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## Global Forum on Competition

**FIGHTING CORRUPTION AND PROMOTING COMPETITION**

**Contribution from Tunisia**

**-- Session I --**

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# FIGHTING CORRUPTION AND PROMOTING COMPETITION

## -- TUNISIA [*] --

1. Corruption involves the corrupter and the corrupted. The World Bank identifies two types of corruption:

- Grand corruption: *i.e.* high-level corruption, where the political decision-makers who implement and enforce laws use their official position to promote their own well-being, status or power;

- Petty corruption: *i.e.* bureaucratic corruption in the public sector, most commonly found in public procurement.

2. The Tunisian Criminal Code, dating from 1998, penalises the corrupter, the corrupted and the intermediary between the two. It penalises both positive and negative acts. This includes donations or promises of donations and gifts or advantages of any kind, whether for the purpose of active or passive corruption.

3. Similarly, the Criminal Code penalises acceptance of donations by corrupted individuals with a view to facilitating the performance of an act in the course of their official duties, as it does cases where public officials accept donations in return for refraining from carrying out official duties that they are duty bound to perform. The Criminal Code includes a special article on acts of corruption in the context of public procurement.

4. Although it has been in force for a long time, the Criminal Code has not managed to prevent the corruption that is rife in Tunisia.

### 1. Interaction between competition law and corruption

5. As a result of the insertion of a number of exceptions, the wording of some Tunisian legal texts, while defining and setting out the general principles of calls for tenders to ensure equal treatment of candidates, transparent procedures and equal opportunities, has created a loophole for the development of corruption, which has grown in scale over time and has affected, among others, the privatisation of public enterprises, public procurement and concessions.

6. Law No. 89-9 of 1 February 1989 on public holdings, enterprises and establishments created a Committee for Improving and Restructuring Enterprises with Public Holdings (CAREPP), responsible in particular for delivering its opinion on restructuring operations; yet that opinion is merely advisory and, moreover, decisions on the matter are taken by the prime minister, who is not obliged to justify them if they conflict with the Committee's opinion.

[*] Contribution submitted by Mr. Ben Ouali Saloua, Second Vice-Chairman, Competition Council (Tunisia).

7. Similarly, under Article 102 of the Decree regulating public procurement, the prime minister may disregard the opinion of the Committees on public procurement, local authorities, public establishments and non-administrative public establishments, although they have the power to decide with regard to the authorising officers and the directors general of the public establishments and non-administrative public establishments; he may also take decisions on a proposal from the minister concerned or the minister responsible for the sectoral supervision of the non-administrative public establishment **without having to justify the exception.**

8. Article 9 of the Law on concessions, dating from 2008, requires the use of calls for tenders to ensure equal treatment of candidates, transparent procedures and equal opportunities. Yet Article 10 of the same law creates a loophole by allowing recourse to consultation or direct negotiation in certain exceptional cases, in particular where the performance of the contract relates to services that can be provided only by a specific person.

9. In that respect, Decree No 1753 of 2010 laying down the conditions and procedures for granting concessions provides that any concession granter who decides to grant a concession by direct negotiation must draw up a report stating the reasons for selecting the potential participant with whom the direct negotiation is to take place. The report is submitted for an opinion to the unit responsible for monitoring concessions created by the above Decree No 2008-2965. That unit answers to the prime minister and is responsible for delivering an opinion on the reports presented by the prime minister. This attachment to the prime minister raises the question of the **unit's degree of independence**. Moreover, some privatisations of public enterprises have not respected the interests of the Treasury. Sometimes the privatisation procedure has deviated, enabling those close to the former president and some privileged businessmen to acquire these enterprises at prices below their market value.

10. Moreover, the system of administrative authorisations for carrying out certain economic activities, such as marketing cars or the licensing of supermarkets, has made it easier for privileges to be granted to those close to the former president.

11. Political interference in economic matters has also favoured private interests over the public interest. There are many examples, but an indicative case is the management of state-owned property. For instance, illegal measures were taken to declassify some parts of state-owned property with the purpose of making over land to certain people close to the deposed regime, sometimes free of charge or at derisory prices. Squandering the nation's wealth to satisfy the appetite of family and friends was standard practice. A system of patronage and favouritism was established.

12. In view of this difficult situation, the supervisory and regulatory institutions could not play the full role conferred on them by the legislation.

13. In spite of this situation, the Competition Council has tried to combat practices that encourage corruption, but its role as defined by the legislation sometimes remains inadequate.

## 2. Role of the Competition Council in fighting corruption

14. Law No 91-64 of 29 July 1991 on competition and prices creating the Competition Council gave it an advisory and a judicial role.

### *2.1 Advisory role*

15. In regard to the Council's advisory role, until 2005 it was not obligatory for draft regulations that laid down special conditions governing economic activities or a profession, or that established restrictions that could hinder market access, to be submitted to the Council for its opinion. The Council did not have to

be asked for its opinion on these texts until after the 2005 reform. As a result, the terms of reference governing certain professional and economic activities even prior to 2005 have since been submitted to the Council for its opinion. In the case of legislative texts, to date it is still not obligatory to consult the Council.

16. Similarly, new Article 7 of the Law on competition and prices provides that all merger projects or operations likely to create a dominant position on the domestic market or a substantial part of that market are subject to the approval of the minister for commerce, who submits them to the Competition Council. The Council assesses whether the project or the merger makes a sufficient contribution to technical or economic progress to compensate for the prejudice to competition and must take into account, when assessing the economic value of the merger project or operation, the need to consolidate or protect the competitiveness of national enterprises in the face of international competition.

17. Since a merger, within the meaning of that law, is the result of any act, in whatever form, that involves the transfer of property or the use of all or part of the assets, rights or obligations of an enterprise in such a way as to enable an enterprise or a group of enterprises to exercise directly or indirectly a deciding influence on one or more other enterprises, it made sense to seek the Council's opinion on all privatisations carried out in Tunisia. However, the public authorities have failed to submit the case files on these operations to the Council for consultation.

18. Aware of this failure, the public authorities put in place after the 2011 revolution have brought a bill before the Constituent Assembly with a view to strengthening the Competition Council's role. This would make it obligatory to seek the Council's opinion on any bill of an economic or commercial nature. **The fact remains, however, that the Council is still failing to properly fulfil its role in that, despite the mandatory requirement that it be consulted, its opinions are not in conformity and the public authorities are therefore under no obligation to comply with them.**

### *2.2 Judicial role*

19. With regard to its judicial role, the Tunisian competition law lists three anti-competitive practices:

- concerted action, collusion and explicit or tacit agreements with an anti-competitive object or effect, and where they seek to hinder the fixing of prices by the free play of supply and demand, to restrict the market access of other enterprises or the free play of competition, to restrict or control production, outlets, investment or technical progress, and to allocate markets or supply sources;

- abuse of a dominant position on the domestic market or on a substantial part thereof, or of a state of economic dependence of a client or supplier enterprise that has no alternative options, for the marketing, supply or provision of a service;

- any predatory price offer or pricing practice that might put balanced economic activity and fair competition on the market at risk.

20. Public procurement remains, more than ever, the magnet of corruption.

21. The Council has, on several occasions, reached decisions recognising the reprehensible nature of the practices submitted to it for consideration and sentenced those responsible to sanctions, in particular in cases relating to public procurement. The Competition Council does not tolerate agreements for the exchange of information prior to tendering or agreements to share public procurement contracts between

tenderers[1]. Similarly, it does not tolerate abusive behaviour by an enterprise in a dominant position in the form of abuse of economic dependence or predatory price-fixing.

22. Cases of predatory pricing are referred to the Council either by the public purchasers via the minister for commerce or by the other bidders. The latter may also refer a case to the Council on the grounds of agreement among the other bidders participating in the tender. Furthermore, the Council may act on its own initiative to examine this kind of case, although this remains difficult because it cannot detect anti-competitive practices associated with corruption because it is not a member of the committees responsible for ensuring the proper conduct of public procurement procedures. The Council made a proposal to this effect during the revision of the texts governing public procurement, but it has remained a dead letter.

### *2.3 Forwarding case files on corruption*

23. In addition to the power of sanction, under Article 20 of the Law on competition and prices, the Competition Council **may, since 2005, in specific cases, forward files to the Public Prosecutor's Office with a view to criminal prosecution**. Yet it is not always clear to the Council whether it can automatically associate anti-competition practices with acts of corruption. It would have to prove that those acts were associated with acts of corruption.

24. Moreover, Article 34 of Executive Order 2011-120 setting up the Permanent National Forum to Combat Corruption provides that state services, and in particular administrative services, **public establishments**, control, inspection and audit bodies, local authorities and public enterprises, must forward to the Chairman of the Forum **declarations relating to all that they have learned and may have been able to obtain during the exercise of their duties, and that might help the Forum in the performance of its tasks. Since the Competition Council is a public institution, it is subject to the provisions of the above Article 34.**

25. Similarly, Article 36 of that executive order expressly provides **that the Chairman of the Competition Council** must forward to the Chairman of the Forum any information, data and documents relating to the operations carried out by credit companies, collective investment agencies, investment companies and companies floated on the stock exchange that appears to indicate the presence of corrupt practices. Since the Council does not yet have any information of that nature available, it has not yet forwarded any such files.

[1] E.g.: Decision No. 81180 of 22 July 2010 sentencing seven bidders for a public procurement contract relating to the printing of school books to fines of between TND 5 000 m and 80 000 m and the obligation to publish the decision.