

Towards Achieving Economic Freedom: Enforcing the Principle of Competition Freedom through Suppressing Anti-competitive Practices

نحو تحقيق الحرية الاقتصادية: تكريس مبدأ حرية المنافسة من خلال قمع الممارسات المقيدة للمنافسة

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Received: 14/04/2024

Accepted: 14/05/2024

Published: 20/06/2024

Abstract:

This study endeavors to elucidate the practices in which economic operators might engage that potentially undermine free competition, and it explores the mechanisms designed to combat and deter such practices. This investigation is driven by the question: How effective are the mechanisms that legislators have enacted to safeguard the principle of free competition in realizing economic freedom?

Keywords: Freedom of Competition; Prohibited Agreements; Dominance; Economic Dependency; Competition Council.

ملخص:

تهدف هذه الدراسة إلى تسليط الضوء على الممارسات التي يمكن أن يقوم بها المتعاملون الاقتصاديون والتي من شأنها المساس بمبدأ حرية المنافسة، وكذا التطرق إلى آليات محاربتها وردعها، وذلك من خلال الإجابة على الإشكالية المتمثلة في: ما مدى فعالية الآليات التي كرسها المشرع لحماية مبدأ المنافسة الحرة في إطار تحقيق الحرية الاقتصادية؟

الكلمات المفتاحية: حرية المنافسة، اتفاقات محظورة، هيمنة، تبعية اقتصادية، مجلس المنافسة.

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1. INTRODUCTION

Upon gaining independence, Algeria adopted a socialist regime for managing its institutional framework, akin to other nations that had recently gained sovereignty. This regime was characterized by state monopolization of most economic activities, which stifled individual entrepreneurial initiatives and dampened competitive forces.

However, due to multiple inefficiencies and systemic failures, this approach necessitated a transition to an alternative system. This shift was marked by a move towards a market economy, which is encapsulated in the recognition of private property rights as enshrined in the first paragraph of Article 49 of the 1989 Algerian Constitution, affirming that "Private property is guaranteed." This constitutional guarantee forms the cornerstone for the establishment of a free economic system within the country.

The realization of economic liberalization, or economic freedom as it is often termed, requires the removal of restrictions on commercial and industrial activities. This involves opening public sectors to private participation and attracting foreign investment.

Nevertheless, it is crucial to regulate economic freedom rather than leaving it unchecked to prevent the eradication of competitive practices. Achieving this balance necessitates the development of suitable mechanisms that not only ensure the smooth functioning of the market but also maintain its regulation to safeguard the liberty of all stakeholders in trade and industry.

With these considerations in mind, this paper addresses the central question:

- How effective are the legislative mechanisms designed to protect the principle of free competition in achieving economic freedom?

To thoroughly examine this question, we have adopted the descriptive analytical approach as the most appropriate methodology for the scope of this study. Additionally, to respond to this inquiry, we have organized the discussion into two principal sections. In the first section, we explore the various practices that potentially restrict competition. In the subsequent section, we delve into the consequences and penalties that arise from engaging in such restrictive practices.

2. The Content of Practices Restricting Competition

2.1. Prohibited Agreements

Article 6 of Order No. 03-03, in its amended and supplemented version concerning competition, refers to the principle of prohibiting agreements that restrict competition.

The article states, "Any behaviors, planned acts, agreements, and understandings, whether explicit or implicit, aiming to disrupt, restrict, or harm the freedom of competition in the market or in a significant part of it, especially those seeking to limit market entry, engage in commercial activities, reduce or control production, sales outlets, or investments, divide markets or sources of supply, or obstruct price setting according to market mechanisms through industrial promotion of price increases or decreases, or impose unequal conditions for identical services on merchants, thus depriving them of the benefits of competition, and making the conclusion of contracts with partners conditional on their acceptance of services unrelated to the subject of these contracts by their nature or commercial custom" are prohibited.¹

Thus, preventing this type of practice requires two conditions: the existence of an agreement and its goal being to obstruct or limit freedom of competition. The legislator has not provided a definition for an agreement due to the difficulty in determining a precise definition, given the flexibility and continuous change characteristic of agreements. Therefore, it sufficed to establish a number of forms that an agreement could take.²

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Consequently, Article 6 of the Competition Law deals with prohibited agreements in general without setting specific definitions for an agreement. The focus is on the effect of the agreement and whether it obstructs or restricts freedom of competition.³

Regarding the parties to the agreement, the Algerian legislator has defined "enterprise" to include any natural or legal person, regardless of its nature, as long as it carries out economic activity on a permanent basis and not on a temporary or occasional basis. This definition aims to include all types of commercial entities, companies, and institutions operating in the economic field.⁴

Based on this definition, Article 6 of the Competition Law can apply to agreements made between natural individuals, companies, and various institutions as long as these agreements meet the conditions for prohibiting agreements that restrict competition and impede market freedom.⁵

In terms of organic agreements, these can take the form of legal entities, such as an enterprise establishing a commercial company, or they can appear in the form of associations like unions or professional organizations. In these cases, organic agreements are often aimed at adopting policies that restrict competition.

On the other hand, contractual agreements are considered by civil law as contracts, whether written, oral, or implied, emanating from the parties' freedom and creating obligations for each contracting party.⁶

Contractual agreements take two main forms: horizontal and vertical. Horizontal agreements occur between enterprises competing with each other at the same level, while vertical agreements occur between enterprises operating at different levels in the market's economic chain.⁷

Regarding planned acts, these are defined as undeclared cooperation between enterprises, which manifest in practice without reaching the level of explicit agreement. These acts include two elements: a material element that involves acting to restrict or eliminate competition, and a moral

element that appears as the enterprise relinquishes adopting independent behavior in the market, expecting other companies to follow suit, making it difficult to prove such behaviors.

In addition to verifying the existence of an agreement, it is also essential to study its impacts on freedom of competition. The agreements subject to prohibition are those characterized by a nature that limits competition in the market, whether by disrupting it, restricting it, or negatively impacting it⁸.

For an agreement to fall under the prohibition specified in the referred article⁹, a causal relationship between the prohibited agreement and the damage incurred on competition must exist. Moreover, the ability to prove this relationship plays a crucial role in confirming its existence or absence.

Agreements that restrict competition take multiple forms¹⁰, including those aimed at reducing the number of competitors by limiting market access or barring competitors, as well as those targeting the restriction of trade activities such as setting prices for goods or services and supervising distribution operations.

According to Article 9 of Order No. 03-03 concerning competition, agreements and practices that arise from the implementation of a legislative or regulatory text in force do not fall under the provisions of Articles 6 and 7 mentioned above.

Agreements and actions that their proponents demonstrate contribute to economic or technological advancement or enhance production efficiency are allowed, provided that these agreements and practices receive explicit approval from the Competition Council.¹¹

The legal article indicates that a legal justification for prohibited agreements has been provided, hence an agreement that contradicts competition cannot be prosecuted if it falls under a legislative or regulatory text that is applied.

Benefiting from this exemption requires the presence of certain conditions in the legislative text concerning the exemption, and the prohibited practices must result directly and necessarily from these texts. The text granting the exemption should be interpreted narrowly, clearly stating the allowance of the practice.¹²

Contributing to economic or technological growth is a justification for exempting a prohibited agreement, but this justification must clearly reflect tangible benefits to the economy from the competition-restricting agreement. It is essential to emphasize that these benefits should not lead to the complete elimination of competition in the targeted market.¹³

2.2. Arbitrary Exploitation of a Dominant Position

The power of an enterprise does not prevent it from entering the market because its entry is the objective set by the competition law, which in turn promotes the economic process. However, the law prohibits practices that disrupt the freedom of competition and deprive other competitors from operating in the relevant market.¹⁴

To determine whether an economic enterprise or operator is in a dominant position, it is necessary to understand the relevant market and then address the specifications that determine whether the agent is in a state of dominance or monopoly.

According to the order regulating competition in Algeria, the market relevant to competition-restricting agreements is defined as any market for goods or services that are affected by these restrictive practices. Additionally, the relevant market includes any market considered by consumers to be similar or substitutable to the market affected by the restrictive practices.

Several factors are considered in defining the relevant market, including the characteristics of the products or services, their prices, and their usage methods, in addition to the geographic area where the concerned enterprises offer their goods or services. This definition aims to determine

the scope of the market affected by the competition-restricting practices and apply the appropriate laws to maintain freedom of competition and protect consumer rights.

Article 3 of Order No. 03-03 defines a dominant position as a situation that allows a particular enterprise to achieve a distinctive economic authority in its market, enabling it to hinder the existence of effective competition and undermine the ability of other parties to act independently towards their competitors or customers or suppliers significantly.¹⁵

In the context of Article 7 of the amended and supplemented Competition Law, a complete ban on monopoly or market dominance has not been imposed; rather, the focus is on preventing the arbitrary exploitation of these positions. The law stipulates that the arbitrary exploitation of market dominance or monopoly is prohibited, especially for purposes such as:

- _ Restricting access to the market or hindering commercial activities therein.
- _ Reducing or controlling production or supervising marketing outlets or investments or technological advancement.
- _ Artificially distributing markets or sources of supply.
- _ Influencing price determination in the market by stimulating an artificial rise or fall in prices.
- _ Imposing unequal commercial terms on services to trading partners, depriving them of competitive advantages.
- _ Linking the execution of contracts with partners to their agreement to accept additional services unrelated to the content of these contracts, whether in terms of their nature or the commercial custom in force.¹⁶

2.3. Arbitrary Exploitation of Economic Dependency

The arbitrary exploitation of economic dependency is a practice condemned by competition law due to the severe damages it inflicts on competition. The Algerian legislator addressed this issue in Article 11 of Order No. 03-03, as amended and supplemented, considering it an independent wrongful act, previously classified under the category of arbitrary exploitation of economic dominance.

The article states that "it is prohibited for any enterprise to exploit the economic dependency of another enterprise, being a customer or supplier, in a way that disrupts the foundations of fair competition. This exploitation includes the following:

- _ Refusing to sell without a legitimate reason.
- _ Conditional or discriminatory selling.
- _ Selling linked to the purchase of a minimum quantity.
- _ Commitment to resell at a lower price.
- _ Terminating commercial relationships due to a partner's refusal to comply with unjustified commercial terms.
- _ Any action aimed at reducing or eliminating competitive advantages in the market."

Article 3 of the Competition Law defines economic dependency as a relationship in which an enterprise does not have a suitable alternative if it decides to reject the terms imposed by another enterprise, whether as a customer or supplier.¹⁷

Convicting a case of arbitrary exploitation of economic dependency does not require the practice to emanate from the enterprise, but that the enterprise has relative control over the enterprise it deals with. According to Article 11 of the Competition Law, the prohibition requires proving the

existence of economic dependency and the occurrence of arbitrary exploitation of this condition.¹⁸

3. Penalties Resulting from Engaging in Competition-Restricting Practices

3.1. Administrative Proceedings for Competition Offenses

The Competition Council in Algeria was established in 1995 with the aim of preserving and enhancing free competition in the market economy sector. This body was specifically tasked with monitoring and regulating competition-restricting practices due to several reasons, including the Algerian courts' lack of jurisdiction to effectively handle these practices.

Unlike the courts, the Competition Council possesses expertise and specialization in the fields of economics and competition, with the capability to monitor the market and identify suspect practices that hinder competition freedom. Thanks to the economic expertise of its members and its available capabilities, the Competition Council can take necessary actions to impose penalties on violators.

Thus, the Competition Council plays an important role in promoting the market economy in Algeria and ensuring that there are no practices that restrict competition freedom and harm consumers and the economy in general.

Although the Competition Council is not a judicial body and its role is limited to imposing administrative penalties, the Algerian legislator stipulated in Article 45 of Order No. 03-03 that "the Competition Council issues reasoned decisions aimed at terminating observed acts that limit competition, based on complaints and files submitted to it or those it initiates on its own, provided they fall within its jurisdiction.

The Council has the right to impose financial penalties that apply immediately or within specified periods in case of non-compliance with orders, and it has the authority to order the publication of its decision or part of it, or its distribution or display.

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To curb the outcomes of anti-competitive practices, the Competition Council issues penalties consisting of orders and financial fines, in addition to publishing the decisions.¹⁹

The intervention of the Competition Council through its issuance of orders as one of its powers, and as precautionary measures, occurs before issuing any decision on the matter²⁰. It also stops less severe practices that could affect the principle of competition freedom, by issuing an order to cancel any non-compliant clause.

The Competition Council issues two types of orders:

- _ Avoiding or preventing a competition-restricting practice.
- _ Obliging to undertake a certain action.

In addition to issuing orders, there are financial penalties imposed in cases of engaging in anti-competitive practices, determined in a deterrent manner in the competition law with the aim of achieving discipline and prevention. When high financial fines are imposed on violators, they have a deterrent effect on economic actors and encourage them to comply with competition rules.

If the financial penalties are high enough to exceed the profits gained by the offenders from competition-restricting practices, they make such practices economically unfeasible and reduce the incentives to participate in them, thereby causing economic actors to refrain from violating competition rules for fear of bearing the heavy financial burden of the imposed fines. This enhances compliance with free competition.

Furthermore, the Algerian legislator specified through Article 14 of the same order that practices that restrict competition are subject to a fine not exceeding 12% of the total revenue excluding taxes, achieved in Algeria during the last financial year, or a fine at least double the profit gained from these practices, provided that the fine does not exceed four times this profit.

In cases where specific revenues for the offender are not available, the fine shall not exceed six million Algerian dinars (6,000,000 DZD).²¹

Moreover, in pursuit of improving the effectiveness of monitoring competition-restricting practices, the legislator stipulated what is called a leniency procedure, which aims to motivate parties involved in such acts to admit to engaging in practices that violate the principle of competition, in exchange for exemption from financial penalties, either fully or partially.

The Algerian legislator included this exemption in the provisions of Article 60 of the Competition Law, clarified that the Competition Council is authorized to decide on reducing the financial penalty or exempting enterprises from it if they admit to the offenses directed against them during the investigation period, and if they show cooperation that contributes to accelerating the investigation process and commit not to repeat the violating acts. It should be noted that the provisions of this paragraph do not apply in cases of recurrence of offenses, regardless of their nature.²²

3.2. Judicial Proceedings for Competition Offenses

The primary purpose of competition law is to achieve economic efficiency. For this reason, the task of combating prohibited practices is not limited to the Competition Council alone but also includes the judiciary as a key player in this area.

Victims of practices that restrict competition have the right to file complaints with the judiciary, which allows them the option to resort to either the Competition Council, the judicial authorities, or both to seek compensation or redress for the damages resulting from these practices.

The legislator ensures this right through Article 48 of the Competition Law, which states that "any natural or legal person who suffers damage as a result of a practice that limits competition, within the scope of this law, has the right to file a lawsuit with the appropriate judicial authority according to the prevailing legislation."

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Therefore, victims need to assess the capabilities of both the Competition Council and the judicial authorities and take appropriate action according to the desired outcomes.²³

It is essential to differentiate between penalties issued by civil judicial bodies and those issued by criminal judicial bodies. Victims of anti-competitive practices have the right to file petitions with civil courts.

These petitions differ in nature from proceedings before the Competition Council, which focuses on combating anti-competitive practices by issuing decisions and implementing financial penalties as an administrative body. Civil courts, however, are responsible for tasks such as canceling contracts or contractual terms and providing compensation for damages resulting from those practices. As a result, two types of lawsuits are directed to civil courts:

- _ A lawsuit to nullify obligations.
- _ A lawsuit to seek compensation.

While Article 172 of the Penal Code includes provisions related to competition-restricting practices within the framework of illegal speculation crimes, these crimes are subject to a penalty that may include imprisonment for a period ranging from six months to five years, in addition to a financial fine ranging between five thousand and one hundred thousand Algerian dinars.

Any individual who contributes to the artificial rise or fall of commodity prices is criminalized, and the article also considers certain behaviors that fall under harmful practices to competition, such as offering bids in the market to cause disruption or presenting offers at high prices, and conducting business with the aim of achieving illicit and unfair profit from the balance of supply and demand.²⁴

Competing violations require, like other crimes in the criminal field, the fulfillment of specific elements to prove guilt and execute the punishment. These include the material and moral elements of the crime.

4. CONCLUSION

The legislative intent behind economic liberalization was to establish a robust framework capable of curbing all practices that might impede the freedom of competition. A significant aspect of this framework is the creation of a market regulation authority, epitomized by the Competition Council.

Although the Council lacks the authority to enforce civil or criminal penalties, due to its inherently administrative nature, it plays a pivotal consultative role. Both civil and criminal judicial bodies have the option to seek guidance from the Competition Council on matters concerning competition restrictions.

This is articulated in Article 38, Paragraph 1, of Order No. 03-03, which stipulates that judicial bodies may consult the Competition Council regarding their handling of cases related to practices that restrict competition according to this order, and it shall not express its opinion except after completing the procedures of an oral hearing, unless the Council has previously considered the case.

The reliance on the Competition Council's opinion is predicated on its accumulated expertise in navigating the complexities associated with anti-competitive practices. This strategic alignment allows for a more informed judicial process, ensuring that the principles of fair competition are upheld while fostering an environment conducive to economic freedom and growth.

5. Endnotes:

¹ Fatiha Belkacem, *Transparency of Commercial Practices and Consumer Protection*, Master's thesis, Faculty of Law, University of Oran, 2007, 125.

² Nabil Nasri, *The Legal Status of the Competition Council between Order 95/06 and Order 03/03* Master's thesis, Mouloud Mammeri University of Tizi Ouzou, 2004, 64.

³ Order No. 03-03, art. 6.

⁴ Mansour Daoud, *Legal Mechanisms for Regulating Economic Activity in Algeria*, PhD thesis, Mohamed Khider University of Biskra, 2016, 29.

⁵ Jalal Massad, *The Extent to Which Competition is Affected by Commercial Practice*, PhD thesis, Mouloud Mammeri University of Tizi Ouzou, 2012, 53.

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⁷ Dalila Mokhtor, "The Vertical Agreement and Its Relation to Competition Law," *Critical Journal of Law and Political Science* 2, 2013, 511.

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⁹ Yamina Jraï, *Market Regulation in Light of Competition Law*, Master's thesis, Mouloud Mammeri University of Tizi Ouzou, 2007, 80.

¹⁰ Massad, *The Extent to Which Competition is Affected*, 79.

¹¹ Algerian Competition Law, art. 9.

¹² Louiza Lahrari, *Consumer Protection Under Consumer Law and the Suppression of Fraud and Competition Law*, Master's thesis, University of Tizi Ouzou, 2012, 61.

¹³ Massad, *The Extent to Which Competition is Affected*, 111.

¹⁴ Mohamed Teyoursi, *Legal Regulations for Competitive Freedom*, Dar Houma, Algeria, 2015, 245.

¹⁵ Order No. 03-03, art. 3.

¹⁶ Order No. 03-03, art. 7.

¹⁷ Ibid.

¹⁸ Competition Law, art. 11.

¹⁹ Order No. 03-03, art. 45.

²⁰ Linda Arcelin, *Competition Law: Anticompetitive Practices in Domestic and Community Law*, Rennes, France, 2009, 213.

²¹ Order No. 03-03, art. 56; see also Law No. 08-12, amending and supplementing Order No. 03-03.

²² Algerian Competition Law, art. 60.

²³ Algerian Competition Law, art. 48

²⁴ Algerian Penal Code, art. 172.