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ROUNDTABLE ON PROSECUTING CARTELS WITHOUT DIRECT EVIDENCE OF AGREEMENT

Contribution from Algeria

-- Session II --

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1. General framework

1. The economic reforms undertaken over the past decade have broadly contributed to liberalising the regulation of the economy and commerce in Algeria. The measures implemented have helped to re-establish macroeconomic and financial balances and to clarify the respective roles of the State and the liberalisation of foreign trade.

2. These reform measures are now playing a key role in the establishment of the free-trade area with the European Union and in the determined efforts being made to prepare for Algeria's accession to the World Trade Organization (W.T.O.).

3. To this end, Algeria has presented a programme for the revision of legislative and regulatory texts.

4. It is in this perspective that the Government prepared Ordinance n° 03.03 of 19 July 2003 on competition. Prior to this ordinance, the legislative and regulatory framework in this field had a number of shortcomings, such as:

- insufficient development of a competition culture;
- the low number of complaints filed with the competition authorities;
- operational difficulties of the Competition Council.

5. These dysfunctions, combined with the competitive pressures generated by the opening up of our economy to international trade, have made it necessary to update the legislative framework governing competition and bring it in line with international practice.

6. The main reasons for revising the former Ordinance issued in 1995 were as follows:

1. firstly, the fact that the regulations on competition (cartels and illegal agreements, abuse of dominant position and mergers) were separate from the regulations on commercial practices (failure to issue invoices or indicate prices, etc.);
2. secondly, the need to break with the repressive character of our legislation and introduce consultation mechanisms promoting contacts and co-operation between the commerce administration, the Competition Council and the business sector so that firms can become more familiar with the competitive functioning of the market;
3. thirdly, the need to restore the Competition Council to its role as the main market regulator;
4. fourthly, the requirements for integration into both the regional economy (European Union) and global economy (WTO), which unquestionably calls for the modernisation and harmonisation of our national competition legislation.

7. The main objectives targeted by this legislative framework are to set the conditions for competition on the market, to prevent any practice that restricts competition and to monitor economic concentrations in order to stimulate economic efficiency and improve consumer well-being.

8. This legislation applies to all production, distribution and service activities. Its scope covers the activities of all public entities except when these are exercising public power prerogatives or carrying out public service missions.

9. In addition to illegal agreements and abuse of dominant position, the new Ordinance issued in 2003 prohibits other practices which distort competition such as:

- the abuse of economic dependence;
- the establishment of import monopolies through exclusive purchase contracts;
- and the practice of predatory pricing.

10. It must be pointed out that the Ordinance provides for exceptions to this general prohibition, when the restrictive practices and agreements are authorised by a specific legislative or regulatory text. These exceptions also cover agreements and practices that enable small and medium-sized enterprises to strengthen their competitive position on the market or that promote employment.

11. This Ordinance also includes a new provision introducing a preventive and educational measure consisting of a clearance certificate. Under this new procedure, firms concerned that their behaviour may not be in compliance with the rules of competition may ask the Competition Council to verify whether the practices or agreements that they are planning are compatible with the law and to grant them a clearance certificate.

2. Presentation of the regulatory framework in the field of cartels

12. With regard to **economic concentration**, the new Ordinance renews the jurisdiction of the Competition Council. Plans for concentration must be notified to the Competition Council when these will result in exceeding a threshold of 40% of the sales or purchases on a given market.

13. However, the Ordinance provides for an exception to this principle by allowing the Government to authorise economic concentrations rejected by the Competition Council when the public interest so requires and this is justified by objective economic conditions in order to develop and ensure the competitiveness of domestic firms facing international competition, to create jobs or to develop new technologies.

14. In short, this text restores to the market its role as a stimulus for productive activities and broadens the competitive nature of transactions by strengthening the regulations aimed at preventing and correcting behaviour and practices that can interfere with or distort the free play of competition.

15. For example, the following are prohibited: concerted practices and activities, explicit or tacit arrangements and agreements when they have the effect of restricting market access or the exercise of commercial activities, allocating markets or sources of supply or interfering with the pricing process by favouring higher or lower prices, abuse of a dominant or monopolistic position on a market or market segment, etc.

16. However, some agreements, arrangements or practices are not always intended to create barriers or obstacles to market access, for they can also be aimed at improving the commercial organisation of firms, creating jobs, reducing supply costs or pooling management resources or new technologies and making firms more competitive on the market.

17. It was in this context that Executive Decree n° 05-175 of 12 May 2005 specifying the procedures for obtaining a clearance certificate regarding agreements and dominant position on the market was issued in accordance with the provisions of Section 8 of Ordinance n° 03-03 mentioned above, which lay down that:

“The Competition Council may certify, at the request of the enterprises concerned, the fact that there is no reason for it to object, on the basis of the elements known to it, to an agreement, a concerted activity, arrangement or practice as defined in Sections 6 and 7 above”.

18. The clearance certificate is defined as being an authorisation issued by this regulatory authority to show that the agreement or dominant position does not constitute a barrier to competition, but is intended to ensure economic or technical progress and that it helps to improve employment or consolidate the competitive position of small and medium-sized enterprises.

19. This decree also laid down the procedure for obtaining a clearance certificate regarding an agreement or a dominant position on the market being planned by a company or companies requesting the Competition Council's opinion regarding these practices.

20. These provisions enable companies to verify beforehand whether the Competition Council, on the basis of the elements known to it, considers that the agreement or dominant position planned on a given market is or is not prohibited by the Ordinance on competition.

21. In the light of the elements provided to it, the Competition Council may decide that there is no basis for it to object to the behaviour being planned with regard to an agreement, a concerted activity, an arrangement or any other practice falling within the scope of the legislation in force.

22. The Council then issues an administrative document known as a clearance certificate.

23. However, this certificate may be challenged by a referral to the Competition Council alleging evidence that the market is being disrupted. Consequently, the clearance certificate is not final and does not mean that cases involving parties that have been granted certificates cannot be brought before the Competition Council.

24. Thus, this procedure, which is of a preventive and educational nature, will enable companies that wish to ensure that their practices are in compliance with the regulations in force to apply to the Competition Council for the relevant clearance certificate.

25. Given the growing complexity of competition regulations and the business world and the fact that firms are not sufficiently familiar with these regulations, this procedure will enable businesses to take advantage of the Competition Council's expertise in this field.

26. Consequently, it will be up to the economic operators concerned to justify and demonstrate that their activities and practices are in compliance with the legislative provisions in force by using the information form annexed to the decree in order to indicate the following:

- how the company applying for clearance will benefit from the activity or practice;
- why the behaviour of the company or companies concerned will not prevent, restrict or distort the free play of competition on a given market;

- how the relevant activity or practice will be beneficial to competition, users and consumers;
- how long the planned operation (agreement or dominant position) will last.

27. This procedure will also make it possible to reduce the caseload of the Competition Council, since the prior, preventive review of applications by firms for a clearance certificate, will enable these economic operators to avoid breaking the law and having cases brought against them by adversely affected competitors or by the Competition Council acting on its own initiative.

3 Privatisation and competition

28. Firstly, it is crucial to remember that privatisation is first and foremost an eminently political act. Privatisation is aimed at meeting many objectives that are not all convergent and that must be prioritised by organising a privatisation programme.

29. In the case of Algeria, the objectives such as those mentioned below may change and be adapted depending on the activity or enterprise being privatised, **for privatisation is not an ideological goal but a means of restoring growth and creating useful jobs by pursuing the following key objectives:**

- to make the economy much more efficient, thereby stimulating growth and job creation;
- to promote competition and eliminate administrative rigidities;
- to make transactions more transparent and combat anticompetitive practices;
- to relieve budgetary constraints in order to reduce the public debt burden in the medium term;
 - to promote certain enterprises commercially and with foreign investors;
 - to promote wider participation of the population in equity markets and employee share ownership (an explicit objective of the privatisations in the UK and France).

30. There have been a number of reforms of the strategy of privatisation of the public economic sector, culminating in Ordinance n° 01- 04 of 20 August 2001 on the organisation, management and privatisation of public economic enterprises. The purpose of this text is to define the rules for the control and privatisation of these enterprises. It is also aimed at channelling the transfer of the public economic sector towards private ownership and/or management in compliance with the rules on transparency, fairness and competition using competitive bidding procedures.

31. This Ordinance specifies that the assets of public enterprises may be transferred and sold under ordinary law. The Council for State Assets (*Conseil des Participations de l'Etat*, CPE) is responsible for setting the overall strategy and implementing policies and programmes for the privatisation of State-owned economic enterprises.

32. The CPE is a collegial body chaired by the Head of the Government and composed of representatives of the ministries concerned and which makes the final decision regarding the privatisation operations submitted to it.

33. In addition, the Council for State Assets has provided Asset Management Companies (*Sociétés de Gestion des Participations*, SGP) with the legal tools required so that they can handle directly at their level

all opportunities that may arise with regard to investors, particularly when the State-owned enterprise is an SME.

34. The framework established can be summarised as follows:

- Any investor interested in acquiring all or part of the capital of an independent operating unit may express its interest to the SGP or the enterprise in question;
- In this case, the SGP must announce that the State-owned enterprise is open for privatisation, that one or more parties have expressed interest and that interested investors should come forward within a maximum period of 4 weeks;
- The interested party or parties then submit a bid;
- the SGP and the State-owned enterprise then make an estimate of the value of the enterprise or the assets to be sold;
- negotiations are initiated between the SGP and the prospective buyer or buyers;
- after both parties have reached an agreement, the SGP or the unaffiliated enterprise forwards the file to the Ministry responsible for State assets and investment promotion, which gives its approval and proposes that it be submitted to the Council for State Assets, which meets regularly.

35. In this regard, the Ministry responsible for the privatisation process has implemented a plan of communication with the public and investors regarding privatisation policies and opportunities for equity investment in public economic enterprises (cf. website).

36. It should be emphasised that the Government does not negotiate the terms directly with purchasers. Instead, the Asset Management Companies or State-owned enterprises not affiliated with them conduct the negotiations with investors.

37. However, both the supply and the potential demand for privatisation are only estimated. **The supply** is calculated by estimating the value of the enterprises to be placed on the market. This assessment is based primarily on the enterprises' accounts and actual real estate holdings.

These enterprises' accounting systems must therefore be upgraded and their assets clearly identified in order to conduct these assessments, which in any case can only be used as a general guide. **The demand** for privatisation expressed in terms of resources can be based on the domestic savings of enterprises and foreign direct investment.

38. **The techniques of privatisation are adapted to the economic objectives.** The legitimate concerns of the State, such as the protection of employment and activity, the development of employee share ownership and investment in renovation and modernisation are taken into account in the privatisation specifications. If a competitive bidding procedure is not used, the approach being promoted is to encourage a joint venture involving domestic private parties and foreign partners to take over the State-owned enterprise.

39. Another possibility available is to choose operators through a call for tenders open to all parties, setting minimum and/or maximum equity ownership amounts for local and foreign purchasers. Sale

through competitive bidding generates a capital and securities market and makes it possible to lay the foundations for a real market economy.

4. Conclusion

40. Despite this legislative and regulatory system, it should be mentioned that no case of a cartel has been detected thus far at the local level. This is explained by the newness of the system within a market economy.

41. The fact is that the majority of large strategic companies are State owned and are in a virtually monopolistic position because of the lack of competitors. This is true of the cement, pharmaceutical and milk production sectors.

42. Privatisation of the public sector remains timid and the process is affected by some endogenous barriers mainly related to the organisation of State land ownership and the definition and assessment of assets, all of which closely involve property issues, and local expertise is not well adapted to these types of operations.

43. The State, in disengaging from the economic and production sectors, is introducing a series of measures to facilitate the privatisation of the public sector without adversely affecting the interests of workers. It engages in regular consultations with management and workers' representatives.