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THE EFFECTIVENESS OF COMPETITION LAW RULES IN ADDRESSING THE ABUSE OF A DOMINANT POSITION IN DIGITAL MARKETS

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Abstract:

This article examines the effectiveness of Algerian competition law in addressing abuses of dominant position in digital markets. It evaluates whether traditional concepts and criteria of dominance can be applied to the digital environment and assesses the adequacy of the existing legal framework, particularly Ordinance No. 03-03 on Competition, in tackling anticompetitive practices by digital platforms. It also highlights the distinctive characteristics of digital markets and the legal challenges they create, drawing on comparative experiences, especially the European approach. Finally, it proposes developing and modernizing Algeria's legislative framework to ensure effective competition protection in the context of ongoing digital transformation.

Keywords: Competition Law; Abuse of Dominant Position; Digital Markets; Digital Platforms; Digital Transformation.

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Introduction:

Market dominance constitutes one of the practices to which competition legislation in many comparative legal systems has devoted considerable attention, with the aim of protecting competition and market participants from abuses committed by dominant undertakings.

A dominant position arises when an undertaking possesses sufficient economic power to impede the maintenance of effective competition in the market. Dominance does not, in itself, constitute an infringement of competition rules. Accordingly, an undertaking is not subject to penalties or proceedings before the Competition Council merely because it holds a dominant position. However, when such a position is abusively exploited and used as a means of restricting competition, the conduct falls outside the scope of lawful competitive behaviour and becomes an anticompetitive practice, requiring intervention and the imposition of appropriate penalties on the undertaking concerned.

The Algerian legislator has addressed the abusive exploitation of a dominant position in the various competition laws adopted in Algeria, particularly Ordinance No. 03-03 on Competition.[1] This legislation regulates dominant positions, determines the meaning of their abusive exploitation, identifies the forms that such abuse may take, and provides for penalties against dominant undertakings in order to preserve competition in the market.

Alongside the physical markets traditionally regulated by competition legislation, new spaces have emerged in which anticompetitive practices, including abuses of dominant positions, have intensified. These spaces are commonly referred to as digital markets or the digital environment.

The digital environment operates according to mechanisms that differ from those prevailing in physical markets. It relies on digital systems in which undertakings operate through digital platforms that are not confined by specific geographical boundaries. Within these markets, some undertakings have been able to exploit their dominant positions to exclude competitors.

This development has required many countries to amend their competition laws in order to ensure that they are capable of addressing abuses of dominant positions in digital markets.

Algeria is not immune to such practices restricting competition, as dominant undertakings operating in digital markets may adversely affect competition within its market. This, in turn, requires Algeria to address the abusive exploitation of dominant positions in digital markets, as other countries have sought to do.

Against this background, this article seeks to address the following question:

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To what extent are the rules established under Algerian competition law suitable and sufficient to address the abusive exploitation of a dominant position in digital markets?

Considering that abuse of a dominant position requires, first, the existence of an undertaking in a dominant position and, second, the abusive exploitation of that position, the analysis of the research question is divided into two sections.

The first section examines the extent to which the concept of a dominant position can be applied to practices occurring in digital markets. The second section assesses the adequacy of the rules prohibiting the abuse of a dominant position under competition law in protecting competition in digital markets.

THE FIRST TOPIC: THE COMPATIBILITY OF THE CONCEPT OF A DOMINANT POSITION UNDER COMPETITION LAW WITH DIGITAL MARKETS

Assessing the extent to which the concept of a dominant position established under competition law is compatible with practices occurring in the digital environment requires, first, an examination of the concept of a dominant position in digital markets and, second, an analysis of the criteria for establishing dominance in the digital environment.

FIRST REQUIREMENT: THE CONCEPT OF A DOMINANT POSITION IN THE DIGITAL ENVIRONMENT

The concept of a dominant position is one of the fundamental concepts of competition law, as it provides the legal basis for determining whether an undertaking possesses market power capable of influencing the structure of competition within the relevant market. Although this concept developed in the context of traditional markets, the profound transformations brought about by the digital economy have given rise to new forms of dominance that differ from traditional dominance in their mechanisms and manifestations, while retaining the same essential characteristic, namely, the undertaking's ability to act to an appreciable extent independently of its competitors and customers.

Accordingly, it is necessary, first, to clarify the legal meaning of a dominant position and, second, to determine the market within which such dominance is exercised in the context of the digital economy.

Firstly: Definition of a Dominant Position in the Digital Environment

The European Court of Justice has defined a dominant position as a position of economic strength enjoyed by an undertaking that enables it to prevent effective competition from being maintained in the relevant market by allowing it to behave

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to an appreciable extent independently of its competitors, customers, and ultimately consumers.[2]

The Algerian legislator adopted a comparable approach in Article 3 of Ordinance No. 03-03 on Competition, defining a dominant position as one that enables an undertaking to acquire a position of economic strength in the relevant market capable of hindering the maintenance of effective competition and allowing it to act, to an appreciable extent, independently of its competitors, customers, or suppliers.

The Algerian legislator has not specifically defined a dominant position in the digital environment, nor has it expressly referred to such dominance in the relevant provisions. From a practical perspective, however, dominance in digital markets does not differ in its essential meaning from dominance in traditional markets. The principal distinction lies in the nature of the relevant market. Dominance in the digital environment concerns a market operating through virtual and intangible digital systems. Unlike physical markets, the digital environment is immaterial and relies on digital means of communication that function in an integrated and coordinated manner, process information, and operate at a very high speed.[3]

On this basis, dominance in the digital environment may be understood as a situation in which an undertaking possesses not only economic power, but also technical and informational power, enabling it to create obstacles to effective competition in the digital market and to affect the competitive position of its competitors, customers, and consumers.

Market power in the digital environment cannot therefore be assessed solely by reference to sales volumes or market shares. It may also depend on an undertaking's ability to control data, attract and retain users, and benefit from network effects. These factors may confer substantial market power on an undertaking even where its market share, assessed according to traditional criteria, does not appear particularly high.[4]

Secondly: Scope of the Dominant Position in the Digital Environment

Digital platforms constitute the principal environment in which undertakings may exercise a dominant position in digital markets. These platforms operate through data-processing systems and software based on complex algorithms that often entail significant development and operational costs. They generally involve multi-sided activities and rely primarily on the internet to facilitate interactions between one or more categories of users.[5]

Digital platforms are also characterized by their operation as multi-sided markets, as they simultaneously connect different categories of users. The value of

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a platform may increase as the number of its users grows, thereby strengthening its competitive position and making market entry more difficult for new competitors.[6]

Dominant undertakings may collect data from users who benefit from free services offered through the platform and subsequently exploit such data to improve user targeting and generate profits. Dominance in the digital environment may therefore arise from an innovative idea or business model that reflects a high degree of efficiency and market control, enabling the undertaking to compete on a broad scale and ultimately establish a dominant position in the market.[7]

Google provides an example of an undertaking that has achieved a dominant position in the field of online search services. The company generates substantial revenues from advertising by using data collected from users of its free search services to target them with relevant advertisements through its websites and mobile applications.

SECOND REQUIREMENT: CRITERIA FOR DETERMINING A DOMINANT POSITION IN THE DIGITAL ENVIRONMENT

Determining the criteria for establishing a dominant position is essential in order to assess whether an undertaking has attained a level of market power that requires regulatory scrutiny. Where the undertaking has not engaged in abusive conduct, the Competition Council may issue a declaration of non-intervention.

Despite the importance of these criteria, Ordinance No. 03-03 does not regulate or specify them, nor has any implementing text been adopted for this purpose. They are likewise not defined in Executive Decree No. 05-175, which sets out the procedures for obtaining a declaration of non-intervention concerning agreements and dominant positions in the market.[8] This legislative gap has left the Competition Council, market regulatory authorities, and the judiciary to address the matter according to their respective approaches.

This differs from the position under the repealed Ordinance No. 95-06 on Competition,[9] pursuant to which Executive Decree No. 2000-314 was adopted. That Decree addressed the issue and established criteria for determining whether an economic operator held a dominant position.[10] Although the Decree has been repealed, the criteria it established may still provide a useful analytical framework for assessing whether an undertaking operating in the digital environment holds a dominant position.

These criteria are as follows:

Firstly: The Criterion of the Market Share Held by the Dominant Undertaking

The market share held by the dominant undertaking is compared with the shares held by its remaining competitors. This criterion is essential for assessing a dominant position in traditional markets and also occupies an important place in

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the digital field, which is characterized by a fundamental feature, namely the large size of the undertakings operating within it. Various studies conducted worldwide have confirmed that seven of the ten largest undertakings active in this field hold dominant positions in the provision of digital products.[11]

However, it should be noted that some legislations have specified a market-share threshold that may indicate the existence of a dominant position. For example, the Egyptian legislator set the threshold at 25% of the market, while the German legislator set it at 33% or more. Other legislations have left this matter to the authorities responsible for applying competition law, as is the case with the Algerian and French legislators. This approach may lead to differing decisions, with the percentage relied upon varying from one sector to another and from one authority to another.

Microsoft, for example, was the subject of considerable controversy in cases concerning the abuse of a dominant position in Europe and the United States because of its dominance in the personal computer sector and its exploitation of that dominance in a manner that hindered competition from other undertakings producing free software. Despite differences in Microsoft's market share from one country to another, the decisions issued against it agreed that it had abusively exploited its dominant position. This resulted in the imposition of financial penalties and, in many cases, obligations to provide undertakings not to undermine competition.[12]

Another example is the decision adopted by the Post and Telecommunications Regulatory Authority against Orascom Telecom in 2007, in which it confirmed that the undertaking held a dominant position in the mobile telecommunications market, as its share exceeded 50% of the total number of subscribers.

Likewise, reference may be made to the decision adopted by the Algerian Competition Council in 1999 against the National Enterprise for Electronic Industries.[13]

In another decision unrelated to digitalization, specifically the decision concerning LAFARGE in the cement market, the Competition Council held that the undertaking, despite holding a 36% market share, occupied a dominant position. However, it found no abusive exploitation of that position because the undertaking was not the only dominant operator in the market.

The legal or technical advantages enjoyed by an undertaking also constitute an important criterion for assessing a dominant position in the digital environment. The latter is fundamentally characterized by the control exercised by dominant undertakings over a particular technology or application that has enabled them to achieve dominance. Without such control, there would be no basis for establishing a dominant position.

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The market-share criterion alone is no longer sufficient to assess market power in digital markets, as some platforms may enjoy significant economic influence by possessing vast quantities of personal data or exercising control over digital infrastructure, despite not holding the largest market share.[1]

Secondly: The Criterion of Financial, Contractual, or Actual Relationships Linking the Dominant Undertaking to Other Undertakings

This criterion includes the financial or actual advantages linking the dominant undertaking to other undertakings, as well as the advantages arising from the geographical proximity from which the undertaking benefits.

The criterion of geographical proximity becomes less significant in the digital environment because digital markets generally operate without regard to geographical boundaries.

Alongside these criteria, the assessment of a dominant position in practice is based on two main elements:

- The ability of the dominant undertaking to impose its conditions on its competitors.
- The absence of meaningful choice for the other party, whether an undertaking or a consumer, which compels it to accept the conditions imposed by the dominant undertaking.[14]

These criteria were taken into consideration in the proceedings against Microsoft. The company was accused of adopting closed and non-open software systems in a manner that hindered the ability of its customers to switch to competing browsers and compelled them to operate within the integrated framework of Windows and Internet Explorer. This conduct adversely affected competing browsers, including Firefox, Opera, Safari, and Google Chrome.

THE SECOND TOPIC: THE SUITABILITY OF THE RULES PROHIBITING THE ABUSE OF A DOMINANT POSITION TO THE DIGITAL MARKET

A dominant position is not prohibited in itself. However, when such a position is abusively exploited, the conduct constitutes an anticompetitive practice prohibited by law, and its perpetrators may be sanctioned whenever the legally prescribed conditions are fulfilled, as examined in the First Requirement.

The application of these conditions to abuses committed in the digital environment has resulted in sanctions being imposed on several undertakings. Nevertheless, other undertakings have been able to circumvent or manipulate the applicable rules in order to avoid liability, particularly in the absence of clear and specific provisions addressing the abuse of a dominant position in the digital environment, as examined in the Second Requirement.

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FIRST REQUIREMENT: THE LEGAL BASIS FOR PROHIBITING THE ABUSE OF A DOMINANT POSITION

Article 7 of Ordinance No. 03-03 relating to competition constitutes the legal basis for prohibiting the abuse of a dominant position. It provides that:

"Any abuse resulting from a dominant position in the market, or from a monopoly over the market or a substantial part thereof, is prohibited where it aims at:

- limiting access to the market or the exercise of activities within it;
- reducing or controlling production, market outlets, or technical development;
- sharing markets or sources of supply;
- obstructing the determination of prices according to market mechanisms by artificially encouraging their increase or decrease;
- applying unequal conditions to commercial partners for equivalent services, thereby depriving them of the benefits of competition;
- making the conclusion of contracts with partners conditional upon their acceptance of additional services."

The practices referred to in Article 7 are illustrative rather than exhaustive. Consequently, they may also apply to the digital environment whenever they are compatible with the characteristics of digital markets. Thus, where an abuse of a dominant position is committed in the digital environment, its legal basis may be identified within the practices listed in Article 7.

Where a particular form of abuse does not correspond directly to one of the practices expressly mentioned in Article 7, this does not necessarily allow the undertaking concerned to escape liability under competition law. Since the practices constituting abuse of a dominant position are listed by way of example rather than limitation, the scope of Article 7 may be interpreted broadly enough to encompass abusive conduct occurring in digital markets.

The general wording of Article 7 of Ordinance No. 03-03 therefore theoretically permits the inclusion of new forms of abuse that were not known at the time of its adoption. This allows for a flexible interpretation capable of accommodating the development of digital markets without requiring an amendment to the provision each time a new abusive practice emerges.

SECOND REQUIREMENT: FORMS OF ABUSE OF A DOMINANT POSITION IN THE DIGITAL MARKET

The most significant abusive practices associated with a dominant position in the digital environment include predatory pricing, which may be preceded by the practice of selling at extremely low prices. Predatory pricing constitutes an exclusionary strategy whereby an undertaking initially sacrifices profits by setting

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prices at very low levels in order to exclude its competitors from the market. Once competitors have been eliminated or significantly weakened, the undertaking subsequently raises its prices in a manner that enables it to recover its losses and generate substantial profits.[15]

These practices may fall within the price-related forms of abuse referred to in the aforementioned Article 7 of the Competition Law.

Alongside these practices, another form arises in digital markets, namely the provision of free services. This raises the question of how an undertaking may be prosecuted for excessive or predatory pricing when the consumer has paid no monetary price.

The provision of a service free of charge should not, in itself, be regarded as conclusive evidence of predatory pricing. Rather, the situation must be assessed in conjunction with the revenues generated from services linked to the allegedly predatory service, such as advertising revenues derived from the provision of free services. Revenues generated from the sale of enhanced versions of the service should also be taken into account, together with advertising revenues. Where it is established that such revenues are substantial in comparison with the actual cost of providing the free service,[16] the provision of the service free of charge may constitute an abusive practice by a dominant undertaking.

Predatory pricing is traditionally based on the dominant undertaking offering its products or services for a certain period at prices below their normal level in order to exclude competitors, and subsequently returning to normal prices or imposing excessive prices once effective competition has been eliminated.

However, the situation in digital platforms does not always correspond precisely to this traditional model. Certain products and services are permanently provided free of monetary charge, without this necessarily constituting predatory pricing, because the undertakings concerned may simultaneously generate revenues from other sources. The apparent gratuity of digital platforms may therefore conceal another economic dimension through which undertakings generate substantial profits in comparison with the cost of the free service provided.

Accordingly, the price must be assessed on both sides of the platform. A service described as free is not necessarily provided without consideration, as users may effectively provide value through the collection of their personal information and the attention they devote to the platform.

Accordingly, the American judiciary was criticized for ruling that Google had not abused its dominant position on the ground that it provided a free service. Such reasoning overlooked the fact that the service was, in reality, supported by

revenues derived from subscription fees imposed on undertakings using search platforms.[17]

By contrast, the European judiciary adopted a different approach and considered Google to have abused its dominant position through the provision of free services.

Among the most prominent newly developed forms of abuse in digital markets is self-preferencing. This occurs when a platform gives priority to its own products or services in search results or in their display, to the detriment of competing services. It is considered one of the most significant forms of abuse of market power in the digital economy.

Alongside this practice, which is specific to digital platforms, another form of conduct has emerged that may constitute an abuse of a dominant position, namely the excessive collection of data. This practice falls within the forms of abuse of dominance provided for under Article 102 of the Treaty on the Functioning of the European Union, as data has acquired market value in the digital environment and has become comparable to money as a source of economic value.

Practical application in comparative legal systems reveals that combating the abuse of a dominant position in digital markets no longer relies exclusively on the traditional rules of competition law. It has increasingly become based on legislation specifically designed for digital markets, with the aim of preventing dominance from developing into abusive practices that may harm competition.[18]

Conclusion:

The study demonstrated that the rapid development of the digital economy has given rise to new forms of anti-competitive practices, foremost among them the abuse of a dominant position, which is increasingly carried out through digital tools and technical mechanisms that differ in nature from those traditionally known in conventional markets. This development has resulted in the emergence of positions of economic power based on control over data, algorithms, network effects, and multi-sided digital platforms, which are factors that the traditional standards of competition law are no longer sufficient to fully address.

The study also showed that the provisions of Ordinance No. 03-03 relating to competition, despite their flexibility and broad scope, which allow them to be applied to certain forms of abuse committed in digital markets, were primarily established to regulate traditional markets. They therefore do not fully account for the economic and technical characteristics that distinguish the digital environment, thereby limiting their effectiveness in addressing certain emerging practices that are difficult to assess according to traditional standards for determining a dominant position or establishing its abusive exploitation.

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The study further concluded that the concept of a dominant position under Algerian legislation remains applicable to digital markets. However, the criteria adopted for determining such a position, foremost among them market share, are no longer sufficient on their own to assess the market power of digital undertakings. This requires consideration of additional criteria, including the volume of data controlled by the undertaking, network effects, control over digital infrastructure and algorithms, and the ability to restrict users from switching to competing platforms.

Study Recommendations:

Based on the findings of the study, the following recommendations are proposed:

- Reviewing the provisions of Ordinance No. 03-03 relating to competition in a manner that responds effectively to the transformations brought about by the digital economy.
- Introducing a legal definition of digital markets and digital platforms within Algerian competition legislation.
- Expanding the criteria used to assess a dominant position to include big data, network effects, and algorithms, alongside the traditional market share criterion.
- Introducing specific provisions addressing emerging forms of abuse in the digital environment, particularly those related to the exploitation of personal data, platform self-preferencing, the tying of digital services, and the use of algorithms to exclude competitors.
- Strengthening the technical and digital capacities of the Competition Council and enabling it to seek the assistance of experts in artificial intelligence, data analysis, and digital markets, thereby enhancing the effectiveness of investigations into anti-competitive practices.
- Drawing on comparative experiences, particularly that of the European Union in regulating digital markets, in a manner that contributes to the development of the Algerian legislative framework and achieves a balance between encouraging innovation, protecting competition, and safeguarding consumer rights.

Accordingly, ensuring the effectiveness of competition law in the digital environment can no longer be limited to applying traditional provisions to a new economic reality. Rather, it requires the development of the legal framework in a manner consistent with the specific characteristics of the digital economy and capable of protecting competition against the various forms of abuse committed by dominant digital undertakings. Such an approach would strengthen legal certainty and contribute to economic development based on free and lawful competition.

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