for the Union for the Mediterranean officials was also discussed.

Other meetings in Brussels focused on the support to EMUNI on the management and application of EU funds. Marilyn Fiaschi and Katerina Galanaki, EU Experts were nominated for a mission to Slovenia to support the development of an EU Unit for EMUNI and to prepare a document to be presented to the Ankara meeting on staff training and competencies at EMUNI.

At the commission session of ARLEM, President Mifsud was one of the keynote speakers together with rapporteur Mr Khalid Al-Hnaifat from Jordan, Ms Julia Jordan, Mission UfM from the French Co-Presidency, Mr. Jean Louis Ville, Head of Unit, DG EuropeAid, European Commission, Ms Najat Rochdi, UNDP Office in Geneva, Deputy Director, Ms Pascale Chabrillat, Caisse des Dépôts and Ms Jackie Church, European Investment Bank, Liaison Officer.

The President of EMUNI was invited by the co-chair, Mr. I. Jakovcic, President of the Region of Istria, Croatia, to visit Istria to discuss issues of common concern on the Mediterranean and to include the Universities from the Croatian side into EMUNI.

President Mifsud also held a planning meeting with the other co-President of ECOTER, Mr. Luc Van den Brande, on a number of issues including the possibility for EMUNI to work as academic think tank of ARLEM, as from the next meeting to be held in Agadir. Mr. Van den Brande promised all his support to EMUNI and a joint meeting will be held with the European Investment Bank to look at opportunities for EMUNI to work in line with the BEI.

Also a meeting is being prepared with Madam President Bresso and Mr. Boudra, the two co-presidents of ARLEM to discuss cooperation of EMUNI with the Euro-Mediterranean Regional and Local Assembly.

Brussels. 5 July 2010.

EURO-MEDITERRANEAN PARLIAMENTARY ASSEMBLY RECOMMENDATION

Tabled on behalf of the Committee on Economic and Financial Affairs, Social Affairs and Education of EMPA

By Mr. Mohammed M. Abou El Enein Chairman of the Committee,

Based on the proposals presented by the Rapporteurs,
Mr. Mohammed M. Abou El Enein, Chairman of the EMPA Economic Committee, Member of Egyptian People's Assembly on "Mediterranean postcrisis management", and "Education and Human Capital Development in the Euro-Mediterranean Countries ";
Ms Inès Ayala Sender, Vice-Chairperson of the EMPA Economic Committee, MEP, on "Education and Human Capital Development in the Euro-Mediterranean Countries ";
Ms Dominique Vlasto, MEP, on "Mediterranean post-crisis management" and
Mr. Wolfgang Großruck, Member Austrian Parliament, "Mediterranean post-crisis management";

Having regard to the Green Paper "The European Research Area: New Perspectives", Commission of the European Communities, Brussels, 4/4/2007;

Having regard to first Euro-Mediterranean Ministerial conference on higher education and scientific research: "Towards a Euro-Mediterranean higher education & research area" (Cairo Declaration, 18 June 2007) EUROMED 2007;

Having regard to the Draft Report on "University-business dialogue: a new partnership for the modernisation of Europe's universities", Committee on Culture and Education, European Parliament, 2007;

Having regard to the opinion of the European Economic and Social Committee on the Green Paper "Migration & mobility: challenges and opportunities for EU education systems", Brussels, 25 February 2009;

Referring to the meeting of finance ministers and central bank governors, held in the United Kingdom, 7 November, 2009;

Referring to the opinion of the European Economic and Social Committee on "Concerted action to improve the career and mobility of researchers in the EU", Brussels, 16 December 2009;

Referring to the outcome of the G20 workshop on securing sustainable economic recovery, held in Seoul, Korea, 15-16 November 2009;

Taking into account the results of the Union for the Mediterranean Trade Ministers' Eighth Conference, held in Brussels on December 9, 2009;

Having regard to the results of OECD's study: "The Financial Crisis: Reform and Exit strategies", (2009);

Referring to the report of the International Monetary Fund on "Global Financial Stability: the Developments of Financial Markets", January 2010;

Having regard to KDI/IMF Conference on Reconstructing the World Economy February 25, 2010, Seoul, Korea, and to the paper entitled "A Strategy for Renormalizing Fiscal and Monetary Policies in Advanced Economies";

Having regard to the results of the World Economic Forum annual meeting, held in Davos, Switzerland, on 27-31 January 2010;

A- Whereas signs of recovery in the global economy have increased:
Rates of GDP have begun to take a positive trend in many countries, such as China, Japan, France and Germany. The rate of growth in Japan was 3.7% in the second quarter of 2009;
Financial markets improved and banks capital increased;
The International Monetary Fund (IMF) cut its forecasts relating to financial institutions' losses;

But we still have many challenges, including:
- Recovery is marred by disparities from one country to another and still depends on the policies adopted by the countries concerned;
-The high rate of unemployment is a source of economic and social costs, resulting from the global economic crisis;

B- Though noting that business communities have restored confidence in the international economy recovery, expectations about the global economy performance are marred by some risks with regard to the quality of growth and its balance. In other words, its capacity to raise the incomes of developing and poorest countries is not sufficient;

C- Recognizing as one of the key lessons learned from similar crises, such as the Great Depression and Japan's crisis in the 1990s, that the premature withdrawal of stimulus measures can be very expensive, especially if the financial system continues to be vulnerable to risks and shocks;

D- Due to the "Global Crowding Out", the budget deficit in some developed countries increased to up to 10% of the gross domestic product (GDP). This will lead to a decline in funding and investment in developing countries and emerging markets, and affect growth sustainability in the coming period;

E- Whereas this crisis is not the first one faced by the world and will not be the last, and what is important now is to contain its consequences and agree on a common vision and serious institutional arrangements to ensure non-recurrence of such crises in future;

F- Whereas the "Union for the Mediterranean" is very important, as it has been established permanently and has taken important practical steps since last year's Paris summit. A list of more than 230 projects has been prepared and agreed upon. These projects cover 6 specific areas of cooperation including preservation of the environment, raising the efficiency of energy use, supporting civil protection mechanisms, developing higher education and scientific research, supporting small and medium enterprises and enhancing business communication on both sides of the Mediterranean;

G- Noting that one important challenge facing the "Union for the Mediterranean" is to mobilize funding resources for the implementation of these projects and make it available for public and private sectors in South Mediterranean countries, and it is necessary to ensure that this goal is not affected by the current global crisis;

H- Whereas global post-crisis management suggests that there will be a new model for growth and competitiveness, which depends on knowledge-based economies;

I- Whereas education, in all its dimensions, is at the core of the Euro-Mediterranean policy, since it fosters an economic and cultural closeness of the two shores, through a significant investment in human capital and the field of knowledge, thereby leading to an increase of the region's competitiveness as well as social, economic and territorial cohesion within a framework of sustainable development;

J- Stressing that joint education is a good opportunity for exchanging experiences, overcoming the difficulties that face the process of developing education, and laying permanent foundations for a Euro-Mediterrean region of prosperity;

K- Underlining that further efforts towards a more knowledge-based society remain crucial. Education, research and innovation are the main sources of economic growth, employment and competitiveness. They are also important factors for social cohesion and stabilization. Therefore, they should continue to be at the heart of any strategy;

L- Recalling the importance of the definition of lifelong learning and the many concepts it covers, ranging from general education to non-formal and formal learning throughout life, and vocational education and training;

The Mediterranean post financial crisis management:

1) Calls upon the Union for the Mediterranean (UfM) to play an important role in addressing the common socioeconomic challenges facing the Euro-Mediterranean region, as it provides the ideal framework to promote regional integration, enhances multilateral relations, fosters recovery, and enhances long-term growth and prosperity; stresses the need to implement as soon as possible the identified UfM projects in the fields of SMEs and business development, transport, energy, environment, education and social affairs, in order to promote job creation and boost the confidence of investors, employers, workers and consumers in the region;

2) Acknowledges the high degree of international interdependence in effectively combating the economic crisis and calls for comprehensive coordination of the relevant actions initiated by individual countries in the region; considers of vital importance to that effect the need to enhance cooperation not only in the framework of the UfM, but also between the individual Mediterranean partner countries, building on the experience of the Agadir Agreement;

3) Stresses that it is vital to reform the existing international financial structure in the framework of the discussions of the G20, in order to facilitate the development of sound financial innovations that support the real economy. The greatest possible effectiveness and efficiency in financial sector supervision have to be ensured: clear rules, regulatory measures, more transparency and a reform of supervision are essential for efficient financial markets. Furthermore, the introduction of a financial transaction tax if it is agreed at an international level, would contribute to improve financial markets' stability;

4) Believes that a way out of the current crisis will also have to facilitate a business-friendly environment, inter-connecting infrastructure, reduced administrative burdens and accelerated market uptake of innovations as well as the creation of a level playing field where businesses can compete as regards quality whilst maintaining proper environmental, safety, employment and social standards that will benefit workers, consumers and business;

5) Commits to implementing recovery plans that support decent work, help preserve employment, and prioritize job growth; and calls for the provision of income, social protection, and training support for the unemployed and those most at risk of unemployment to be continued; insists on the need to improve life-long professional retraining and the possibilities of professional retraining;

6) Stresses the need to conduct an International Parliamentary Conference to study the causes of the international financial crisis and its impacts on the global economic system. The main axes of such conference would be:
- Reforming the financial governance structure in Bretton Woods institutions;
- The most important features of the new international financial system;

- Mechanisms to avoid protectionist measures as a hindrance to international trade;
- Social effects of economic crisis, including mechanisms for raising the level of employment, and poverty reduction;
- Cooperation mechanisms to stimulate demand in developing countries.

7) Urges that the exit from the crisis should be the point of entry into a sustainable and ecological social market economy, a smarter, greener and knowledge-based economy in the whole Euro-Mediterranean region, whereby prosperity is supported by innovation and a more efficient and careful use of resources;

8) Emphasizes that international consistency of policies will be the key to a successful exit process, in spite of the differences in primary indicators of recovery in some countries, where the different circumstances of each country play a greater role when authorities come to develop policies.

9) Welcomes the trade reforms and significant progress made by several Mediterranean partner countries in reducing customs duties; invites the partner countries to carry on these reforms, so as to mainly reduce non tariff barriers to trade; considers that the Agadir Agreement represents a solid basis for developing South-South regional integration and that it should be fully implemented and extended to all eligible Mediterranean partners;

10) Stresses that South-South regional integration is another key building block of the Euro-Mediterranean Free Trade Area and that the network of Free Trade Agreements in the Mediterranean region needs to be completed and subsequently reinforced by moving beyond trade in goods to cover services, investment and regulatory issues; calls upon the European Union and the Mediterranean Partners to progressively turn the trade component of the existing Euro-Mediterranean Association Agreements into far-reaching and comprehensive Free Trade Agreements;

11) Considers that protectionist measures represent a threat of so-called "Beggar thy Neighbour." This is associated to the need to establish controlling mechanism to assess the trade-related measures taken by countries, issuing periodic reports and following up the development of the financial crisis and its impact on trade; recalls that all trade-related measures must respect the rules of the World Trade Organisation;

12) Invites the Mediterranean partner countries to follow structural reforms aiming to stimulate the development of the private sector and, in particular, to improve and simplify:
a) The execution of the contracts, which takes more than two years on average due to the administrative red tape;
b) Access to credits that remains excessively limited for SMEs because of the guarantees demanded by the banks, and because of the insufficient credits offered to the small businesses;
c) The protection of the investors, who ask for a stable and transparent legal framework in order to take their investment decisions;

13) Stresses that promoting employment opportunities and sustainable labour market integration is the most efficient way for ensuring sustainable, quality and fair growth that achieves gender equality in the labour markets.

14) Stresses the importance of SMEs as an engine of economic growth, employment and regional planning; emphasizes the need to implement, in the framework of the Union for the Mediterranean, the Mediterranean Business Development Initiative through assessing the needs of these companies, developing solutions and providing these entities with resources in the form of financial and financial services;

15) Calls for increased cooperation between business confederations of the EU and partner countries, through the Mediterranean Union of Enterprise Confederations, BUSINESSMED, especially to adopt and spread economic and social "best practices" for enterprises, in order to enhance convergence and integration between enterprises of the countries of the Union for the Mediterranean; asks the European Commission and the Mediterranean partner countries to extend to the organizations representing SMEs the group of industrial cooperation responsible for the implementation of the Euro-Mediterranean Charter for Enterprise to cover the organizations representing SMEs, so that it becomes the tool enabling to barriers to growth and development of SMEs to be removed;

16) Urges the need to expand food production in Mediterranean countries through promoting investment and productivity in the agricultural sector, promoting rural development and intensifying agricultural research; insists on the need for rural policy to ensure a sustainable development and to follow proper methods of use of water, in order to guarantee an optimal use of natural resources, to modernise and maintain rural employment and to achieve food security;

17) Within the framework of the outcomes of the G20 summit, takes note of the idea of establishing a special fund for international development and investment in agriculture in poorer areas because there is an urgent need to advance the issue of investment in the agricultural sector to reduce the repercussions of poverty and achieve food security;

18) Emphasizes the importance of the commitment of developed countries to allocate 0.7% of their Gross National Product (GNP) for Official Development Assistance (ODA) to developing countries, in addition to 0.15% - 0.20% of GNP to the least developed countries; notes that some countries have set timetables to meet their long-term obligations and that the European Union, for example, agreed to allocate 0.56% of GNP to help ODA by 2010, and 0.7% by 2015.

Education and Human Capital Development in the Euro-Mediterranean Countries:

19) Recalls that in times of crisis being an entrepreneur is not a choice; supports the idea of integrating a culture of entrepreneurship into curricula (beginning early with primary curricula); encourages the business world to participate actively in the design of educational material on entrepreneurship to be made available at all levels of education;

20) Considers that the role of primary education is also essential: equal opportunities of admission for boys and girls to primary education should be obligatory. Quality and free primary education for all must be one of our principal goals in line with the Millennium Development objectives. In this context, it is necessary also to consider a special cooperation for the training of teachers;

21) Emphasizes the need to fight against school dropout, especially in the stages of primary and secondary education, and to promote female education, taking into consideration the need to close the gap between rural and urban areas;

22) Calls for supporting Mediterranean Partner Countries to establish comparable Quality Control and Accreditation schemes;

23) Stresses the need for a unified framework to improve education in the Mediterranean. There should be a unified programmes to build capacities and capabilities, and unified formal programmes of study for the universities in the Mediterranean region;

24) Calls for the development of medium-and-long term programmes to improve education quality, especially in the early stages, focusing on teaching languages and computer science, as well as literacy; recalls the principle that education is the best way to open the mind of young people to foreign cultures and people;

25) Stresses the importance of pre-school (kindergarten) education, as it paves the way to instilling the rules of thinking and creativity. In this early stage creativity and innovative skills could be discovered and promoted;

26) Emphasizes the fact that it is necessary to invest more in qualifying young people of the South of the Mediterranean in order to increase their opportunities in the labour market in their country of origin as well as in the countries of the North;

27) Calls for investment not only in basic research and innovation, but also in transnational research, technologies and capacity-building that help to bridge the gap between north and south. Special emphasis should be placed on environmental innovations;

28) Calls for developing - parallel to higher education reform - initiatives to support market-based reform in the field of Technical, Vocational Education & Training; recalls the importance of promoting and improving life-long professional training and the possibilities of professional retraining;

29) Calls for enhancing participation in a Euro-Mediterranean Scholarship Scheme in the framework of the Erasmus Mundus External Cooperation Window, including by providing a more flexible framework and by studying the possibilities of joint funding to allow increased participation;

30) Regrets the lack of knowledge amongst Mediterranean youth about existing student exchange programmes; stresses the need for better and more efficient information on programmes, such as Erasmus Mundus and Averroes, in order to give the possibility to more young people on both shores of the Mediterranean to study in a foreign country; calls for a reinforcement of these programmes; recalls that such educational programmes help to bridge the gap between countries and represent a remarkable asset for these students;

31) Stresses the well-coordinated research programmes and priorities, including a significant volume of jointly programmed public research investment at Mediterranean level involving common priorities, coordinated implementation and joint evaluation;

32) Calls for closer, mutually beneficial coordination between the EU and South countries, as well as between S&T cooperation policy and other areas of external relations; notes that such coordination should be sought both in multilateral forums and initiatives as well as in bilateral cooperation with partner countries;

33) Favours mobility of researchers; calls for the participation of the Mediterranean Partner Countries in the "People Specific Programme of FP7";

34) Calls for the establishment of a single and open Mediterranean labour market for researchers that ensures effective and secured mobility within Europe and partner countries and attracts talented young and women into research careers; notes that this requires efforts at all levels in the private and public sectors and by local, national and Mediterranean administrations;

35) Emphasizes the necessity to provide enough funds for the southern countries to promote the scientific research and raise the related proportion of expenditure in their financial balances;

36) Emphasizes the need to communicate to all governments, donors, and United Nations the need to take steps to reconstruct Gaza and press Israel to reopen borders and crossings, in order to allow the movement of students between the universities in Gaza and the West Bank, as well as to work actively towards ensuring an adequate level of education in the Palestinian territories;

37) Supports technological development for establishing centres of scientific excellence, and creating an electronic network;

38) Underlines the primary role that the UfM has assigned to EMUNI with the aim of promoting closer ties between the north and the south of the Mediterranean through culture and education, the transfer of technology and knowledge, as well as the cooperation in higher education, research, training and exchanges of the university community on both sides; welcomes the commitment of EMPA to that end by creating the Working Group on EMUNI, which will follow the activity of the University and will enable it to fulfil the objective of creating a Euro-Mediterranean Higher Education, Science and Research Area. A strong political and financial umbrella is needed to help achieve the university targets in all the Euro-Mediterranean countries;

39) Stresses the need to address the issue of the brain drain from the south of the Mediterranean to the north; encourages scientists to return to their home countries or to transfer their expertise; urges Southern countries to provide the necessary climate for creativity and innovation, and draw on their migrant scientists in making a breakthrough and revival in the South.

Amman , 14 March 2010

Explanatory Note of the Chair of the EMPA Economic Committee

As a follow-up to the debate during the plenary meeting of 13-14 March 2010 in Amman on the consideration of potential transformation of the Facility for the Euro Mediterranean Investment and Partnership (FEMIP) into a Euro Mediterranean Bank, two paragraphs (19 and 20) were added to the Economic Committee Recommendation, as a compromise outcome of the lengthy discussions.

The purpose of this explanatory Note is to precise the framework and the main lines supported by Members with regard to this issue. The framework of discussions was enlarged with other current initiatives having as objective to evaluate the opportunity of establishment of a bank dedicated to the financing of the co-development in the Mediterranean region: the analysis of the Commission of experts of the Union for the Mediterranean (UfM), which will be presented at the UfM Summit of 7 June 2010; the MidTerm Review of the European Investment Bank (EIB), including the recommendations for improving EIB activities outside the EU.

The proposal of transforming FEMIP into a Euro-Mediterranean Development Bank, as a branch of EIB, to which EIB would contribute with 51% of the capital and the other 49% should represent contributions from Northern and Southern Mediterranean Partners was subjected to an extensive debate as follows:

- The transformation of FEMIP into a bank might lead to diminishing the funds allocated for projects, as part of the capital would be used in the administration of the bank;

- FEMIP is bringing a real value added and there is no reason to change its structure or functioning. It was expressed the opinion that FEMIP should be maintained in its current form as a financial mechanism to finance Euro-Mediterranean cooperation projects, especially in the framework of the European Neighbourhood Policy.

- Majority of the Mediterranean countries members agreed on the importance of an effective financial mechanism to finance the projects that have been agreed upon in the framework of the Union for the Mediterranean and that priority be given to establishing the Euro-Mediterranean Bank;

- Most members are nearly in agreement on establishing the Bank as a separate mechanism from FEMIP. President of the Italian Parliament, who is the current EMPA chairman, stressed the special importance of the Bank and that it has to be seriously considered;

- To establish the Euro-Mediterranean Bank requires a thorough study. In this context, we are waiting for the study undertaken by the working group set up by the President of the French Republic Nicolas Sarkozy to consider the establishment of the bank: its returns, and the basis of capital equities distribution, which will have the weight in decisionmaking.

APPEL DE HAMMAMET

Appel des dirigeants des entreprises méditerranéennes aux chefs d'Etat et de gouvernement de l'Union pour la Méditerranée[1]

Nous, chefs d'entreprises des pays des deux rives de la Méditerrané, nous nous sommes réunis à Hammamet les 25 et 26 mai 2010, dans le cadre de la deuxième édition des « Entretiens de la Méditerranée », organisée conjointement par l'Institut de Prospective Economique du Monde Méditerranéen (IPEMED) et l'Institut Arabe des Chefs d'Entreprises (IACE).

Nous avons pris, à cette occasion, connaissance des conclusions des travaux réalisés en partenariat avec des acteurs majeurs de la Région et coordonnés par IPEMED. Ces travaux, regroupés dans un document : 7 projets pour le 7 juin, devaient être portés à la connaissance des Chefs d'Etat et de gouvernement réunis lors du deuxième sommet de l'Union pour la Méditerranée, initialement prévue le 7 juin 2010 à Barcelone (Espagne).

Plus que jamais, notre conviction est grande que l'analyse qui a été à l'origine du lancement de l'Union pour la Méditerranée le 13 juillet 2008 à Paris est de toute première actualité.

La crise économique et financière, partie des Etats-Unis d'Amérique, a traduit les décalages entre l'économie réelle et l'économie financière, les déséquilibres croissants du Monde et le triomphe du court terme sur le long terme. Aujourd'hui, la crise bouscule les gouvernements, met à mal des pays entiers et menace la stabilité financière, économique, sociale et politique de l'Europe.

Il est temps que l'Europe prenne l'exemple sur les grands ensembles régionaux qui se mettent en place en Amérique ou en Asie. L'Europe, seule, serait condamnée au déclin démographique, économique et politique. Dans le même temps, les pays des rives sud et est de la Méditerranée risquent d'être des laissés pour compte de la mondialisation. Le destin de l'Europe, et de ses voisins du sud et de l'est, est commun.

Cela suppose une vision ambitieuse pour un avenir commun souhaité et assumé, une plus grande solidarité qui renforce la proximité et la complémentarité. Des institutions et des régulations communes doivent être créées, dédiées à la région: elles seraient à la fois un symbole fort de la volonté politique, mais également un garant de bonne gouvernance au service du développement et des populations. Seul un partage de la valeur ajoutée, maximisant la part de chacun, permettra à la région de se positionner solidairement en tant qu'acteur majeur dans la compétition internationale.

Nous retrouvons toutes ces idées et ces orientations dans ces 7 Projets pour le 7 Juin que nous adoptons. Nous appelons les chefs d'Etat et de gouvernement de la région à en prendre connaissance et à engager les moyens à leur disposition pour mettre au plus tôt ces recommandations en pratique.

Que les chefs d'Etat et de gouvernement mettent en place les bases d'une véritable Union économique en Méditerranée et nous, chefs d'entreprises des deux rives, nous engageons à donner à la région une croissance forte, durable et partagée.

Hammamet, Tunisie le 25 mai 2010

[1] http://www.entretiensdelamediterranee.coop/spip.php?article16

EURO-MEDITERRANEAN BUSINESS DECLARATION 2010

Taking the initiative, shaping the Union for the Mediterranean

Les 3 et 4 juin 2010, des représentants d'organisations d'entreprises et du secteur privé de la région euro-méditerranéenne se sont réunis à Barcelone dans le cadre du sommet des leaders économiques de la Méditerranée dans le but d'inciter les dirigeants politiques à continuer la promotion de l'intégration économique euro-méditerranéenne, en impliquant systématiquement le secteur privé dans le processus de construction de l'Union pour la Méditerranée.

Depuis sa création en 2008, l'UpM n'a pas encore répondu aux attentes créées. Après deux ans, l'UpM continue à se concentrer davantage sur son implémentation, par exemple sur ses structures et responsabilités, que sur ses résultats. L'UpM lutte actuellement pour atteindre son principal objectif: offrir un climat de confiance à ses membres en créant des projets concrets sur le terrain.

En outre, l'annulation du sommet politique des chefs d'état et de gouvernements de l'UpM, prévu pour les 7 et 8 juin 2010, est une déception et un autre signe qui démontre que l'UpM n'agit pas de façon profitable pour la zone euro-méditerranéenne. Les entreprises ont besoin que les gouvernements de l'UpM fassent preuve de leur leadership, en créant un climat propice pour l'investissement.

L'UpM doit se stimuler par un nouvel esprit de coopération et de conciliation pour débloquer le développement potentiel d'échanges économiques. Les sommets politiques devraient toujours s'organiser en accord avec cet esprit et en se basant sur les principes du Processus de Barcelone. Le financement supplémentaire du Secrétariat de l´UpM doit dépendre de sa capacité à developper des projets d'affaires avec tous les partenaires. Nous espérons aussi que les organisations d'entreprises seront étroitement associées aux futures décisions pour garantir que nos opinions soient tenues en compte.

Le secteur entrepreneurial euro-méditerranéen a mis en œuvre une série de points clés, des propositions et des recommandations pour la construction de l'UpM, afin de la transformer en une union opérationnelle, qui pourrait développer des projets concrets d'intérêt commun pour la région euro-méditerranéenne et promouvoir un développement durable, en particulier dans les pays du sud de la méditerranée. Pour améliorer la situation actuelle et promouvoir les futures actions qui visent au succès du partenariat de l'UpM, le secteur privé euro-méditerranéen appelle à:

1- Une implication systématique du secteur privé dans la construction de l'UpM

Il est essentiel que le secteur privé participe plus clairement et activement à l'élaboration de politiques pour la construction de l'UpM. Il devrait être un acteur du processus et non pas un simple exécuteur. Le secteur privé est l'un des principaux catalyseurs de la croissance économique, de la création d'emploi et du développement social dans la région euro-méditerranéenne. Le feedback du secteur privé sur leurs besoins réels et leurs priorités sont indispensables pour la création d´une UpM complète et solide.

2- Re-souligner l'importance d'une gouvernance efficace de l'UpM

L'UpM a besoin d'un soutien politique et technique efficace pour atteindre les objectifs convenus. Les nouvelles initiatives doivent se restreindre aux éléments strictement nécessaires et respecter le critère de la valeur transnationale ajoutée. Celles-ci devraient s'appuyer sur les programmes précédents et les résultats atteints grâce au Processus de Barcelone, et ne pas se répéter. Le mandat du Secrétariat et les incertitudes concernant le rôle que doivent jouer la Commission Européenne et l´UpM sont encore confus. Une clarification des processus et des structures est donc nécessaire. Bien que le Secrétariat

doive recevoir des contributions financières appropriées des pays membres, le financement global des structures doit toujours respecter le principe du ¨ budget prudent¨.

3- Les réformes visant à améliorer la compétitivité en Méditerranée

Afin de stimuler le secteur privé, le développement des PMEs, la compétitivité, ainsi que le commerce et l'investissement en Méditerranée, une série de réformes économiques et structurelles sont nécessaires. Il s'agit notamment de:

- Lutter activement contre le protectionnisme à travers des mécanismes clairs qui permettent de configurer et résoudre les problèmes
- Eliminer les obstacles faisant face au commerce transfrontalier et à l'investissement à travers la promotion de l'intégration des marchés du sud de la méditerranée, tout en s'appuyant sur les progrès réalisés dans le cadre de l'Accord d'Agadir
- Établir des objectifs de stabilité macro-économique et un environnement rentable et réglementé pour l'investissement
- Accroître l'investissement direct étranger, en améliorant les instruments financiers et réglementaires, ainsi que la sécurité juridique
- Améliorer l'accès au financement, notamment pour les PMEs et les start-ups
- Encourager la diversification des économies méditerranéennes en soutenant les secteurs émergents qui ont un effet multiplicateur sur la création d'emplois et le développement économique durable
- Investir dans des projets d'infrastructure entre les régions à travers un partenariat public-privé bien définit
- Renforcer la coopération dans l'enseignement supérieur et dans la recherche pour réduire l'écart en matière de connaissances entre les deux rives de la Méditerranée

4 - Un plan d'action pour garantir un développement économique durable dans le sud de la Méditerranée, comprenant:

- Des mesures spécifiques ciblant les femmes et les jeunes entrepreneurs, pour exploiter au maximum le potentiel de la population active de la région, ainsi que l'implication des diasporas et les communautés d'expatriés
- Encourager et stimuler l'Investissement Socialement Responsable (ISR) et la Responsabilité sociale des Entreprises (RSC)
- Créer un dialogue systématique et déterminé, et une coopération entre le secteur public et privé de la région, tels qu'ils existent dans le consortium MedAlliance, tout en mobilisant le potentiel qu´offrent les associations public-privées pour le développement de la Méditerranée
- La promotion de l'épargne d'énergie, des énergies renouvelables et de la production propre afin de sauvegarder les faibles ressources

5- La création d´une zone euro-méditerranéenne de libre-échange:

Des accords bilatéraux de libre-échange existent entre l'Union Européenne et presque tous les pays du sud de la Méditerranée, mais la plupart de ces accords sont obsolètes et ne se concentrent que sur un nombre limité de sujets. Par exemple, la convergence du commerce des services est insuffisante, bien qu'il existe un grand potentiel dans des domaines tels que les services financiers, les télécommunications, la distribution, l'énergie, les services environnementaux, la logistique et le transport. Outre la création d´un marché régional de services, nous appelons à l'élimination progressive des tarifs douaniers, à la réduction des barrières non tarifaires, à l´amélioration des règlements sur l'investissement et la protection de la propriété intellectuelle, à la réduction de la bureaucratie, et à la création d'un mécanisme inaliénable et efficace pour le règlement des conflits, ainsi qu'à un nouvel aspect simplifié et codifié du cadre juridique.

Plus précisément, le secteur privé appelle l'Union Européenne et les gouvernements méditerranéens à:
a) Examiner, approfondir et compléter tous les accords bilatéraux de libre-échange, en veillant à inclure des mesures inaliénables pour protéger les investissements. Toute action qui s'oppose à l'esprit

de la zone de libre-échange est extrêmement nuisible à la confiance du secteur privé et doit donc être traitée par l'UpM.
b) Établir un accord global et ambitieux, comprenant toute la région euro-méditerranéenne, sur les produits industriels, les services et l'agriculture, en y incluant tous les secteurs et sujets importants.

6 - Mettre en place une initiative méditerranéenne de développement d'affaires en se concentrant sur les PME

Plus de 90% des entreprises euro-méditerranéenne sont des PMEs. Elles sont le moteur de la croissance économique et de la création d'emplois dans la région. Elles sont en même temps celles qui ont le plus de difficultés à accéder au financement et à recevoir une assistance administrative et technique. C'est donc pour cela que nous soulignons l´importance d'élaborer des politiques, des programmes et des initiatives d´appui aux PMEs. L'UpM doit priorisez les initiatives des PMEs regroupées sous l'égide de l'Initiative du Développement d'Entreprise en Méditerranée. Cette priorité de l'UpM ne devrait pas se limiter à l'accès au financement, mais devrait aussi aborder des sujets cruciaux, tels que le coaching des entrepreneurs, la formation, et la promotion des partenariats nationaux et internationaux pour développer les technologies. Les représentants des entreprises et des organismes de soutien au secteur privé sont des partenaires indispensables dans cette initiative, étant donné qu´ils possèdent le savoir-faire nécessaire et spécifique concernant les PMEs, et sont présents dans tous les pays membres de l'UpM.

7- Une extension du programme Invest in Med

Le programme Invest in Med, co-financé par la Commission Européenne et géré par un consortium public-privé (MedAlliance), a obtenu des résultats significatifs au cours des deux dernières années. Le projet a rassemblé des organisations privées et publiques de soutien aux entreprises d'Europe et la Méditerranée pour promouvoir le commerce et les flux d'investissement entre les deux rives de la mer Méditerranée. L'élan suscité par le programme est important et ne doit pas être stoppé. Nous appelons donc à l´extension du programme pour s'assurer que les réseaux créés soient durables et que les initiatives puissent continuer, en incluant tous les pays méditerranéens impliqués dans le processus de l'UpM. L'extension du programme devrait inclure non seulement des initiatives pour développer le commerce et l'investissement dans la région, mais aussi des actions visant à améliorer la mise en valeur des organisations d'entreprises représentatives, et le renforcement de leurs rôles comme partenaires essentiels et multiplicateurs dans le développement économique.

Conclusion
Il existe de grandes opportunités pour le développement et la croissance économique dans la zone euro-méditerranéenne. Le secteur privé compte sur les gouvernements pour que lors de leur prochaine réunion prévue en novembre 2010, ils puissent faire avancer le processus vers la création d'un véritable marché régionale dynamique et ouvert.

Soutenu par:
ANIMA - Agence de promotion des investissements
ASCAME - Association des Chambres de Commerce et d'Industrie de la Méditerranée
BUSINESSEUROPE - Confédération des Entreprises Européennes
BUSINESSMED - Union Méditerranéenne des Confédérations d'Entreprises
EUROCHAMBRES - Association Européenne des Chambres de Commerce et d'Industrie
GUCCIAC:Union Générale Chambres de Commerce, d'Industrie et d'Agriculture des Pays Arabes
UEAPME - Union Européenne de l'Artisanat et des Petites et Moyennes Entreprises

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Mr.Andrés BASSOLS SOLDEVILA,Senior Adviser to the SG

SIX DEPUTY SECRETARIES GENERAL[5]

- **Dr. Lino CARDARELLI** [6], project funding co-ordination, Small and Medium sized Enterprises / business development
- **Mr. Yigit ALPOGAN** Transports [7]
- **Mr. Panagiotis ROUMELIOTIS** energy including renewable energy sources[8]
- **Dr Rafiq H. HUSSEINI**, environement an water including pollution[9]
- **Prof. Ilan CHET** higher education, research including EMUNI[10].
- **Ms Cecilia ATTARD-PIROTTA** social and civil affairs including civil protection[11]

[2] http://www.europarl.europa.eu/meetdocs/2009_2014/documents/empa/dv/final_version_u/final_version_ufm.pdf
[3] http://www.jordandirections.com/27/jordanian-masaadeh-chosen-0112-secretary-general-of-ufm-2010
[4] http://nominations.acteurspublics.com/nomination/09-09-10/bruno-fulda-directeur-de-cabinet-du-secretaire-general-de-l-upm
[5] http://www.diplomatie.gouv.mc/315Diplomatie/wwwnew.nsf/1909!/x6Fr!OpenDocument&ExpandSection=55,52#_Section55 . See XII Transitory provisions UfM Secretary statutes
[6] http://www.erg.it/homeIT/governance/consiglioAmministrazione/CVLinCardarelli.html
[7] http://www.mfa.gov.tr/euromed_barcelona-process.en.mfa
[8] http://www.idis.gr/EN/About/cv-Roumeliotis_en.htm
http://www.medafrique.info/news/show.php?id=1448
[9] http://www.medafrique.info/news/show.php?id=1448
[10] http://www.diplomatie.gouv.mc/315Diplomatie/wwwnew.nsf/1909!/x6Fr!OpenDocument&ExpandSection=55,52#_Section55
[11] http://www.timesofmalta.com/articles/view/20100426/local/foreign-office-head-for-top-med-union-post

STATUTES OF THE SECRETARIAT OF THE UNION FOR THE MEDITERRANEAN[12]

The participants at the Paris Summit for the Mediterranean on 13 July 2008 agreed that the Union for the Mediterranean (UfM) will build on the Barcelona Declaration of 28 November 1995, promote its goals which were further emphasised in Marseille meeting of Ministers of foreign affairs on 3-4 November 2008, and reinforce the acquis of the Barcelona Process by upgrading their relations, incorporating more co-ownership in their multilateral cooperation framework, strengthening equal footing governance and translate it into concrete projects, thus delivering concrete benefits for the citizens of the region.

The Paris summit also agreed to establish new institutional structures to contribute to achieving the political goals of the initiative inter alia through the setting up of a Secretariat with a key role within the institutional architecture of the UFM;

On the basis of the mandate given in the Paris Declaration, and by the Ministers of Foreign Affairs in their meeting in Marseille on 3-4 November 2008, the Statutes of the Secretariat of the Union for the Mediterranean have been drawn up and adopted by the Senior Officials of the participants in the UfM.

I. NAME, LOCATION AND LEGAL PERSONALITY

1. The Secretariat of the Union for the Mediterranean is hereby established.
2. The Secretariat will bear the name of Secretariat of the Union for the Mediterranean.
3. The Secretariat will have its headquarters in Barcelona.
4. A Headquarters Agreement between Spain and the Secretariat will grant the Secretariat the privileges and immunities for carrying out its activities. The other participating States to the UfM may also on a voluntary basis grant the Secretariat, if appropriate, the privileges and immunities necessary for carrying out its activities.

II. MANDATE AND TASKS

1. The mandate of the Secretariat is of a technical nature with a focus on the projects. The Secretariat will have a key role within the institutional architecture.
2. The Secretariat will:
   a) work in operational liaison with all structures of the process, particularly with the co-presidencies, including by preparing working documents for the Senior Officials, and through them for the other decision making bodies: Summits, the Conference of Ministers of Foreign Affairs and respective Sectoral Ministerial Meetings oftheUfM;
   b) give an impulse to this process in terms of follow-up, promotion of new projects and the search for funding and for implementation partners in accordance with point VII;
   c) work as the focal point for multi-source funding of projects in the framework of the UfM;
   d) inform the Joint Permanent Committee and report to the Senior Officials concerning the above mentioned activities.

III. COMPOSITION OF THE SECRETARIAT

1. The Secretariat, which will have a lean structure, will act under the direction of a Secretary General, assisted by six Deputy Secretaries General.
2. The term of office of the Secretary General and Deputy Secretaries General will be for 3 years, which may be renewed once for a maximum of three years.

[12] http://www.europarl.europa.eu/meetdocs/2009_2014/documents/empa/dv/final_version_u/final_version_ufm.pdf

3. The Secretary General and Deputy Secretaries General will not hold any public office or be engaged in any business, whether remunerated or not.
4. In case of absence of the Secretary General, his tasks will be assumed, on a temporary basis, by the Senior Deputy Secretary General.
5. In the performance of their duties, the Secretary General, the Deputy Secretaries General and the staff of the Secretariat will not seek or receive instructions from any government or from any other external authority. Each participant in the UfM undertakes to respect the exclusively international character of the responsibilities of Secretary General and Deputy Secretaries General and the staff of the Secretariat and undertakes not to seek to influence them in the discharge of their responsibilities.
6. The staff of the Secretariat will be appointed by the Secretary General after consultations with the Deputy Secretary General responsible for the concerned field on the basis of merit and geographical balance.
7. The international staff of the Secretariat will consist of seconded officials from participants in the UfM. Seconded officials will be remunerated by their respective administrations, taking into account the principle that seconded officials with equal responsibilities will receive equal allowances irrespective of their country of origin.
8. The international staff will include a Senior position held by European Commission/European External Action Service seconded official, acting as advisor to the Secretary General.
9. The local staff may be recruited by the Secretariat to perform administrative and technical functions.

IV. SECRETARY GENERAL

1. The Secretary General will be selected among candidates from Mediterranean partner countries, appointed or dismissed by consensus by Senior Officials.
2. The Secretary General will be the legal representative of the Secretariat and will sign the Headquarters Agreement.
3. The Secretary General will be responsible for the overall running of the Secretariat and will have full executive authority over its functioning, subject to the powers reserved to the Summit, the Foreign Affairs Ministers Conference, the appropriate Sectoral Ministerial Meetings or Senior Officials.
4. The Secretary General will:

a) prepare the annual work programme of the Secretariat and its annual budget in consultation with the deputies concerned;
b) appoint the staff of the Secretariat within the organisational structure in accordance with point VI(b);
c) ensure the stability of the structure of the Secretariat and the compliance with the Secretariat's objectives and mandate;
d) maintain the links with the other bodies of the Union for the Mediterranean;
e) execute the budget;
f) submit annual activity reports and financial accounts to the Senior Officials;
g) maintain transparent procedures and correct circulation of information concerning all activities carried out by the Secretariat, including his /her obligation in accordance with point II (2)(d);
h) establish rules of procedure of the Secretariat.

V. DEPUTY SECRETARIES GENERAL

1. The tasks and responsibilities of the Deputy Secretaries General will be proposed by the Secretary General and approved by Senior Officials, in accordance with the project priorities defined in the Summit Declarations. One Deputy Secretary General from a Member State of the European Union will be designated by the Secretary General to serve as the Senior Deputy Secretary General.

2. The Deputy Secretaries General will be selected three by and from EU member States and three by and from Mediterranean Partner Countries, in close consultation with one another, and appointed "en bloc" by consensus by the Senior Officials. [This provision shall be subject to a review at the end of the third term of office; without prejudice to the right of the UfM members to propose amendments to the statutes whenever it is viewed necessary].

3. They will be selected taking into consideration geographical balance, experience and technical expertise in their respective areas of work. All the Euro-Mediterranean partners are eligible for these posts on a rotating basis.

VI. FUNCTIONS OF THE SENIOR OFFICIALS IN RELATION WITH THE SECRETARIAT

The Senior Officials, acting by consensus, will, in particular:

a) select, appoint and have the power to dismiss the Secretary General and the Deputy Secretaries General;
b) approve the organizational structure of the Secretariat, staff regulations, and the description of posts and functions, submitted by the Secretary General;
c) adopt the annual work programme and the annual budget of the Secretariat;
d) adopt the Annual Activity Report and give a discharge to the Secretary General in respect of the implementation of the budget of the Secretariat on the basis of the financial accounts;
e) approve and amend the guidelines for project selection, processing and funding;
f) consider and approve reports and recommendations by the Secretariat on examination and screening of project initiatives in accordance with point VII(3)(b);
g) adopt and amend these Statutes.

VII. PROJECTS

1. The Secretariat will work on the basis of guidelines for project selection, processing and funding approved by Senior Officials.

2. In submitting project proposals, the Secretariat shall uphold the principle of sustainable development and that every project must:

a) strive to contribute to stability and peace in the whole Euro-Mediterranean region;
b) not jeopardise the legitimate interest of any member of the Union for the Mediterranean;
c) take account of the principle of variable geometry;
d) respect the decision of member countries involved in an ongoing project when it is subject to further development.

3. The Secretariat will:

a) gather, within the project priorities identified by the decision-making bodies regional, sub-regional or trans-national project initiatives (from various sources such as sectoral

ministerial meetings, national or regional authorities, regional groupings, private sector, civil society);

b) examine and screen project initiatives; inform the Joint Permanent Committee and report/make recommendations to Senior Officials after close coordination with concerned States and funding partners;
c) propose upon instructions by the Summit, the Foreign Affairs Ministers Conference, the appropriate Sectoral Ministerial Meetings or the Senior Official meetings the necessary follow-up in terms of initiating the promotion of the projects and the search for partners for their implementation;
d) ensure appropriate co-ordination with, and provide assistance to, the various interested partners with respect to funding, implementation, monitoring and evaluation of projects.

VIII. FUNDING

1. The running costs of the Secretariat, including local staff and equipment, will be funded from grants provided by the participants in the UfM on a voluntary and balanced basis, as well as from the European Union's budget. Any funding by the European Union will come from existing resources within the European Neighbourhood and Partnership Instrument ("ENFI") and other relevant instruments, within the Multiannual Financial Framework ceilings, and will follow the rules and procedures laid down in the Financial Regulation applicable to the general budget of the European Union and the ENFI Regulation.

2. The host country will provide appropriate premises for the Secretariat free of charge.

3. Senior Officials will adopt the annual budget of the Secretariat upon proposal of the Secretary General together with the concerned Deputy Secretary General (revenue and expenditure of the Secretariat including allocations of staff) before the end of the preceding calendar year, in accordance with point IX(2).

4. Funding should aim at ensuring the uninterrupted and regular working of the Secretariat and reflect the European Union Member States' and Mediterranean partners' shared responsibility for the UfM. The Secretary General will provide Senior Officials with a statement of expenditure for the current year before contributions for the next year can be agreed.

IX. BUDGET OF THE SECRETARIAT

1. The financial year of the Secretariat shall be the calendar year.
2. Before 1st October of each year, the Secretary General and together, with the concerned Deputy Secretary General, will submit to Senior Officials the draft annual budget for the revenue and the expenditure of the Secretariat including allocations of staff. Senior Officials will adopt the annual budget with any amendments and return the budget for execution to the Secretariat by 1st December ofthat same year.
3. If, at the beginning of a financial year, the budget has not yet been adopted, a sum equivalent to not more than one twelfth of the budget appropriations for the preceding financial year may be spent each month.
4. Any funds remaining uncommitted at the end of each financial year shall be carried over to the budget for the following year and thereby reduce the required budgetary allocation in that following year.
5. The functions of the Secretary General or Deputy Secretaries General and the accounting officer will be separate and mutually incompatible.

X. FINANCIAL PROCEDURES

1. Financial control and audit mechanisms of the Secretariat will be ensured in full compliance with the principles of good financial management and in accordance with internationally recognised standards.
2. Annual financial reports will be provided to the Senior Officials on the Secretariat's administrative costs and expenditures in the format and detail required by Senior Officials.
3. An annual audit by an external auditor approved by the Senior Officials will be conducted of the Secretariat's expenditures and related financial activities. The results of the audit will be reported to Senior Officials within 30 days after completion.
4. Every three years an external evaluation report of the Secretariat's activities will be drawn up and submitted to the Senior Officials and the Secretary General.

XI. SETTLEMENT OF DISPUTES

The Senior Officials shall be responsible for discussing any dispute between members of the UfM relating to the functioning of the Secretariat, as well as with respect to the implementation of projects. If the Senior Officials are unable to resolve the dispute, it will be referred to the Conference of Ministers of Foreign Affairs.

XII. TRANSITORY PROVISIONS

1. For the first term of office, the six Deputy Secretaries General will be from the following Euro-Mediterranean partners: Palestinian Authority, Greece, Israel, Italy, Malta and Turkey.
2. For the first term of office,the Deputy Secretaries General will be responsible for the following areas within the framework of the UfM:

   a) Italy : project funding co-ordination. Small and Medium sized Enterprises / business development;
   b) Turkey : transport;
   c) Greece : energy including renewable energy sources;
   d) Palestinian Authority : environment and water including de-pollution;
   e) Israel : higher education, research including EMUNI;
   f) Malta : social and civil affairs including civil protection.

3. The annual budget of the Secretariat for the first year of its functioning will be adopted by Senior Officials, acting by consensus. Initial financial contributions will be made available as soon as the statutes are adopted so as to allow the secretariat to start functioning.

Done in Barcelona 3rd March 2010

INFRAMED[13]

Annoncée le 26 mai 2010 la « InfraMed Infrastructure sera institué en droit français, apportera son concours à « l'Union pour la Méditerranée » en finançant des projets d'infrastructures urbaines, énergétiques et de transports durables. Investira principalement dans des projets entièrement nouveaux, répondant aux exigences de base en matière de protection de l'environnement, d'impact social, de transparence et de passation de marchés. S'appuiera sur un partenariat avec la Caisse de Dépôt et de Gestion (Maroc) et EFG Hermès (Egypte), associés à des fonds locaux d'investissement dans les infrastructures qui seront levés par ces deux institutions dans leurs pays respectifs. Deux fonds nouvellement créés investiront dans des projets d'infrastructure aux côtés d'InfraMed qui allouera au moins 20 % de ses investissements à l'Egypte d'une part, au Maroc d'autre part.

1) Conseil d'investisseurs (dotation 385 million € à terme 1 milliard €)

Présidence d' Inframed - Cassa Depositi e Prestiti (CDP) (Italie) Apportation 150 millions €.

Vice-Présidence d'Inframed - Caisse des Dépôts (CDC) (France). Apportation 150 millions €.

Vice-Présidence d'Inframed -Caisse de Dépôt et de Gestion (CDG)(Maroc) Apportation 20 millions €.

EFG Hermes (Egypte) - Apportation 15 millions €.

Banque européenne d'investissement (BEI) - Apportation 50 millions €.

2) Comité Strategique en charge d'orientations sur le développement global des activités sous la Présidence le Ministre du Commerce et de l'Industrie (Égypte).

3) Directeur général d' InfraMed Management

4) Comité des investissements en charge d'approuver chaque investissement.

[13] http://www.eib.europa.eu/about/press/2010/2010-078-lancement-du-fonds-dinfrastructure-inframed.htm

INTERNATIONAL CITY FOR THE MEDITERRANEAN[14]

The project for the restoration of the Saint Paul Historic Site[15] in Barcelona.

The architectural ensemble at the Saint Paul Historic Site is an important reference of artistic and cultural heritage in the city of Barcelona; it was declared World Heritage by UNESCO in 1997. The year 2009 marks the beginning of 8 years and 178 million € restoration project of Europe's most important modernist ensemble, the site covers 13.5 hectares, with a total of 19 buildings, 45.280 m2 of built space, 45.189 m2 of exterior space, with a green area covering 15.700 m2 of gardened zones and 1 km of underground tunnels.

Mediterranean Centre. The artistic and historical value of the modernist buildings and the central location in the city of Barcelona are all factors favouring an ambitious project capable of mobilizing different institutions and organizations, as a strategic project for the city. The project will host resident institutions working in areas having major development challenges in the Mediterranean; cooperation could generate synergies for new actions in various fields of economic development, innovation technology, research, energy, health, tourism, environment and culture. The project wishes to become an "Interdisciplinary Space for Development and the Analysis of Future Trends in the Mediterranean", bringing together international institutions, territorial networks and organizations working for the region.

This projects pretends to attract partners that operate in the Mediterranean region, although not necessarily as an exclusive work environment, to serve as a home for sectoral networks and to catalyze the creation of new ones and to promote the environment for initiatives to create research, training experts, encouraging institutional cooperation and enlarging communication knowledge in the region

Barcelona can best develop by gaining capital status within a geographic framework that extends beyond Spain or the European Union immediate borders. Today's Mediterranean region represents an opportunity for increasing relations with partners, and the selection of Barcelona as the location for the headquarters Secretariat of the Union for the Mediterranean (UfM) is an opportunity for the city's historic trading vocation. Barcelona must acquire more international weight, create institutional density and achieve a critical mass of knowledge and leadership capacity.

One of the modernist pavilions of the Saint Paul Hospital will house from early 2012 an International Institute of the United Nations University[16]. This is the first Centre of these characteristics to be established in southern Europe and in the Mediterranean. The initiative is part of the project that will transform the Saint Paul heritage site into an international hub.

Information provided by the Project Team

[14] http://www.santpau.cat/patr_mediterrania.asp
[15] http://www.santpau.cat/patr_rehab.asp
[16] http://www.santpau.cat/patr_unu_iiac.asp

Liste d'articles publiées[1] au MCB-BMC n°1

ALGÉRIE:
Quelle perspective pour la mise en place d une véritable économie de marché concurrentielle ?
Par M. Said IGHILAHRIZ

EGYPT:
Introducing Competition Law and Policy. The case of Egypt
By Khaled ATTIA

JORDAN :
Hurdles to Implementing Competition Policy in Jordan
By Yusuf MANSUR, PhD
Jordan competing in the EuroMed market;
By Mohamed ALZOUBI
Master's degree in Regulation and Competition/ International Conference

LIBAN:
EuroMed Marché : expérience et évaluation
Par Mme Rita FEGHALI ; Par Georges el KHOURY
MAROC: Le Conseil de la Concurrence du Maroc : une nouvelle relance
Par M. Abdelali BENAMOUR
Jumelage institutionnel: Renforcement des autorités

PALESTINIAN AUTHORITY:
The future of Competition Policy
By Mr. Jamal FARHA

TUNISIE:
Politique de concurrence en Tunisie : démarche progressive.
Le programme de jumelage concurrence Tunisie-UE: expérience réussie
Par M. Khalifa TOUNEKTI

TURKEY:
How to manage multi-country & multi-annual programmes: Towards Mediterranean Free Trade Area
By Mr. Murat KUS

CROATIA:
Croatian Competition Policy
By Ms Mirta KAPURAL

EUROPEAN UNION:
The EuroMed Market Programme: Towards the Free Trade Area
By Mr. Salvador FONT SALAS

Competition & renewable energy in the Mediterranean region
By Dr. Sílvia GÓMEZ TRINIDAD

Services financiers : Banque

[1] Disponibles dans: http://ec.europa.eu/competition/publications/mediterranean/index.html

Par M. Jean-François PONS

Adapting competition enforcement tools to MED economic growth
By Dr. Rainer BIERWAGEN

Bulgarian Commission on Protection of Competition
By Mrs. Miroslava MARINOVA

The Bulgarian institutional competition framework
By Marya PAPAZOVA

Public Procurement Law: Towards the EuroMed FTA
By Mr. Stefano FERRANDO

EuroMed accounting and auditing work
By Ms Maria Teresa VENUTA

Liability of the group's parents company for anti-competitive behaviour of its subsidiaries: The Akzo Nobel Case
By Jorge VA-AGUAVIVA

Groupe de Travail Marchés Publics
Par M. Olivier MOREAU

L'EuroMed Marché et le libre échange
Prof. Jean Louis REIFFERS

BusinessEurope & Businessmed: Bridging the Mediterranean
By Leander VAN LAERHOVEN

The EuroMed Market competition policy work
By Juan Antonio RIVIÈRE

Conclusions finales du Programme EuroMed Marché ;
Final Conclusions of the EuroMed Market Programme

Institutional Twinning / Jumelage Institutionnel ;
Exemple de Jumelage institutionnel: Renforcement des autorités
TAIEX – Technical Assistance & Information Exchange;
Exemple d'actions TAIEX dans le domaine de la concurrence

Regional Co-operation programmes: Web site references

Barcelona, Mediterranean vocation: Union for the Mediterranean Headquarters
By Ms Barbara SCHWARZÄLDER

INTERNATIONAL COMPETITION NETWORK:
8TH Annual ICN Conference :Main Conclusions
By Ms Maria Cecilia ANDRADE

INFORMATIONS:
UpM: Commission increases contribution to priority projects. ;
EU strategy to improve maritime governance in the Mediterranean Sea;

The Marseille Center for Mediterranean Integration ;
Déclaration des 5èmes Rendez vous de la Méditerranée;
List of websites references

ECN BRIEF 4

This is the fourth issue of the ECN Brief which is a publication of the European Competition Network (ECN). The ECN is a network of the Member States' competition authorities (NCAs) and the European Commission (DG Competition). The ECN Brief aims to inform you about the activities of the ECN and its members and to reflect the richness of enforcement actions and advocacy in the Network. It focuses on news of major interest about EU competition law and policy. The present edition covers news from June to September 2010.

http://ec.europa.eu/competition/ecn/brief/04_2010/brief_04_2010_short.pdf