



MENA Commercial Law Strengthening project- CLS

National Thematic Study on “Competition Policy and Law in Tunisia”

Executive Summary

This study comes within the second phase of the MENA-CLS Project where Competition Law and policy in Tunisia was selected in view of its pioneering experience in the region. Moreover, this study covered competition policy in its broad concept while focusing on the competition laws and their practical implementation.

1. The report encloses four parts:

- **Part One:** reviews the background and the economic context of the Competition Law's implementation. This part specifically focuses on the interaction between the competition policy and other market oriented economic policies that contribute to providing enabling conditions for the law's implementation. This part also highlights the importance of the enactment of such law and provides an overview on the evolution of the national economy's structure as well as the state of competition in key sectors and their role in economic policies.
- **Part Two:** reviews the legislative and institutional framework for competition and highlights the evolution of legal provisions and the reasons behind this evolution as well as the judicial jurisprudence.
- **Part Three:** assesses the implementation of the law by reviewing the evolution of the activities of the competition agency and the development of case law it also assesses the contribution of implementing the competition law to strengthening the national economy as well as addressing problems that may arise in the market.
- **Part Four:** focuses on the formulation of the study's recommendations both at the level of structural reforms to enhance competition or legislative and executive reforms to implement the Competition Law.

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

For the purpose of this study, the national team undertook an inventory process for the most important economic legislations related to competition. Moreover, it benefited from the available judicial jurisprudence and outcomes of related studies and economic reports. The national team also carried out individual meetings with national competencies involved in this area to benefit from their opinions on the Tunisian experience in the framework of competition and development prospects.

They carried out surveys targeting 165 people from the legal, business and public communities to conduct an objective assessment on 1) their views regarding business laws and their role in enabling investment and facilitating business, 2) the degree of familiarity with these laws in general and competition law in particular 3) the degree of satisfaction on the performance of agencies responsible for the implementation and 4) the level of competition in different economic sectors in general as well as strengths and reform priorities.

This study was subject to discussion and further enrichment within the framework of the national workshop held on December 17, 2009 grouping more than 100 persons

representing all involved sectors such as businesspersons, representatives from the public sector, lawyers, judges, university professors and media representatives.

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

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

The study also reviewed the evolution of competition in the national economy despite the structurally justified disparity between the sectors.

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

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

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

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

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

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

7. In the area of structural reforms aimed at enhancing the level of competition in the national economy, the study's recommendations included in particular:
 - Further facilitating access to economic activities through continuing efforts to simplify procedures and reduce cost as well as opening certain sectors granted to

public institutions in the form of concessions taking into account the social dimension and maintaining the amending role of the state in strategic sectors.

- Promoting competition in certain sectors that are still framed or characterized by a weak level of competition, such as the free professions.
- Benefiting from the underway legislative diagnosis on the services sector for the development of competition rules.
- Promoting freedom of trade and continuing efforts to reduce the level of tariff and non-tariff protection.
- Progressing in the liberalization of prices in certain sectors that are still framed and that meet the necessary conditions of competition.
- Further activating the role of consumers in raising competitiveness and taking advantage of which is provided by the National Institute of Consumption which was finally established.

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

- The development of a vertical agreement processing system by granting bloc exemptions to selective distribution contracts to encourage these types of contracts particularly franchise in accordance with Chapter 6 of the Competition Law.
- Expanding the field of mandatory counseling of the Competition Council to cover ordinal texts as well as draft laws that have an impact on competition.
- Authorizing the resort to the Council's jurisprudence
- Strengthening the independence of the Council's investigation body (reporters).
- Calling on the government's representative automatically in cases of appeal and cassation to the decisions of the Competition Council and empowering him to make notes and observations
- Requiring the Council's reporters and non-judge members to take the oath as is the case for the Directorate General for Competition and the judges.
- Enriching the legal drafting with certain concepts developed by the Council's jurisprudence such as the concept of the institution, components of a dominant position and of an economic dependency and the concept of predatory pricing (extremely low prices)
- Requiring the exemption of agreements with weak impact

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

- Avoiding the duplication of authorization procedures for economic concentration operations by better coordinating the review of these operations by the agencies involved
- Establishing a special official magazine to publish the decisions and opinions of the Competition Council and the decisions of the Minister in authorization procedures relating to economic concentration or exempting practices justified by economic progress.

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

- Promoting the development of a competition culture and activating the contribution of all operators and parties to the process
- Enhancing the interaction between the various actors intervening in the implementation of the law and between economic agents.
- Developing monitoring and information systems on the status of competition in various sectors of the economy, drawing on the work of the National Observatory for the Supply and Prices and the cooperation with the university (researches and studies).
- Strengthening programs on developing national capacities for the implementation of the law and benefiting from all available mechanisms and international cooperation
- Enhancing the teaching of competition and consuming laws in Tunisian universities

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

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

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

- Devote greater attention to the practice of major distribution channels and their relationship with producers

- Pay attention to concentration trends among large retailers to prevent anti-competitive practices
 - Contribute to the elaboration of a strategy to address the growing phenomenon of parallel trade and its negative repercussions on the evolution of the organized sector
 - Continue the study of standards for economic activity to ensure they do not include conditions limiting competition
 - Study the status of competition in major economic sectors and activities
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13. Moreover, the national workshop to discuss the study (17/12/2009) highlighted certain reservations regarding the feasibility of accelerating the process of privatization to stimulate competition as well as the feasibility of including a prison sentence against any violation to the competition laws and policies since Tunisia tend to abandon penalties that deprive economic freedom