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ABSTRACT

This on-Topic is a collection of essays on a range of current issues which are of academic and practical significance within the Middle East and North Africa (MENA). Important competition law regimes in the region are discussed, with specific focus on major trends and developments. The various essays offer good attention to detail and appropriate analysis when surveying these developments. They also give readers the opportunity to reflect on the differences and similarities between the regimes in question. With this collective effort, the MENA region's light shines more strongly in the world of competition law and policy.

Ce dossier est une collection d'articles sur une série de questions actuelles qui sont d'une importance académique et pratique au Moyen-Orient et en Afrique du Nord (MENA). Les principaux régimes de droit de la concurrence de la région sont examinés, avec un accent particulier sur les tendances et les développements majeurs. Les différents articles accordent une grande attention aux détails et à une analyse appropriée lorsqu'ils examinent ces développements. Ils donnent également aux lecteurs l'occasion de réfléchir aux différences et aux similitudes entre les régimes en question. Grâce à cet effort collectif, la région MENA brille davantage dans le monde du droit et de la politique de la concurrence.

Competition law and policy in the Middle East and North Africa

Foreword

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1. Twenty years ago, I began writing my monograph, *Competition Law and Policy in the Middle East* (Cambridge University Press). The book would eventually be the first published volume on this important topic. As I embarked on the project, I was motivated by many factors. The widespread perception had been, however, that there was not enough happening on the ground across the region to justify a whole book, not to mention the difficulty in discovering trends and developments in 21 countries. Almost all these countries were lagging behind in terms of accessibility to relevant materials and certainly lacked proper expertise in competition law and policy.

2. When the book appeared in 2007, my hope was for it to be a door opener so that many publications — especially authored and edited volumes — would enter the vast and impressive world of competition law literature and scholarship. Since then, various informative articles and essays have appeared in academic journals and other fora. Many of these have been written by authors of Middle Eastern origins or with links to the region. Every time a new publication appears on Middle Eastern competition matters, I feel immense joy. But I must admit I was beyond delighted when *Concurrences* got in touch informing me of its plan to publish an On-Topic on the Middle East and North Africa (MENA). I congratulate everyone involved in making the decision to publish the On-Topic, and I commend all the authors who produced the interesting papers discussed below. With this collection of essays, more light is being shed on the MENA region.

3. The last few years have witnessed many significant developments on the MENA competition law scene. New laws and several amendments to existing rules, as well as detailed administrative guidance, have appeared, which are geared towards: (i) effective and efficient enforcement; (ii) sound legal and economic analysis; and (iii) transparency and legal certainty for the benefit of businesses and legal advisors. Several high-profile investigations have been conducted with some remarkable decisions being rendered. Even arbitration avenues have been pursued at the highest level in precedent-setting disputes, which centred exclusively on the interpretation and application of the competition rules of some countries in the region. Merger control, vertical restraints, abusive dominance, anti-cartel enforcement and — gradually — digital markets have become focus areas in several MENA countries. Attention has also been given by some competition authorities in the region to formal and informal bilateral ties. Some of these ties have not been limited to MENA countries themselves: they have reached parts of wider Africa and other world continents. At a regional level, in 2020 the United Nations Economic and Social Commission for Western Asia (ESCWA), the United Nations Conference on Trade and Development (UNCTAD) and the Organisation for Economic Co-operation and Development (OECD) launched their Arab Competition Forum (now in its fifth

edition). This was followed by the launch — in 2022 — of the Arab Competition Network (ACN), which aims to further cooperation between competition authorities of Arab countries.

4. Most of these developments are discussed or reflected in the essays at hand. These developments clearly show how important progress has been made in recent times. They prompt five observations to be made, as follows.

5. First, the potential has always been there for most MENA nations to advance themselves (considerably) more in the competition law arena.

6. In saying "most," I am allowing an exception for at least six nations, which have been victims of serious progress-impeding conflicts: Libya, Palestine, Iraq, Sudan, Syria, and Yemen. Those nations covered in the essays at hand, however, are all beyond the exception territory. Some of these nations have been more successful than others in realising their potential. The essay dealing with the Turkish competition law regime gives an example in point. Çiğdem G. Okkaoğlu, Yavuz Selim Günay and Eymen Kurt — conducting thorough research and meticulous analysis — skilfully mark the country's move from past to present on the topic of physical investigations and what the future should or might look like with the expanding role of technology and its rapid advancement. The authors ultimately paint a candid picture of the use by the Turkish Competition Authority (TCA) of different technological tools as part of its investigations and offer an outlook for the future. The TCA's experience is worth consulting by fellow MENA competition authorities.

7. Secondly, there remains a noticeable trend of "copy and paste" exercise on the part of the majority of MENA nations whereby elements of the European Union (EU) competition law regime in particular are introduced domestically but without appropriate assessment of their suitability or without giving these elements the necessary domestic orientation.

8. The contribution by Asad Ahmad and Salma Farouq on developments in the Kingdom of Saudi Arabia's merger control regime — "Navigating the New Saudi Arabia Merger Control Regulations" — offers a detailed account of all changes introduced and some enforcement actions by the General Authority for Competition (GAC) in recent times. Whilst not explicitly acknowledging the similarities with elements of the EU merger control regime (in particular, guidance of the European Commission and EU Courts' jurisprudence), the contribution does reveal that these similarities are extensive. Of course, Saudi Arabia is not the only MENA nations in which the trend is possible to detect, whether at present or in the past — as can be seen from the contribution by Hugh Hollman and Pauline Van Sande, "Modernizing Merger Control: Egypt's Strategic Reforms and Their International Resonance". In a fairly comprehensive essay benefitting from an analytical tone in places, the authors acknowledge the similarities between the recently introduced changes to the Egyptian merger control regime and the EU regime. The authors discuss these changes and spell out these similarities in an appropriate context.

9. One ought not, needless to say, protest against countries or competition authorities in the region feeling attracted to or influenced by the EU regime. This is perfectly understandable. Having said that, where such influence results in a pure copy-and-paste exercise, the opportunity to have rules that are workable and optimal for domestic circumstances will be missed. Interestingly, Turkey, which has just been mentioned above, offers arguably the most remarkable past of close following of EU competition law and practice within the region. That process has, in fairness, slowed down at some point with the TCA and the Turkish government more widely steering the Turkish competition law regime towards a more Turkish identity and orientation.

10. What should happen in any given country, at the very least, is a careful evaluation of the EU experience and its suitability in light of prevailing domestic economic, cultural, political, and social circumstances. These circumstances should be the guiding compass when introducing fresh competition rules and guidelines or amendments to these. In this respect, it is worth noting the contribution by Professor Rachid El Bazzim ("Negotiated Leniency Procedures in Moroccan Competition Law"), which gives a careful assessment of a highly practical and valuable tool in anti-cartel enforcement in the country. Professor El Bazzim demonstrates quite well why a competition law or an enforcement mechanism (in this case, the leniency cartel programme) "*should consider Morocco's specific factors to be effective and appealing*." (Emphasis not in original)

11. Thirdly, having detailed laws, rules or guidance (however carefully drafted) is not sufficient, in itself, to guarantee an effective protection of competition. Proper enforcement is needed, as well as an economy that is open to competition and features a healthy competition culture.

12. What gives a country proper competition enforcement is the presence of a fully independent competition authority with a clear mandate and sufficient resources to discharge its duties. What gives such a country an economy that is open to competition (i.e. an economy genuinely open for business) and a healthy competition culture are fundamental and strategic decisions, which, among other things, keep "special interests" at an appropriate distance and set a limit on the scope of exclusions or exemptions in the law. Looking around the MENA region, it is clear most countries face an obstacle on these two fronts. The room is certainly there for the laws in these countries to be amended: (i) to remove, in particular, problematic exclusions and exemptions, and (ii) for the local competition authorities to be given greater independence. Moreover, the dominance of special interests — often taking the form of overlapping business and political (family) ties — and the maintaining of an informal economy are a problem. Whilst I have only seen the abstract of the contribution on Algeria

by Rafik Rabia, the short text provided shows a relevant case study of a competition law at a crossroads where some of the issues mentioned here could be helpfully explored.

13. Fourthly, there should be greater use made of economic analysis; and where such analysis is already deployed, it should be made more sophisticated and more impactful.

14. I read the contribution by Muath Masri ("Antitrust in the Middle East: New Competition laws, and Time for More Economics") with particular interest. Whilst short, the contribution contains a realistic and fair perspective. The author makes what could be regarded as three practical suggestions on how to address the insufficient role played by economic analysis in the work of the vast majority of competition authorities in the MENA region. These are: (i) greater engagement on economic analysis during investigations; (ii) publishing detailed decisions containing the analysis and evidence behind these decisions; and (iii) (intriguingly) facilitating interaction between competition authorities and economists within the ACN.

15. Fifthly, the topic of poverty and how it could be tackled through competition law and policy remains relevant.

16. Poverty is a serious challenge throughout the MENA region. The basic position is that harm to competition causes particular harm to the poor. This creates a direct link between competition enforcement and a desirable reduction in poverty. The last contribution in the collection — "The Role of Competition Law Enforcement and Advocacy in Reducing Poverty" — addresses this topic. Whilst I had the opportunity to see only the abstract and plan for this contribution, they do give the impression of a highly promising essay by the author, Razan Alqasem, who puts forward fundamental and relevant questions to be explored.

17. In sum, this On-Topic and its essays are timely and most welcome. I do hope that this collective effort is the first of many to come. ■

Evolution of on-site inspections in Türkiye

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I. Introduction

1. On-site inspections are recognized as a critical and controversial tool in the enforcement of antitrust regulations. They have evolved significantly over time, driven by changing legal structures, technological advances, and privacy concerns. This article will discuss the past, present and future of on-site inspections taking into account legal technologies in this field.

2. This article begins by describing the objectives, legal basis and procedures, and then examines key periods and notable developments since their inception. With a particular focus on recent years, it assesses legislative changes, debates on personal data and attorney-client privilege, and important decisions by the Constitutional Court.

3. The research continues by looking to the future and emphasizes the increasing technological role of on-site inspections in competition law. It examines international examples and considers the future of on-site inspections after 2023 from various perspectives, taking into account Türkiye's unique dynamics. This comprehensive study aims to provide policymakers, legal professionals and academics in the field of competition law with valuable insights into understanding the complex world of on-site inspections and their enduring importance in competition regulation.

II. Overview of on-site inspections in antitrust law

1. Purpose

4. In terms of antitrust law, an on-site inspection can be defined as an inspection conducted by the competition authority's authorized staff at the premises of the undertaking. On-site inspections are usually the last solution in order to uncover evidence of anticompetitive behaviour that is secretive in nature.[1] In this context, it can be said that the legitimate purpose of on-site inspections is preserving the evidence that shows restriction of competition and can be used to prove the behaviour.[2] As a matter of fact, in a decision of the Council of State,[3] it has been stated that on-site inspections must be unannounced, sudden, swift and uninterrupted due to their nature.

1 A. R. M. Cruz, Competition Litigation: "Dawn Raids" and Administrative Searches and Seizure, *Ataneo Law Journal*, 2016, Vol. 61, Issue 2, pp. 491–553.

2 H. Brom, On-site Inspection and Legal Certainty, *Prague Law Working Papers Series* 2022/II/1, 2002.

3 Council of State 13th Branch, 26.03.2013, decision No. 2013/847.

2. Legal basis for on-site inspections

5. The protection of competition is a fundamental responsibility of the state under Article 167 of the Constitution, which provides that the state shall take measures to ensure and improve the proper and stable functioning of money, credit, capital, goods and services markets, and shall prevent monopolization and cartelization in the markets, whether occurring de facto or by collusion.

6. The legal basis for on-site inspections is found in Act No. 4054 on the Protection of Competition ("Act No. 4054"). According to Article 15 of this Act, the Competition Board ("Board") may conduct inspections at undertakings and associations of undertakings when it deems it necessary. With the amendment made in 2020, the Board may inspect all kinds of data and documents kept in physical and electronic media and information systems, and may take copies thereof. Authorized staff shall carry a certificate of authorization indicating the subject and purpose of the inspection, and an administrative fine will be imposed on the undertaking in case of false information being provided. A court order for an on-site inspection is only necessary in cases where the inspection is hindered or likely to be hindered.

7. However, as digital data are becoming increasingly subject to examinations, the Guideline on the Examination of Digital Data in On-Site Inspections (the "Digital Guideline") was published in 2020 in accordance with the principle of certainty in order to prevent confusion in practice.[4] In current practice, the inspection of digital data is carried out within this guideline's scope.

3. Procedure

8. In principle, on-site inspections may be conducted while performing all duties assigned to the Board by the law. On-site inspections may be carried out not only for the undertakings about which a full-fledged investigation is being carried out but also for all undertakings deemed necessary, even if there is no such obligation.

9. If the undertaking does not give permission, the premises will not be entered by force. In this case, the Board shall take a decision that the on-site inspection is hindered and impose an administrative fine. As will be explained in detail below, the Board is quite strict in exercising this rule and broadly interprets the concept of "hindrance of on-site inspection." In addition, one of the most important points about on-site inspection is the confidentiality of the examination due to the purpose of it. Accordingly, only the authorized staff who will conduct the on-site inspection knows it.

10. It is mandatory for the authorized staff who will go to the on-site inspection to come with a certificate of authorization. The subject and purpose of the inspection are clearly stated in the authorization certificate. The inspection is limited to the scope of the authorization certificate. However, undertakings often object to this by saying that the scope of the authorization is unclear and too broad.

III. Past of on-site inspections

1. 1998–2003: Development of the system

11. In order to comprehend the chronological development of on-site inspections, it will be useful to look at the first version of the relevant Articles of Act No. 4054. In the first version of the Act published in the Official Journal[5] dated 7.12.1994 and numbered 22140, there was no regulation on digital data, and the most important difference in Article 15 is the third paragraph added in 2003, which imposes the obligation on undertakings to provide all kinds of information and documents requested and enables the on-site inspection to be carried out with the order of the Criminal Court judge in cases when the inspection is hindered or there is a possibility of hindrance.

12. Another significant difference between the initial version of Act No. 4054 in 1994 and the current version in 2023 can be seen in Article 16. In subparagraph 1-b of Article 16, contrary to the current legislation, the fine was stipulated as a fixed amount in 1994. A similar situation is also valid for Article 17. In addition, the provision in paragraph 3 of the 1994 version of Article 16, which stipulated that the natural persons could also be fined in case of hindering on-site inspection, was subsequently abolished. In addition, with the Communiqué No. 1999/1 issued by the Authority,[6] the amounts of administrative fines under Articles 16 and 17 were changed and increased eightfold, affecting the practice from 1999 until the amendment of the law in 2008.

13. The first fine for hindrance of on-site inspection was imposed on Telsim and Turkcell[7] with the decision dated 14.12.1999 and numbered 99-57/614-391. The reasoning of the decision, which was published in 2008, was that the undertakings provided incomplete, false or misleading information to the Competition Board and did not make an invitation to end the hindrance.

4 https://www.rekabet.gov.tr/Dosya/kilavuzlar/yerinde-inceleme-kilavuz1-20201009091644514-pdf (last access 16.08.2023), (in Turkish: Yerinde İncelemelerde Dijital Verilerin İncelenmesine İlişkin Kılavuz)

5 Official Journal, dated 7.12.1994 and numbered 22140, https://www.resmigazete.gov.tr/arsiv/22140.pdf (last access 16.08.2023), (in Turkish: 13 Aralık 1994 Tarih ve 22140 sayılı Resmi Gazete)

6 Communiqué No. 1999/1 on the Announcement of the Increase of the Administrative Fines Regulated in Articles 16 and 17 of Act No. 4054 on the Protection of Competition to be Effective until 31.12.1999

7 Turkish Competition Authority, 14.12.1999, *Telsim and Turkcell*, case No. 99-57/614-391.

2. 2003–2008

14. As mentioned above, the most important amendment added to the Act in 2003 is the possibility of obtaining the order of the Criminal Court judge in cases where there is a possibility of hindrance. As a matter of fact, in practice, there are important decisions in which this procedure has been followed.[8]

15. However, in 2008, very important amendments were made to Articles 16 and 17 of the Act, which are related to on-site inspections, and these articles have taken their contemporary form. The amendment in Article 17 changed the fixed fines into proportional fines with the provision that administrative fines shall be imposed at the rate of five per ten thousand of the annual gross revenues of the companies at the end of the fiscal year preceding the decision, or if it is not possible to calculate this amount, at the end of the fiscal year closest to the date of the decision and to be determined by the Board. A similar situation applies to Article 16.

3. 2008–2020

16. In the period between 2008 and 2020, it can be said that the examination of digital data was approached more cautiously. Until the 2018 *Ortodonti* decision,[9] it can be said that the examination of digital data was not within the main scope of the inspections. In this decision, the WhatsApp conversations obtained by the authorized staff of the Authority had a serious impact on the shaping of the judgment paragraph of the relevant decision. As a matter of fact, from this date onwards, the examination of digital evidence such as e-mail accounts and WhatsApp Web conversations, if the necessary signs are seen, will become an ordinary practice and will become the main subject of the evaluations about hindrance of inspection.[10]

17. In fact, approximately three months after the *Ortodonti* decision, the first detailed examination of cell phones will be carried out in the *Mosaş* decision.[11] In the *Ege Gübre* decision, the Board did not accept the objection of violation of the right to privacy for the examination made on the personal e-mail account of the undertaking official and fined the undertaking for hindering the on-site inspection. The process that developed around these decisions will lead to the amendment of the Act regulating that digital data can also be the subject of on-site inspections in 2020 and the Digital Guideline, which will be published in the same year. As of this date, the examination of digital data has been placed on a clearer legal basis.

8 Turkish Competition Authority, 5.08.2010, *Hazır Beton*, case No. 10-52/1049-388.

9 Turkish Competition Authority, 29.03.2018, *Ortodonti*, case No. 18-09/157-77.

10 Turkish Competition Authority, 21.06.2018, *Mosaş*, case No. 18-20/356-176; 7.02.2019, *Ege Gübre*, case No. 19-06/51-18; 13.03.2019, *Coşkunlar*, case No. 19-12/146-67; 7.11.2019, *Siemens Healthcare*, case No. 19-38/581-247; 26.12.2019, *Askaynak*, case No. 19-46/793-346; 9.01.2020, *Groupe SEB*, case No. 20-03/31-14.

11 Turkish Competition Authority, *Mosaş Decision*

IV. Current situation and noteworthy matters about on-site inspections: 2020-2023

1. Amendment of the Act No. 4054 and guidance on the examination of digital data

18. In 2020, some amendments were made to Act No. 4054 with Act No. 7246 on the Amendment of the Act on the Protection of Competition ("Act No. 7246"), which are closely related to the examination of digital data in on-site inspections. In the preamble of the relevant law, the importance of on-site inspections for competition investigations was underlined, and it was emphasized that it was necessary to clarify the ability to inspect digital data and to make copies and printouts of digital data.[12] As a result of this amendment, the Digital Guideline was published, which put the examination of digital data in on-site inspections on a legal basis. According to this Guideline, authorized staff are entitled to examine servers, computers and storage devices belonging to the undertaking. The decision on whether to examine portable communication devices is made after a quick review to determine whether they contain data belonging to the undertaking. Devices containing data belonging to the undertaking are examined by means of forensic informatics tools. During the examination, the evidentiary data are separated and all other data are permanently deleted.

19. Portable communication devices for purely personal use may not be subject to inspection. During the inspection, it is the responsibility of the undertaking to prevent any interference with the data and the digital environment in which the data is kept. Undertaking officials are obliged to provide full and active support in matters requested by the authorized staff regarding information systems. If deemed necessary during the inspection, the digital data to be inspected shall be copied to two separate data storage. One of the copies is given to the undertaking. In the final report showing process of the on-site inspection, hash values are also included in this report to confirm that the data are exactly the same as their original form. One copy of the report shall be given to the authorized person of the undertaking. The report shall be signed by the authorized staff of the Turkish Competition Authority (TCA) and the official of the undertaking. In case the undertaking official refrains from signing, this shall be written in the report and the report shall be signed by at least two authorized staff of the TCA.

12 Preamble of Act No. 7246: https://www5.tbmm.gov.tr/sirasayi/donem27/yil01/ss215.pdf, (in Turkish: 7246 Sayılı Kanunun gerekçesi).

20. It is essential that the inspection is completed on the premises of the undertaking. However, if deemed necessary, the examination may continue in TCA's forensic informatics laboratory. In any case, the examination of digital data obtained from mobile phones shall be completed at the premises of the undertaking. The digital data to be inspected at the headquarters of the TCA are transferred to three separate data storage. One of the copies is left at the undertaking and the other two copies are placed in an envelope and secured by sealing it.

21. At the end of the inspection, all data storage used, except for the three copies mentioned above, are cleaned in such a way that the data contained therein cannot be recovered. The relevant undertaking is invited by the TCA to have a representative present for the examination to be continued in the forensic informatics laboratory. If it is claimed that the digital data in question contains confidential data, action shall be taken within the scope of the Communiqué on the Regulation of the Right of Access to the File and Protection of Trade Secrets.[13]

2. Attorney-client privilege

22. Attorney-client privilege, which is a well-established principle in today's legal world, is guaranteed by Article 36 of the Constitution. Indeed, according to the European Court of Human Rights (ECHR), the "*right to a fair trial*" under Article 6 and the "*right to respect for private and family life*" under Article 8 of the European Convention on Human Rights also cover communications between attorneys and their clients.[14] Although this issue is not explicitly mentioned in Act No. 4054 and other secondary legislation, the Board has developed a practice by using the provisions in other laws and the European Union practice as a guide.[15]

23. In the *Sanofi-Aventis*[16] decision, which is one of the most important decisions on this issue, the undertaking had stated that some documents obtained from the undertaking during the on-site inspection were created by a lawyer who was not an employee of the undertaking, so it was not possible to use these documents in full-fledged investigations. Although the decision states that there are no concrete grounds to support this claim, it mentions the European Union practice. Accordingly, for the attorney-client privilege to be applied, "*the communication in question must be within the scope of the client's right of defence and for that purpose*" and "*the written communication must be between independent lawyers and clients who are not in an employer-employee relationship with the client*." First of all, correspondence between the lawyer working under the undertaking and the officials of the undertaking cannot benefit from this privilege, and correspondence with independent lawyers, the contents of which are on matters that design, maintain or conceal the violation of competition, are not protected under this privilege.

24. In this context, in documents that are claimed to fall within the scope of this privilege, this claim must be supported by information and other documents. If the claim is supported with sufficient grounds, the relevant document shall be placed in a sealed envelope and brought to the Board. However, refusal to allow the on-site inspection of a document due to an unsubstantiated privilege defence may constitute a hindrance to the on-site inspection.

25. However, as the Board stated in the *CNR*[17] decision, the sealed envelope procedure is to be followed in the event that undertakings or their representatives claim confidentiality. Accordingly, undertakings wishing to benefit from this privilege should raise this claim, at the latest, at the time of the on-site inspection.[18] This is because, as stated in the doctrine, the authorized staff who will conduct the inspection are not obliged to *ex officio* observe the documents that will benefit from the attorney-client privilege.[19] In the *Dow*[20] decision on a similar issue, the undertaking did not raise any objection during the on-site inspection and did not annotate the report. However, the relevant documents were later submitted to the Board in sealed envelopes, and those that met the above criteria were returned to the undertaking.

26. The *EnerjiSA*[21] decision provides more detailed guidance on this issue. In the decision, the Board stated that the documents related to the competition compliance programme cannot benefit from the privilege and that the correspondences that can benefit from this privilege cannot be of a nature to assist infringements and must be related to the right of defence. Although the court of first instance[22] found the Board's decision unlawful on the grounds that the reports prepared within the scope of the competition compliance programme do not aim to circumvent the law or to guide companies in violating competition rules, but rather to ensure the undertaking's compliance with competition law rules, the regional administrative court[23] overturned the decision of the court of first instance by pointing out that such a document is also not within the scope of the right of defence. The Council of State[24] The Council of State

13 Communiqué No. 2010/3 on the Regulation of the Right of Access to the File and Protection of Trade Secrets, https://www.resmigazete.gov.tr/eskiler/2010/04/20100418-4.htm,(in Turkish: Dosyaya Giriş Hakkinin Düzenlenmesine Ve Ticari Sirlarin Korunmasina İlişkin 2010/3 Sayılı Tebliğ).

14 G. Gürkaynak, *Rekabet Hukuku*, Seçkin, Ankara, 2022, at 482.

15 Ibid.

16 Turkish Competition Authority, 20.04.2009, *Sanofi-Aventis*, case No. 09-16/374-88.

17 Turkish Competition Authority, 6.12.2016, *CNR*, case No. 09-46/1154-290. X

18 Gürkaynak, *supra* note 14, at 484.

19 Ibid.

20 Turkish Competition Authority, 2.08.2015, *Dow*, case No. 15-42/690-259.

21 Turkish Competition Authority, 6.12.2016, *EnerjiSA*, case No. 16-42/686-314.

22 Ankara 15th Administrative Court, 16.11.2017, decision No. 2017/3045.

23 Ankara Regional Administrative Court 8th Administrative Chamber, 10.10.2018, decision No. 2018/1236.

24 Council of State 13th Branch, 5.07.2022, decision No. 2022/3005

confirmed this decision of the regional administrative court. As a matter of fact, in a later decision, a total of 16 pages of documents taken during the on-site inspection and requested to be returned were dated before the start date of the preliminary investigation in which the relevant on-site inspection was carried out. Therefore, since it was understood that they were not directly related to the exercise of the right to defence, it was concluded that they could not be considered within the scope of the principle of confidentiality and that the request for their return should be rejected.[25] In another decision, it was stated that the presence of an independent lawyer in the information section of the e-mail containing the relevant document was not sufficient to benefit from the attorney-client privilege for this document.[26]

27. In addition to all these, it should also be noted that the rights of the lawyers of the undertaking to be present in the premise during the examination, to intervene in the process and to annotate the report are absolute. However, the authorized staff of the Authority does not have to wait for the lawyer to arrive to start the examination.[27] In practice, it can be seen that the authorized staff waits for the lawyers for a reasonable period of time,[28] but if this period exceeds the reasonable level, the experts start the examination, and actions such as document destruction during the interim period constitute hindrance of the on-site inspection.

3. Controversies on personal data and the Constitutional Court's norm review No. 2022/139

28. During on-site inspections, it can be seen that undertakings often raise concerns regarding personal data as an objection to the inspection. However, at the decisions so far, it can be seen that the Board has not found these concerns to be justified and has continued to rules fine in an uncompromising manner. It is observed that the concerns of the undertakings regarding personal data are generally that personal e-mail accounts cannot be examined, they have third-party data in their systems, and they do not want to be held liable for data protection law in Europe due to the application of the General Data Protection Regulation (GDPR) where the data is located, even if the data does not belong to third parties. According to the Board's case law established over time, personal devices or applications may also be examined, provided that they contain information about the undertaking and there is an indication to that effect.[29]

29. In the *Ege Gübre*[30] decision, the Board's authorized staff were hindered from obtaining a copy of an e-mail, which was found to contain information on competition violations, on the grounds that it was from the personal e-mail account of the undertaking's official. Subsequently, a decision of the Criminal Court judge was required for the authorized staff to access the relevant e-mail. In this case, the undertaking argued that access to the personal e-mail account of the relevant undertaking official was a clear violation of the freedom of communication and claimed that the evidence obtained in this way could not have any legal result. However, the Board did not take this defence seriously, even though it could be said to have a reasonable legal basis, and did not make any reference to Act No. 6698 on Protection of Personal Data ("Act No. 6698"), which was already in effect at that time, and imposed a fine for hindrance of on-site inspection. However, it is also interesting to note that the undertaking did not make any statement based on Act No. 6698, as understood from the file.

30. On the contrary, in the *Burdur Otogaz*[31] decision, which is a later decision, the Board's explanations are better grounded in legal terms. In this decision, it was accepted that the inspection of personal portable devices may raise privacy concerns, but the Board, citing the Spanish practice and referring to Article 20(4) of the Council of the European Union's Regulation 1/2003, stated that any area related to the commercial activity of the undertaking may be the subject of the inspection.[32]

31. In a 2019 decision,[33] the Board sets out clearer criteria for when personal e-mail accounts may be examined. Accordingly, when there is an indication that personal e-mail accounts are "*used for business purposes*," these accounts may be inspected, since the correspondences are extremely important in revealing the infringement, especially in terms of cartel allegations, and the inspection of personal e-mail accounts used for business directly affects the outcome of the on-site inspection. In fact, the reasoning of this decision emphasizes that the inspection did not start directly on the personal accounts, but that the personal accounts were started to be inspected in line with the evidence obtained from the e-mails in the corporate account. In this respect, it can be said that the Board's jurisprudence on personal accounts has become more solidly grounded in legal terms over time. As a matter of fact, the guidelines published in 2020 also introduced the practice of conducting a rapid review to determine whether personal accounts and devices contain information belonging to the undertaking.

32. One of the most striking decisions on personal data concerns is the *Siemens Healthcare*[34] decision. In this case, it was requested to grant global authorization to the

25 Turkish Competition Authority, 17.01.2019, *Warner Bros*, case No. 19-04/36-14.

26 Turkish Competition Authority, 14.11.2019, *Huawei*, case No. 19-40/670-288.

27 Turkish Competition Authority, 8.02.2018, Çekok *Gıda*, case No. 18-04/56-31.

28 Turkish Competition Authority, 5.08.2009, *Koçak Petrol*, case No. 09-34/837-M; Council of State 13th Branch, 26.03.2013, decision No. 2013/847; Council of State Chamber of Administrative Cases High Chamber, 18.01.2016, decision No. 2016/23.

29 Gürkaynak, *supra* note 14, at 480.

30 Turkish Competition Authority, *Ege Gübre Decison*

31 Turkish Competition Authority, 9.01.2020, *Burdur Otogaz*, case No. 20-03/28-12.

32 Gürkaynak, *supra* note 14, at 481.

33 Turkish Competition Authority, 26.12.2019, *Askaynak*, case No. 19-46/793-346.

34 Turkish Competition Authority, *Siemens Healthcare Decision*

personal data of the undertaking in the eDiscovery application for the search of the database of the undertaking for employees in Türkiye. The undertaking rejected this request on the grounds that different data protection laws may be violated due to its employees residing in the EU. Although the undertaking subsequently installed the system in a way that would not cause such a violation and invited the Authority's experts for inspection, the Board ruled imposing a fine for hindrance since it could not be proved that the data was protected as required on the first day of the inspection and the inspection could not be performed with the eDiscovery system. In this decision, the Board also took an uncompromising approach to the delay based on objections to the protection of personal data, which has a reasonable legal basis. The reasoning of this decision is noteworthy as to why the Board's case law is in this direction. The Board reiterates that, by its nature, on-site inspections should be unannounced, sudden, swift and uninterrupted, and underlines that what should be understood by not hindering the on-site inspection is that the documents to be submitted and the date of submission should be those deemed appropriate by the Authority, not those permitted by the undertaking.

33. However, the debate on the protection of personal data in on-site inspections is not limited to this. The amendment to Act No. 4054 in 2020, which allows the Authority to take copies and physical samples of the data of the undertakings during on-site inspections, was brought before the Turkish Constitutional Court ("the Constitutional Court") by the members of the Parliament with a request for annulment through abstract norm review.[35] The ground for the request for annulment was that there was an ambiguous and disproportionate interference with the right to protection of personal data, as there were no restrictions on the copying process in question. However, the Constitutional Court did not agree with this view. The Constitutional Court stated that there is no unconstitutional situation since the subject, scope and limits of the authority recognized in the rule and the cases in which it will be used are specified and the whole process will be carried out in accordance with Act No. 6698, in the on-site inspections. Moreover, since the rule in the relevant law is within the scope of the obligation to prevent monopoly and cartelization in the markets, it has a legitimate basis in terms of the requirements of a democratic society.

34. However, the dissenting votes of this decision also contain remarkable explanations. In his dissenting opinion, President Zühtü Arslan stated that the rule foresees that "*all kinds of data*" may be collected, and that among these data, there may be "*sensitive*" ones. This type of personal data can only be processed with the consent of the relevant person or situations (clearly) stated in law. He also said that the relevant law does not provide any guarantee for sensitive personal data, and therefore, he did not agree with the majority opinion that the relevant article of the law is not unconstitutional.

35 Turkish Constitutional Court (norm review), 9.11.2022, decision No. 2022/139.

4. Physical hindrance of inspection

35. One of the most striking issues about on-site inspections is the physical hindrance of on-site inspections. Physical hindrance can be in the form of not allowing authorized staff to enter the premises of the undertaking at all, or it can be in the form of cutting the electricity, removing cables, dismantling cases, etc., while the experts are conducting the inspection. In addition, it is also observed that the undertakings stall the experts with various equivocations, provide false information about the undertaking officials present on the premise, and sometimes these incidents even turn into serious quarrels.

36. In the *Mosaş*[36] decision, the internet connection was disconnected by the undertaking and the computer cases were dismantled and taken away by the undertaking officials so that they could not be inspected, despite the fact that the authorized staff of the Authority stated that such behaviour prevented on-site inspection. The incident in question involves an undertaking official who, while removing computer cases and disconnecting cables to hinder the on-site inspection, tells the competition authority experts that they can do whatever they want, even file a report if they wish, but he must carry out his actions regardless. This is important in terms of reflecting the attitudes of the undertakings in physical obstructions. As a matter of fact, in addition to this, it was also observed that in a WhatsApp group of undertaking officials, they made plans such as breaking the modem and disrupting the internet connection. As a result, the undertaking was fined for hindering the on-site inspection. The reflections of the incident in this decision will be reflected in the guideline published in 2020, as "*it is the responsibility of the undertaking to prevent interference with the data and the environment in which the data is kept during the inspection.*" The methods used by the undertaking in this decision, such as system interruptions, will also be encountered in subsequent on-site inspections.[37]

37. Physical hindrance of the on-site inspection may sometimes occur through false statements or by making it impossible for the experts of the institution to start the inspection by not providing the documents that will enable the necessary planning to be made. In the *Lafarge Beton* decision,[38] the undertaking officials tried to prevent the authorized staff of the Authority from obtaining certain documents related to the inspection's planning.

38. The *ETİ*[39] decision is the most important example of the prevention of authorized staff from starting the examination by preventing them from obtaining information on the operation of the undertaking through false

36 Turkish Competition Authority, *Mosaş Decision*

37 Turkish Competition Authority, *Coşkunlar Decision*

38 Turkish Competition Authority, 9.12.2009, *Lafarge Beton*, case No. 09-58/1396-364.

39 Turkish Competition Authority, 29.04.2021, *ETİ*, case No. 21-24/278-123.

statements. In the decision, during the on-site inspection conducted during the pandemic, when the authorized staff of the Authority came to the undertaking, they were informed by security that security staff were the only ones on the premises. However, in the detailed inspection carried out later, it was understood that contrary to the initial information, some senior officials had been on the premises from the beginning. This is one of the reasons why the undertaking was penalized for hindering the on-site inspection. Indeed, it is the responsibility of the undertaking to find and show the documents requested by the experts of the institution.[40]

5. Hindrance of inspection in the digital environment

39. Hindering on-site inspections in the digital environment is one of the most common ways of hindrance and can occur in many different ways due to its nature. The most common methods are usually the deletion of relevant documents or messages. However, as will be explained in more detail below, the technologies can detect the deletion of data quite easily and sometimes restore this data. In cases where the data has been deleted, the general tendency of the Board is to directly issue a decision about hindrance of the on-site inspection, without even discussing the nature of the data or the general cooperation of the undertaking.

40. One of the most common objections to a decision about hindrance of on-site inspection in cases of data deletion is that the deletion took place on the private initiative of the relevant undertaking staff. However, the Board does not consider these objections to be valid in a very precise manner.[41] In addition, the fact that the deleted data can be retrieved later with forensic computing devices does not contradict the characterization of the relevant action as obstruction of on-site inspection. The Board states that accepting otherwise would mean a reward for the undertakings.[42]

41. One of the situations that most clearly reveals the erasure activity is that the data on the relevant device dates back much earlier than the date of the on-site inspection.[43] However, the Board does not rely solely on this when ruling to impose a fine due to hindrance; the log records of the relevant device are examined, and the deletion is proved by performing simulations in the laboratories on the premises of the Authority in accordance with the defence of the undertaking.[44]

42. Another issue that undertakings rely on to support that the deletion is based on legitimate grounds during on-site inspections is that serious embarrassment will arise for the person concerned due to the expressions used in the deleted messages. In the *P&G* decision,[45] since the titles of the group names were business-related, the relevant official's defence that the reason for the deletion was the embarrassment he would experience due to the obscene expressions he used being seen by others was not accepted.

43. In addition, during on-site inspections, undertakings use technically sophisticated ways to delete data and thus hinder the inspection. In the *TTNET* decision,[46] during the examination of the computer of an employee of the undertaking, it was observed that when the computer was first turned on, the authorized staff who carried out the examination observed that only four Word documents remained in a folder containing a large number of Word documents, which were already open for the purpose of examination at that moment. Subsequent technical examination revealed that the other documents in the folder had been deleted by the undertaking through remote access to the computer. Even though the documents were subsequently presented by the undertaking to the professional staff conducting the inspection, the deletion of the data was considered to be a hindrance of the on-site inspection on the grounds that it was not possible to determine whether any changes had been made to them. This decision is important in terms of showing the extent to which undertakings may hinder on-site inspection.

44. Another way to prevent on-site inspection in the digital environment is to deny the necessary authorizations regarding the system where the data can be examined to the authorized staff who will conduct the inspection. As a matter of fact, as seen in many decisions, undertakings refuse to provide the "authorization" that should be granted by the undertaking for the examination of data through eDiscovery, citing reasons such as "*since the undertaking has a global operation, it must be authorized by the global management*" or "*since the undertaking operates in many countries, the regulations regarding personal data in those countries are not compatible with the current on-site inspection process.*"[47] As a result, it is not possible for the authorized staff to access the data. As will be detailed below, in these cases, the Board finds that the on-site inspection is hindered.

45. Finally, the difficulty of proving that the on-site inspection was hindered in the digital environment also emerges as an important issue of debate. The most striking decision regarding this situation is the *A101* decision.[48] In the aforementioned decision, since there was no WhatsApp application on the work phone used by the

40 İ. Y. Aslan, *Rekabet Hukuku – Teori ve Uygulama*, Ekin, 2021, at 1294.

41 Turkish Competition Authority, 20.05.2021, *Unmaş*, case No. 21-26/327-152.

42 Ibid.

43 Turkish Competition Authority, 27.05.2021, *Sahibinden*, case No. 21-27/354-174; 17.06.2021, *Medicana*, case No. 21-31/400-202; 8.07.2021, *P&G*, case No. 21-34/452-227.

44 Turkish Competition Authority, *Sahibinden Decision*

45 Turkish Competition Authority, 8.07.2021, *P&G*, case No. 21-34/452-227.

46 Turkish Competition Authority, 18.07.2013, *TTNET*, case No. 13-46/601-M.

47 Turkish Competition Authority, 7.11.2019, *Unilever*, case No. 19-38/584-250; 7.11.2019, *Siemens Healthcare* Decision.

48 Turkish Competition Authority, 23.06.2022, *A101*, case No. 22-28/464-187.

undertaking official, the device was analysed with forensic software and no data indicating the presence of the WhatsApp application was found. When the WhatsApp application was accessed on the phone of another undertaking official, it was observed that the application remained on the start screen, asking for information such as phone number and name. When WhatsApp backups were then accessed, it was seen that the last backup was made the day before the on-site inspection. No log record of WhatsApp was found during the examination with the forensic informatics device. As a result, it was ruled that there was no need to impose an administrative fine due to the hindrance of the on-site inspection due to the lack of a finding as to whether the deletion was made on the phones and when it was made.

6. On-site inspections and immunity of domicile—the Constitutional Court's *Ford Otosan* individual application decision and its effects

6.1. Summary of the decision

46. In the decision, the Constitutional Court[49] ruled that Ford Otosan's "*right to property*" and the principle of "*right not to be tried or punished twice in criminal proceedings for the same criminal offence*" were not violated, while it ruled that the "*the right to trial within reasonable time*" was violated due to the almost 10 years between the preliminary investigation and the completion of the judicial process, and the "*right to residential immunity*" was violated due to the fact that on-site inspections were carried out without a court order, which will be the main subject of this section of the article.

47. The Constitutional Court begins its judgment by stating that workplaces are also included in the concept of residence. According to the Court, one of the criteria for limiting rights and freedoms is complying with the wording of the Constitution. As a matter of fact, the first paragraph of Article 21 of the Constitution emphasizes that no one's residence may be entered without a duly issued court order. Entering the residence with the approval of a competent authority, such as the Competition Board in this case, may only be possible in cases where there is an inconvenience in delay, but in these cases, the decision of the competent authority must be submitted to the approval of the judge in charge within 24 hours. Article 15 of Act No. 4054 does not envisage a regulation in line with these rules in the Constitution. As a matter of fact, the relevant provision in the Constitution applies to all cases where public officials attempt to enter the residences of individuals against their consent. Accordingly, the applicant's "*right to residential immunity*" has been violated by the current practice in the on-site inspections.

6.2. Legal consequences of the Constitutional Court decision

48. Basically, individual application decisions have two functions: objective and subjective. While the subjective function is to ensure the protection of the fundamental rights and freedoms of individuals through constitutional jurisdiction, the objective function is limited to the protection of the legal order and the development of constitutional jurisprudence.[50] Accordingly, the most fundamental characteristic of individual application judgments is that they have their direct effects only on the applicant, and unlike norm review, their objective function does not arise directly for everyone, and articles of law cannot be annulled, even if they are considered unconstitutional.

49. What is controversial about the effects of the decision is what will happen in the future since the relevant article is still in force. As a matter of fact, it is observed that there is no change in the Competition Authority's on-site inspection procedure. At this point, it can be said that since the related legislation is still in force, the authorized staff of the Competition Authority cannot use "*objection to an unlawful order*" to refrain from going to an on-site inspection within the scope of Article 24 of the Turkish Criminal Code.

50. In this case, the first issue to be examined is the effect the decision will have on the courts of first instance. In the doctrine, it can be seen that the discussions on this issue focus on whether the reasonings of individual application decisions should also be binding. While some authors argue that the reasonings of individual application decisions are also binding for all other courts,[51] others argue that such an interpretation lacks a positive basis.[52]

51. Considering these explanations, in terms of on-site inspections, which can be said to be a common practice, it is quite probable that the undertakings will try to obtain a ruling in their favour by bringing forward the Turkish Constitutional Court decision in the courts of first instance. When we look at the practice, it can be said that there are decisions of the court of first instance that are in line with the individual application decisions, as well as decisions that contradict the Constitutional Court's decision and where the case law of the Constitutional Court is (compulsorily) followed only afterwards, with a separate individual application and a particular violation decision.[53]

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49 Turkish Constitutional Court, 23.3.2023, *Ford Otomotiv Sanayi A.Ş.*, Individual Application No. 2019/40991, https://kararlarbilgibankasi.anayasa.gov.tr/BB/2019/40991 (accessed 8.08.2023), (in Turkish: *Ford Otomotiv Sanayi A.Ş. Bireysel Başvurusu*).

50 İ. E. Perdecioğlu, *Anayasa Mahkemesi Kararlarının Uyumlaşma Sorunu Mülkiyet Hakkı* Örneği, Adalet, Istanbul, 2018, at 50–57.

51 K. Kanadoğlu, *Anayasa Mahkemesi'ne Bireysel Başvuru,* Onikilevha, Istanbul, 2015, pp. 260–266 ; Perdecioğlu, *supra* note 50, at 25.

52 Y. Akçil, Bireysel Başvuru Kararlarının Subjektif ve Objektif Etkisinin İdari Yargı Yönünden İncelenmesi, *Anayasa Yargısı,* 2022, Vol. 39, Issue 1, pp. 1—45

53 Perdecioğlu, *supra* note 50, at 67; Turkish Constitutional Court, 3.01.2014, *Kemal Aktaş ve Selma Irmak*, Individual Application, No. 2014/85, https://kararlarbilgibankasi.anayasa.gov.tr/BB/2014/85 (accessed 8.08.2023).

52. However, the common point of the authors is that, in parallel and repeated cases, it is necessary for the courts to follow the case law of the Turkish Constitutional Court in cases that can be clearly linked to an individual application decision in order to avoid unnecessary compensation and workload as the matter will most likely be brought before the Turkish Constitutional Court again anyway.[54]

53. In this case, it can be said that it would be reasonable for the Competition Authority to act more selectively if it continues to conduct on-site inspections without a court decision. Otherwise, there is a possibility of recourse to the Authority for damages that may arise, and a serious economic burden may arise.

54. At this point, it is also necessary to mention the process[55] that may develop after a copy of the decision is sent to the Grand National Assembly of Türkiye ("TBMM") in order to redress the violation, since the decision arises from a "*structural problem*" in a law in force, as stated by the Constitutional Court.[56] As will be discussed in more detail below, in this case, the TBMM may or may not amend the law and may return the letter sent to it. As of September 2023, the Constitutional Court has sent 11 individual application decisions[57] to the TBMM for the removal of structural problems to redress violations. In one of these cases, the TBMM returned[58] the decision to the Constitutional Court, while in the others, no action was reported to have been taken.

55. In the last scenario, the norm in question may be brought before the Constitutional Court for annulment, this time through concrete norm review, on the grounds that it is contradicting with Article 21 of the Constitution.[59] In this case, it can be said that the individual application decision is a strong basis for the annulment of the article of law. As a matter of fact, in an individual application decision,[60] the Constitutional Court ruled a violation of rights due to the fact that a married woman cannot use her own surname alone, and then annulled this norm when the relevant issue came before it through concrete norm review.[61] However, it should be taken into consideration that there were almost 10 years between the two decisions. In another case, the Constitutional Court rejected the norm review application of the retrial court after the individual application,[62] on the grounds of lack of jurisdiction since the relevant law could not be applied in this retrial.[63] Considering all these possibilities, it is difficult to give a clear opinion on the process that will develop, both because the above-mentioned possibilities are complex legal processes and because it is really uncertain which of these possibilities will be realized. Indeed, it may take years to clarify the path that the courts of first instance will follow.

6.3. Situation outside Türkiye

56. In terms of the ECHR jurisprudence on the right to residential immunity and on-site inspections, it would be useful to examine the situation in other countries. The main decision of the ECHR in the field of on-site inspections is the *Niemetz*[64] judgment, in which the ECHR ruled that workplaces also have the status of residence. In addition, the ECHR stated that in order for interference with the right to residential immunity by public force to be legitimate, the interference must be prescribed by law, pursue a legitimate aim and be to the extent necessary in a democratic society.[65] In terms of on-site inspections, the legitimate aim is the protection of the economic welfare of the country through competition law.[66]

57. However, in determining the necessity of interference in a democratic society, the ECHR looks for the existence of adequate and effective safeguards to prevent the abuse of the powers of power by the relevant public authority.[67] In this respect, the ECHR has held that the fact that the authorities themselves determine almost all of the characteristics of the inspections they will carry out does not provide the necessary and effective safeguards.[68] However, the ECHR does not always mandate a court order for searches of workplaces. On the other hand, in order for a search without a court order to be considered legitimate, an independent observer must be present.[69]

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54 Akçil, *supra* note 52; Kanadoğlu, *supra* note 51; Perdecioğlu, *supra* note 50.

55 *See* A. Kılıç, Anayasa Mahkemesinin Bireysel Başvuru Kararlarının Türkiye Büyük Millet Meclisine Bildirilmesi, *Anayasa Yargısı*, 2021, Vol. 38, Issue 1, pp. 85–126

56 Turkish Constitutional Court, 23.3.2023, *Ford Otomotiv Sanayi A.Ş.*, Individual Application No. 2019/40991 para. VI/C, at 48.

57 Turkish Constitutional Court, Individual Application Cases: *Y.T.* App. No. 2016/22418; *Süleyman Başmeydan* App. No. 2015/6164; *Bedrettin Morina* App. No. 2017/40089; *Sabri Uhrağ* Application App. No. 2017/34596; *Kadri Enis Berberoğlu* No. (1): 2017/27793, (2): 2018/30030, (3): 2020/32949; *Sabri Uhrağ* App., *Süleyman Kurtel* App. No. 2016/1808; *Keskin Kalem Yayıncılık ve Ticaret A.Ş. ve diğerleri* App. No. 2018/14884; *Nevriye Kuruç* App. No. 2021/58970; *Yeni Gün Haber Ajansı Basın ve Yayıncılık A.Ş. ve diğerleri* App. No. 2016/5903; *Tarık Yüksel* App. No. 2019/1255; *E.Y.* App. No. 2018/10482.

58 Turkish Constitutional Court, *Kadri Enis Berberoğlu*, Individual Applications No. (1): 2017/27793, (2): 2018/30030, (3): 2020/32949.

59 İ. Şahbaz, Bireysel Başvuru Üzerine Verilen İhlal Kararı Sonrası Somut Norm Denetimi, *Maltepe* Üniversitesi *Hukuk Fakültesi Dergisi*, 2022, Vol. 1, Issue 2, pp. 117–175

60 Turkish Constitutional Court, 19.12.2013, *Sevim Akat Eşki*, Individual Application No. 2013/2187.

61 Turkish Constitutional Court (norm review – general assembly), 14.01.2021, Decision No. 2021/1.

62 *G.B.* Individual Application No. 2016/3122.

63 Turkish Constitutional Court (norm review – general assembly), 14.01.2021, Decision No. 2021/1.

64 *Niemetz v. Germany*, Application No. 13710/88, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57887%22]} (accessed 8.08.2023).

65 H. Gündüz, Avrupa İnsan Hakları Sözleşmesinin Rekabet Hukukuna Etkileri, Rekabet Kurumu, 2009, at 21.

66 *Société Colas Est and others v. France*, Application No. 37971/97, https://hudoc.echr.coe.int/app/conversion/docx/?library=ECHR&id=001-60431&filename=CASE%20OF%20STES%20COLAS%20EST%20AND%20OTHERS%20v.%20FRANCE.docx&logEvent=False (accessed 8.08.2023) (in French).

67 Gündüz, *supra* note 65, at 22.

68 *Crémieux v. France*, Application No. 11471/85, https://hudoc.echr.coe.int/ENG#{%22itemid%22:[%22002-9644%22]} (accessed 8.08.2023); *Miailhe v. France*, Application No. 12661/87, https://www.stradalex.com/en/sl_src_publ_jur_int/document/echr_12661-87_001-82929 (accessed 8.08.2023).

69 Gündüz, *supra* note 65, at 23; *Camenzind v. Switzerland*, Application No. 136/1996/755/954, https://hudoc.echr.coe.int/app/conversion/docx/pdf?library=ECHR&id=001-58125&filename=CASE%20OF%20CAMENZIND%20v.%20SWITZERLAND.pdf&logEvent=False (accessed 8.08.2023).

58. Indeed, very similar to the Turkish Competition Authority's powers, the ECHR ruled that the French Competition Authority, which has the sole authority to determine the appropriateness, number, duration and scope of the on-site inspection, violated the right to residential immunity when the on-site inspection was not based on a court order and was not attended by an independent observer.[70] In this respect, it can be said that the Constitutional Court's violation of rights decision in the individual application is in line with the ECHR case law.

59. Finally, it can be said that the countries in the European Union where a court decision is required for an on-site inspection are in the minority. As stated in Pınar's article in 2011, these countries are Austria, Germany, Bulgaria, France, Ireland, Sweden, Hungary and Portugal.[71]

6.4. Future scenarios for Türkiye

60. In terms of the implications of the judgment for Türkiye, given that the ECHR judgments are similar, it would be useful to look at possible scenarios in terms of the position that the Turkish Parliament will take. First, the TBMM could amend the law and designate a court with general jurisdiction in Ankara for on-site inspections. Such a system would be in line with Article 21 of the Constitution, which provides that in cases of undue delay, the inspection would be carried out by a decision of the Board and then submitted to the approval of the judge in charge within 24 hours.

61. In a different scenario, an amendment to the relevant law may determine the competent court for the on-site inspection decision as the court in the jurisdiction of the undertaking. In this case, even though the Board may authorize an on-site inspection in cases of undue delay, the fact that the court is located in the jurisdiction of the undertaking may trigger arguments that confidentiality will be compromised and the purpose of the on-site inspection will naturally be impeded. Finally, the designation of the court as a criminal or civil court may also have different effects due to the inclinations of the courts.

62. In the last scenario, the TBMM does not make any legislative changes, resulting in an increase in judicial applications by the undertakings subject to on-site inspection. In such a scenario, the workload of the courts of first instance is almost certain to increase, but the workload of the Constitutional Court is also likely to increase depending on the attitude of the courts of first instance. The Constitutional Court, which is likely to take into account its previous decision in the individual applications that come before it, is likely to give compensation decisions, which will not only impose a serious financial burden on the state, but also create a very complex situation for both practitioners and undertakings.

70 Gündüz, *supra* note 65, at 24; *Société Colas Est and others v. France*, Application No. 37971/97.

71 H. Pınar, Avrupa Birliği Rekabet Hukukunda AB Komisyonunun İnceleme Yetkisi, *Rekabet Dergisi*, 2011, Vol. 12, Issue 4, pp. 117–118; Gündüz, *supra* note 65, at 33 fn.

V. The future of on-site inspections: Beyond 2023 and the increasing role of technology

1. The efficiency of on-site inspections and digital evidence collection

63. On-site inspections have been an effective tool for antitrust authorities because traditional methods are not sufficient to identify evidence of anticompetitive behaviour due to their secretive nature. Often, the success of full-fledged investigations is based on the evidence collected in on-site inspections.[72]

64. Due to the increasing digitalization of undertakings' operating systems, today the most common type of evidence is digital, as can be seen in the aforementioned decisions. At this stage, in addition to the more classical e-mail correspondence and WhatsApp messages, "cloud storage systems" are of particular importance. Cloud storage is a part of cloud computing where data and files are stored online through a provider. This data can be accessed over public or—sometimes—private network connections.[73] These systems have become popular because they are cost-effective. However, cloud-based systems are more difficult for the authorities to monitor due to the fact that their servers are often located in different countries, causing regulations on data transfer and technical difficulties in copying data.

2. The necessity of using technology in on-site inspections

65. The amount of data that needs to be examined in on-site inspections can exceed the capacity of human-powered systems because irrelevant data needs to be eliminated. As the OECD states, an efficient and useful review that achieves its objective requires access to relevant and accurate data.[74] In practice, the authorities tend to copy data storage devices and examine them at the Authority's premises, as the amount of data obtained during an inspection can take many hours to manage and sift out irrelevant data. Therefore, competition authorities use eDiscovery tools to cope with this process.

72 Cruz, *supra* note 1, at 493.

73 What Is Cloud Storage? Amazon Web Services, https://aws.amazon.com/what-is/cloud-storage/?nc1=h_ls (accessed 8.08.2023).

74 C. Volpin and T. Ohno, Digital Evidence Gathering in Cartel Investigations, September 2020, available at SSRN: https://ssrn.com/abstract=3917878 or http://dx.doi.org/10.2139/ssrn.3917878.

66. Time also becomes an important issue due to the amount of data obtained in inspections. As in any judicial process, competition investigations must be conducted within a reasonable period of time.[75] In addition, technological devices or software can be more successful in examinations due to their ability to search by concepts and categorize information. Moreover, these systems become smarter with each examination thanks to their artificial intelligence and machine learning capabilities.

67. The burden of analysing significant amounts of data, the inadequacy of technological devices or software, and the manpower required to conduct the research can cause some necessary and important information to be missed. It is quite possible for a human to miss detailed information and negatively affect the fate of the investigation. However, a software that is supported by artificial intelligence and has the advantages of machine learning and conducts its research using the concept of association with relevant information is much less likely to miss information than a human.

3. Examples of technologies used in on-site inspections from around the world

68. Natural language processing (NLP) offers important inferences from data sources to serve a variety of analytical goals, including description, categorization, data condensation, and the study of topics and emotions. NLP incorporates statistical and linguistic analysis methods to build a conceptual understanding of the text, such as identifying tags, phrases and their connections.[76] The output that the system will provide is an important guidance for authorities. This technique is used to automatically identify and quantify similarities in documents from different undertakings, to check the accuracy of the exported text and even to determine the possible impact of the information extracted from the document in a projection.[77]

69. Keyword search is the most commonly used method to analyse the data obtained in the on-site inspection. In this process, authorities often use advanced forensic search software, such as EnCase and Nuix, which can detect keywords despite spelling errors and get comprehensive results, with self-learning algorithms to increase detection capability. They are also capable of "conceptual search," a process far beyond what a human can do.[78] Conceptual search includes detecting synonyms and misspellings, identifying variations of keywords, and even detecting regularly used contact addresses.[79] Furthermore, this type of software can also detect encrypted information. Often, NLP techniques and eDiscovery tools are used together.[80]

70. The critical component for the hardware used by authorities in on-site inspections is accessing data with different input types.[81] For example, a standard data collection device called TX1 has SATA, USB 3.0, PCIe, FireWire, Ethernet and IDE ports.[82] This allows authorities to examine all types of data storage, from flash drives to SSDs. Another popular device is the Cellebrite, which is used to retrieve deleted data.[83] Since data deletion is a very common "escape route" in on-site inspections, this device can be considered to have an important function.

4. The case of Türkiye

71. When deemed necessary, the Turkish Competition Authority conducts an examination of the undertaking's IT system and security infrastructure. In this examination, it is checked whether the undertaking imposes access/use restrictions on the domain/IP range of rival undertakings. In this process, especially firewall, WAF, e-mail, logging and SIEM servers are examined.[84] A firewall can be considered a border gateway that manages network web activity with its sub-types, such as WAF.[85] SIEM is another security solution that shows the connection between logging, activities and effects.[86] Using these systems to audit the business's web activities is a smart and efficient shortcut.

72. The Authority also uses forensic software and hardware during on-site inspections to collect and analyse digitally stored data.[87] In this process, the authorities use devices of Cellebrite and XRY to collect data from the undertaking system and retrieve deleted data. The impact of these devices can be seen directly in the cases.[88]

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75 Turkish Constitutional Court, 23.3.2023, *Ford Otomotiv Sanayi A.Ş.*, Individual Application No. 2019/40991.

76 L. Parks and W. Peters, Natural Language Processing in Mixed-methods Text Analysis: A Workflow Approach, *International Journal of Social Research Methodology*, Vol. 26, Issue 4, 2023, pp. 377–389.

77 T. Schrepel and T. Groza, The Adoption of Computational Antitrust by Agencies: 2nd Annual Report, *Stanford Computational Antitrust*, Vol. 3, 2023, pp. 55–157, available at SSRN: https://ssrn.com/abstract=4476321 (accessed 13.07.2023).

78 Volpin and Ohno, *supra* note 74, at 9.

79 S. Ardiyok and B. Yüksel, The Use of Digital Evidence and Technological Tools in Competition Enforcement Actions and their Interference with Private and Privileged Information and Data Protection Rules, Mondaq, 5 April 2016, https://www.mondaq.com/turkey/trade-regulation-practices/479716/the-use-of-digital-evidence-and-technological-tools-in-competition-enforcement-actions-and-their-interference-with-private-and-privileged-information-and-data-protection-rules (accessed 15.08.2023); Volpin and Ohno, *supra* note 74, at 9.

80 Volpin and Ohno, *supra* note 74, at 9.

81 Schrepel and Groza, *supra* note 77.

82 https://digitalintelligence.com/storeproducts/d6280 (accessed 15.08.2023).

83 Turkish Competition Authority, 20.10.2022, *TMMOB Elektrik Müh. Odası*, case No. 22-48/698-296.

84 Schrepel and Groza, *supra* note 77.

85 https://www.kaspersky.com/resource-center/definitions/firewall (accessed 15.08.2023).

86 https://www.microsoft.com/en-us/security/business/security-101/what-is-siem#:~:text=improving%20your%20SIEM-,The%20role%20of%20SIEM%20for%20businesses,enterprise%2C%20effectively%20streamlining%20security%20workflows. (accessed 28.08.2024). X

87 *Supra* note 4.

88 Turkish Competition Authority, 20.10.2022, *TMMOB Elektrik Müh. Odası*, case No. 22-48/698-296, https://www.rekabet.gov.tr/Karar?kararId=9108b51c-ae30-4dc1-8217-ec488a5315a7 (accessed 28.08.2024).

73. Cellebrite and XRY have several products that are used specifically for advanced logical data extractions. Advanced logical extraction is a transfer method that combines logical and file system extractions, enabling complex extractions to be overcome.[89] Logical extraction uses software to extract all data from a system, which is then used to reconstruct the state of the device and the information it contains.[90] In a classic file system transfer, only data is transferred.[91] The state of the device is not reconfigured using software. Another way of transferring data involves physically accessing the data storage devices. However, while this method can be used for devices with standalone data storage, it cannot be used for cell phone-type devices as the storage parts cannot be removed without a harmless method.

74. XRY also has advanced systems that specialize in cloud storage systems. The system leverages tokens on mobile devices to facilitate application functionality and eliminates the need for users to repeatedly enter login credentials. This is advantageous when searching for data related to online content and applications for platforms such as Google, iCloud and WhatsApp.

75. The Authority uses eDiscovery tools for almost every on-site inspection of digital media. This tool is used for data stored in hardware and communication applications such as e-mail and WhatsApp. Authorities first use built-in data detection systems, such as the "recover deleted items" feature in Microsoft Outlook. However, the organization's experts can also perform manual reviews, sometimes with their own knowledge.

76. The Authority also uses Oxygen's software for advanced eDiscovery review.[92] Oxygen Corporate Explorer is designed for businesses and private organizations and enables efficient discovery of vital evidence through adaptive data transfer from remote workstations, cloud platforms and mobile/IoT devices. These advanced digital forensics tools speed up investigations and even identify deleted data by simplifying automated collection, comprehensive analysis and versatile reporting.[93]

5. Projections for the future

77. The rapid advancement of technology will make data collection, analysis and processing more efficient. Some of these may be as follows:

- Automation and artificial intelligence integration: By increasing the use of automation and artificial intelligence in on-site inspections, the speed and accuracy of data collection and analysis processes can be further improved. Increasing artificial intelligence algorithms can further refine the data already filtered by various software and provide a preliminary report.
- Data mining and projections: In the future, technologies used in on-site inspections may offer more data mining and projection capabilities. Through big data analytics, signs of competition infringements can be detected at earlier stages. This offers competition authorities a more proactive approach.
- Security and traceability with blockchain technology: Blockchain technology can enable more secure storage and traceability of data obtained in on-site inspections. A blockchain-based system used at the beginning of on-site inspections can be used to prevent subsequent deletion and manipulation of data by undertakings.

VI. Conclusion

78. As on-site inspections have been one of the most successful methods to uncover antitrust rule violations, it is clear that they are and will remain an indispensable practice in competition law. The main controversies about on-site inspections are the procedure, the alleged arbitrariness due to the lack of a court decision, and the hindrance by undertakings that actually arise from it. This is the reason why the case law of the ECHR requires that an on-site inspection be based on a court decision or require the participation of an independent element. Thus, with the assurance provided by the judiciary or an independent element on the undertaking, possible claims of arbitrariness will be eliminated. Thus, the attempts to hinder on-site inspections will perhaps decrease, and if not, the penalties to be imposed due to this will be based on clearer legal grounds. However, in Turkish practice, the fact that the decision on this issue is not a norm review but an individual application decision will cause various confusions.

79. Apart from this, the use of technological software and hardware is increasing day by day in on-site inspections, which is an efficient method of obtaining evidence. It can be said that the effect of this is largely positive. This is because competition violations will be detected both more successfully and more quickly, thus ensuring that the economic loss suffered by the society is eliminated faster and that the relevant undertaking's right to trial within a reasonable time is ensured. As a matter of fact, the recommendations of international organizations such as the OECD are in this direction. It seems inevitable that the technologies used in on-site inspections will be affected by the development of technology in the future. ■

89 Although the website cannot be accessed directly as the undertaking merged with another undertaking, recent pages can be viewed using WebArchive: https://web.archive.org/web/20230206070433/https://cellebrite.com/en/glossary/advanced-logical-extraction-mobile-device-forensics/; Promotional Brochure of XRY, https://www.msab.com/wp-content/uploads/2021/10/21-0001-08_XRY_Logical_EN.pdf (accessed 28.08.2024).

90 Ibid.

91 https://web.archive.org/web/20230201022940/https://cellebrite.com/en/glossary/file-system-extraction-forensics/; https://www.msab.com/product/xry-extract/xry-logical/ (accessed 15.08.2023).

92 Turkish Competition Authority, 8.12.2022, *Güven Grup*, case No. 22-54/831-341.

93 https://oxygenforensics.com/en/products/oxygen-corporate-explorer/ (accessed 15.08.2023).

Navigating the new Saudi Arabia's merger control regulations

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I. Introduction to Saudi Arabia's merger control legislation and enforcement authorities

1. Saudi Arabia's merger control legislation is primarily governed by Cabinet Resolution No. 372 of 1440H, which promulgates the Kingdom of Saudi Arabia (KSA) Royal Decree No. M75 of 1440 Hijri (equivalent to 2018 Gregorian) as amended ("KSA Competition Law"). This law is further supplemented by the implementing regulations outlined in Resolution No. 337 of 25/1/1441 Hijri (equivalent to 2019 Gregorian) as amended ("Executive Regulations"), which provide detailed guidance on its application.

2. In addition to the overarching legislation, the General Authority for Competition (GAC) issued Merger Review Guidelines in July 2021, providing specific directives and considerations tailored to different types of transactions and sectors. A new and updated version of these guidelines was released in November 2023, reflecting evolving regulatory frameworks and market dynamics ("Guidelines"). On 1 July 2024, the GAC proposed further amendments to the Guidelines for public consultation, with the feedback period ending on 1 August 2024. The proposed amendments (which have not been issued yet) introduced significant changes, including adjustments to notification thresholds, clarification of the change of control criterion, an exemption for joint ventures supporting the Saudi manufacturing sector, and limitations on the validity of clearance decisions. Given the importance of these revisions, it is expected that an updated version of the Guidelines will be officially announced in Q4 2024.

3. As the primary enforcement authority, the GAC oversees the implementation and enforcement of KSA's competition laws and regulations. The GAC supervises the enforcement of the KSA Competition Law and its Executive Regulations with the aim to enhance fair competition, encourage it, combat unfair monopolistic practices, ensure abundance and diversity of high-quality goods and services at competitive prices, and foster innovation. The GAC's tasks are embodied in three main functions: (i) safeguarding fair competition, (ii) enforcing regulations, and (iii) market monitoring.

4. It is mandatory to file with the GAC in the event a transaction falls within the definition of economic concentration and meets the financial thresholds in KSA.

5. Economic concentration is defined as any action that results in a total or partial transfer of ownership of assets, rights, equity, stocks, shares, or liabilities of a firm to another by way of merger, acquisition, takeover, or the joining of two or more management in a joint management, or any other form that leads to the control of an entity, including influencing its decision, the organisation of its administrative structure, or its voting system. This definition captures asset and share purchases, joint ventures, mergers, and takeovers.

6. Exceptions:

– The Guidelines confirm that if a transaction does not lead to a change of control over the target entity, then no GAC filing would be required.

– Public institutions and state-owned companies, if they are solely authorised by the government to supply goods or services in certain fields.

II. General presentation of the merger control

1. Scope of control in economic concentration

1.1 Change of control

7. An economic concentration takes place where there is a relevant change of control concerning an undertaking engaged in economic activity. Where a transaction involves the sale (or similar) of a mere asset, without there being a change of control concerning an undertaking engaged in an economic activity, the transaction is generally not notifiable.

8. An economic concentration takes place where there is a change in control or decisive influence over a relevant undertaking on a lasting basis. Such control may be acquired by one undertaking acting alone or by several undertakings acting jointly. Such a change in control or decisive influence can take place through different means and can take many different forms. The change in control can take place through various means, including but not limited to the following:

– A merger, when, for example, two or more previously independent undertakings amalgamate into a new undertaking, and the previously independent undertakings cease to exist as separate legal undertakings;

– An acquisition or takeover, when, for example, one previously independent undertaking acquires and absorbs another previously independent undertaking;

– An economic or management amalgamation of two different undertakings into a single undertaking, when, for example, the previously independent undertakings continue to exist as separate legal undertakings, but they are factually amalgamated into a single undertaking;

– One or more undertakings acquire direct or indirect control of the whole or part of one or more undertakings; or

– Other arrangements that bring the previously independent undertakings together under common or joint control.

9. It is now unambiguous that transactions that do not result in a change of control (e.g. acquisition of a minority interest with no veto rights over strategic decisions or internal restructuring within the same corporate group that results in no relevant change of control over the involved entities) are not within the scope of the KSA Competition Law and notice to the GAC is not required.

1.2 Definition of "control"

10. While prior to the issuance of the Guidelines, it remained unclear how the GAC would analyse the elements of control, the Guidelines now clarify this by defining "control" as "*the ability to exercise decisive influence over the undertaking. Control may be exercised solely or jointly*," including the appointment of senior management and approval of budgets, business plans, and major investments.

2. Joint ventures

11. The KSA Competition Law uses the principle of economic concentration to assess merger control issues. A joint venture will constitute an "economic concentration" when "*the joint venture forms an autonomous economic undertaking or performs the economic functions of an autonomous economic undertaking, on a lasting basis*." This would be considered a "full-function joint venture." The GAC will decide whether a joint venture would be considered a full-function joint venture on a case-by-case basis. Attributes of a full-function joint venture include the following:

– The joint venture must operate in a market and perform the functions normally carried out by a commercial undertaking operating in that market.

– The joint venture must ordinarily have a management team dedicated to its day-to-day operations and access to sufficient resources, including finance, staff, and assets (tangible and intangible), in order to conduct, on a lasting basis, its business activities within the area provided for in the joint-venture agreement.

– It must be intended to operate for a sufficiently long period to bring about a lasting change in the structure of the undertakings concerned (the joint-venture resources would be indicative, on this point).

– It will ordinarily have sufficient autonomy from its parent undertakings, in terms of its operational decision-making, to be considered a full-function joint venture.

12. A joint venture may begin its life as a non-full-function joint venture and subsequently becomes a full-function joint venture. It will, at that time, be considered as a new economic concentration requiring notification. Such a change in the nature of the joint venture can include the following:

– Enlarging the joint venture's activities, such as commencing commercial sales to third parties in an open market.

– Acquiring the whole or part of another undertaking from the parent undertakings.

– Transferring significant additional assets, contracts, know-how, or other rights to the joint venture, constituting or enabling an extension of its activities, products, or geographic markets beyond the scope of the original joint venture.

– Changing the organisational structure of the joint venture.

13. Changes in the nature of the joint venture are considered to have taken place upon the shareholder(s) or the joint venture's management taking the relevant decision that led to the joint venture becoming a full-function joint venture, or from when the relevant activity commenced.

3. Economic concentrations that should be notified

3.1 A Sufficient nexus exists with a KSA market

14. In determining whether an economic concentration involving a foreign entity triggers a filing requirement with the GAC, several factors are considered. The GAC will require an economic concentration taking place outside KSA to be notified where there is a sufficient nexus between the economic concentration and a market inside KSA. Pursuant to the KSA Competition Law and the Executive Regulations, this nexus is established where the foreign conduct may have an effect on a market inside KSA.

15. In practice, the GAC will consider that there is sufficient effect on a market in KSA where that potential effect is direct, substantial and reasonably foreseeable. Any conduct that has such a direct, substantial, and reasonably foreseeable effect on a market in KSA, including an economic concentration, is sufficient to establish KSA's jurisdiction over the conduct in accordance with the KSA Competition Law. In the interests of international comity, the GAC will in general not consider that there is sufficient effect on a market where the foreign conduct (including economic concentrations) does not meet these criteria. For clarity, direct effect is not limited to direct sales and may take place by way of indirect sales (e.g. sales by way of a distributor).

16. The GAC will also look at whether the actual or potential effect on competition is substantial. This requires the effect be on a market in KSA. The GAC considers it sufficient to establish jurisdiction where the actual or potential effect of the conduct on a market in KSA is more than trivial. The test for substantiality is not the same as the competition test for determining whether an economic concentration is permissible under the KSA Competition Law; in general, the threshold for establishing jurisdiction will be lower and require less evidence than the threshold for determining the permissibility of an economic concentration.

17. The GAC will also look to whether the potential effects on a market are reasonably foreseeable. This means that the effect of the foreign conduct (including an economic concentration) can be reasonably foreseen and is more than merely speculative.

18. In general, the GAC will consider it sufficient to establish a nexus if one or more of the foreign undertakings has sales in KSA that in total exceed 40 million Saudi riyals in KSA. However, direct sales in KSA are not necessary to establish a sufficient nexus to a KSA market. An economic concentration (or other conduct) among foreign undertakings may have an effect on competition in KSA where those firms are active in KSA, or may potentially be active in markets in KSA, or are active (or may potentially be active) in foreign markets that are sufficiently closely connected to markets in KSA. It will be sufficient for competitive outcomes inside KSA, as seen through the impact on prices, quality, or other dimensions of competition, to be affected in a sufficiently proximate way.

19. The Guidelines introduced a hypothetical scenario, showcasing the considerations involved in assessing foreign-to-foreign transactions under KSA's merger control regulations.

20. Hypothetical example summary:

– Alphaco, a Swiss manufacturer of turbines, intends to acquire Betaco, a Mexican machinery manufacturer. Neither company has any physical presence in KSA. However, Alphaco has previously sold turbines to a Saudi electricity generation company for 50 million Saudi riyals, and Betaco has previously bid (unsuccessfully) to sell transmission wires to another Saudi electricity provider.

– Although neither company meets the territorial or business presence criteria under KSA Competition Law, both companies have made sales into KSA (in the case of Alphaco exceeding 40 million Saudi riyals) or attempted to make sales into KSA (in the case of Betaco). Their past commercial activities demonstrate a potential direct effect on competition within KSA's relevant markets. Additionally, even if the companies had not attempted to sell into KSA, their merger would be likely to have a direct effect on the worldwide market for electricity generation and similar equipment, which may have a direct, causal effect on the prices for such equipment within KSA. Moreover, the potential effect would clearly be appreciable and more than trivial. As a result, the economic concentration would have a sufficient connection to KSA through an effect on a market in the KSA. Consequently, Alphaco and Betaco must notify their merger to the GAC if the other requirements for mandatory merger notification are fulfilled.

3.2 Financial thresholds

21. The GAC issued two amendments to the financial thresholds in 2023. The first amendment came in March 2023, where the GAC doubled the financial

threshold required to trigger an economic concentration filing from 100 million Saudi riyals to 200 million Saudi riyals combined global turnover of the entities party to the economic concentration. The second amendment to the same financial threshold was made in October 2023, wherein the GAC added two other financial thresholds which must be met to trigger an economic concentration filing.

22. As of today, and under the newly issued Guidelines, the GAC must be notified of any economic concentration that meets the criteria in the KSA Competition Law and all three of the following financial thresholds ("Financial Thresholds"):

- The total worldwide annual sales value of economic concentration parties exceeds 200 million Saudi riyals. For the calculation of this first threshold, it does not distinguish between sales taking place within KSA and those taking place outside KSA. Accordingly, the GAC will consider the relevant annual sales figures to be the combined aggregate group-wide and worldwide sales figures of all the relevant entities.
- The total worldwide annual sales value of the target establishment exceeds 40 million Saudi riyals; and
- The total annual sales value in Saudi Arabia of all economic concentration parties exceeds 40 million Saudi riyals.

23. One of the key elements of Saudi Vision 2030 is to make KSA a global investment powerhouse to stimulate the economy and diversify the KSA revenues. It is likely that the GAC hopes this new change in the Guidelines will reduce the need for reporting economic concentrations that do not substantively affect competition in KSA, thus removing a hardship for business transactions to take place.

III. Procedural rules

1. Compulsory notification and suspension

1.1 Parties responsible for submitting the filing

24. The parties intending to participate in the economic concentration transaction must notify the GAC of the transaction. It is worth mentioning that neither the KSA Competition Law nor the Guidelines place an obligation on any specific party to submit the filing. In practice, an economic concentration application may be submitted by any of the parties' legal representatives involved in the transaction. It is important to highlight that the legal representative tasked with submitting the economic concentration application will be required to obtain a power of attorney from each and every party directly involved in the transaction (buyer, seller and target).

1.2 Notification fee

25. The notification fee was reduced in June 2023, being set at 0.0002 times (0.02%) of the total annual sales of all parties participating in the transaction subject to the economic concentration filing, with a ceiling of 250,000 Saudi riyals (USD 66,573) rather than the previous cap of Saudi riyals 400,000 (USD 106, 518). For example: Notification Fee = (Merging/Acquiring entity revenues + Merged/Acquired entity revenues) x 0.0002.

1.3 Suspension

26. The KSA Competition Law provides that the undertakings participating in the economic concentration (or transaction) may not complete the transaction unless notified by the GAC of its approval in writing, or if 90 days have elapsed since the review period by the GAC commenced and it has not provided an approval or rejection.

2. Regulatory review

27. The 90-day regulatory review period will begin on the date on which the GAC notifies the applicant that the notification submission is complete. If the last day of this regulatory review period corresponds to an official holiday, the next working day thereafter shall be considered the last day of this regulatory review period.

28. The regulatory review period may be suspended under certain circumstances:

- When the GAC requests any information or documents from the applicants, it may suspend the regulatory review period from the date when it requests the information or documents to the date when the applicant provides the requested information or documents.
- When the GAC finds that the economic concentration parties or their representatives have provided incorrect information or failed to submit available information to the GAC within the prescribed period.

29. Where the regulatory review period is suspended, the days during which it is suspended are not counted as part of the 90-day regulatory review period.

30. Review process. The economic concentration must be notified to the GAC at least 90 days prior to the completion of the transaction. The applicant's notification submission will be considered complete when the applicant has satisfied the required conditions for notification, including providing the required information and documents necessary for complete notification. The 90-day regulatory review period will begin on the date on which the GAC formally informs the applicant that their notification submission is complete.

31. The regulatory review period may be suspended when:

– The GAC requests any information or documents from the applicants—it may suspend the regulatory review period from the date when it requests the information or documents to the date when the applicant provides the requested information or documents; or

– The GAC finds that the economic concentration parties or their representatives have provided incorrect information or failed to submit available information to the GAC within the prescribed period.

32. A case team will be appointed to conduct a review and investigation into the economic concentration within the 90-day period. Once the case team has completed its review, it will submit a detailed note outlining its opinion for the GAC's board of directors ("Board"). The Board will evaluate the case team's opinion, taking into account all relevant factors and its objectives under the KSA Competition Law and Executive Regulations. The Board will issue a decision in one of the following three ways:

– Approval of the economic concentration application;

– Refusal of the economic concentration application, where such decision is accompanied by a statement of reasons; or

– Approval of the economic concentration, subject to conditions determined by the Board, where such decision is accompanied by a statement of reasons.

33. Access to appeal and judicial review. The parties have 30 days from the date of notification or from the date specified for delivering the decision to the parties of the case, even if they failed to appear, to appeal the GAC's decision to the Riyadh Administrative Court of Appeal; otherwise, it will become final.

34. If one of the parties appeals the GAC's decision before the Riyadh Administrative Court of Appeal, that party must notify the GAC within three working days from the date of appeal, by means of a letter containing the GAC's decision number and date, and the number and date of the appeal filed with the Riyadh Administrative Court of Appeal and a copy thereof.

35. Typical timeline for appeals. No statistics have been released with respect to successful or unsuccessful appeals against the GAC. A failure by the concentration parties to submit a notification does not preclude the GAC from initiating a review and assessment of the economic concentration either prior to or after the completion of the transaction.

IV. Procedural infringements

1. Penalties/consequences of failure to notify an economic concentration

1.1 First the rule, then the application

36. On 25 February 2024, the GAC announced its sanction of fining two companies for their conclusion of an economic concentration in KSA without notifying the GAC. This economic concentration involved Panda Retail Company's ("Panda") acquisition of Atabat Al-Bab Telecom and Information Technology Company ("Atabat Al-Bab"). The GAC fined Panda and Atabat Al-Bab 400,000 Saudi riyals each and ordered them to publish the report of the penalty in the local media at their own expense.

37. It was found in the investigations that the two companies violated Article 7 of the KSA Competition Law by completing an acquisition deal without notifying the GAC. Article 7 of the KSA Competition Law mandates that establishments wishing to participate in the economic concentration process must inform the authority at least 90 days before its completion if the total value of annual sales exceeds an amount specified by the Executive Regulations.

38. This comes in line with the penalties prescribed under Article 19 of the KSA Competition Law for violating Article 7 of the KSA Competition Law, which are fines not exceeding 10% of the total value of the annual sales subject to the violation, or a fine not exceeding 10 million Saudi riyals if it is not feasible to estimate the annual sales or, at the GAC's discretion, a fine not exceeding three times the gains that the violator accrues from the commission of the violation.

39. It is worth mentioning that on 9 October 2020 and 16 October 2020, the GAC fined two companies 10 million Saudi riyals each for violations of the Saudi merger control regime coupled with other KSA Competition Law violations of creating a cartel for fixed market share control.

2. Penalties/consequences of inaccurate or misleading information

40. Pursuant to Article 49 of the Executive Regulations, if the notifying party is found to have withheld information, provided misleading information, or concealed or destroyed documents that are useful in the GAC's investigation, they would be punished by a fine not exceeding 5% of the total annual sales turnover or

not exceeding 5 million Saudi riyals when it is impossible to estimate the annual sales.

3. Penalties/consequences of incomplete notification

41. In the event a notification is made without all the requisite documents being provided, the GAC reserves the right to close the notification file. The GAC's annual reports for 2021, 2020, and 2019 reveal that only one application was rejected in 2021 due to an incomplete notification application.

V. A look at the recent applications

42. In April 2024, the GAC released its first quarterly report for the year 2024 on economic concentration applications ("GAC Report"). The GAC Report states that during the first quarter of 2024, the GAC received 93 economic concentration applications. The GAC approved 48 applications and issued 32 no-notification required certificates, while 13 applications are under review.

43. According to the GAC Report, the number of economic concentration applications decreased during the first quarter of 2024 compared to the first quarter of 2023 by a total of eight requests. Meanwhile, the total number of applications increased to 93 requests, compared to 83 requests in the first quarter of 2023:

– No objection (approved):

(i) 2023 Q1: 56
(ii) 2024 Q1: 48

– Not required to notify:

(i) 2023 Q1: 27
(ii) 2024 Q1: 32

– Under review:

(i) 2023 Q1: 23
(ii) 2024 Q1: 13

44. The no objection (approved) economic concentration applications received for 2024 Q1 categorised based on the month:

– January: 13

– February: 17

– March: 18

45. The GAC Report further provided that acquisitions accounted for 71% of the total transactions received by the GAC during the first quarter, followed by joint ventures at 21%, registering additional car agencies at 6%, and finally, mergers at 2%.

46. The horizontal relationship between commercial establishments accounted for the highest proportion at 50%, followed by the conglomerate relationship at 29%. Additionally, the vertical relationship obtained the lowest proportion, comprising 21% of economic concentration applications.

47. Interestingly, the manufacturing sector accounted for the largest share of economic concentration applications in the first quarter with 17 concentration requests, followed by the information and communications sector and the wholesale and retail trade sector, each with 7 economic concentration applications. The professional, scientific, and technical activities sector followed with three applications.

48. At the local level, economic concentration transactions by local establishments accounted for 38%, while foreign establishments accounted for 63% of the total transactions.

49. Similar to the report for the year 2023, the GAC Report also indicated a lack of instances where applications were rejected.

VI. Recent rejected applications

50. Pursuant to the GAC's annual report for 2022, the Board issued a decision of one economic concentration application rejection for 2022, which was in relation to the application for acquisition submitted by the National Gas and Industrialization Company (GASCO) of 55% of Alnaqel Alafdal Gas Company ("Alnaqel Alafdal").

51. In the year 2022, GAC received 316 applications for economic concentration. It issued 176 no-objection decisions. It processed 128 applications as non-reportable applications and rejected 1 application, while 11 applications remained under review.

52. GASCO had announced the signing of a share purchase agreement with Mohammed bin Manahi bin Munir Al-Buqami to acquire 55% of Alnaqel Alafdal. The total value of the transaction amounted to 29.1225 million Saudi riyals. The signing of the share purchase agreement and the announcement did not imply the completion of the transaction, as it is contingent upon GAC approval. However, the GAC issued its decision rejecting the transaction.

53. Through its interviews and investigations with competing third parties in relation to Alnaqel Alafdal, the GAC concluded the existence of significant concerns regarding the potential consequences of completing this transaction. Competition authorities are committed to maintaining a vibrant competitive landscape in markets and reducing barriers to entry. In its analysis of entry barriers resulting from the execution of the economic concentration transaction, the GAC arrived at two

conclusions:

– First, the GAC believed that the ownership by GASCO of competitors' data obtained from competitor retailers of Alnaqel Alafdal (such as their locations, capacity, financial and operational capabilities, and more) could potentially lead to the exploitation of this data being used to limit the growth and expansion of competing companies to the acquired Alnaqel Alafdal, or being proactive and reacting quickly to any shift in the business model undertaken by any of this company's competitors.

– Second, the GAC believed that the creation of a dominant and vertically integrated entity in most stages of the supply chain as a result of this transaction would make it more difficult for new competitors or investors to enter the gas supply market. This could make it difficult for the Ministry of Energy to succeed in the near future to open competition in supply chains.

VII. Conclusion

54. The GAC has significantly contributed to KSA's antitrust landscape through its proactive issuance of guidelines and regular annual reports. Through its guidelines, the GAC aims to offer insights into the regulatory framework to navigate merger control procedures with greater clarity. Moreover, the GAC's regular reports provide crucial insights into market dynamics, enforcement activities, and trends in economic concentrations.

55. Through its GCC-leading Anti-trust & Competition Department, GLA is happy to have established a great working relationship with the GAC. GLA has been at the forefront of navigating the new KSA Competition Regime, creating proper precedent and assisting in moulding this novel area of KSA law. ■

Modernizing merger control: Egypt's strategic reforms and their international resonance

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I. Introduction

1. Egypt's merger control regime has recently entered a new era marked by pivotal changes that promise to reshape the competitive landscape. As of 1 June 2024, Egypt introduced a mandatory pre-closing notification system, supplanting the previous post-closing review framework. This development heralds a new chapter in the enforcement of antitrust laws and is anticipated to have a profound impact on merger control in the country.

2. This article starts with an overview of the historical context surrounding the Egyptian merger control system, laying the groundwork for a deeper understanding of the recent reforms. It then describes the principal modifications introduced by the new regime, providing a comparison with international standards. This comparative analysis scrutinizes the extent to which Egypt's revised regulatory approach aligns with, or deviates from, the prevailing global norms and methodologies in merger control.

3. Particular emphasis is placed on the innovative aspects of Egypt's new regime. These include the scrutiny of so-called killer acquisitions, which are strategic buyouts that may stifle competition by eliminating emerging threats. This article also examines the assessment of minority shareholdings and the incorporation of data-driven analysis into the review process. Such forward-looking provisions underscore Egypt's commitment to a more proactive and pre-emptive regulatory stance.

4. In the concluding sections, the potential ramifications of Egypt's regulatory transformation for both international commerce and regional economic integration are considered. It pays special attention to how Egypt's new system might interact with and influence the supranational regulatory framework of the Common Market for Eastern and Southern Africa (COMESA) and the Arab Competition Network. By considering the implications of these regulatory changes, the article aims to offer some insights useful to future business strategy and economic policy within the region.

II. Historical background to the current development

5. National competition law in Egypt is a relatively recent development marked by the enactment of the Law on the Protection of Competition and the Prohibition of Monopolistic Practices, designated as Law No. 3 of 2005 (ECL 2005). This pivotal legislation provided for the establishment of the Egyptian Competition Authority (ECA), the regulatory body tasked with overseeing and enforcing the new competition law. Provisions dealing with competition did exist prior to ECL 2005, including Articles 345 and 346 of the Egyptian Criminal Law that dealt with anticompetitive behavior and monopolistic practices, but ECL 2005 was the first adoption of specific competition legislation.

6. In its formative years, the ECA concentrated its efforts on anticompetitive practices and agreements, cartels and the enforcement of anti-abuse rules. These efforts were aimed at mitigating what were considered the most egregious violations of competition law. Notably, the initial framework did not include a specific regime for merger control. Consequently, mergers were only subject to scrutiny under the general provisions governing

anticompetitive agreements, and this examination only occurred post-closing. However, the ECA did establish a mandatory notification system based on Article 19 of the 2005 law that required parties to notify the ECA of merger transactions within 30 days of closing. The ECA also set a notification threshold for transactions where the parties' combined turnover in Egypt reached or exceeded EGP 100 million (approx. USD 2 million). Failure to comply with this notification requirement within a set time could result in criminal fines. In 2015, to streamline the process, a guidance paper was published to provide a more comprehensive explanation of the notification process.

7. The ECA's authority to conduct inspections, as granted by Article 11(3) of the ECL, became instrumental in the evaluation of merger notifications. Although the ECA lacked a comprehensive framework for merger reviews, it utilized its inspection powers to initiate investigations into mergers that raised possible competition concerns. These investigations were conducted within the context of the existing provisions on anticompetitive agreements and abuse of dominance. Additionally, the ECA had the competence to issue non-binding opinions to other governmental bodies, a practice that was used in over 700 transactions, particularly in collaboration with the Ministry of Health and Population (MOHP) and the Egyptian Drug Authority (EDA).[1]

8. The ECA sought to enhance its role by engaging with regional and international organizations, such as COMESA. Since 2015, the ECA has reviewed more than 150 merger cases referred by COMESA, demonstrating its commitment to regional cooperation in competition law enforcement.[2] In addition to cooperation with COMESA, the ECA has been very much involved, often as a driving force, in other regional and international initiatives. In 2020, the ECA took a prominent role within the International Competition Network (ICN), particularly as the Middle East and North Africa (MENA) regional leader for the ICN Merger Working Group (MWG) Project on Merger Control in Times of Crisis.[3] The MWG's activities, endorsed by the president of the ICN, underscored the importance of collaboration and participation among MENA authorities in the realm of merger control. In parallel, in December 2021, Dr. Mahmoud Momtaz, the head of the ECA, announced the plans to set up an Arab Competition Network (ACN) to enhance cooperation among regulatory bodies in the region. The ACN was eventually launched on 15 March 2022, comprising of 17 MENA competition authorities and under the presidency of the head of the ECA.

9. In alignment with international best practices, the ECA embarked on the development of a pre-closing merger control regime in 2017. The legislative evolution was partly driven by the economic ramifications of currency devaluations on mergers and acquisitions. The new framework was intended to ensure that acquisitions by foreign entities and consolidations within Egypt did not impede future investments or harm the local market. This initiative culminated in the Egyptian Cabinet's approval of draft legislation in 2020, and on 29 December 2022, the Egyptian Parliament amended Law No. 3 of 2005, formally introducing the pre-closing merger control regime.

10. The implementation of the new merger control regime required the amendment of the executive regulations to set out the new filing procedures. This was achieved through Ministerial Decree No. 1120 of 2024, issued by the Egyptian government on 4 April 2024, which set the effective date of the new regime as 1 June 2024. In preparation for this change, the ECA released the Economic Concentration Review Guidelines on 26 May 2024, along with a comprehensive FAQ document to assist companies in navigating the forthcoming regulatory landscape. This marked a new chapter in the evolution of competition law in Egypt, with the ECA poised to play an even more pivotal role in shaping Egypt's economy.[4]

III. Overview of the new rules in comparison with international best practices

11. As already explained above, the main reform is that Egypt will shift from a post-closing regime to a mandatory pre-closing system. Whilst before, transactions above certain thresholds had to be notified after closing and the companies subsequently could (but not necessarily would) be subject to an investigation and receive a decision, transactions that reach the new thresholds will need to be notified and reviewed before the parties can close. This brings about a major change not only for companies active or thinking of being active in Egypt but also for the ECA, which will most likely have to devote significantly more of its resources to merger control compared to before. Nevertheless, this brings Egypt closer to the global standard in which most competition regimes with merger control provisions have opted for

1 UNCTAD, Voluntary peer review of competition law and policy of Egypt: Overview; 24 April 2024, para. 29, https://unctad.org/system/files/official-document/ciclpd75_en.pdf.

2 Ibid.

3 ICN, ICN MENA Region Working Group Report on Merger Control in Times of Crisis, December 2020, https://www.internationalcompetitionnetwork.org/wp-content/uploads/2022/04/MWG_Webinar-Merger-Control-Covid_MENA_2020.pdf.

4 For the Guidelines, *see* https://eca.org.eg/getattachment/f22fb654-aabc-444f-b783-d9a-51d69ea98/Ex-ante-Control-of-Economic-Concentrations.pdf; for the Q&A, *see* https://eca.org.eg/getattachment/072faab2-84c6-41b9-b9f3-8bfda288492e/Q-As-on-the-Ex-ante-Control-of-Mergers.pdf.

a mandatory suspensory pre-closing regime. The most recent example is Australia, which is moving to a single mandatory, suspensory, administrative regime.

12. To fully grasp the impact the reform may have on companies, it is useful to compare the old and new filing thresholds. Under the previous system, transactions in which the parties reached EGP 100 million combined turnover in Egypt would need to be notified. This relatively straightforward threshold has now been replaced with two alternative thresholds in Article 19bis ECL:

- A domestic threshold: under which the combined Egyptian turnover or the value of Egyptian assets of the parties exceeds EGP 900 million (approx. USD 19 million), and each of at least two parties has an Egyptian turnover exceeding EGP 200 million (approx. USD 4 million);
- An international threshold: under which the combined worldwide turnover or the value of assets held worldwide by the parties exceeds EGP 7.5 billion (approx. USD 0.15 million), and at least one party has an Egyptian turnover exceeding EGP 200 million (approx. USD 4 million).

13. These new thresholds are significantly higher than before, which should limit the influx of cases and allow the ECA to focus on transactions with potentially more substantial impacts in Egypt. In this regard, it needs to be noted that while it is not clear from the text of the international threshold itself, the newly adopted Guidelines clarify that this threshold will only apply if the local turnover of EGP 200 million (approx. USD 4 million) is achieved by the target entity in Egypt. This should limit the number of foreign-to-foreign notifications without any link to Egypt but in which the acquirer has some turnover in Egypt. However, the continuing currency devaluation may upset the ECA's strategic intention in its raising of the thresholds, with the result that even more transactions may be caught.

14. All of these elements are designed to allow the ECA to focus its resources and attention on the cases most likely to warrant it. Nevertheless, the new regime also allows for the review of transactions that fall below the thresholds up to one year after their closing, provided there are indications and/or evidence that the concentration may lessen, restrict or harm freedom of competition. This provides the ECA with the power to cast an even wider net if needed and in particular to catch potential so-called killer acquisitions, which are in general not caught by the thresholds should the target's turnover not reflect its competitive position or impact.

15. All in all, these thresholds are very much aligned with the most modern merger control systems and how jurisdictions are generally updating their existing frameworks. Globally, and regionally, we see jurisdictions, such as China, Saudi Arabia, and Morocco, increasing their standard thresholds to limit the need to review smaller transactions that are less likely to have a significant impact on the competitive landscape, while at the same time adding powers to address killer acquisitions. These acquisitions can be called in for review in several ways. Some jurisdictions, such as Germany, have adopted alternative thresholds based on the value of consideration, given that a high transaction value can indicate the competitive value of a target even if its turnover is not triggering a notification. Other jurisdictions, most notably the EU with its more controversial and contested new approach under Article 22 EUMR, are moving towards adopting similar provisions to those in Egypt that allow the authority to call in transactions (even after closing) that are below the thresholds but for which there is some indication that they can have anti-competitive effects.

16. In addition to the thresholds, another key element of any merger control regime is how to define economic concentrations that will be captured by the merger control regime. Under the previous system in Egypt, a mere acquisition of rights or interests was sufficient. The new provisions have a much more detailed definition of economic concentration. The definition has three main components.

17. First, the regime captures concentrations, whether mergers or acquisitions, that lead to a change of control (*de jure* or de facto and joint or sole control). The definition of control in Article 2/h ECL is very similar to the EU concept of control as set out in the European Commission's Consolidated Jurisdictional Notice, which essentially revolves around whether one or more parties have what is termed "decisive influence" over the economic decisions of another party. This could be either on a formal basis, for instance by being the majority shareholder, or on a factual basis, such as by being the only shareholder during shareholder meetings.

18. Secondly, the ECL captures concentrations, whether mergers or acquisitions, that lead to one or more parties gaining "material influence" over another party. Material influence is defined in Article 2/I ECL as the ability to directly or indirectly influence the policy of another person, including their strategic decisions or commercial objectives. In the Executive Regulations, this is further defined as: (i) any action that results in the acquisition of more than 25% of the total voting rights or share capital of another; or (ii) any action that results in the acquisition of less than 25% of the total voting rights or share capital of another, if it is combined with other elements that can lead to effects on the policy, including the percentage of the acquirer's voting rights in relation to other shareholders, any special voting rights, the existence of common shareholders between the parties, or the presence of one or more representatives of the acquiring person on the board of directors of the acquired person. In addition, a *de minimis* threshold is included that excludes acquisitions of less than 10% of the total voting rights or share capital, unless the acquirer will become one of the three primary shareholders of the target. This material influence concept allows the ECA to capture acquisitions of minority shareholdings that may have a competitive impact, even though they do not rise

to level of decisive influence. Similar concepts are applied in Germany, where an acquisition of 25% or more in shareholding constitutes a concentration. Smaller shares are also caught if they are accompanied by so-called plus factors, such as (i) the investor being the largest shareholder (and the rest of the shares being widely dispersed); (ii) the level of the investor's board-level representation (coupled with minority protection rights not amounting to decisive influence); (iii) superior market and industry knowledge of the investor regarding the target's business; and (iv) strong commercial links between the target and the minority shareholder, enabling the acquirer to influence the undertaking in question.

19. Thirdly, the regime captures full-function joint ventures on the basis of a definition very much in line with the European Merger Regulation. Generally, a full-function joint venture operates in a market and performs the functions normally carried out by entities operating in the same market, independently of its parent companies. This concept is crucial because it does not include cooperative joint ventures that mainly rely on their parent companies and are not subject to merger control. Three criteria used by the ECA to assess full functionality overlap with the definitions used in the EU, namely (i) independence from the parents; (ii) market presence; and (iii) sufficient resources. The only additional criteria that can be found in the EU definition is that the joint venture should be intended to operate on a lasting basis. While this is not included in the ECL, it will most likely, in practice, also form part of the assessment by the ECA.

20. Another aspect of merger control regimes, besides their scope, is their formal requirements. In Egypt, these were revised and set out in the Executive Regulations that accompanied the ECL reform. The regulations provide for fixed filing templates—a general form for normal transactions and a short form for no-issue filings. This is in line with the Organisation for Economic Co-operation and Development (OECD) recommendations on merger review that recommend that countries should ensure that the review process enables competition authorities to obtain sufficient information to assess the competitive effects of a merger and provide procedures that seek to ensure that mergers that do not raise material competitive concerns are subject to expedited review and clearance.[5]

21. The OECD also recommend that the review of mergers should be conducted, and decisions taken, within a reasonable and determinable time frame. The Executive Regulations put this recommendation into effect by including fixed review timelines that consist of two phases, without the possibility of stopping the clock and pausing the review process.

22. From start to finish, the procedure under Egyptian merger control is similar to many other regimes. Under the standard procedure, the ECA encourages pre-notification discussions, but limits these to the scope of application of the ECL and excludes the economic impact or substantive assessment. Subsequently, once a notification is submitted, the ECA will take three to five working days to decide whether the notification form is complete, and this period will retroactively be included in the legal review time limits. Upon receiving the complete filing, the ECA will have 30 working days, subject to a potential extension of 15 working days, to decide whether the proposed transaction "*would result in limiting competition, restricting it, or harming it*." If the transaction raises anticompetitive concerns, the ECA can refer the file to a second review phase, which can last up to 60 working days (also subject to a potential extension by another 15 working days). Following the ECA's review, it can either approve the economic concentration, reject it, or approve it subject to certain remedies, which can be structural or behavioral measures. In the event that the ECA rejects the economic concentration, it is possible to appeal the decision within 30 days. If the ECA does not decide within that deadline, the transaction is deemed to be approved.

23. The ECA has stated that these timelines have been carefully tested to ensure that a review within 30 days should be possible if all information is complete. These deadlines are consistent with the timing and process of other merger control regimes and should allow for reasoned decisions within a reasonable time frame.

24. Another important element of a merger control regime is how it can sanction for non-compliance. Article 22 bis/d ECL has a relatively straightforward penalty system that also leaves some discretion with the ECA. The law provides for fines for all types of non-compliance. Fines of between 1 and 10% of the value of parties' turnover or assets (whichever is highest) can be imposed, or a fixed amount between EGP 30 million to EGP 500 million (approx. USD 0.6 million to USD 10 million), if the value of turnover or assets cannot be calculated. These fines can be applied in situations of (i) failure to notify; (ii) gun-jumping whereby the standstill period is not respected and a transaction is closed before it is approved or notified; (iii) failure to comply with the ECA's decision; and (iv) not responding to information requests or providing false or misleading information.

25. Overall, the Egyptian regime strongly aligns with international norms and practices applied by merger control systems worldwide. It incorporates several foundational principles and methodologies that are widely recognized and adopted across most jurisdictions. These include the implementation of specific turnover thresholds and a clear definition of what constitutes control in the context of mergers and acquisitions. However, the Egyptian regime does distinguish itself by integrating more contemporary features that embrace recent trends.

26. A notable modern aspect of the Egyptian merger control framework is its proactive stance on killer acquisitions. The ECA is empowered to scrutinize

5 OECD Recommendation of the Council on Merger Review, OECD/LEGAL/0333, https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0333#dates.

transactions that fall below the established thresholds for up to one year following the close of the relevant transaction. This authority may be exercised if there is evidence that the transaction lessens, restricts or harms the freedom of competition. The ECA's Guidelines provide a detailed approach to this assessment, considering whether there is (i) a restriction of technological development and innovation; (ii) an increase or decrease in pricing; (iii) a reduction in the quality of the products; or (iv) barriers to entry or expansion for other competitors.

27. A progressive feature is the extension of the ECA's review scope to include minority shareholdings, especially through the lens of the concept of "material influence." This concept allows the ECA to evaluate and address situations where even a minority interest could exert a significant impact on the strategic decisions of a company, potentially affecting market competition.

28. The ECA has also taken strategic steps to bolster its analytical capabilities by establishing an Economic Intelligence Department. This specialized unit is composed of data scientists and economists, providing support to the newly formed Department for Economic Concentrations. This Economic Intelligence Department is tasked with several critical functions that enhance the ECA's review:

- Maintenance of market databases: The department is responsible for compiling and managing extensive databases that contain information on key markets. This includes data on market size, competitor information, and other relevant metrics that inform the ECA's decision-making process.
- Market monitoring: By closely monitoring and closely observing pricing mechanisms and market dynamics, the department can identify markets that may require further investigation. This ongoing surveillance not only flags potential issues for the ECA's attention but also supplies valuable data for substantive analysis.

29. The Economic Intelligence Department's contributions are not limited to these functions; it also plays a pivotal role in substantiating the Merger Department's decision with a firm economic basis. This integration of economic expertise is intended to ensure that merger assessments are grounded in a thorough understanding of market fundamentals and dynamics to better anticipate the potential impacts of economic concentrations.

IV. Potential for enhanced regional economic integration following Egypt's reforms

30. The recent reform of Egypt's merger control regime raises significant questions regarding its implications for cross-border transactions and the broader objective of regional economic integration. This is particularly relevant when considering the interplay with existing regulatory frameworks, such as the regional concentration control system of the COMESA, of which Egypt is a member state.

31. The reform's immediate effect on companies operating within the region is the introduction of more rigorous scrutiny for cross-border transactions that involve Egyptian entities or impact the Egyptian market. Although the thresholds for notification may have been raised, the scope of transactions that now require a substantive assessment has broadened. Companies are advised to undertake a comprehensive evaluation to determine which of their entities may be subject to these revised laws and regulations. The reform ensures that notified concentrations will undergo a comprehensive competitive assessment, which, despite being subject to fixed timelines, will influence the timing and strategic planning of deals as the assessment now needs to be completed prior to closing and is subject topotential gun-jumping penalties if the standstill obligations are disregarded. Additionally, the introduction of a new regulatory framework typically brings an initial period of uncertainty as both businesses and regulators adjust to the new rules, which may result in a more cautious approach to mergers and acquisitions in the short term, potentially affecting the volume of deals.

32. From a wider perspective, the reform could also affect the trajectory of regional economic integration, especially in relation to COMESA. The merger control regimes across the MENA region have undergone considerable evolution, markedly influenced by COMESA. This regional merger control system overseen by COMESA established itself as a pivotal entity for the submission and assessment of merger notifications in the region. COMESA's commitment to enhancing competition and achieving regulatory harmonization across member states has been instrumental in this transformation.

33. Acting as a driving force for reform, the COMESA regime has encouraged member countries to synchronize their national regulations and procedures with the overarching standards designed under the COMESA umbrella and to undertake significant improvements within their domestic regulatory structures. This push

towards uniformity and the strengthening of regulatory mechanisms is a testament to COMESA's central role in shaping the future direction of merger control within the MENA region.

34. Before having its own post-closing regime, the ECA has been reviewing mergers referred by COMESA. The organization has a "one-stop shop" merger control regime for its member states, meaning that transactions that involve parties operating in several COMESA member states may trigger a notification to the COMESA Competition Commission (CCC), which has the authority to review and approve or prohibit such transactions. However, upon request of a member state, COMESA may refer a case to a member state if it is demonstrated that if the merger is carried out, it is likely to disproportionately reduce competition to a material extent in the member state or any part of the member state.

35. Moreover, On 24 January 2024, the CCC announced its proposed Competition and Consumer Protection Regulations, set to replace the 2004 Competition Regulations by the end of the year. These revisions aim to introduce several key changes, including:

- Transition to a suspensory review regime, delaying merger implementation until CCC approval.
- Introduction of a deal value threshold for mergers involving digital platforms or markets.
- Inclusion of greenfield joint ventures within the regime's scope.
- Prohibition on member states from using alternative assessment tools during the CCC's merger investigation.
- Expansion of the public interest assessment to encompass environmental sustainability and innovation.

36. The ECA's Merger Department has developed its expertise through cooperation with COMESA, and the potential for alignment and harmonization between Egypt's new system and COMESA's merger review process is significant. The close relationship between the two authorities could lead to more streamlined cross-border transactions within the region. This could encompass the further exchange of information and best practices, as well as coordinated transaction reviews that span multiple jurisdictions. Such developments would be advantageous for businesses operating in, or looking to enter, multiple COMESA member states, including Egypt. Especially in light of the upcoming revisions of the COMESA system, which will significantly widen the scope of merger control in the region, a move that runs in parallel to the widened scope of Egypt's review (for MENA cross-border transactions).

37. The ACN has emerged as a cornerstone in the development of antitrust policies within the MENA region. Established with the support of regional regulators, including the ECA, which has been at the forefront as the chair of the organization, the ACN has been pivotal in enhancing the understanding and application of antitrust laws. Its creation was inspired by the collaborative spirit seen in international networks such as the ICN, the European Competition Network (ECN), and the OECD, which have each had their respective impacts on the region's regulatory landscape.

38. The ACN's mission is to promote collaboration, coordination, and convergence among its member authorities to achieve a harmonized application of competition rules and enforcement strategies across the MENA region. By consolidating experiences and identifying best practices, the ACN encourages regular and effective communication among its members. This collaborative approach is particularly beneficial in merger investigations, where it can lead to increased cross-border exchanges and the sharing of best practices. Egypt's modern merger control system exemplifies a model that other regulators in the region could emulate, potentially elevating merger control practices throughout the MENA area. The ACN's efforts have been central to the ongoing process of regulatory convergence, driving the alignment of competition policies and approaches across the region.

39. While the ACN's future impact remains to be fully realized, its ambitions are strong. It has been established amidst a growing awareness of the importance of merger control and the pivotal role that free competition plays in strengthening the region's economic landscape. As the ACN continues to evolve, its member authorities are actively honing their enforcement strategies, setting the stage for the network to potentially achieve an influence comparable to that of the ECN. The ACN's commitment to enhancing regulatory convergence and cooperation is expected to lead to more stringent enforcement of antitrust and merger control laws. This dedication to rigorous oversight is likely to facilitate a more synchronized approach to the review of cross-border mergers. Furthermore, the ACN is poised to tackle the challenges of economic integration head-on. While this may result in increased scrutiny for companies operating within the region, it simultaneously promises to reveal new opportunities for investors. The network's strategic focus on fostering economic cohesion among Arabic-speaking nations is a testament to its forward-looking vision, one that balances regulatory vigilance with the pursuit of market growth and development.

V. Conclusion

40. The ECA's reforms are multi-faceted, combining a combination of tried and tested aspects of merger control with contemporary additions that align with current trends. In so doing, they introduce additional complexity for cross-border transactions, while also offering opportunities for deeper regional economic integration. The interaction between Egypt's new system, COMESA's regulatory mechanisms, and the merger control systems of other regional countries will play a pivotal role in shaping the future of economic cooperation in the region. Efforts towards convergence and cooperation could lead to a more predictable and efficient regulatory environment, which would benefit businesses and foster investment and growth. However, the challenge of aligning multiple regulatory systems will necessitate a sustained commitment from all stakeholders involved to ensure that the developments continue to be in the interests of individual jurisdictions and the MENA region as a whole. ■

Negotiated leniency procedures in Moroccan competition law

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1. In the legal field, clemency is based on an incentive to virtue, which, if necessary, is expressed through repentance. However, leniency, as introduced in Moroccan competition law by Law No. 104-12 on Free Pricing and Competition,[1] ("Law No. 104-12") has a different nature: it is used as a tool to strengthen the effectiveness of the fight against anticompetitive practices.

2. Leniency refers to the procedures of Article 41 of Law No. 104-12. These procedures enable a cartel undertaking to obtain an exemption from or a reduction of a fine if it contributes to determining the reality of an infringement by providing the Competition Council or the administration[2] with necessary and unpublished information and denouncing the other companies involved in the cartel. Article 41 is specifically tailored to address the conduct of cartels, delineating the scope of its application exclusively to collusive arrangements that restrict competition, without encompassing other forms of anticompetitive behaviour.[3]

3. In the concept of leniency, it is also possible to include, broadly, the provisions of Article 37 of Law No. 104-12 concerning settlement procedures. Thanks to these provisions, a prosecuted company that does not contest the reality of the grievances notified to it and that also undertakes to change its behaviour will benefit from a transaction proposal setting the minimum and maximum amounts of the potential financial penalty. Even if total exemption is impossible, the negotiation regarding the amount of the fine is indeed a leniency measure that rewards the docility of the company, not the aid to establish the infringement.[4] This provision covers not only cartels but also all anticompetitive practices in general. In other words, settlement procedure is a more comprehensive and sustainable approach than leniency programme to combating anticompetitive practices.

4. As is commonly observed in competition law, leniency is a mechanism that first took root in the United States in 1978[5] before settling in Europe in 1996.[6] This legal instrument was then integrated into the legal systems of developing countries, including Morocco, which implemented leniency mechanisms similar to those of developed jurisdictions. In the current context, competition authorities around the world prioritize detecting and eradicating cartel behaviour.[7] However, leniency is losing impetus, both in the European Commission and in other jurisdictions. In 2023, the OECD published a comprehensive study listing several explanatory factors.[8]

5. The basis of the mechanism is simple: if an undertaking discloses to a competition authority the existence of an anticompetitive cartel or provides information on such a cartel, it may benefit from immunity or a reduction of the fine depending on the order of arrival at the competition authority or the nature of the information

1 Law No. 104-12 on Free Pricing and Competition, published in the *Official Bulletin* No. 6280 on 7 August 2014, as amended and supplemented by Law No. 40-21, published in the *Official Bulletin* No. 7196 on 25 November 2022.

2 In Morocco, the relevant authority is the Directorate of Competition, Pricing, and Compensation of the Ministry of Economy and Finance.

3 "*Cartels are instances of formal, often secret, cooperation between competing firms with a view to suppressing or softening the rivalry between them by reaching an agreement on outputs, sales, prices or other commercial variables*."*See* C. Argenton, D. Geradin and A. Stephan, *EU Cartel Law and Economics*, 2d ed., Oxford University Press, 2022, at 5.

4 M. Hellwig, K. Hüschelrath and U. Laitenberger, Settlements and Appeals in the European Commission's Cartel Cases: An Empirical Assessment, *Review of Industrial Organization*, Vol. 52, No. 1, 2018, pp. 55–84.

5 S. D. Hammond, The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades, Presentation at the 24th Annual National Institute on White Collar Crime, 25 February 2010, at 2.

6 A. O'Brien, Leadership of Leniency, in *Anti-Cartel Enforcement in a Contemporary Age: Leniency Religion*, C. Beaton-Wells and C. Tan (eds.), Hart Publishing, Oxford, 2015, at 19.

7 C. Beaton-Wells, Leniency Policies: Revolution or Religion?, in Beaton-Wells and Tran (eds.), *supra* note 6, at 3.

8 Among these factors are time, deterrence, private enforcement, sanctions, costs, cartel complexity, regulations, multijurisdictional investigations, and cross-sector policies. *See* www.oecd.org/daf/competition/the-future-of-effective-leniency-programmes-2023.pdf

provided.[9] Any contemporary element of the practices bringing significant added value is the privileged source of this approach. For a company, the main advantage of participating in a leniency programme is the possibility of significantly reducing or even eliminating the fines it could incur for its participation in a cartel. In addition, although participation in a cartel may harm a company's reputation, cooperation with competition authorities can help mitigate such damages. This can be especially important if the company operates in a sector where consumer confidence is essential.

6. Leniency is deeply rooted in game theory and results from an economic reflection on "the prisoner's dilemma." Indeed, the threat of a cartel denunciation by one of its members acts as a deterrent and compromises the sustainability of its illicit activities.[10] The leniency procedure has been met with considerable success in the United States and Europe, allowing authorities to prosecute and sanction numerous cases.[11] The success in dismantling cartels in these jurisdictions contrasts with the low level of market protection in developing countries.[12] Moreover, this instrument confers a significant procedural advantage on competition authorities. An undertaking submitting such a request is obliged to cooperate throughout the investigation, which may last several years, or risk losing its immunity or reduced penalty.

7. In the Moroccan context, although the leniency programme was established in 2014, the Competition Council has not published any notices regarding leniency. Despite introducing other legislative amendments in 2022, this lack of communication indicates the Council's deficient commitment to refining the procedure. In developing countries, the insufficient allocation of resources for competition regulation creates a favourable climate for the emergence of cartels.[13] These secret agreements, by their harmful nature, can then flourish and exert a disproportionate influence on market dynamics, competition, and overall economic stability.[14] Cartel members are often arranged into secret organizations, and they implement sophisticated tactics to avoid leaving traces, whether handwritten or digital. The legislator thus had to establish an effective whistleblowing tool. Another factor justifying the adoption of leniency programmes is that price-fixing schemes are international in scope. Participants are often powerful companies, sometimes exporting to southern markets, with advanced financial and technological resources. Therefore, all consumers could be affected.[15] In this context, the Moroccan legislator has always sought to align competition law and the institutions responsible for its implementation with international standards.

8. This article comprehensively examines negotiated leniency procedures within the framework of Moroccan competition law. We analyse the mechanisms, benefits, and challenges associated with these programmes. The article first analyses the legal provisions related to leniency procedures as outlined in Law No. 104-12. Next, we delve into the settlement procedures put into practice by the Moroccan Competition Council in the *Hydrocarbons* case in 2023. Finally, we explore the uncertainties that undermine negotiated procedures within competition law.

I. Leniency: Cooperation in exchange for uncovering secret cartels

9. Leniency procedures were adopted in response to the proliferation of large-scale secret cartels, which are by definition harmful.[16] In the context of Moroccan law, the concept of leniency is explicitly used in Article 41 of Law No. 104-12. Although the term is not specifically defined, it refers to total or partial exemption from a fine.

10. In large cartel cases, the companies involved deploy increasingly sophisticated methods to minimize hard evidence of their participation.[17] Consequently, providing proof of such participation using traditional investigative techniques is often difficult. Leniency programmes prove to be effective tools in this regard because regardless of the number of precautionary measures cartel members take, they are not resistant to such programmes. The innovation here lies in the source of the information: the data comes from within the cartel itself. The company itself plays an active role in establishing the evidence.[18] Article 41 requires that the information provided not only

9 K. Brisset, Leniency Programs, in *Encyclopedia of Law and Economics*, A. Marciano and G. Ramello (eds.), Springer, New York, 2016, https://doi.org/10.1007/978-1-4614-7883-6_297-1

10 C. R. Leslie, Antitrust Amnesty, Game Theory, and Cartel Stability, *Journal of Corporation Law*, Vol. 31, 2006, pp. 453–488, at 453.

11 N. Zingales, European and American Leniency Programmes: Two Models Towards Convergence, *Competition Law Review*, Vol. 5, No. 1, 2008, pp. 5–60, at 8–12.

12 UNCTAD, The use of leniency programmes as a tool for the enforcement of competition law against hardcore cartels in developing countries, TD/RBP/CONF.7/4, 26 August 2010, https://unctad.org/system/files/official-document/tdrbpconf7d4_en.pdf

13 R. El Bazzim, The issues of liberalization and economic regulation authorities in Morocco, *Confluences Méditerranée*, Vol. 114, Issue 3, 2020, pp. 109–120.

14 L. F. Bergquist and M. Dinerstein, Competition and Entry in Agricultural Markets: Experimental Evidence from Kenya, *American Economic Review*, Vol. 110, No. 12, 2020, pp. 3705–3747.

15 P. Desbrosse, Leniency Programs in a Context of Globalized Markets, *Revue internationale de droit économique*, Vol. xxiv, No. 2, 2010, pp. 211–240. https://doi.org/10.3917/ride.242.0211.

16 J. Ysewyn and J. Boudet, Leniency and competition law: An overview of EU and national case law, 2 August 2018, *e-Competitions Leniency*, art. No. 72355.

17 *See* A. Ezrachi, The fight against cartels, in *Competition and Antitrust Law: A Very Short Introduction*, Oxford University Press, 2021.

18 B. Boulu-Reshef and C. Monnier-Schlumberger, The fight against cartels: How to deter hotheads?, *Revue économique*, Vol. 70, Issue 6, 2019, pp. 1187–1199, https://doi.org/10.3917/reco.706.1187.

contributes to identifying the other members of the cartel but is also unpublished. It is imperative that this information be as precise and complete as possible, because the company's exemption is directly linked to it and will be "*proportionate to the contribution made to establishing the infringement.*"

11. Despite the interdependent nature of companies and the fact that they can often be engaged in long-term strategic alliances, or even partnerships in the form of joint ventures, the analysis of the Moroccan economy highlights the need for more rigorous supervision that at present by the Competition Council in specific sectors. Indeed, in the context of leniency programmes, the decision to involve other companies is a major challenge, given the potentially severe consequences and the risk of reprisal. However, competition authorities could launch specific investigations into economic sectors characterized by an oligopolistic structure or operations lacking transparency. These investigations could be based on various measures, such as exceptionally high price levels or margins, or market shares that remain constant over an extended period of time. In the Moroccan economic context, several sectors can be identified as being potentially subject to cartelization practices. These sectors include hydrocarbons, banking, insurance, telecommunications, energy and cement, as well as transport, quarrying, clinics and the private education sector.[19]

12. The role of the Competition Council is crucial to prevent abuses that could arise during the application of leniency procedures, where a company could manipulate the process by omitting vital information. Discussions between competition authorities and businesses require a balance between encouraging cooperation and penalizing abusive behaviour. Indeed, leniency procedures depend on the ability of companies to assess their own interests and weigh the risks and potential benefits of reporting anticompetitive practices. This reflects a more pragmatic and realistic approach to antitrust law than other branches of economic law.[20]

II. Settlement procedures

13. Within the Moroccan legal framework, Law No. 40-21 of 2022, which modifies and supplements Law No. 104-12 relating to free pricing and competition, introduced transactional mechanisms in the field of competition law. These mechanisms are seen as flexible and predictable options for companies that are accused of engaging in anticompetitive practices.[21] They encourage cooperation between companies and the Competition Council while ensuring effective enforcement of competition law.

14. Article 37 of Law No. 104-12 allows for a significant settlement of the sanction for the cooperating company after the notification of grievances (i.e. at the procedural stage). The legislator has stated that "*when a company or an organization does not contest the reality of the grievances notified to it*," a proposed settlement setting the minimum and maximum amounts of the financial penalty envisaged will be granted to it. Unlike Article 41, Article 37 covers not only cartels but also all anticompetitive practices.

15. To obtain leniency, the company must first demonstrate docility by not challenging the facts alleged against it. The Moroccan legislator drew inspiration from similar procedures existing in European and American law. However, the Moroccan Competition Council seems to suffer from the same challenge: the lack of means to support long procedures.[22] Non-contestation mechanisms reduce the duration of the leniency procedure and, thus, costs, thereby increasing the effectiveness of the competition authority, as it has more time to address pending or more complex cases.

16. The second paragraph of Article 37 also stipulates that the undertaking must endeavour to rectify its behaviour going forward. This condition ensures the future correction of the behaviour in question. The wording of this article facilitates a constructive dialogue between the company and the Competition Council. However, the leniency procedures set out in Article 41 only afford the undertaking the opportunity to provide the information necessary to prove the existence of the cartel—the scope of the negotiation is therefore considerably limited. The spirit of Article 37 is not to unilaterally impose behaviour on the company; the company must play an active role because it is expected to "*commit*." Since the condition of behavioural change for the future is formulated in very general terms, the spectrum of possible corrective measures also remains broad.

17. Building upon the principles established in Article 37, the recent implementation of a settlement procedure underscores the practical relevance of the competition legal framework. In 2023, in the context of the *Hydrocarbons* file, the Moroccan Competition Council implemented a settlement procedure. This approach was welcomed by the companies involved as well as their professional organization. These entities have expressed their interest in taking advantage of the provisions stipulated in Article 37 of Law No. 104-12.[23]

19 M. Benmoussa, Tribune : Décartelliser l'économie marocaine, *Telquel*, 12 May 2022, https://telquel.ma/2022/05/12/tribune-decartelliser-leconomie-marocaine_1766366.

20 J. D. Jaspers, Leniency in exchange for cartel confessions, *European Journal of Criminology*, Vol. 17, Issue 1, 2020, pp. 106–124, https://doi.org/10.1177/1477370819874432.

21 *See* M. Mezaguer, *Les procédures transactionnelles en droit antitrust de l'Union européenne*, Bruylant, Brussels, 2015.

22 R. El Bazzim, The Independence of Morocco's Competition Council, *Journal of African Law*, Vol. 67, Issue 1, 2023, pp. 155–168, doi:10.1017/S0021855322000274.

23 Conseil de la concurrence, Communiqué du Conseil de la concurrence au sujet du dossier des hydrocarbures, 2023, https://conseil-concurrence.ma/wp-content/uploads/2023/11/Communique-du-Conseil-de-la-concurrence-au-sujet-du-dossier-des-hydrocarbures-1.pdf.

18. During the same year, the Moroccan Competition Council imposed sanctions on oil companies, including Total Energies, Afriquia and Vivo Energy, for anticompetitive practices. In addition to paying a collective fine of 1.84 billion dirhams (EUR 165 million), the companies accepted behavioural commitments aimed at improving future competition in the hydrocarbon market. The magnitude of the fine imposed, however, is considered negligible in relation to the revenues and profits of hydrocarbon companies, especially since the liberalization of the sector in 2015. Therefore, in 2020, the Moroccan Competition Council recommended a fine of 9% of annual turnover, but procedural anomalies suspended the decision. The subsequently announced settlement fine mentioned above marked the conclusion of a case that spanned more than five years. This outcome creates the impression of an imbalance between the seriousness of the offence and the severity of the penalty. This perception could raise questions about the effectiveness of negotiated competition regulation mechanisms in sectors of the Moroccan economy subject to cartelization.

III. Uncertainties weakening negotiated procedures

19. The legislator must ensure that the articles relating to negotiated procedures are as predictable, clear and legible as possible to create confidence and legal certainty.[24] The absence of automatism in granting leniency, as stipulated in Article 41, could reduce the appeal of leniency. The text states that "*the Council may, subject to the conditions specified in the leniency notice, grant an exemption from financial penalties.*" This lack of automatism could deter some companies and be seen as a weakness of leniency programmes. Similar comments may be made regarding the section on transactional procedures, which specifies that the general rapporteur may, after validation by the Council, submit a transaction proposal. A company may be reluctant to cooperate if it is not certain that it will be treated favourably despite compliance with the conditions. The same article stipulates that, "*following the approach by the company or organization*," the Competition Council will set the conditions for obtaining leniency in an exemption notice. Therefore, a company wishing to cooperate does not know, in advance, the conditions it will have to meet to benefit from leniency. This contrasts with other leniency programmes that provide legal certainty by allowing companies to assess their eligibility for leniency beforehand and, if necessary, adjust their behaviour accordingly.

20. Legal uncertainty also stems from a lack of information on the major companies involved in a cartel. No provisions are made for the instigators of the cartel or those who have coerced others to join. In other systems, these companies are not eligible for leniency. This ambiguity could compromise the integrity of the procedure.

21. Furthermore, Moroccan law does not clarify whether leniency can be granted after an investigation has been opened. A company must provide new information, but this does not guarantee a reduction in the fine. The final decision rests exclusively with the Competition Council, regardless of prior negotiations with the administration or the general rapporteur. The negotiation mechanisms in Morocco, which mitigate penalties for entities that cooperate and admit their involvement in illicit cartels, are largely inspired by French practices in this area.[25] Nevertheless, it is imperative to consider the characteristics of Morocco, as a developing country, which could impact the effectiveness of leniency programmes. For instance, the prevalence of close relationships between businesses, the dominance of an informal economy, and a culture of limited competition could lessen the appeal of these programmes.

IV. Conclusion

22. Competition authorities allocate significant resources to detect, investigate, and prosecute illegal cartel practices. To reduce the costs associated with convicting cartels, they increasingly rely on leniency programmes. However, implementing such programmes in developing countries, such as Morocco, can encounter legal, economic, and cultural obstacles. Consequently, this may reinforce cartel stability when the benefits of collusion rise due to expected reduced fines. Despite being enshrined in legal texts, leniency programmes in these countries are still awaiting concrete implementation.

23. This contribution examines the legal framework of the Moroccan leniency programme. Considering that the primary objective of leniency programmes is to disrupt and discourage cartel behaviour, the article first analyses the legal provisions related to leniency procedures as outlined in Law No. 104-12. Additionally, the study delves into the settlement procedures that were put into practice by the Moroccan Competition Council in the *Hydrocarbons* case in 2023. Lastly, the article addresses the uncertainties that undermine negotiated procedures within competition law.

24. The leniency tools available to competition authorities in Morocco for controlling cartels are now legally guaranteed. However, their effectiveness is not absolute, leading to an under-application of competition law, especially concerning presumed cartels. Despite the

24 Y. Katsoulacos and D. Ulph, Legal uncertainty, penalties, limits to effects-based standards, in *Handbook on European Competition Law*, I. Lianos and D. Geradin (eds.), Edward Elgar Publishing, Cheltenham, 2013, pp. 584–592.

25 R. El Bazzim, *Conseil de la concurrence au Maroc : de la recherche de l'indépendance à la régulation du marché*, L'Harmattan, Paris, 2019.

resounding success of the *Hydrocarbons* case in Morocco in 2023, the weaknesses of leniency tools persist. The decision, while modest in terms of fines imposed, may in a way appear as an illusion, so much in reality painless for the hydrocarbon companies. The cartelization of certain sectors in the Moroccan economy raises concerns, reflecting both the dominant market power of cartelists and the Competition Council's inability to address potentially suspicious cases. Strengthening and applying leniency tools is essential for better enforcement of competition rules.

25. Leniency programmes should consider Morocco's specific factors to be effective and appealing. Competition authorities need to strike a delicate balance between incentives and barriers, encouraging business cooperation while maintaining the effectiveness of the fight against illegal cartels.

26. In a context where trust and personal relationships play a pivotal role in business, the social or informal sanctions faced by whistleblowers can be significant. Additionally, the informal sector remains a crucial part of the Moroccan economy, employing a substantial portion of the population. Notably, cartel members operating within the informal economy risk losing their anonymity if they report to the authorities.

27. Ultimately, the subject of leniency procedures is as legal as it is political, and the questions it raises reveal differences in culture. In developing countries, implementation of the procedure is still lagging behind, whereas in developed countries there is a constant stream of innovative techniques being developed to increase its effectiveness. It remains to be seen how long it will take before these techniques are integrated into the Moroccan context. ■

Algerian competition law at a crossroads

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1. Algerian competition law is relatively recent. Its development has been subject to the upheavals and setbacks typical of any recent economy. Algeria's socialist history and the predominance of state-owned enterprises have complicated the development of this field.

2. The Algerian market is in dire need of regulation. Despite the abundance of products in today's world, Algerian consumers face product shortages due to informal cartels. The market regularly sees prices rise without any competitive constraint, and there are few, if any, alternatives to poor-quality products.

3. To understand the state of competition law in Algeria, we need to look at the history of its development. In 1988, Algeria underwent an abrupt transition from a command economy to a market economy. State-owned enterprises that were still active were privatized and the market was opened up without any liberal experience.

4. In 1995, the Algerian state set up a legal arsenal to deal with anti-competitive practices and ensure effective merger control.[1] A Competition Council, based on the French model, was charged with establishing free and undistorted competition. It operated in an economy in transition, from economic dirigisme to a market economy.

5. However, the majority of essential goods were subsidized, and prices remained under state control despite the freedom of prices introduced by the ordinance. As the private sector was not developed at that time, the economy was concentrated around the state-owned enterprises that were still active.

6. In 2002, Algeria and the EU concluded an association agreement, Title IV, Chapter 2, Articles 41-49 of which refers specifically to competition.[2] In order to harmonize the existing rules with the provisions of the Algeria/EU agreement, a new legislative framework was put in place.[3]

7. The Competition Council thus has a sufficient legal arsenal to carry out its mission effectively (I.). However, despite this legislative framework, the Competition Council's activities have been frozen for ten years. It was only on 29 January 2013 that the Council was reactivated, but its impact on the ground remains barely perceptible. The absence of a competition culture and certain ambiguities in the texts significantly challenge the effectiveness of this law (II.). However, there are real prospects for change in the short term, given the efforts made by the public authorities to this end (III.).

I. The legal framework of Algerian competition law

8. Under the influence of French law, the Algerian legislator established a legal framework covering all areas of competition rules, with one exception: state aid.

9. The structure of the Algerian market has been designed to accommodate the competitive dynamics of a liberal economy. Vertical integration and the separation of network and production/distribution activities have enabled fair access to infrastructure. For this purpose, sectoral regulatory authorities have been set up to maintain a competitive structure in regulated markets.

10. Access to the Algerian market has been fully liberalized since the Supplementary Finance Act of 2020, after two decades of the 49/51 rule. Under the old Investment Act, foreign companies could not hold more than a 49% stake in a company incorporated under Algerian law, regardless of the sector of activity. Market entry was thus conditional on the inclusion of an Algerian partner. At present, only companies operating in a sector deemed strategic by the government remain subject to the 49/51 rule.

1 Ordinance No. 95-06 of 25 January 1995 on Competition.

2 https://mfa.gov.dz/media/images/PDF/Accord-Association-Algerie-UE.pdf (in French).

3 Ordinance No. 03-03 of 19 July 2003 on Competition.

11. Reliance on imported products has, however, redirected the attention of decision-makers towards buying and reselling activities. The impediments and restrictions of competition observed in recent years stem mainly from this supply channel. Market power is therefore easily identifiable from import data by product.

12. In order to avoid de facto monopolies, either because of the financial power of importing companies or because of the exclusivity that an importer might have, the government has introduced a system of import quotas per company and per nomenclature, allowing powers to be diluted among several small operators and thus allowing the market to be deconcentrated.

13. This technique is limited by the purchasing power of companies. Small operators without any financial power find themselves with a quota that significantly exceeds their import capacity, while large companies are restricted by these provisions. In the end, this ad hoc solution shifted the problem to a significant reduction in supply, with similar consequences.

14. In response to the urgent need for regulation, the Competition Council has been given prerogatives enabling effective control of the market. Ordinance No. 03-03 of 2003 makes it possible to apprehend any anti-competitive act that has the effect of restricting competition in the market. Cartels, abuse of dominant positions and any significant influence on market structure are prohibited.

15. On the *ex ante* side, the legislator has given the Competition Council the power to control mergers. Article 17 of the Ordinance provides that "*mergers likely to harm competition, in particular by strengthening the dominant position of an undertaking in a market, must be submitted by their authors to the Competition Council, which shall take a decision within three (3) months.*" It's a personal translation

16. However, the Competition Council struggles to perform effective oversight due to the text's limitations. Reading this article, it is difficult to discern, on the one hand, an obligation to notify and, on the other, an assessment test. In fact, the text seems to empower the applicant companies themselves to assess whether the planned transaction is "*likely to affect competition*." Companies are therefore only obliged to submit their transactions to the Council for control if they consider that the transaction is likely to harm competition. It is therefore not surprising to note the absence of notification of merger projects to the Council.[4]

17. In addition to this non-obligation to notify, the text does not specify what should happen to a merger that harms competition. Consequently, there is neither a real obligation to notify in the absence of a control threshold nor a formal prohibition on mergers that harm competition. The author of these lines, who was consulted on the reform, has highlighted these limitations and proposed amendments to overcome these difficulties.[5]

18. As for a sanction, the Algerian system is theoretically one of the most repressive in the world. Fines for anti-competitive acts can be as high as 12% of turnover in the last known financial year. For the mergers, they are 7% for each participating entity, i.e. 14% of cumulative sales. Unfortunately, these fines are rarely applied due to the difficulties described below.

19. State aid is not covered by current legislation. Neither the 1995 Law nor the 2003 Ordinance prohibit or control state aid. In practice, it is very rare to find state aid to the private sector that is likely to distort competition. There are several types of aid—tax reductions or exemptions, access to industrial or agricultural land—that are granted without discrimination. Objective criteria are used to encourage investment in the Sahara and remote regions of Algeria, as well as the export of products and services.

20. However, since 1988, laws and regulations have given preferential treatment to state-owned enterprises. Ordinance No. 01-04 of 20 August 2001, which governs the organization, management and privatization of state-owned enterprises, excludes from the scope of the Commercial Code public enterprises whose activities are of a strategic nature in terms of the government's program. In practice, state-owned enterprises continue to enjoy favorable conditions of access and operation, to the detriment of the private sector.

21. By way of example, the deeds of state-owned enterprises are drawn up free of charge by the Public Lands Department, whereas the deeds of private enterprises are drawn up in authenticated form. State-owned enterprises are not subject to registration or transfer duties, whereas the private sector is.

22. State-owned enterprises can only open bank accounts with state-owned banks. Private banks are thus deprived of the large amount of funds and flows from public companies.[6] As regards the management of difficulties, public companies frequently receive budgetary allocations during financial difficulties in order to guarantee the remuneration of their employees.

23. Consequently, there is an original distortion of competition in Algeria between the public and private sectors. However, this observation needs to be qualified given the current make-up of the Algerian market. The private sector represents the majority of the industrial and commercial fabric , which puts the importance of these public companies in the competitive process into perspective.

4 Travaux de la journée d'étude du 19 avril 2019 sur le contrôle des concentrations, *Bulletin de la concurrence* No. 20.

5 https://www.conseil-concurrence.dz/?s=consultation+.

6 *See* D. Slimani, Le droit de la concurrence et entreprises publiques, *Bulletin officiel de la concurrence* No. 18, p. 10.

II. Difficulties of application

24. Despite this legal arsenal, the Competition Council is struggling to apply it effectively for various reasons. The first reason is linked to the lack of a competitive culture. The concept of competition law and order escapes all market players. Since its reactivation in January 2013, the Competition Council has found itself inundated with referrals that have nothing to do with competition law, such as public procurement and unfair competition. Despite the Competition Council's efforts to raise awareness and provide information, the competition culture is struggling to make inroads.

25. The second problem relates to the lack of data for assessing the competitive structures of the markets, given the size of the informal economy. This makes it difficult to define the market and assess market power.

26. The third difficulty is more structural and lies in the overlap between the Competition Council and the sectoral authorities. When the network markets were opened up, the sectoral regulatory authorities, such as the Post and Telecommunications Regulatory Authority or the Hydrocarbons Regulatory Authority (ARH), were given a general mission to protect the competitive structure of the markets. Their task of preserving attractive and easy access to the market structure has sometimes been understood as a general power to protect competition. It is not uncommon, therefore, to see a positive conflict of jurisdiction in which the Competition Council, wrongly, withdraws in favor of the sectorial authority.

27. In addition to this overlap, the Competition Council has lost its symbolic power over the years. When it was created in 1995, the Council was placed under the authority of the president of the Republic, which shielded it from any possible pressure. During its first term of office, plenty of decisions were taken, notably against state-owned companies such as ENIE and SNTA.

28. The ordinance of 2003 relegated this role by placing the Competition Council under the Prime Minister and, since 2015, under the Minister of Commerce. Since then, the Competition Council has had to contend with a confusion with the departments of the Ministry of Commerce. Sometimes, the Ministry regards it as an internal body and tends to encroach on its powers.[7] Since 2020—the end date of the last mandate—the Competition Council's activities have once again been frozen pending a reform of competition law.

29. These difficulties hinder the development of competition law in Algeria, which explains the significant delay in its development. However, recent events and a growing awareness of the importance of protecting competition have put this law back at the center of the country's concerns, which augurs well for major developments in the future.

III. A law with major prospects for development

30. The constitutional amendment of 2020 established consumer protection as a constitutional value. A new dimension is thus given to the protection of competition, which calls for an inevitable evolution. The country's economic reality has caught up with decision-makers, who in recent years have had to deal with cartels operating on consumer products. Shortages of oil, semolina and flour, for which there is no explanation given the country's surplus production capacity, have become an everyday occurrence for the public.

31. In order to put an end to this situation, the legislator has, in a way, formalized the return of the criminalization of restrictions of competition. An emergency criminal legislative framework has been put in place, with prison sentences of up to 10 years for any operator guilty of acts that affect product supply and prices. Surveys of factory production capacity are carried out regularly by government departments in order to measure the impact of stockpiling and to enable products to be traced through the various distribution processes.

32. As a result, there has been a real awareness of the importance of the Competition Council and the imperative of undistorted competition. For a long time, the Council has advocated a policy of raising awareness and disseminating a competition culture. Over the past decade, the Competition Council has organized several study and awareness-raising days, communicating widely on the need for compliance and the fines incurred.[8]

33. Collaboration between the Competition Council and the EU has led to major progress in this area. Several large-scale studies have been carried out by joint Algerian and European teams, notably on the pharmaceutical market[9] and the maritime transport market.

7 R. Rabia, Injonctions et engagements en droit algérien de la concurrence, *Bulletin officiel de la concurrence* No.16, pp. 20–28.

8 *See Bulletin Officiel de la concurrence* Nos. 11, 16, 18, 20.

9 Conseil de la concurrence, Étude sectorielle sur la concurrentiabilité du marché des médicaments à usage humain en Algérie (conseil-concurrence.dz).

34. In addition, a compliance program was drawn up by the Competition Council to enable companies to integrate the competition aspect into all their strategic decisions. This program, which was widely communicated to undertakings likely to come within the scope of competition law, served as a sort of warning before a repressive policy enforcement.

35. The return to penalizing economic acts was a matter of urgency. This policy is not intended to last and the Competition Council should take over in the coming months. To this end, a draft reform of competition law is currently under discussion. In any case, competition should soon find a prominent place in national policies. ■

Antitrust in the Middle East: New competition laws, and time for more economics?

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I. New developments in competition law

1. The last couple of years saw important competition law developments in the Middle East. In Egypt, amendments to the competition law were passed in December 2022, introducing a pre-merger approval regime.[1] Morocco also amended its competition law a few days earlier.[2] The United Arab Emirates (UAE) introduced a new competition law in December 2023, completely replacing the old law.[3] Drafts of new competition laws are making their way through the legislative process elsewhere in the region, including in Jordan.

2. These new laws are welcome. They signal the intent of governments, lawmakers and regulators in the region to modernize competition law by setting appropriate thresholds for merger notification, limiting exemptions, and imposing severe fines for non-compliance, amongst other measures. This will contribute to more active enforcement, for which there is a great need in a region that has seen limited enforcement to date (many authorities have never blocked a merger or issued an infringement decision). However, little has been said about how the role of economics will change, if at all.

II. Economics is integral to effective implementation of competition law

3. A greater emphasis on economic analysis can help competition authorities in the region get the most out of their new, modern competition regimes. Competition law and economics go hand in hand both in the design and implementation stages:

– First, competition law has economics at its heart. For example, the reason why a conduct, such as bundling or predatory pricing (i.e., pricing below cost), is outlawed only when it is practiced by a dominant firm is that economic theory has shown that these practices can only impede competition when conducted by a dominant firm to drive competitors out of the market, and otherwise they likely benefit consumers. As such, a good understanding of economics is fundamental to designing appropriate competition laws.

– Second, economic analysis can be used as an initial screen to filter out transactions and conduct that do not warrant a deeper investigation. Authorities have limited resources and should focus on the cases that are most likely to substantially lessen competition. Simple economic analysis such as analyzing market definition, market shares and dominance can help weed out cases that are unlikely to harm competition and which the authorities should not waste valuable resources reviewing.

– Third, once initial screens have been applied, economic analysis is crucial in reaching a sound decision during an in-depth investigation. For example, a merger between competitors in the same market will eliminate some competition but may also

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1 Law No. 175 of 2022 of Competition, Egypt, Arab Legislation Portal https://alp.unescwa.org/plans/1849#:~:text=December%202022-,Law%20no.,ECA's%20remedial%20measures%20are%20adopted.

2 Laws Nos. 40.21 and 41.21, Ministry of Economy and Finance, Kingdom of Morocco, Adoption by the parliament of the texts amending the law on freedom of prices and competition and the law on the competition council, news, 1 November 2022, Ministry of Economy and Finance, https://www.finances.gov.ma/en/Pages/detail-actualite.aspx?fiche=6176#0.

3 Law No. 36 of 2023. *See* United Arab Emirates Legislation, Federal Decree-Law on Regulating Competition, https://uaelegislation.gov.ae/en/legislations/2117/.

bring about efficiencies and innovations that benefit consumers, and economic analysis can help determine whether the risk to competition is substantial enough to warrant prohibiting the merger.

III. Practical steps to integrate economics in competition enforcement

4. From the outside, economics does not seem to play as prominent a role in competition enforcement in Middle Eastern competition authorities as in regions with a longer history of competition law enforcement, including the UK, the US and Europe. It may be the case that economists are more involved behind the scenes, but it is hard to tell because most authorities do not publish detailed decisions setting out the evidence they have assessed and the analysis they have conducted. This creates uncertainty for businesses subject to competition investigations, which affects their willingness to do business and invest in the country. Below, I suggest three practical ways to address this that are likely to have the most impact.

1. Transparency in process by engaging on economic analysis during the case

5. Competition authorities often request substantial amounts of data from the parties. The parties may rightly wonder what the authority intends to do with this data, as this is not always apparent. It would be helpful for economists at the authorities to directly engage with the parties and their economic advisers on what analysis they would like to run and what questions they would like to answer. This would be a win-win: for the parties, this would allow them to understand the motive behind the request and respond with the most suitable data for the analysis in question, limiting the burden of providing potentially irrelevant data; for the authority, this would ensure that they receive data that is directly responsive to the questions they want to find an answer to. The parties may even have similar analysis off-the-shelf that they conduct in the normal course of business, which could be more easily provided and carries more evidential weight as it would have been prepared independently of the current investigation.

2. Transparency in decision making by publishing full reports

6. When issuing a decision, authorities can publish reports setting out the analysis and evidence that led them to reach that decision. For example, the Egyptian Competition Authority published a 100-page report on the Uber/Careem merger review, which set out the authority's substantive assessment in that case, including its economic analysis.[4] However, to our knowledge, this is an exception and publishing such reports is not a common practice in the region. Publishing reports consistently would allow the business and legal community to understand how the authority will approach cases in the future and conduct their own competition risk assessment (for example, when deciding whether to proceed with a merger). It also serves as an incentive for the authority to ensure that its economic analysis is robust and thorough, as it will be scrutinized by the public. Moreover, authorities can publish interim reports while the case is ongoing to allow the parties to understand and address the authority's concerns before the final decision is issued.

3. Ongoing collaboration between authorities and practitioners, including via the Arab Competition Network

7. The Arab Competition Network was set up to encourage collaboration between competition authorities in the Arab world, which is a positive step. It is also important to encourage discussions and knowledge-sharing between authorities and competition economists. This can be done via the Arab Competition Network or otherwise, for example by organizing roundtable discussions. In addition, authorities can organize training sessions in competition economics. This will enable a greater understanding of the fundamental economic concepts relevant to competition and highlight the areas where economic analysis can contribute to competition enforcement.

IV. Conclusion

In conclusion, I note that there are promising signs of competition authorities in the region embracing economics. Anecdotally, Saudi's General Authority for Competition has more economists than lawyers amongst its ranks. It is likely that the use of economic analysis is getting ever more sophisticated. By engaging on and publishing the results of their economic analysis, competition authorities in the region will be able to demonstrate their sophistication to businesses and the international antitrust community. ■

4 *See* ECA's Assessment of the Acquisition of Careem, Inc. by Uber Technologies, Inc., 19 December 2019, https://www.docdroid.net/GXSIQ7c/ecas-assessment-of-the-acquisition-of-careem-inc-by-uber-technologies-incnon-confidential1-pdf.

The role of competition law enforcement in reducing poverty

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I. Introduction

1. The intersection of competition law and its enforcement and socio-economic considerations is a topic of growing importance in contemporary competition law discourse. For a long time, competition law has focused on promoting market efficiency and consumer welfare. However, there is an increased recognition that social and socio-economic considerations can and should play a role in competition law enforcement. Several jurisdictions incorporate public interest goals into their competition law frameworks. Critics argue that it can complicate the enforcement process and analysis, potentially leading to inconsistency and uncertainty. What has been described as a "socially responsible" competition law and competition enforcement is not new, but rather an evolving approach that developed over time, as there has been a growing emphasis on integrating non-economic goals. This evolution is evident in both developed and developing jurisdictions, where a broader understanding of the social role competition law and its enforcement has emerged, reflecting a more inclusive approach. This broader view promotes competition law enforcement to contribute to wider developmental concerns, particularly in developing countries.

2. Today, despite decades of efforts to reduce poverty, it continues to be a major global concern. According to the World Bank, around 700 million people live under the extreme poverty line.[1] This underlines the urgent imperative to incorporate poverty reduction in all policies,[2] among which competition policy. Competition law and poverty reduction have been an area of interest for the Organisation for Economic Co-operation and Development (OECD) in 2013,[3] and today the United Nations Conference on Trade and Development (UNCTAD) started a round table on competition policy and poverty reduction, aiming to examine the link between them and address the potential role of competition authorities.[4] Research on the interplay between competition and poverty reduction revealed that well-structured competition laws can enhance poverty reduction, and envisioned a framework and policy where competition law can be tailored to support poverty and a policy.[5]

3. Considering the crucial role competition enforcement plays, and the wide discretion competition authorities have, enforcement can be geared to help reduce poverty, as a standalone tool. In addressing this intersection, this paper will first explore how competition affects the poor and then look into the critical role competition authorities can play to reshape the outcomes.

1 Around 700 million people live on less than USD 2.15, which is the extreme poverty line for low-income countries. As of 2022, around 1.8 billion people lived on less than USD 3.65 per day (the poverty line for lower-middle-income countries), and 3.6 billion people lived on less than USD 6.85 per day (the poverty line for upper-middle-income countries). World Bank, Poverty & Inequality Update, 2024, https://thedocs.worldbank.org/en/doc/69d007a1a509633933b92b3804d0e504-0350012024/original/poverty-and-inequality-spring-update-6.pdf; According to a World Bank report, "*if current trends continue, an estimated 7 per cent of the global population - approximately 575 million people - will still be living in extreme poverty by 2030, with most in sub-Saharan Africa*", World Bank, The Sustainable Development Goals Report: Special Edition – Towards a Rescue Plan for People and Planet, 2023, at 12 https://unstats.un.org/sdgs/report/2023/The-Sustainable-Development-Goals-Report-2023.pdf

2 United Nations Department of Economic and Social Affairs (UNDESA), Making Eradication of Poverty an Integral Objective of All Policies: What ill it Take?, Policy Brief, 2017, https://www.un.org/development/desa/en/news/intergovernmental-coordination/integration-segment-endpoverty.html.

3 OECD, Competition and Poverty Reduction, 2013, https://web-archive.oecd.org/temp/2019-10-16/249667-competition-and-poverty-reduction.htm.

4 Intergovernmental Group of Experts on Competition Law and Policy, Round Table on Competition Policy and Poverty Reduction, 2024, https://unctad.org/system/files/information-document/ccpb_IGECOMP2024_PROG_RT_Competition_Poverty_Reduction_en_5.pdf.

5 E. Fox, Economic Development, Poverty and Antitrust: The Other Path, *Southwestern Journal of Law and Trade in the Americas*, Vol. 13, 2007, p. 211 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1002637; E. Fox, Imagine: Pro-Poor(er) Competition Law, DAF/COMP/GF(2013)4, 14 February 2013.

II. Unpacking the impact of competition on poverty reduction

4. Despite the considerable resistance to social and socio-economic goals in competition law among the different schools of thought, addressing the different socio-economic impacts of competition was less contentious. Emphasising the link between competition and poverty reduction can be beneficial for competition law and policy, especially in countries with a high percentage of poverty. As poverty reduction is high on the development agenda of many countries, the nexus between competition and socio-economic impacts in general and poverty reduction in particular would boost the interest in adopting and enforcing competition law and policy. The impact of enhanced competition can be direct on consumers, producers, small business owners, and employees. It can also be indirect, through the impact on growth, which may in turn result in poverty reduction. In this section, both the direct and indirect impacts are explored.

1. The direct impact on poor stakeholders

5. Competition has been proven to have an impact on prices, quality and availability of products and services. Theory suggests that competition benefits all consumers by driving prices down to the level of the marginal cost of the most efficient firms.[6] The impact of enhanced competition is believed to be positive, as consumers of all income levels benefit from better product price and quality and more choice. The negative impact of lack of competition, due to competition restraints, may have a greater adverse impact on the poor, who may be forced to reduce spending on basic necessities,[7] which undermines any opportunities that may allow them to break the cycle of poverty. This is not to say that competition's positive impact is necessarily delivered to consumers in general and poor consumers in particular. Sometimes, consumers do not opt for products or services with the most favourable attributes, and sometimes, they do so because of bias toward a specific undertaking.[8] Moreover, studies showed that wealthier or better-educated consumers usually obtain prices lower than other uninformed consumers.[9] It was also argued that the surplus resulting from paying lower prices as a result of competition does not often get spent on products or services that make them better off.[10] It is also suggested that competition may give rise to adverse impacts on consumers in some circumstances. It has been argued that, theoretically, compared to monopoly situations, competition can decrease consumer welfare.[11]

6. Poor employees and poor producers are also affected by competition as they rely on both the formal and informal markets for employment and for selling their products and buying their supplies, respectively.[12] Therefore, anticompetitive distortions in the labour market or the upstream market would significantly undermine their income, wealth or spending. Efforts to reduce poverty in developing countries would only be effective if citizens were earning and sustaining wages in order to participate in the economy.[13] Economic theory and economic evidence show that competition in general has a positive impact on employment[14] despite the debate on whether the entry of small firms would increase employment compared to higher levels of concentration offering more employment.[15] It is argued that, as a result of increased competition, cutting jobs or slashing wages take place in order to reduce costs and achieve greater efficiency,[16] and in some cases where competition leads to excluding inefficient firms, it may result in job losses.[17] However, this prospective short-run effect can ultimately be offset by the long-run benefits, which typically include enhanced job creation and a more dynamic labour market as a result of enhanced innovation. Furthermore, this potential adverse impact can be mitigated by implementing competition policy, and by adopting other policies to ease the impact on unemployment.[18]

7. The poor on the supply side of the market can also benefit from competition, and may be harmed by anticompetitive practices, despite the argument that fierce competition in some cases can force small businesses out of the market because of new entrants, and because of the adverse impact of innovation.[19] This includes different scenarios: firstly, the lack of competition in the downstream market can make

6 OECD, Competition and Poverty Reduction, Policy Roundtables DAF/COMP/GF(2013)12, at 22 https://www.oecd.org/en/publications/competition-and-poverty-reduction_4f74aa23-en.html

7 OECD, Competition and Poverty Reduction: Contribution from the United States, DAF/COMP/GF/WD(2013)59, 21 February 2013, at 3, https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/1302povertyreduction-us.pdf.

8 M. Stucke, Is Competition Always Good?, *Journal of Antitrust Enforcement*, Vol. 1, Issue 1, 2013, pp. 162–197, at 177.

9 OECD, Competition and Poverty Reduction, *supra* note 6, at 40.

10 Ibid.

11 Y. Chen and M. Riordan, Price-Increasing Competition, *RAND Journal of Economics*, Vol. 39, No. 4, 2008, pp. 1042–1058.

12 World Bank, *World Development Report 2000/2001: Attacking Poverty*, Oxford University Press, 2001, at 61.

13 R. Anderson and A. Müller, Competition Policy and Poverty Reduction: A Holistic Approach, *WTO Staff Working Paper* ERSD-2013-02, 2013, 20 February 2013, at 7.

14 OECD, Does Competition Kill or Create Jobs? Background Note by the Secretariat, DAF/COMP/GF(2015)9, 26 October 2015, at 6.

15 *See* D. Waked, Competition Law in the Developing World: The Why and How of Adoption and Its Implications for International Competition Law, *Global Antitrust Review*, Vol. 69, 2008, pp. 69–96, at 84–85.

16 J. Davies and A. Thiemann, Competition Law and Policy: Drivers of Economic Growth and Development, OECD, 2015, at 3.

17 C. Teo, Competition Policy and Economic Growth, ASEAN Conference on Fair Competition Law and Policy, 2003, at 4.

18 For example, introducing short-term unemployment benefits can reduce immediate disruptions, Ibid.

19 OECD, Competition and Poverty Reduction, *supra* note 6, at 43.

the poor on the supply side prone to the abuse of buyer power. This can be common in cases where a small producer supplies one supermarket chain or for example, where this producer has no bargaining position and must subject to the chain's demands for not losing their business, though this might risk the future viability of this business.[20] The second scenario involves the producer as a buyer or customer of input materials, like fertilisers, where a robust competition may offer better product attributes. The final scenario addresses the poor producer as a rival. In the absence of robust competition, small producers are at risk of exploitation or exclusion from the market, which can significantly diminish or eliminate their income. Poor producers are affected by anticompetitive agreements amongst other producers or by dominant rivals' anticompetitive restraints.

2. The impact of competition on growth

8. It is evident that well-functioning markets are crucial for fostering growth and creating opportunities for poor people.[21] Meanwhile, competition is a key driver of well-functioning markets, as it leads to greater macroeconomic growth, which increases employment and wages.[22] Studies outlined the sound legal system and free competitive markets as two of the main components of sustainable economic growth[23] and showed that increased competition leads to higher growth.[24] Technological progress and innovation as drivers of economic growth are boosted by competition, and evidence shows that competitive markets tend to be the most innovative, as rivals are motivated to innovate to gain a competitive edge and improve their profit margins.[25]

9. Some studies looked into the link between adopting competition law and economic growth and argued that competition law has no impact on economic growth in poorer developing countries.[26] Nevertheless, competition law and its enforcement do not necessarily guarantee enhanced competition; they provide preconditions for competition. Therefore, the relationship between competition law and growth differs amongst countries depending on the level of development.[27]

20 P. Dobson, R. Clarke, S. Davies and M. Waterson, Buyer Power and its Impact on Competition in the Food Retail Distribution Sector of the European Union, *Journal of Industry, Competition and Trade*, Vol. 1, 2001, pp. 247–281, at 271.

21 World Bank, *World Development Report 2000/2001: Attacking Poverty*, *supra* note 12, at 61.

22 Davies and Thiemann, *supra* note 16, at 3.

23 B. Owen, Competition Policy in Emerging Economies, *Stanford Institute for Economic Policy Research (SIEPR) Discussion Paper* No. 04-10, April 2005, at 3.

24 S. Khemani, Competition Policy and Promotion of Investment, Economic Growth and Poverty Alleviation in Least Developed Countries, *Foreign Investment Advisory Service (FIAS) Occasional Paper* No. 19 41334, 2007, at 3; A. Mateus, Competition and Development: What Competition Law Regime?, in *Competition Law and Development*, I. Lianos, T. Cheng and D. Sokol (eds.), Stanford University Press, Redwood City, 2013, pp. 115–136, at 117.

25 OECD, Does Competition Kill or Create Jobs?, *supra* note 14, at 16.

26 A. Bhattacharjea, Who Needs Antitrust? Or, Is Developing-Country Antitrust Different? A Historical Comparative Analysis, in Lianos, Cheng and Sokol (eds.), *supra* note 24, pp. 52–65, at 59.

27 T.-C. Ma, The Effect of Competition Law Enforcement on Economic Growth, *Journal of Competition Law and Economics*, Vol. 7, Issue 2, 2011, pp. 301–334.

10. It was argued that economic growth leads to an increase in the poor's income and lifts them out of poverty,[28] and some of the literature even considered it the only way to reduce poverty,[29] assuming all individuals will benefit from this growth. Nevertheless, evidence showed otherwise.[30] Following the recognition of the potential conflict between economic growth and income distribution, it has become widely acknowledged that economic growth can be accompanied by an increase in inequality, as an increase in economic growth would also increase economic concentration and make the situation of lower-income households deteriorate.[31] This gave rise to the pro-poor growth[32] and inclusive growth[33] concepts, which remain unclear and are intertwined. The link was drawn between enhanced competition and fostering inclusive growth, and effective competition policies were essential to achieve that.[34]

III. The role of competition agencies in addressing poverty

11. Enacting competition laws and integrating the most suitable goals into the regulatory frameworks are foundational steps toward achieving the positive desired impact. However, the mere existence of these laws is insufficient to safeguard enhanced market competition and achieve the designated goals. Law enforcement

28 *See* D. Dollar and A. Kraay, Growth Is Good for the Poor, The World Bank, *Policy Research Working Paper* No. 2587, 2001; R. Eastwood and M. Lipton, Pro-Poor Growth and Pro-Growth Poverty Reduction: Meaning, Evidence, and Policy Implications, *Asian Development Review*, Vol. 18, No. 2, 2000, pp. 22–58; and World Bank, *World Development Report 2000/2001: Attacking Poverty*, *supra* note 12, at 47.

29 L. Balcerowicz and A. Rzońca (eds.), *Puzzles of Economic Growth: Directions in Development*, World Bank Publications, Washington, DC, 2015, at 17.

30 *See* J. Donaldson, Growth Is Good for Whom, When, How? Economic Growth and Poverty Reduction in Exceptional Cases, *World Development*, Vol. 36, Issue 11, 2008, pp. 2127–2143; S. Basu and S. Mallick, When Does Growth Trickle Down to the Poor? The Indian Case, *Cambridge Journal of Economics*, Vol. 32, No. 3, 2008, pp. 461-477, at 461.

31 M. Ahluwalia, Income Inequality: Some Dimensions of the Problem, in *Redistribution with Growth*, H. Chenery and others (eds.), 3rd ed., The World Bank and Oxford University Press, 1979, at 3.

32 There are many definitions of pro-poor growth. For example, Kakwani and Pernia defined it as growth that "*enables the poor to actively participate in and significantly benefit from economic activity.*" N. Kakwani and E. Pernia, What Is Pro-Poor Growth?, *Asian Development Review*, Vol. 18, 2000, pp. 1–16, at 3.

33 Many definitions of inclusive growth were introduced by international organisations and governments. A World Bank ~~policy Research~~ working paper described inclusive growth as growth that is "*broad-based across sectors, and inclusive of the large part of the country's labour force*" E. Ianchovichina, and S. Lundstrom, Inclusive Growth Analytics: Framework and Application, The World Bank, Policy Research Working Paper N.4851, 2009 at 2.

34 P. Aghion, R. Cherif and F. Hasanov, Competition, Innovation, and Inclusive Growth, *IMF Working Paper* No. 2021/080, 2021, https://www.imf.org/en/Publications/WP/Issues/2021/03/19/Competition-Innovation-and-Inclusive-Growth-50269; T. Vilakazi, Undermining Inclusive Growth? Effects of Coordination on Fertilizer Prices in Malawi, Tanzania, and Zambia, in *A Step Ahead: Competition Policy for Shared Prosperity and Inclusive Growth*, The World Bank Group, Washington, DC, 2017, https://www.oecd-ilibrary.org/docserver/978-1-4648-0945-3.pdf?expires=1722408827&id=id&accname=guest&checksum=6E14B56107B2A58284A6BFDD16205DC4.

makes the rules actual[35] even where they are not perfectly enforced.[36] By its nature, competition law is designed to enhance and protect competition, and its enforcement to translate into tangible outcomes; otherwise, it remains "*ink on paper*."[37] The role of competition law enforcement in reducing poverty starts with enforcing the law to achieve the intermediate goal of enhancing and protecting competition. Beyond these direct benefits, the question is whether this enforcement can be leveraged to target poverty reduction and whether enforcement priorities can be adjusted to focus on practices that disproportionately affect the poor.

1. Building on a strong enforcement framework

12. As competition law enforcement enhances competition, which in turn is proven to have positive impacts on poverty reduction, effective competition law enforcement is the main key to poverty reduction. While the design of substantive competition rules is important for reducing poverty, effective enforcement of the substantive rules is the primary and most significant, which prerequires an effective enforcement system in place. Today, the majority of countries around the world have a form of competition law in place. The number of jurisdictions has soared from fewer than 20 in the 1990s to over 130 today.[38] In many countries, this came after international efforts and a desire to join regional blocks and communities.[39] For different reasons, many countries chose the route of transplanting a model of competition law, and as this step came after formal or informal pressures, some countries have little interest in enforcing this law, especially with the lack of resources and with it being low on the policy agenda. In many cases, this also left them with a developed country's model with little capacity to undertake major reforms to adapt this framework to the national context. Therefore, this resulted in patterns of lax or absent enforcement emerging in different developing jurisdictions. With this in mind, we can start from the idea that where we have a model of competition law that simply prohibits anticompetitive practices, the first step toward competition law and poverty reduction can be the effective enforcement of competition rules we have in place. This stems from the idea that competition enforcement, in principle, enhances competition, which in turn benefits the poor. This involves a comprehensive and effective legal framework, and efficient implementation by a well-established enforcement agency.

13. An effective competition enforcement system encompasses establishing a solid and adequate legal framework with procedural rules that enable and facilitate this process, creating specialised and well-equipped competition authorities and finally effectively implementing the substantive while employing the different endowed tools and mechanisms. Effective competition law enforcement relies on the agency's ability to apply this law and realise its intended objectives. Even with the obvious divergence of approaches between the different models and between the different competition laws around the world, all of these frameworks have the intermediate mutual goal of protecting competition, even where the ultimate goals diverge. Therefore, as studies showed that competition has, mostly, a positive impact on poverty reduction, the mere effective enforcement increasing or protecting competition in the market is an act of enhancing poverty reduction. As such, the effective enforcement of competition law does not necessarily signify fulfilling its primary objectives; rather, it entails establishing safeguards to guarantee protecting and enhancing competition, as well as protecting and ensuring a well-functioning market. Nevertheless, for the UNCTAD, the effectiveness of enforcement was weighed against producing "good results" based on the objectives of the competition law, and on the allocation of resources to realise these objectives.[40] Here, it should be mentioned that the criteria for considering effective enforcement is rather the objectives of competition law enforcement, and whether they are realised. These objectives include preventing or putting to an end the anticompetitive distortions and restoring or compensating for the harm.[41] However, these are not separate from the goals of competition law, and are open to broader interpretations, especially in developing countries.

14. Nonetheless, effective competition enforcement is not clear-cut; it remains a significant challenge, even for authorities with the longest-standing experience. Major legal and procedural developments are needed to adapt to the changing landscape and emerging challenges like sustainability concerns, the complex supply chain, and technological advancements. Therefore, the first step should be developing a strong enforcement system, alongside revising the existing institutional design[42] of competition authorities that have proven ineffective. Therefore, this starts with establishing an effective competition agency, which is an agency that effectively enforces competition law and best pursues its desired outcomes, endowed with the needed powers, tools and sufficient

35 J. Kleinfeld, Enforcement and the Concept of Law, *Yale Law Journal Online*, Vol. 121, 2011, pp. 293–315, at 296, http://yalelawjournal.org/forum/enforcement-and-the-concept-of-law.

36 Ibid. at 308.

37 M. Dabbah, *International and Comparative Competition Law*, Cambridge University Press, 2010, at 51.

38 W. Ng, Changing Global Dynamics and International Competition Law: Considering China's Potential Impact, *The European Journal of International Law*, Vol. 30, No. 4, 2019, pp. 1409–1430, at 1409.

39 Dabbah, *supra* note 37.

40 UNCTAD, Foundations of an Effective Competition Agency: Note by the UNCTAD Secretariat, TD/B/CI/CLP/8, 2011, at 3–4, https://unctad.org/system/files/official-document/ciclpd8_en.pdf.

41 H. Vedia Jerez, *Competition Law Enforcement and Compliance across the World: A Comparative Review*, Wolters Kluwer, Alphen aan den Rijn, 2015, at 74.

42 Different jurisdictions experimented major reforms, *see* W. Kovacic and D. Hyman, Competition Agency Design: What's on the Menu, *GWU Legal Studies Research Paper* No. 2012-135, *GWU Law School Public Law Research Paper* No. 2012-135, *Illinois Public Law Research Paper* No. 13-26, 2012, at 2 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2179279#.

human and financial resources.[43] Empirical studies have shown that developing countries that enacted competition law enforce their laws to some level[44] despite the varied challenges they face. Therefore, the effectivity of a competition agency is specifically linked to the aspired ends that are meant to be achieved, which can be the goal of protecting and enhancing competition in the market and/or any other end goal.

2. The prospects for poverty reduction-focused enforcement

15. Social and socio-economic considerations in competition enforcement have not been embraced by all jurisdictions. Leading jurisdictions have been hesitant to integrate pursuing such considerations, even where there is a place for them in their parcel of competition enforcement.[45] However, recently, such considerations have been progressively integrated into competition policy, and many jurisdictions have integrated them into their frameworks to meet developmental needs.

16. Poverty reduction is not among the conventional goals of competition law. Despite the wide range of socio-economic goals listed in different competition laws around the world, poverty reduction was nowhere addressed as a goal.[46] The closest it can get to poverty reduction as a goal is by looking into non-economic goals, like reducing unemployment and reducing inequality addressed by different jurisdictions and their link to poverty reduction. It must be noted that developing countries have been leading in deploying social and socio-economic goals, which further allows embracing social and socio-economic considerations in their enforcement, among which poverty reduction. This article does not intend to answer whether poverty reduction should be enlisted as a goal of competition law; yet, the question to be addressed here is whether poverty reduction needs not to be designated as a goal of competition law to be targeted by its enforcement.

17. Associating poverty reduction with the competition law enforcement system and ensuring competition level in the market can be regarded as an ambitious position, especially where pursuing non-economic objectives is not popular yet. Notwithstanding the growing acceptance of these links in academic and policy discussions, the realisation remains faced with difficulties. Poverty reduction considerations align with the broader objectives of competition law; therefore, competition authorities can target reducing poverty through enforcement, in achieving its goals, and within its mandate and discretion. It must be noted that this is limited to where poverty can be related to the competition level in the market. In cases where poverty is caused, increased or sustained by corruption, armed conflicts, and environmental crises, this can be irrelevant.

18. Effective competition enforcement that leads to pro-poor impact includes standard functions, for example, ensuring fair access to markets through reducing entry barriers, and preventing excessive prices. Nevertheless, there are different ways through which competition agencies can proactively target poverty reduction within their mandate and functions. These include using enforcement priorities, using advocacy functions, and using targeted investigations and market inquiries in markets that are sensitive to the poor. In the next section, the focus will be on prioritisation.

19. It must be noted that a distinction was made between cases where protecting competition aligns with social impact and cases where there is a conflict. It is argued that competition authority can be "socially responsible" where this raises no controversy, while protecting against competition to meet social goals.[47] As though this approach aims at a positive impact, but is met with scepticism like in the case of "*striking deals with an oligopoly allowing the latter to collude on the rich-consumers segment against a promise of below-cost price for poorer households*."[48]

3. Enforcement priorities and targeting necessity markets

20. As competition authorities have limited inherent human and financial resources and considering the scope and complexity of market activities, they cannot address all issues simultaneously. This entails setting enforcement priorities to optimise the outcomes, and best allocate their resources. Prioritisation instruments give competition authorities the discretion to prioritise investigating, initiating sector inquiries, and conducting in-depth investigations. The criteria outlined in prioritisation instruments may include the severity and

43 The literature has extensively examined the main characteristics and functions of effective competition agencies, and looked into elements that contribute to their success and efficiency. *See*, for example, T. Muris, Principles for a Successful Competition Agency, *The University of Chicago Law Review*, Vol. 72, Issue 1, 2005, pp. 165–187; W. Kovacic, How Does Your Competition Agency Measure Up?, *European Competition Journal*, Vol. 7, No. 1, 2011, pp. 25–45; L. Göranson, The Efficient and Effective Competition Authority, in *Competition Law Today: Concepts, Issues, and the Law in Practice*, V. Dhall (ed.), 2nd ed., Oxford University Press, 2019; A. E. Rodriguez and A. Menon, The Causes of Competition Agency Ineffectiveness in Developing Countries, *Law and Contemporary Problems*, Vol. 79, No. 4, 2016, pp. 37–67, https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4802&context=lcp.

44 D. Waked, Do Developing Countries Enforce Their Antitrust Laws? A Statistical Study of Public Antitrust Enforcement in Developing Countries, 2011, available at SSRN, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2044047.

45 For example, Article 9 of the Treaty on the Functioning of the European Union states that "[i]*n defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health*." However, the EU competition law was considered indifferent to social considerations. On this, *see* A. Kornezov, For a Socially Sensitive Competition Law Enforcement, *Journal of European Competition Law & Practice*, Vol. 11, Issue, 8, 2020, pp. 399–403, at 399.

46 None of the countries participating in the International Competition network (ICN) reports. *See* ICN, Unilateral Conduct Workbook: Chapter 1: The Objectives and Principles of Unilateral Conduct Laws, 2012; and ICN, Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies, 2007.

47 J. Tirole, Socially Responsible Agencies, *Competition Law & Policy Debate*, Vol. 7, Issue 4, 2023, pp. 171–177, at 173.

48 Ibid.

duration of the caused harm, the size and complexity of the case, the potential outcome, the strength of evidence, and the general policy priorities related to the economic, social and political circumstances.[49]

21. Literature on the subject prescribed enforcement priorities to address different developmental concerns. For example, enforcement priorities were endorsed to address inequality[50] and different developmental concerns.[51] For new competition authorities, the OECD's recommended practices for promoting pro-poor growth endorsed prioritising cases with high entry barriers, cases where prices seem high and those where consumers will benefit most.[52] Competition authorities can resort to enforcement priorities to target poverty, which seems logical and straightforward yet may still raise issues. This requires competition authorities to assess which sectors or practices would have such an impact, and to take the short-term and long-term impact into account, and to consider other prioritisation factors, like the potential outcome. This makes this process complex, open to political influence, and subject to trade-offs. Therefore, in order to target poverty, competition authorities should prioritise the restraints that are most harmful to the poor.

22. The first area of prioritisation, and the most obvious, should be essential products. A call was made for prioritising products purchased by middle- and lower-income customers, including investigating anticompetitive concerns in markets of basic products like food manufacturing and retailing, fuel, and healthcare products in order to reduce inequality.[53] Studies have shown a large share of the poor's income is spent on food,[54] which means that they are more affected by changes in food prices and other attributes. Therefore, prioritising cases relevant to the food sector, or essential products and services, is crucial for socially sensible competition enforcement. The idea of pursuing restraints on essential products before those of luxury ones, to "*sue milk cartels before caviar ones*," is not considered controversial.[55] However, it can be argued that protecting competition in the food sector and other essential products sectors benefits all consumers, whether they are poor or not. That does not contradict reducing poverty, as the rich benefiting from positive product attributes does not lessen the impact of enforcement on poverty reduction. Moreover, a study on food manufacturing concluded that reducing food prices that are affected by market power would lead to an increase in the income of the poor "*at twice the rate of the rich*" when the products concerned are similar to meats, milk, canned vegetables, flour, rice, sugar, soft drinks and margarine.[56] Moreover, we shall not forget the impact of competition restraints on the other side of the market. Restraints affecting employment and the poor as producers should also be of utmost priority for competition authorities.

23. The second aspect of prioritisation concerns the kind of restraint. It is widely accepted that cartels are the most harmful violation of competition law. This view manifests in the U.S. Supreme Court *Trinko* decision, where, famously, the Court described them as the "*supreme evil*."[57] This perception is not unique to the U.S. jurisdiction. Practice shows that cartel enforcement is a priority for many competition jurisdictions around the world. Different jurisdictions prioritise cartels, including Australia, Brazil, the EU, Germany, Russia, South Africa and Spain.[58] A study that included 37 competition authorities has also shown that approximately all of them have set cartel enforcement as a priority.[59] Some developing countries with a high percentage of poverty followed the lead of other jurisdictions, considering cartels as a top priority and viewing them as the most harmful form of violation.[60] On the other hand, hard-core cartels in particular were widely recognised as the most harmful types of cartels and the most harmful restraint of competition in general,[61] which makes them an enforcement priority as well. According to a UNCTAD report, the characteristics of essential products markets make them specifically vulnerable to cartels because these markets are highly concentrated, the product is usually homogenous and has a few substitutes and the price elasticity demand is very

49 For more on priorities identified in different jurisdictions, *see* ICN Agency Effectiveness Working Group, 'ICN Agencies' Case Prioritisation and Initiation, 2021, http://internationalcompetitionnetwork.org/wp-content/uploads/2022/04/AEWG_Report-on-Case-Prioritisation-and-Initiaiton-2021.pdf.

50 B. Dufková, How Concerns of Economic Inequality and Poverty Are Reflected in Efficiency-Based Competition Laws: A Developing Country Perspective, in *Competition Law and Economic Inequality*, J. Broulik and K. Cseres, Hart Publishing, Oxford, 2022, pp. 217–244, at 234–235.

51 E. Fox and M. Bakhoum, *Making Markets Work for Africa: Markets, Development, and Competition Law in Sub-Saharan Africa*, Oxford University Press, 2019; K. Weeks, Enforcement Priorities for New Agencies: Lesson from South Africa on the Deterrence of Cartel Conduct, in *New Competition Jurisdictions: Shaping Policies and Building Institutions*, R. Whish and C. Townley (eds.), Edward Elgar Publishing, Cheltenham, 2012, pp. 183–211.

52 OECD, Promoting Pro-Poor Growth: Policy Guidance for Donors, 2007, at 91 https://www.oecd-ilibrary.org/development/promoting-pro-poor-growth_9789264024786-en;jsessionid=9vgdAItok8BHrTBoKWklTQpQ6RSlvT4-J4iWEwR5.ip-10-240-5-96.

53 J. Baker and S. Salop, Antitrust, Competition Policy, and Inequality, *Georgetown Law Faculty Publications*, Vol. 104, 2015, at 18–20.

54 R. Townsend, Ending Poverty and Hunger by 2030: An Agenda for the Global Food System, 2nd ed., World Bank Group, 2015, at 9.

55 Tirole, *supra* note 47, at 173.

56 Baker and Salop, *supra* note 53, at 19, citing John Connor and others, *The Food Manufacturing Industries: Structure, Strategies, Performance, and Policies*, Lexington Books, Lexington, 1985, at 297–298.

57 The U.S. Supreme Court found that "[c]*ompelling negotiation between competitors may facilitate the supreme evil of antitrust: collusion*." *Verizon Communications v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 408 (2004).

58 ICN Cartel Working Group, Trends and Development in Cartel Enforcement 2010-2020, 2021 at 122–125, https://www.internationalcompetitionnetwork.org/portfolio/trends-and-developments-in-cartel-enforcement-2010-2020/.

59 The BRICS Competition Law and Policy Centre, Combatting Cartels: Empirical Study Prepared by the BRICS Competition Law and Policy Centre, Round Table – Combatting Cross-Border Cartels, 8th United Nations Review Conference on Competition and Consumer Protection, 2020, at 36 https://unctad.org/system/files/non-official-document/tdrbpconf9_d17_cont_BRICS.pdf.

60 For example, the Zambian Competition and Consumer Protection Commission (CCPC) described cartels in general as a top priority and the most harmful kind of practice. *See* Competition and Consumer Protection Commission of Zambia, 2021 End of Year Performance Update of the Competition & Consumer Protection Commission, 31 January 2022, https://www.ccpc.org.zm/details/59.

61 D. Sokol and A. Stephan, Prioritizing Cartel Enforcement in Developing World Competition Agencies, in Lianos, Cheng and Sokol (eds.), *supra* note 24, pp. 137–154, at 137.

low, which makes them prone to cartels.[62] As the expenditure on the products of these markets constitutes a large proportion of the poor's income, such cartels should be on top of priorities.

24. Considering cartels as the supreme evil may marginalise the harm caused by other practices. Abuse of dominance and the existence of entry barriers may bring about as much harm if not more, especially in developing countries. Reducing market barriers and preventing and stopping abuse of dominance may be more pressing for developing countries' policy priorities in general and for reducing poverty in particular. Exclusionary practices have been regarded as an example of one of the most serious restraints that should be prioritised.[63] Some studies suggested that the abuse of dominant power can cause more harm in developing countries than it does in developed ones.[64] This is why choosing enforcement priorities is not straightforward, and should go beyond the lead of other jurisdictions, as these priorities differ depending on the domestic context.

25. In many jurisdictions, exclusionary practices are higher on the list of priorities than exploitative practices[65] despite their significant impact in the short run. For example, in order to avoid intervention in pricing products and services, excessive pricing has not been an area of focus for many jurisdictions. In the EU, the focus has been on exclusionary abuses rather than exploitative ones.[66] However, sanctioning exploitative practices like excessive pricing can protect competition in "socially sensitive markets" and would have a positive impact on essential products.[67] Pricing practices should be put forward as a priority as they mess directly with the welfare of consumers in general and poor ones in particular depending on the product/service in question.

IV. Conclusion

26. The relation between competition law and poverty reduction is embedded in the relation between competition and poverty reduction. Competition law is the most important and critical tool for protecting and enhancing competition, which in turn has been proven to have mostly a positive impact on the poor. The poor, not only as consumers but also as producers and employees, are highly impacted by market competition. The absence of competition affects these stakeholders directly, and indirectly, leading to significant outcomes on their income and wealth and influencing any opportunities that may allow them to break the cycle of poverty. Therefore, where we have a competition law in place, effective enforcement can be the ground for enhancing poverty reduction through competition law. This entails a comprehensive and clear legal framework, independence from political and economic pressure, and adequate financial and human resources. Transitioning from establishing the appropriate set of competition law rules to ensuring their effective enforcement is crucial for poverty reduction, as competition law enforcement enhances competition, which is proven to benefit the poor.

27. Despite the unsettled debate on the non-economic goals of competition law, and the absence of poverty reduction from the parcel of goals of competition law, competition authorities can still target poverty within the available framework and shape its enforcement functions through the different provisions and interpretation of goals. Competition law enforcement amongst jurisdictions has been proven to adapt to several changes and needs. Apart from standard enforcement, competition agencies can proactively target poverty reduction within their mandate and functions, through targeted investigations and market inquiries in specific sectors that are sensitive to the poor, like essential products, labour markets and agriculture. They can also use enforcement priorities to target practices that harm the poor the most, whether by prioritising a sector or a kind of restraint. Nevertheless, this task requires considering the domestic context, and can be quite challenging. ■

62 UNCTAD, The Impact of Cartels on the Poor: Note by the UNCTAD Secretariat, TD/B/C.I/CLP/24/Rev.1, 24 July 2013, at 10, https://unctad.org/system/files/official-document/ciclpd24rev1_en.pdf.

63 Fox and Bakhoum, *supra* note 51, at 85.

64 P. Brusick and S. Evenett, Should Developing Countries Worry about Abuse of Dominant Power?, *Wisconsin Law Review*, Vol. 2008, No. 2, 2008, pp. 269–294.

65 For example, this has been the approach of the European Commission in recent decades: P. Ibañez-Colomo, From Dynamic Markets to Dynamic Enforcement: The Ubiquity and Limits of Competition Policy in a World in Flux, in *Dynamic Markets, Dynamic Competition and Dynamic Enforcement: the Impact of the Digital Revolution and Globalisation on Competition Law Enforcement in Europe*, D. Gerard, E. Morgan de Rivery and B. Meyring (eds.), Bruylant, Brussels, 2018, 121-153 at 133.

66 Kornezov, *supra* note 45, at 401.

67 Ibid.

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