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Contribution from Algeria

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Judicial Perspectives on Competition Law

-- Algeria* --

Judicial Perspectives on Competition Law: Algeria

1. Introduction

1. Algeria made the switch from a managed economy to a liberal economy in the late 1980s.
2. The government started to reform the economy in 1988 following a sharp fall in income from hydrocarbon exports and an IMF recommendation to implement a structural adjustment programme.
3. Following enactment of the 1989 Constitution, the first principles of competition were introduced in Act 89-12 of 5 July 1989 on prices, which prohibited “concerted practices and actions, conventions and express or tacit agreements...” (Article 26) and “any abuse arising from a dominant position on a market or market segment...” (Article 27). Article 31 stated that “the initiators of any business concentration, the effect of which is to control a significant share of the domestic market, must seek prior authorisation [...]”.
4. The 1996 Constitution is more explicit, since Article 37 enshrines the principle of free trade and industry, stating that “freedom of trade and industry is guaranteed. It shall be carried out within the framework of the law.”
5. The economic reforms of the late 1980s and 1990s led to the introduction into domestic law of legal categories inherent in a market economy. In that regard, Ordinance 95-06 of 25 January 1995 confirmed the transition from a managed to a market economy. Seeking to ensure healthy competition between firms and relying on supply and demand to freely determine the price of goods and services, the measure was a key component of the economic reform programme.
6. However, that ordinance was repealed and replaced by a new one in 2003. The reasons for repeal given in the preamble included the rehabilitation of the Competition Council in its role as the main market regulator and the requirements of integration into the regional and global economy (represented by the EU and WTO respectively), which necessarily meant modernising and harmonising Algeria’s competition law.
7. The 2003 ordinance has been amended twice, for the first time in 2008 and then in 2010.
8. The 2003 ordinance on competition as amended and supplemented broadly reproduces French law in the matter by prohibiting practices deemed to restrict competition, especially cartels, abuse of dominant position, predatory pricing, exclusive

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dealing and abuse of economic dependence. It also requires prior authorisation after notification of business concentrations where a market share of over 40% is held.

9. As in French competition law, the prohibition of abuse of dominant position and abuse of economic dependence is tempered by mitigating criteria such as improved competitiveness, the promotion of employment and support for small businesses.

10. The irreversible nature of the shift to a market economy was recently reasserted by Act 16-01 of 6 March 2016 amending the Constitution, Article 43 of which states that “freedom of investment and trade is guaranteed. It shall be exercised within the framework of the law. The State shall endeavour to improve the business climate. It shall, without discrimination, encourage businesses to flourish in the service of national economic development. The State shall regulate the market. Consumer rights shall be protected by law. Monopolies and unfair competitive practices shall be prohibited by law.”

11. Analysis of the amendments made by Article 43 indicates a redefinition of the economic role of the state. Under the new provisions, it is supposed to regulate the market, ensure fair competition between economic operators and above all encourage businesses without discrimination. These are the missions traditionally entrusted to the state in a market economy.

12. This is the legal framework within which interactions between the Competition Council and the courts take place. Relations between the two institutions can be hampered by the fact that neither has much experience of dealing with such matters and case law is therefore scanty.

13. The fact that the Competition Council was inactive between 2003 and 2013, non-renewal of its members having left it inquorate, did nothing to narrow the distance between the judicial authorities and the Competition Council.

14. Judicial perspectives on competition law in Algeria must be approached in light of the following aspects:

1. the legal void to be filled in terms of legislation (amendments to Ordinance 03-03 of 19 July 2003 on competition as amended and supplemented;
2. the current situation of case law in competition matters;
3. the promotion of rules on competition by active cooperation between the judicial authorities and the Competition Council;
4. the anticipation of case law by reference to cases dealt with by long-standing competition authorities, such as the French competition authority.

2. The need to dispel legislative ambiguities (amendments to the law)

15. The task of the courts and of the Competition Council is not made any easier by certain ambiguities in Ordinance 03-03 of 19 July 2003 on competition as amended and supplemented (the “Ordinance”).

16. The experience gained by the Competition Council during a first four-year term (2013-2016) highlighted the need to amend the Ordinance, which currently regulates how the Competition Council works.

17. The proposed amendments were drawn up in cooperation with UNCTAD competition law experts following an audit of legislation commissioned by the Algerian government in 2014 and confirmed by a second review under the UNCTAD MENA

programme in June 2016. They concern 51 of the 74 articles, or nearly 69% of the text of the Ordinance.

18. We shall consider here only those articles which contain deficiencies or ambiguities that are likely to complicate relations with the judicial authorities, and in particular make it easier for parties to appeal decisions taken by the college of the Competition Council in the courts.

2.1. Economic aspects

19. Convinced that court judgments prevail over the administrative decisions taken by the Competition Council, the Council has identified those provisions which do not help the courts to make a ruling.

2.1.1. Dominant position

20. Although the Ordinance refers explicitly to the notion of dominant position, it does not contain criteria for assessing the existence of a dominant position, such as a threshold percentage of market share, even though the Competition Council is best placed both to evaluate market share and to determine or circumscribe the relevant market.

21. The admissibility of evidence by the courts in this regard is therefore not absolute but relative.

2.1.2. Negative clearance

22. Article 8 of the Ordinance states that “the Competition Council may, at the request of the undertakings concerned, ascertain that, in relation to the facts of which it is aware, there are no grounds for it to take action with regard to an agreement, a concerted action, a convention or a practice as defined at Articles 6 and 7 above”.

23. “The conditions for submitting the application to benefit from the provisions of the foregoing paragraph are determined by decree.” (The decree in question is Executive Decree 05-175 of 12 May 2005 defining the conditions for obtaining negative clearance with regard to cartels and dominant position on the market.)

24. The Competition Council considers that authorising an agreement or a dominant position before the event is a complex business because it involves anticipating the future behaviour of the parties to the agreement or the dominant position, to say nothing of the difficulty of monitoring the transaction after clearance has been given.

25. Furthermore, Annex 2 of the Executive Decree requires the undertakings concerned to provide estimates, figures and assessments that are “as close as possible to the real situation”. This increases the risk of diverging interpretations, depending on whether the standpoint is that of the undertakings concerned, the Competition Council or, ultimately, the courts.

26. That is why the Competition Council has recommended repealing the article in question, especially as negative clearance has been abolished in European countries, having shown the limits of its usefulness, and replaced by a system of exemptions.

2.1.3. Concentration that undermines competition

27. Article 18 of the Ordinance contains a threshold in terms of a percentage “of sales or purchases made on a market”. As well as being unclear, this threshold is extremely complex to determine.

28. Where the law mentions a “market”, it certainly means the “relevant market”. Determining the relevant market requires considerable expertise.

29. The relevant markets concerned by the transaction must be defined before market share can be determined, which is often a source of disagreement between firms and competition authorities, since the former tend to extend the definition in order to dilute their market share and hence not be subject to control, while the latter try as far as possible to limit the scope in order to define firms’ economic power.

30. Furthermore, Article 18 does not stipulate whether the threshold should be evaluated in volume or financial terms, a lack of precision that the parties to the concentration can use to their advantage and make the appeal court’s review of the Competition Council’s decision (to allow or refuse the concentration) all the more problematical.

31. For those reasons, the Council proposes replacing market share with sales as the criterion for notification.

2.1.4. No-challenge procedures

32. Article 60 of the Ordinance states that “the Competition Council may decide to reduce the amount of the fine or not to impose a fine on firms which, during the investigation, acknowledge the offences alleged against them, cooperate in expediting the investigation and undertake to no longer commit offences linked to implementation of the provisions of this ordinance...”.

33. However, the Competition Council makes application of Article 60 conditional on **substantive, credible and verifiable** undertakings, bearing in mind that the level of reduction of or exemption from the fine depends on those undertakings.

2.2. Legal certainty

34. By eliminating approximation and ambiguity, legal certainty helps those involved in competition law (courts, Competition Council, parties in dispute and their counsel) to facilitate the disposition of cases and strengthen the rule of law.

2.2.1. Cartels (or collusion) in public procurement

35. Article 6 of the Ordinance states that “concerted practices and actions, conventions and express or tacit agreements (...) are prohibited in particular when they tend to: (...) [last paragraph] allow the award of a public procurement contract to the originators of such restrictive practices”.

36. The Competition Council proposes that the last paragraph should be deleted because it suggests that the Competition Council should hold the contracting authorities liable for the offences instead of prosecuting those responsible for the anti-competitive practices concerned (cartel, concerted tenders), despite the fact that competition law is limited to prosecuting and, where appropriate, sanctioning the tenderers.

37. It is for the administrative courts to settle disputes between a contracting authority and tenderers in accordance with the regulations governing public procurement.

2.2.2. A contradiction in the notion of exclusive dealing

38. Article 10 of the Ordinance prohibiting exclusive dealing contradicts Article 36 of the same Ordinance, which states that “the Competition Council shall be consulted on any draft legislative or regulatory text that is linked to competition or introduces measures, the effect of which is, inter alia:

- to subject the exercise of a profession or an activity or access to a market to quantitative restrictions;
- **to establish exclusive rights in certain zones or activities;**
- to introduce particular conditions for the exercise of production, distribution and service activities;
- to impose uniform practices relating to terms and conditions of sale”.

39. The Competition Council considers that Article 10 should be repealed, having regard to the real nature of commercial relations, since there is a host of exclusive dealing arrangements that should not be prohibited. The only exclusive dealings that should be prohibited are those that fall within the scope of abuse of dominant position.

2.2.3. Notification of concentrations

40. Article 17 of the Ordinance suggests that the parties to a planned merger are in a position to know whether their plan might infringe the law and that consequently, if they think that is not the case, they are not subject to the notification requirement.

41. The text proposed by the Competition Council clarifies the situation by stating that “the concentration must be notified to the Competition Council before it is carried out”.

42. The proposed wording is more consistent with the provisions of other legislations and should be approved without difficulty, especially as the proposed amendments to Article 18 provide all necessary clarification about the sales of the firms involved that serve as the notification threshold.

43. In addition, Article 21 bis states that “all concentrations where the candidates could justify that the transaction would strengthen their competitive position, preserve jobs or improve the position of small businesses on the market are not subject to the threshold set forth at Article 18 [...] **However, only concentrations that have been authorised by the Council may benefit from this provision [...]**”. The last paragraph renders the article inapplicable, since it dispenses the candidates from subjecting their transaction to control if the conditions listed above are proven, whereas according to the last paragraph it will be lawful only if it has been authorised. How can an authorisation be obtained if the article itself dispenses the candidates from the requirement to subject the concentration to the control of the Competition Council?

2.2.4. Appointment of non-permanent members of the college

44. Article 24 of the Ordinance fails to address the risk of conflict of interest by not stipulating that the four members representing firms and the two members representing consumer protection associations must be appointed on a personal basis having regard to

their expertise and moral independence. They must act in a fully objective manner and hence may not represent or defend any party (political party or business community).

45. The Competition Council also notes the absence of any member of the judiciary in the membership of the college (among the six permanent members).

46. The Council has proposed an amendment to include members of the judiciary where the Council is subject to the same rules of procedure as first-degree jurisdictions.

2.2.5. Reporting of offences

47. The Ordinance does not contain any requirement for the Competition Council to inform the competent courts of potential criminal offences, such as obstruction of justice or the destruction of evidence, that it may discover in the performance of its missions.

48. A proposal is made to include an article that would rectify this omission.

2.2.6. Clarification of the relationship with sectoral regulators

49. Articles 39 and 50 of the Ordinance contain ambiguities that do not make the task of the Competition Council or the appeal court any easier.

50. Article 39 states that “when a matter related to a sector of activity within the remit of a regulatory authority is referred to the Competition Council, the Council shall immediately transmit a copy of the case file to the regulatory authority concerned so that the regulatory authority can issue its opinion within a period of not more than 30 days”.

51. The experience of the Council’s first term (2013-2016) revealed a flaw in the wording of the article. The regulatory authority has 30 days in which to respond, but this deadline may be missed, or no action may be taken after the case file is transmitted. In such cases, should the Council take a decision on the matter or definitively shelve it? The article does not say.

52. For that reason, the Competition Council has suggested amending the clause as follows: “On expiry of the stipulated deadline, and if the regulatory authority concerned has taken no action, the Competition Council shall take a decision on the matter without considering the regulatory authority’s opinion.”

53. The last paragraph of Article 50 states that “matters related to sectors of activity placed under the control of a regulatory authority shall be treated in coordination with the staff of the authority concerned”.

54. This provision not only calls Article 39 into question but also raises the problem of how coordination with the staff of the authority concerned should be turned into practical action in a way that will satisfy the courts.

55. For that reason the Council proposes repealing the clause.

2.2.7. Decisions served by bailiff

56. Article 47 of the Ordinance states that “decisions issued by the Competition Council shall be notified for enforcement to the parties concerned by a bailiff”.

57. It is not possible for the Competition Council’s decisions to be notified by a bailiff in all cases, since the competence of bailiffs in Algeria is limited to the venue of the court where they are established, whereas the matters referred to the Competition Council can cover the whole of the country.

58. For that reason the Council proposes amending the article so that decisions can be notified for enforcement to the parties concerned by registered letter with acknowledgment of receipt.

2.2.8. Search and seizure of documents by rapporteurs

59. Article 51 states that “the rapporteur may, without being open to objection on the grounds of professional secrecy, inspect any document necessary to the inquiry entrusted to him. He may demand to see them, regardless of who holds them, and seize documents of any kind that may help him to perform his mission. The seized documents shall be attached to the report or returned on completion of the inquiry.

60. The rapporteur may gather all information necessary to his inquiry from businesses or any other person. He shall set the deadlines within which the information must be provided to him.”

61. Implementing these provisions is ill-suited to the real situation on the ground. That is why the Council recommends the following wording: “Council rapporteurs may perform searches of all business premises and organisations and seize documents only with authorisation issued by order of the court having local jurisdiction. If the inquiry must be conducted in premises in different locations depending on different local jurisdictions, a single order issued by a presiding judge of a competent court will suffice.”

62. Search and seizure operations are carried under the authority and oversight of the judge who authorised them. He appoints one or more judicial police officers to attend such operations and keep him informed of their progress if the needs of the inquiry so require.

2.2.9. Notification of the report to the parties

63. Article 55 of the Ordinance states: “The President of the Competition Council shall notify the report to the parties and to the minister for trade, who may submit written remarks within a period of two months. He shall also inform them of the date of the hearing relating to the matter.

64. The parties may consult the written remarks mentioned at paragraph 1 above fifteen days before the date of the hearing.

65. The rapporteur shall state his observations on any of the written remarks mentioned at paragraph 1 above.”

66. The Competition Council finds that notifying the report to the minister for trade and calling for his remarks may call into question the principle of independence granted to the Competition Council, especially as the Ordinance makes provision for the parties to appeal.

67. Consequently, the Council proposes amending the last paragraph as follows: “The rapporteur shall communicate his observations on any of the written remarks mentioned at paragraph 1 above to the college before the latter’s hearing session”.

68. These are the main articles containing ambiguities which can be used for the purposes of appeals to the appeal court without facilitating the task of the court, which is, in the classic formulation, to “uphold the law and settle disputes”. That task is made even more difficult by the fact we are dealing here with economic matters and proof by presumption or a set of presumptions is accepted.

3. The current situation of case law in competition matters

69. Competition case law generally comprises:

- the case law of the Competition Council,
- the case law of the Court of Appeal,
- the case law of the Supreme Court,
- the case law of the Conseil d'État.

3.1. Case law of the Competition Council

70. Before considering the Competition Council's main precedent-setting decisions and opinions, the first step is to review the matters dealt with by the Council in its first term (2013-2016).

3.2. Consolidation of statistics 2014-2016

71. Overall, 34 referrals were registered in the period 2014-2016. Bearing in mind that 2013 was taken up with establishing the structure and organisation of the Council's human and material resources, which explains why it did not deal with any matters during that year, they may be divided up as follows (on the basis of the grounds invoked by the complainant):

- Abuse of dominant position: 10 referrals
- Predatory pricing: 4 referrals
- Unfair competition (Act 04-02 of 2004): 4 referrals
- Cartels: 3 referrals
- Abuse of economic dependence: 4 referrals
- Favouritism in public procurement: 4 referrals
- Application for interim measures: 2 referrals
- Application for negative clearance: 1 referral
- Application for authorisation of a concentration by notification: 1 referral
- Request for an opinion: 1 referral

72. Overall, the outcome of these 34 referrals was as follows:

- 19 rejected
- 7 deemed inadmissible
- 2 deferred
- 2 applications for interim measures refused
- 1 fine
- 1 absence of legal grounds
- 1 injunction followed by a letter of commitment
- 1 shelved

73. Through this review we should like to highlight the following points:

- Although the Competition Council has been in existence since 1995, albeit in suspension from 2003 until it was reactivated on 15 January 2013, the number of referrals is small in comparison not only with the Council's expectations but above all with the potential extent of anti-competitive practices which go

unreported because of the lack of a competition culture (34 cases in four years gives an average of 9 cases a year, or one every 35 days).

- Of the 34 cases referred, 26 were either rejected or deemed inadmissible, suggesting that parties making referrals are in great need of external assistance (preferably from lawyers) to help them put together their application. In many cases, the complainants fail to distinguish between practices that distort or restrict competition, governed by Ordinance 03-03 of 19 July 2003 on competition as amended and supplemented, and commercial practices governed by Act 04-02 of 23 June 2004 setting the rules applicable to commercial practices, which do not fall within the Competition Council's remit.

74. Certain complainants consider, wrongly, that retaining a lawyer – which is not a requirement under the Ordinance – is superfluous, even though appropriate legal advice is the best way of narrowing down the grievances and ensuring that the referral complies with the Competition Council's working procedures.

75. There are shortcomings even in the way the referrals are drafted, despite the fact that the Competition Council, for educational reasons, drew up and circulated its rules of procedure in Official Competition Bulletin no. 3, Articles 7 to 11 of which set out in detail the requirements for a referral to be deemed admissible by the procedural unit.

76. Although there is no rule or principle that requires complainants to furnish proof of the reported conduct, they need to include credible evidence of their allegations, such that the existence of unlawful practices may be presumed.

- 62% of referrals concern abuse of dominant position, cartels, predatory pricing and abuse of economic dependence (30% concern abuse of dominant position). That confirms the structure of the Algerian market, on which oligopolies are everywhere (even though the analysed sample very much under-represents the real situation and cannot reflect the extent of potentially anti-competitive practices that go unreported).

77. In its consultative role, the Competition Council issued six opinions between 2014 and 2016, including four in 2014 alone.

3.3. Case law of the Court of Appeal and Supreme Court

78. In jurisdictional terms:

- the majority of decisions taken by the college of the Competition Council (26 out of 35, or nearly 75%) have either rejected the matter at issue or deemed it inadmissible, with the result that they cannot be challenged or appealed to the court in Algiers.

79. In each case, the rejection decision has been based on the lack of evidence to support the complainant's allegations.

80. In each case, findings of inadmissibility have been based on the following grounds:

- the allegations do not fall within the Council's remit;
- the facts at issue are out of time;
- there is no interest or capacity to act.

81. However, three decisions have been appealed to the Algiers Court of Appeal. They are the following:

3.3.1. Case no. 48 /2013 of 10 March 2013

82. This matter was referred to the Competition Council by SARL SETPAP ALIF Papiers against SARL RAYEN Papier and SARL EAPI.

83. The complaint by SARL SETPAP ALIF Papiers against the other two companies concerned restrictive practices in connection with Article 14 of Ordinance 03-03 of 19 July 2003, and in particular an unlawful cartel between the two companies, taking the form of predatory pricing with the aim of excluding SARL SETPAP ALIF Papier from the market. Such practices constitute an offence under Articles 6 and 12 of the Ordinance.

84. The college, after hearing the report of the rapporteur assigned to the case, the complainant and the defendants, and having noted the conclusions of the investigation into the matter carried out by the Annaba Province Trade Directorate in May 2013, **decided to reject the referral** for lack of sufficient evidence to support the allegations.

85. That decision was based on the following arguments:

- the prices charged by the two defendants were higher than the cost price of the products sold (exercise books and registers), though they left the companies with only a small profit margin;
- the reduction in prices was directly correlated to a fall in the price of the raw material on the international market;
- there had not been any disturbance or imbalance on the relevant market (school exercise books) since the new prices reported by SARL SETPAP ALIF Papiers had been applied.

86. The complainant appealed the decision to the Algiers Court of Appeal, resulting in Commercial Division judgment no. 03492/16 of 5 June 2016 upholding Competition Council decision no. 27/2015 of 4 November 2015.

87. The Court of Appeal recalled that under the rules of proof “the burden of proof lies with the complainant” and that in this context “the complainant was unable to prove, on the basis of the evidence provided, the link between the financial damage it claims to have suffered and the allegedly predatory prices applied by its two competitors”.

88. The Court of Appeal rejected the complaint of predatory pricing, basing its decision on the Competition Council rapporteur’s final report, which showed that the prices applied by the defendants were higher than the cost price even though they generated only a small profit margin.

89. The Court also took into consideration the absence of any disturbance on the market for school exercise books despite application of the prices at issue.

3.3.2. Case no. 50/2013 of 2 April 2013

90. This complaint by PETROSER against GRIEF SPA ALGERIE was referred to the Competition Council on 2 April 2013 on the following grounds:

- abuse of dominant position on the market for metal barrels for storing lubricating oils;
- breach of the terms of a commercial agreement between the two parties relating to the delivery in quantity of metal barrels;

- breach of the contractual payment terms in the form of a requirement to make advance payment before delivery even though the agreement specified payment after delivery.

91. After acquainting itself with the final report of the rapporteur assigned to the case, dated 17 December 2014, the college concluded that the allegation of abuse of dominant position was groundless since the relevant markets for the two companies (PETROSER and GRIEF) were not the same.

92. Likewise, the complaint of abuse of economic dependence was not upheld, given that PETROSER could source supplies from other distributors;

93. The college also noted PETROSER's refusal to accept an amicable settlement even though the terms of the agreement between the two parties provided for this way of settling the dispute.

94. Lastly the college, finding that the quantities of barrels delivered by GRIEF to PETROSER exceeded the quantities scheduled in the agreement, and finding that no disturbance had been noted on the market for metal barrels, **decided to reject the referral for lack of sufficiently convincing evidence to support the allegations.**

95. In its judgment of 1 June 2016 after hearing PETROSER's appeal, the Algiers Court of Appeal upheld the Competition Council's decision on all points.

96. The judgment noted that the college of the Competition Council is the sole decision-taking body which takes its decisions by a majority of its members and that consequently the arguments put forward by PETROSER were groundless.

97. The judgment rejected the complaint of abuse of dominant position by GRIEF on the grounds that it held an estimated market share of 35%, the complainant not having been able to prove otherwise.

98. It also rejected PETROSER's complaint against GRIEF of abuse of economic dependence on the grounds that the same product (metal barrels) was purchased from a Tunisian company.

99. Lastly, the judgment noted performance of the clause of the commercial agreement between the two parties to the dispute relating to the projected quantities to be delivered by GRIEF to PETROSER, which GRIEF more than fulfilled.

3.3.3. Case no. 25 /2003 of 21 April 2003 between a mineral water distributor and IFRI, a mineral water producer

100. The complaint concerned alleged abuse of dominant position in the form of discriminatory pricing and refusal to sell without good cause (Article 7 of Ordinance 95-06 of 25 January 1995) committed by IFRI against the distributor concerned.

101. After discussion, the college decided by a majority of its members to fine IFRI the minimum amount provided for at Article 14 of Ordinance 95-06 of 25 January 1995.

102. The fine was set on the basis of IFRI's tax balance sheet for 2003, and in particular the amount of sales, in order to determine the amount of the fine as precisely as possible.

103. IFRI appealed the decision twice, first to the Algiers Court of Appeal and then to the Supreme Court.

Algiers Court of Appeal judgment no. 03384 /15 of 28 October 2015

104. The judgment dismissed IFRI's arguments on the following points:

- The legal quorum when the members of the college took their decision complied with the provisions of Article 28 of Ordinance 03-03 of 19 July 2003, which allows the college to take a decision with a minimum of six members in attendance. The argument that the quorum was not met was therefore dismissed.
- The limitation period had been respected because the complainant could not be held responsible for the suspension of the Competition Council's activity between 2003 and 2013. The complainant had complied with all the investigative procedures in 2003 and had consequently contributed to the interruption of the limitation period at each stage.

105. In the same judgment, the court accepted the evidence (various invoices) furnished by the complainant that IFRI had practised discriminatory pricing against it, abusing its dominant position during the period at issue.

106. The judgment dismissed the appellant's application for damages.

Supreme Court judgment no. 1130389 of 16 June 2016

107. The Supreme Court found the appeal admissible in form but dismissed it on the merits.

108. The judgment confirmed that a quorum of six members was consistent with Article 28 of Ordinance 03-03 of 19 July 2003 and hence dismissed IFRI's argument in defence.

109. The same judgment also dismissed the complaint based on limitation on the same grounds as the Algiers Court of Appeal and found that the Competition Council had complied with the formalities and procedures for continuing its examination of the matter after it had been reactivated in 2013.

110. Four conclusions may be drawn from these three cases.

1. Having regard to the recent practice of both the courts and the Competition Council in competition law matters, the courts did not question the Council's findings regarding the admissibility of evidence since they upheld the three decisions taken by the Council.
However, the courts have not found themselves in a position where they have to take difficult decisions on complex economic issues. Hence, there is no point speculating about the courts' competence in competition law matters or whether the effective application of competition law was hindered in the above-mentioned cases.
2. From recent practice in competition law matters we may conclude that the courts are much more likely to refer to empirical rules that are easier to apply than to detailed economic assessments. However, the college of the Competition Council imposes rules on itself relating to the burden and standard of proof and is careful to assess the relevance of the economic analyses provided by its staff.
3. Depending on how practice and the complexity of matters referred to the Competition Council evolve, it cannot be ruled out that in the short to medium term the Council, the courts and the parties to the dispute will consult experts in order to support the admissibility of evidence, especially of an economic nature.

As far as the Competition Council is concerned, Article 37 of the Ordinance allows expert advice to be sought where appropriate, stating that “the Competition Council may take all appropriate action within its sphere of competence, and in particular any inquiry, study or expert assessment [...]”.

4. There is not at present any judicial case law relating to concentrations because almost no business mergers have been notified to the competition authority.

4. Interactions between courts and the competition authority

111. In terms of competition law practice, the Competition Council is a relatively recent player (it was reactivated in 2013 after its activities between 2003 and 2012 were suspended because the terms of office of its members had not been renewed), and small, with a staff of 27 at end-December 2016 (see annual report).

4.1. Interactions with the judicial authorities provided for by law

4.1.1. Interactions with the judicial authorities codified by Ordinance 03-03 of 19 July 2003 on competition as amended and supplemented

112. Interactions between the Competition Council and the judicial authorities are codified in 13 articles of the Ordinance. They include:

113. **Article 19**, the last paragraph of which states, concerning concentrations, that “the [Competition Council’s] decision to reject the concentration may be appealed before the Conseil d’État”.

114. In our opinion, the ambiguity of Article 17, already mentioned in Part 1 of this paper, explains the insignificant number of notifications of mergers sent to the Competition Council between 2013 and 2017, with the result that there has been no appeal to the Conseil d’État to date.

115. **Article 38**, which states that “when hearing matters relating to restrictive practices as defined by this Ordinance, the courts may seek an opinion from the Competition Council. The opinion is given only after all the parties have been heard, unless the Council has already examined the matter in question.

116. The courts shall provide the Competition Council at its request with the reports of inquiries or investigations having a connection with the matters referred to the Council.”

117. **Article 47**, which states that “the decisions issued by the Competition Council shall be notified for enforcement to the parties concerned by a bailiff”.

118. The difficulties of applying this article were described in Part 1 of this paper.

119. **Article 48**, which states that “any natural or legal person who considers himself to have suffered prejudice on account of a restrictive practice within the meaning of this Ordinance may refer the matter for redress to the competent court in compliance with the laws in force”.

120. This article refers to the possibility of obtaining damages that only a court can identify and assess. The Competition Council’s decision is one of the items of proof available to the appellant in order to assert his claim for damages before the Court of Appeal.

121. **Article 49**, which states that “the decisions and judgments issued by the Competition Council, the Algiers Court of Appeal and the Conseil d’État in competition matters shall be published by the Competition Council in the official competition bulletin [...]”

122. **Article 63**, which states that “decisions of the Competition Council concerning practices that restrict competition may be appealed to the Algiers Court of Appeal, ruling in commercial cases, by the parties concerned or by the minister for trade, within a period not exceeding one month as of the date of receipt of the decision.

123. Appeals against the interim measures referred to at Article 46 above must be lodged within twenty days. Appeals to the Algiers Court of Appeal do not suspend the effects of Competition Council decisions. However, the presiding judge of the Algiers Court of Appeal may decide, within a period of not more than fifteen days, to suspend enforcement of the measures provided for at Articles 45 and 46 above ordered by the Competition Council where the circumstances or serious matters so require.”

124. **Article 64**, which states that “appeals to the Algiers Court of Appeal against Competition Council decisions shall be lodged by the parties to the case in accordance with the provisions of the Code of Civil Procedure”.

125. **Article 65**, which states that “as soon as the notice of appeal is filed, a copy shall be transmitted to the president of the Competition Council and to the minister for trade, where the latter is not a party to the case. The president of the Competition Council shall transmit the file of the case at issue to the presiding judge of the Algiers Court of Appeal within the time limits set by him.”

126. The three cases described in Part 2 of this paper that were appealed to the Algiers Court of Appeal were concluded on the basis of the provisions of this article.

127. **Article 66**, which states that “the reporting judge shall provide copies of all new documents exchanged between the parties to the case to the minister for trade and the president of the Competition Council for comment”.

128. **Article 67**, which states that “the minister for trade and the president of the Competition Council may submit written remarks within the time limits set by the reporting judge”.

129. **Article 68**, which states that “parties to the dispute before the Competition Council that are not party to the appeal may join in the case or be cited at any time during the proceedings in accordance with the provisions of the Code of Civil Procedure”.

130. **Article 69**, which states that “the application for a stay of execution provided for at Article 63, paragraph 2 above shall be drawn up in accordance with the provisions of the Code of Civil Procedure.

131. The application for a stay of execution shall be submitted by the principal appellant or by the minister for trade. It is admissible only after the appeal has been lodged and must be accompanied by the Competition Council decision.

132. The presiding judge of the Algiers Court of Appeal shall request the opinion of the minister for trade on the application for a stay of execution, where he is not a party to the case.”

133. **Article 70**, which states that “judgments of the Algiers Court of Appeal, the Supreme Court and the Conseil d’État in competition matters shall be transmitted to the minister for trade and the president of the Competition Council”.

134. As things stand in the current treatment of competition law matters, this codification of relations is under-used both by the courts, the Commercial Division dealing essentially with cases relating to business practices (counterfeiting, disparagement, false invoicing and various types of commercial fraud), and by the Competition Council which, as pointed out earlier, receives few referrals because the competition culture is relatively recent and still being integrated into the corporate mindset.

4.1.2. The Algerian legal system

135. Algeria’s legal system owes much to the French model.

136. Algeria has numerous codes in all areas of law, including civil, penal, commercial, social, administrative, criminal, civil and administrative procedure, etc. Much of the content of the codes is based on French laws, the two countries sharing the same judicial system and culture, with the exception of the Family Code, inspired by Muslim law.

Court system

137. Algeria’s judicial system has two court systems, judicial and administrative, with the Supreme Court and the Conseil d’État respectively at their head.

138. There is also a Court of Conflicts and a Court of Auditors.

Judicial courts

139. **Courts of first instance** generally have four sections: civil, criminal, industrial and commercial.

140. **Special criminal courts**, created in 2004 under rules that create an exception to ordinary law.

141. **Courts of Appeal**, which rule in collegiate form. Each court has several divisions, including a commercial division which hears appeals of Competition Council decisions.

142. **The Supreme Court**, created in 1963 but currently governed by a law passed in 1989. It hears appeals against final judgments of appeal courts and lower courts.

Administrative courts

143. **Administrative courts** are ordinary jurisdictions that hear cases involving administrative matters. Their decisions may be appealed to the **Conseil d’État**.

144. **The Conseil d’État** (which, in competition law, hears appeals relating to business concentrations) was established in 1998. It regulates the activity of the administrative courts. It has a consultative function and issues opinions on draft legislation before it is examined by the cabinet.

145. In jurisdictional matters, the Conseil d’État hears in first and last instance:

- appeals for the cancellation of regulatory or individual decisions issued by central government authorities, national public institutions and national professional organisations;
- appeals for interpretation and for assessment of the legality of acts in disputes that fall within the competence of the Conseil d'État.

146. It hears appeals against judgments rendered by administrative courts in first instance.

4.1.3. The economic competence of the courts

147. The number of cases heard on appeal (three between 2013 and 2016) is too small to allow an assessment of the courts' competence in economic matters.

148. Neither has the Competition Council had to examine and deal with complex economic issues in the matters referred to it over the same period.

149. Nonetheless, as the market opens up and public-sector monopolies are gradually dismantled, complex economic issues are bound to arise, whether in connection with anti-competitive practices or concentrations.

150. The Competition Council has gained (and continues to develop) expertise in competition law as a result of the prerogatives which the state has conferred on it by delegating its power of regulation and by the fact that it is accountable to the state.

151. The courts, responsible for controlling the grounds of the college's decisions, may hamper effective application of competition law if the judge does not have the necessary competence in economic matters or is not familiar with the economic notions that underlie competition law.

152. One strand of government policy on justice (document issued in September 2015) is "adaptation of the legislative arsenal to economic transformation and international standards and mechanisms through amendment of the Commercial Code and Penal Code to improve the investment and business climate by a revision of their provisions relating to businesses".

153. The same document calls for "ongoing strengthening of specialist training programmes for sitting judges, in specialist institutes and universities, in Algeria and in other countries, in various priority areas such as business law, criminal business law, the law of new information and communication technologies, cybercrime and intellectual property. 868 members of the judiciary have benefited from this type of training, including 200 at foreign universities (France and Belgium)".

4.2. Interactions with the courts other than in connection with the hearing of cases

154. Leaving aside hearings of cases in which the Competition Council interacts with the Court of Appeal, the Council, when it organises study days (one per quarter) has consistently invited judges from the Court of Appeal, the Supreme Court and the Conseil d'État to attend talks given by eminent Algerian and foreign experts.

155. These study days have focused on themes of interest to judges, such as:

- abuse of dominant position,
- collusion between tenderers for public procurement contracts,
- programmes of compliance with competition rules,

- proposed amendments to Ordinance 03-03 of 19 July 2003.

4.3. Generalist or specialised courts in competition matters

156. This issue was settled by the Justice Minister in 2005.
157. Rather than creating specialist jurisdictions, Algeria has opted to bring in specialist judges.
158. That will involve the creation of centres of specialisation in civil and commercial matters.
159. At present, the Algiers Court of Appeal hears commercial cases.
160. The most important thing is to have judges who are competent to render a fair judgment in a case of an economic nature, which requires specialist training.

5. Jurisprudential perspectives of competition law

161. Given the small corpus of competition case law in Algeria, for the reasons given above, we see reference to the case law of other countries with long-standing and effective competition authorities as the best way of accelerating the development of Algerian competition law.
162. We believe that certain texts with their origins in such case law are sensible and objective enough to be easily adapted to the current context of applying competition law to the Algerian market, and especially to businesses. They concern the following aspects.

5.1. The Competition Council's remit

163. Although competence to assess a company's compliance with the terms of an agreement lies not with the Council but rather with the commercial courts, the Council is competent to assess whether contractual stipulations or clauses and their application are intended to or may prevent, restrict or distort free competition on a market.
164. The administrative courts have competence to assess whether decisions taken by public entities in the framework of a public service mission for which they have the prerogatives of a public authority are lawful and, where applicable, to rule on the liability such public entities may incur.
165. Consequently, if a decision or measure that is disputed from a competition law standpoint involves prerogatives of a public authority linked to a public service mission, the administrative courts have sole competence to assess whether it is lawful and, where applicable, to rule on the liability incurred by the entities concerned.
166. Likewise, the courts have consistently held that the Competition Council is not competent to assess the way in which public entities organise their calls for tender for public procurement contracts.

5.2. Limitation

167. Article 44, last paragraph of Ordinance 03-03 of 19 July 2003 states that “matters dating back more than three years may not be referred to the Competition Council if no action has been taken to identify, ascertain and sanction them”.

168. The courts have consistently held that the suspensory effect of inquiries or investigations applies to all the parties to the proceedings. Thus, an action intended to identify, ascertain or sanction anti-competitive practices, even if it concerns only some of the undertakings at issue or only some of the acts committed during the period to which the referral applies, interrupts the limitation period for all the undertakings and all the acts concerned, provided that there is a link between them.

169. All administrative acts of rapporteurs intended to identify, ascertain or sanction anti-competitive practices may also interrupt the limitation period.

170. Case law can go further, by considering acts performed by authorities other than the rapporteur to have a suspensory effect, provided that such authorities have a legal connection with the matter under investigation.

171. “Acts performed by anyone that were not investigative measures as such but had an impact on the conduct of the Council’s sanction procedure have already been deemed to interrupt the limitation period.”

5.2.1. Admissible forms of proof

172. “Except where otherwise provided by law, offences may be established by any form of proof and the judge rules according to his personal conviction. The judge may base his ruling only on evidence provided to him during the hearing and discussed before him in the presence of both parties.” Applying this principle, the French competition authority’s practice in taking a decision does not prevent a complainant from presenting information obtained from an undertaking by unfair means, such as, for example, by falsely posing as a consumer or by recording business conversations during a meeting.

173. In contrast, under the oversight of the Court of Appeal, the Council strictly ensures that rapporteurs do not use unfair means during inquiries or investigations.

5.3. Practices not mentioned in the referral

174. A referral in rem to the Competition Council is valid with regard to all the undertakings cited and authorises the Council to examine practices not mentioned in the referral provided that they are linked to the practices alleged in it.

175. In this context a Paris Court of Appeal judgment states: “the Council, to which a set of acts and practices affecting the operation of a market is referred in rem and which is not bound by the complainant’s petitions and classifications, may, without any other formality, consider practices revealed by the investigations it has undertaken as a result of the referral which, though not expressly mentioned therein, have the same purpose or effect as those reported to it”.

5.4. Examination of interim measures

176. An application for interim measures may be examined only if the referral on the merits is admissible and is not dismissed for lack of sufficient evidence.

5.5. Notification of complaints

177. The complaint is a set of legally defined offences that are alleged against one of more undertakings. The purpose of notifying a complaint is not to anticipate or exhaust the subsequent adversarial hearing in advance, or to deprive the Council of its power to freely give the grounds of its decision, provided that it considers only the notified complaints and bases its decision on the evidence provided. Separation of the investigative and deliberative functions prevents the Council from being reduced to a mere chamber for registering the rapporteur's reasoning.

5.6. Duration of proceedings

178. The courts have consistently held that where there is no proof that the duration of the investigation has irredeemably comprised exercise of the rights of the defence, proceedings may not be found unlawful on account of their duration alone.

179. If proceedings are deemed excessively long, an order may be made to make good the prejudice, but not under any circumstances to cancel or overturn the Competition Council's decision.

5.7. Compliance with injunctions

180. Injunctions decided by the Competition Council must be expressed clearly, precisely and without uncertainty as to their performance. Consequently, injunctions must be interpreted strictly when steps are taken to ensure that those responsible for anti-competitive practices comply with them.

5.8. Proof of a cartel

181. An undertaking's attendance, even in a passive role, at a meeting with an anti-competitive purpose is sufficient to establish its participation in the cartel, unless the undertaking can prove that it has not subscribed to the anti-competitive practices decided at the meeting by publicly distancing itself from them.

182. Proof of a voluntary exchange of information in such market circumstances is sufficient to establish the existence of a cartel.

183. "Although a finding of parallel behaviour is not sufficient in itself to prove the existence of a cartel, the existence of a cartel may be established where the sole finding of parallel behaviour is compounded by other elements such as to form with it a set of reliable, precise and consistent evidence."

5.9. Liability for practices during company restructuring

184. Where the legal person responsible for operating an undertaking no longer has legal existence, the legal person to whom the undertaking has been transmitted in legal terms is held liable for the practices concerned, i.e. the legal person that has received the

rights and obligations of the person who engaged in the practices (in a merger, for example, this would be the company that takes over a company that has engaged in anti-competitive practices).

185. The legal person whose human and material resources have helped to carry out the practices is liable to sanctions if it still has legal personality, even if the resources have been transferred to another company. Where the undertaking that has engaged in the practices no longer has legal existence, the legal person that has acquired the material and human resources used to carry out the practices is accountable for them.

186. Consequently, the acquiring legal person that ensures the economic and operational continuity of the acquired company is held liable for such anti-competitive practices.

5.10. Liability between parent and affiliate

187. The courts have consistently held that an affiliate is liable for practices it has engaged in if it is capable of defining its own commercial, financial and technical strategy and of freeing itself from managerial review by the headquarters of its parent.

5.11. Relevant markets

188. Defining the relevant market is a key element of competition law because it is the basis for assessing an undertaking's market power and the effects of the practices engaged in.

189. It is also one of the factors for quantifying the damage to the economy, which is the basis for assessing sanctions.

190. The relevant market is defined in two stages. The Council first identifies the goods and services traded on the market, then the geographical zone concerned.

191. A substantial and lasting price differential between different products may indicate that the products concerned are not substitutable and hence do not form part of the same market.

192. In the case of cartels found in the context of tender submissions, each call for tenders is regarded as a separate market, with demand being circumscribed in each set of specifications.

5.12. Bidding consortia

193. It is not unlawful per se for independent and competing firms to form consortia in order to bid for a contract. Such consortia can foster competition if they enable their members to submit a bid that they would not have been able to submit in isolation, or to submit a more competitive bid. In contrast, they may distort competition if they artificially reduce the number of bidders or conceal an agreement on prices or the sharing-out of a market.

194. However, it is up to the awarding authority or client to refuse a bid from a consortium if they suspect that it is intended to reduce competition.

195. Where firms exchange information before the bid deadline because they are planning to form a consortium but ultimately do not do so, the firms involved are

prohibited from submitting bids in apparent competition, since competition between such bids is irredeemably vitiated by the initial exchange.

5.13. Proving a meeting of minds equivalent to a cartel

196. Proving a meeting of minds between two or more firms is a precondition for proving the existence of a cartel. If there is no agreement with an anti-competitive purpose, the signing of which proves the consent of the firms concerned, proof may arise from a set of factual circumstances such as the application by one firm of the terms of a decision taken by another.

5.14. Cartels and exchanges of information that do not concern prices

197. Exchanges of information between competitors, insofar as they are likely to make the market more transparent and give competitors information about each other's performance, are anti-competitive even if they do not concern prices (this applies in particular and essentially to oligopolistic market).

5.15. Imposed prices

198. On the question of establishing the existence of a vertical cartel seeking to impose a resale price, case law requires proof that such prices were mentioned during commercial negotiations between the supplier and his distributors, that the prices thus determined were indeed applied by the distributors – revealing the existence of a meeting of minds and hence a cartel – and that the supplier has applied a price control system, such a system generally being necessary to ensure the long-term operation of a price cartel.

5.16. Abuse of dominant position

199. Abuse of dominant position is defined in case law as a situation where a firm may isolate itself from market conditions and act more or less freely, without taking account of the behaviour and reaction of its competitors.

200. Such a situation may arise from various factors characteristic of the market itself or of the firm, such as having a legal or de facto monopoly or a substantial share of the market. It may also arise from membership of a large group, weak competitors or the possession of a technological advance or specific know-how.

201. The assessment of abuse of dominant position is conducted in three stages.

- The first is to determine the relevant market on which the firm or group of firms operates.
- The second is to determine the position that it occupies on the market.
- The third, if a dominant position is found, is to examine the practices at issue in order to determine whether they are abusive and anti-competitive.

202. The Council may not examine a firm's allegedly abusive practices if it finds that the firm is not in a dominant position on a market.

5.17. De jure or de facto monopolies

203. Having a de jure or de facto monopoly is sufficient to prove that the holder has a dominant position. The same applies where a firm has a quasi-monopoly.

5.18. Price gouging

204. Price gouging may be established if there is a clear disproportion between the price and the value of the corresponding product or service and if there is no economic justification for such disproportion.

205. If it is not possible to prove disproportion by examining the costs, case law admits the use of an assessment by comparison with the prices charged by firms in equivalent situations.

5.19. Predatory pricing

206. Proof of predatory pricing presupposes that the predatory firm suffers a loss. Several conditions must be met: a dominant position held by the alleged predator, prices lower than the relevant cost and a strategy of anti-competitive foreclosure made credible by the possibility of recovering losses once the competitor has been frozen out of the market (that possibility being assessed at the time the strategy is implemented).

5.20. Economic dependence

207. “Economic dependence for a distributor is defined as the situation of a firm that does not have the option of replacing its supplier or suppliers with one or more other suppliers that can meet its sourcing requirements under comparable technical and economic conditions. The mere fact that a distributor sources much or all of his supplies from a single supplier is not sufficient to prove economic dependence.”

5.21. Practices contributing to economic progress

208. These provisions are interpreted strictly. The progress concerned must be progress for the community as a whole and not merely allow for an improvement in the economic situation of the firms concerned. In particular, it must be proved that the alleged economic progress is directly attributable to the practices at issue and could not have been achieved by other means. It must also be proved that the progress is sufficiently great to justify the distortion of competition.

209. These are some examples of case law that the Algerian Competition Council can use as benchmarks, bearing in mind that there are many others that may help it resolve the matters referred to it and at the same time enable it to convince the courts that its decisions are well-founded.

6. Conclusion

210. The judicial perspectives on competition law in Algeria will become clearer as the current reforms bring about economic transformation and a competitive market is established.

211. The lack of competition case law highlights the weakness of interactions between the courts and the Competition Council.

212. And yet these interactions are grounded in and fostered by thirteen articles of Ordinance 03-03 of 19 July 2003.

213. The current competition culture, still being ramped up, does not encourage the number of referrals that would meet the Competition Council's expectations and consequently has a negative effect on the intensity of interactions between the courts and the Council.

214. Nevertheless, the Competition Council has developed a level of expertise in the meantime that will enable it, from 2018, to examine matters on its own initiative on predetermined markets for which it has detailed sectoral studies.

215. The fact that the Court of Appeal and Supreme Court recently upheld its decisions (2016) is a first success for the Competition Council with regard to control of the quality of its investigative and deliberative work.

216. Through the frequent and extensive participation of judges in the study days and seminars organised by the Competition Council, the judicial authorities have shown their determination to increase their skills and hence to facilitate the admissibility of evidence provided by the Competition Council when the courts hear the cases brought before them.