

**Monopoly Abuse Prohibition in the Algerian Competition Law:
Between Complexity and Perplexity**

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Abstract: Today, it has become highly imperative to prevent abuse of monopoly, as described by the Competition Law, in order to restore balance in contractual relations, particularly after the emergence of powerful institutions in the production and distribution sectors. At the same time, it turned out that all abuses arising from a dominant position are not regarded as absolutely prohibited by law, since the basic concept of prohibition is conditional on a number of restrictions or exceptions, especially those related to "*efficiency gains*", such as the declaration of non-intervention which was properly accepted by the Algerian legislator. It is therefore entirely legally valid to express some complexity, and even perplexity, with respect to the principle of proscribing all abuses of monopoly.

Keywords: Monopoly; Dominance; Competition; Abuse; Consumer; Company

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Introduction

Although the Competition Act prohibits the abusive exploitation of a dominant position, as a consequence of the abuse of monopoly, it should be noted that the reason behind this prohibition lies in the fact that the legislator sought to establish balance in contracts concluded between parties whose bargaining capacities are not equal. This can be achieved by preventing the powerful side from abusing its economic power through its control and monopolization over all or most of the market shares, hence protecting the weak side from the arbitrary situations that result from market dominance.

In view of the above considerations, today, it has become urgent to preclude the abuse of dominant position, as defined by the Competition Law, in order to redress the balance in contractual relations, particularly after the emergence of powerful institutions in the production and distribution sectors. However, it should be noted that not all abuses resulting from a dominant position are considered as absolutely proscribed by law because the principle of prohibition is conditional on certain restrictions or exceptions.

In this regard, the Algerian legislator and his French counterpart have both insisted on the principle of prohibiting abuses stemming from a dominant position. However, these abuses can be protected by exceptions that exclude them from proscription. Hence, the principle of banning abuses emanating from a dominant position is not thoroughly applied because it is subject to a number of legal restrictions or exceptions¹. Moreover, the Algerian legislator has instituted a declaration of non-interference with the aim of restricting the principle of prohibiting abuses that arise from a dominant position².

The above declaration ensures protection by the law to any person who acquires it against those who would try to attack him by getting involved in forbidden abuses during the entire period of validity of this declaration. It should be emphasized that, through this authorization, the legislator sought to take into consideration the dynamics and complexities of the economic reality which are not always consistent with the legal texts and principles that can be distinguished by rigidity and stability.

On the other hand, it should be noted that, for the time being, the French legislator has not yet considered such a declaration. Besides the declaration of non-interference, there are some other exceptions as well that may impact the principle of prohibition, specially those linked to the application of legislative texts or those regarding the contribution of abuse of dominant position to economic and technical progress³.

Section one: Declaration of Non-Intervention

It is worth noting that the Algerian legislator, by using Article 8 of Ordinance 03-03, specifies the following: "The Competition Council may note, at the request of the institutions

¹ V. IDOT.L., Les limites et le contrôle de la concurrence dans la perspective d'une harmonisation internationale, in: Revue internationale de droit comparé. Vol.54.n°2, Avril-Juin 2002, p.385

² The executive decree No. 05-175 dated 12/05/2005, which specifies the procedures for obtaining a non-interference declaration regarding agreements and dominant market positions, Official Journal No. 35 issued on 18/05/2005.

³ Article 9 of Ordinance 03-03 concerning Algerian competition.

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concerned, and on the basis of the information provided to them, that an agreement, a collusive act or practice, as stipulated in Articles 6 and 7 above, does not necessitate their intervention. In addition, the methods for filing a claim to benefit from the provisions of the preceding paragraph must be determined by decree."

It should be pointed out that the Algerian legislator has introduced a restriction on the prohibition of abuse that arises from a dominant position based on the conditions stipulated in this article. As a consequence, the Executive Decree 05-175, which was released on May 12, 2005, indicates the steps to follow in order to get a declaration of non-intervention concerning agreements and market dominance. It should be highlighted that only the Algerian legislator adopted this kind of procedure of declaration of non-intervention for covering abuse, while his French counterpart did not.

Further, the particularity of this declaration resides in the fact it is released by the Competition Council in response to the demand of the institutions that are concerned⁴. This demand is formulated in a precise format that is specified by the Algerian legislator in the same decree⁵, which authorizes the Council to consider that their intervention regarding the procedures described in Articles 6 and 7 of Ordinance 03-03 relating to competition is not really necessary.

The Council of Ministers, in Europe, delivered the Regulation 17-62⁶ which entered into force on the 13th of March of the year 1962. This Regulation which, in Article 2, asserted that the demands for declarations of non-intervention or "*negative certificate requests*" may be applied to abuses of a dominant position. It is noteworthy that the motives that characterize the resolution including the declaration of non-intervention seek essentially to show that the procedure that was stated at the European Competition Commission is not concerned by the implementation of Article 85(1) or Article 86, regarding, respectively, the prohibited agreements and the abuse of a dominant position⁷.

The Treaty of Rome, which was *signed on 25 March of the year 1957*, did not deliver any exception concerning sanctions for abuse of a dominant position, which is not the case for

agreements. It should be emphasized that the European Competition Commission can grant a "Certificate of Non-Intervention" at the demand of the recipient institution when it arrives at the conclusion that the procedure involved does not *transgress the established rules of the Treaty*. It can then be deduced that the Algerian legislator was influenced by the European Union competition law which stipulated this procedure in situations where the

⁴ Article 2 of Executive Decree No. 05-175, Official Gazette No. 35, dated 18/05/2005, states that the individuals qualified to request the declaration are the concerned institution or institutions, in the case of agreements requiring at least two institutions. This request can also be submitted by representatives of these institutions, provided they present a written authorization specifying their representation authority. Additionally, concerned foreign institutions or their authorized representatives must provide an address in Algeria, as stipulated in Article 3 of the aforementioned decree.

⁵ See the two annexes related to the application for a declaration of non-intervention and the information form concerning the latter (derived from Executive Decree No. 05-175 dated May 12, 2005, which specifies the procedures for obtaining the declaration of non-intervention regarding agreements and market dominance, Official Gazette No. 35 of 2005, in accordance with the provisions of Article 8 of Ordinance 03-03 as amended and supplemented).

⁶ Regulation No. 17-62 of February 6, 1962, Official Journal of the European Communities No. 13 of February 21, 1962, pp. 204-211.

⁷ Philippe LAURENT, "Concurrence ,procédures individuelles d'application des articles 85 et 86 du traité de Rome ",jurisclasseur commercial, concurrence/consommation ,fascicule 480,(05/1983),p.21.

adopted procedures can impact competition but do not require any economic surveillance. Moreover, an institution cannot know whether the practice it is getting involved in is prohibited if it fails to adapt it.

In this case, the Commission can therefore intervene to declare that the adopted practice is trustworthy. One of the criticisms made against the Algerian legislator is the fact that he failed in the title selected for the Executive Decree 05-175 of May 12, 2005, "the decree describing the methods for getting a declaration of non-intervention concerning agreements and market dominance." It is important to note that not all agreements are proscribed ; solely those that can affect competition are. Hence, the expression "*dominant market position*", in this case, is inappropriate since a dominant position is intrinsically not viewed as proscribed but is rather legal. Indeed, the dominant market position is the objective sought by all economic operators. Therefore, proscription applies solely to abuses that hurt competition, which means that it is necessary to request a declaration of non-intervention.

Now, with regard to submitting an inquiry for a declaration of non-intervention, one has to note that the adopted procedures, as well as the examination of that inquiry, are all specified in Executive Decree 05-175⁸. In this regard, it should be emphasized that the addendum to Executive Decree 05-175 alludes to Article 59 of Ordinance 03-03 that is associated with competition. One has to understand that the Competition Council can impose, through that addendum, a penalty no greater than 500 000 Algerian Dinars, on the basis of the statement established by the rapporteur, against those institutions that purposefully give incorrect or incomplete details about the information that is required from them, or others that omit to supply that information in accordance with the timetable established by the rapporteur⁹.

The other reproach that can be made to the Algerian legislator lies in the fact that, in the Executive Decree 05-175, he did not precisely define the deadlines for studying the request nor the time limits set for responding to the request. Most of the time, when the request is rejected, the Competition Council delivers a ruling with a legal order that requires the institution to restrict its practices; if not, the sanctions provided for by the Competition Act of the year 2003 are automatically applied. In addition, it should be highlighted that, just like many other decisions of the Competition Council, the refusal decision can be pleaded.

Furthermore, the declaration of non-intervention that is provided by the European Competition Commission, which stipulates that the contested practice does not impact trade between Member States, does not imply that this practice is classified as anti-competitive in the internal market of a Member State. Nevertheless, that Member State cannot apply sanctions on the basis of the European Union law; it must resort to its own internal national law alone.¹⁰.

Section Two: Exception Arising from a Legal Text Application

The Algerian legislator, in Article 09 of the Competition Law of the year 2003, granted some exceptions relating to the adopted global principle about the proscription of abuse arising from a dominant position. It is indeed asserted that "The agreements and practices ensuing from the implementation of a legal or regulatory text that is considered for the

⁸ Articles 4, 5, 6, and 7 of Executive Decree No. 05-175 dated May 12, 2005, which establishes the procedures for obtaining a declaration of non-intervention regarding agreements and market dominance.

⁹ Article 59 of Ordinance 03-03, as amended and supplemented.

¹⁰ Emmanuel PUTMAN, *Contentieux économique*, 1ère édition, P.U.F, Paris, 1998, p.32.

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application of that text are not subjected to the conditions laid in the above mentioned Articles 6 and 7. In addition, all agreements and practices whose owners can demonstrate that they contribute to *technical* and *economic development* or help to improve employment opportunities, or enable small or medium-sized enterprises to ameliorate their competitive situation in the market are accepted. Moreover, only agreements or practices that have been permitted by the Competition Council can take advantage of this provision". This is equivalent to Article L. 420-4 of the French Commercial Code.

Based on the previously mentioned text, the Algerian legislator adopted two kinds of exceptions. The first one relates to a legal or regulatory text, while the second comprises a number of exceptions that are conditional on the contribution of abuse arising from a dominant position to economic and technical development.

With regard to the exception arising from the implementation of a legal or regulatory text that is considered for the application of that exception, the abuse deriving from a dominant position shall not be reprobated since the practice can be evidenced by the implementation of that legislative text. This is in harmony with the European law. It is worth noting that the provisions of Article 82 of the Treaty cannot be applied to the dominant firm on account of the law, because it has not adopted any personal conduct but has acted under permission of the State. Consequently, according to the law, the dominant firm should not be condemned for abuse, but the State can be pursued based on the theory of "*automatic abuse*".¹¹

The above observation conforms with the conditions of Article 10/1 of the French Competition Law or Article L.420-4 of the French Commercial Code. Note that, for the purpose of implementing this exception, the French courts issued two essential rules. The first one indicates that some special requirements must be satisfied in the text that specifies the exception from proscription, while the second states that the banned practices ought to be a real and important result of the texts that are used as a justification.

First: Conditions of the Legislative and Regulatory Text

The regulation issue that is invoked to justify an abuse of dominant position must limit competition. However, the whole economic sector must not be exempted from this regulation in the context of a free economy¹². It is important to specify that, in terms of administrative publications, previous judicial practices in France, before the 1986 Competition Law, are not likely to be in line with the latter law. In fact, the Technical Committee on Agreements and Dominant Positions admitted that these publications could be issued instrumentally by firms even if they are not real regulatory texts, under the following three conditions. First, they must be issued only by the Minister of Economy; second, they must represent an explanation of a regulation that already exists, and finally, they must explicitly authorize certain practices that restrict competition.¹³

¹¹ Marie MALAURIE-VIGNAL l'abus de position dominante, LGDJ,, Paris, 2003, p.176

¹² Véronique SELINSKY, Concurrence (Faits justificatifs des pratiques anticoncurrentielles), juriscasseur commercial, concurrence/consommation, fascicule 320, 1988, p.04 .

¹³ Véronique SELINSKY, Concurrence (Faits justificatifs des pratiques anticoncurrentielles), juriscasseur commercial, concurrence/consommation, fascicule 320, 1988, p.04

Second: Relationship Between the Text and the Excluded Practice

In paragraph 1 of the French Commercial Law L. 420-4-I, the French legislator exempted, in virtue of this same article (formerly Article 10/1 of the French Competition Law of 1986), any abuse arising from a dominant position that is associated with the implementation of a legal or regulatory text that is put into action when applying the legislative text. Though the French legislator insists on the necessity to have a connection between the anti-competitive practices under consideration and the text supporting these practices, he does not stipulate the nature of that interconnection. Therefore, the general interpretation of the text authorizes the introduction of relations between practices and the text, even if they are far away from each other. This would diminish the effectiveness of Articles 06 and 07 of this same law.

Section Three: Exception Linked to Economic Performance

It turned out that the Algerian legislator, by way of the provisions of Article 09/02 of the Algerian Competition Law of 2003, authorized agreements and anti-competitive practices as long as they promote economic and technical development, enhance job opportunities, or ameliorate the competitiveness of small and medium-sized enterprises in the market. It is worth emphasizing that this is part of a whole that falls within the economic performance concept that is beneficial to the State and which endorses its policies. This is consistent with the position of the French legislator who, through article 10/02 of the Competition Act of 1986, and Paragraph 2 of Article L.420-4 of the Commercial Code, also implemented an exemption on the basis of economic performance.

It should be noted that the purpose of the legislator is to satisfy two essential goals. He first seeks to achieve better agreement between production and needs and second to utilize available resources in a more efficient way in order to meet the needs of consumers. In some situations, the aforementioned goals may be realized by means of anti-competitive practices. Hence, the legislator takes into consideration the favorable aspects of these practices and legitimizes them by asserting that they are beneficial to the public for a specified period of time, thus placing abuse in a dominant position, lawfully acceptable, because it promotes economic progress, hence deleting its anti-competitive essence. It can therefore be inferred that the exception or exemption justification plays an essential role in the economic policy.

Furthermore, the economic growth may be evaluated by carrying out an economic performance assessment of the appropriate anti-competitive practices via a comparison of advantages and disadvantages. It should be pointed out that this evaluation is based on a precise analysis of the economic progress concept that does not employ Article 10/2, except if all the other conditions are fulfilled¹⁴.

First: The Economic Progress Concept

The principle of economic growth has been defined, based on numerous factors, via juridical interpretations and through the efforts made by the Competition Council, like the positive effect of abuse that emanates from a dominant position on productivity enhancement, technological development, and creativity.

1.Enhancement of Productive Capacity: This item has a significant importance for the National Assembly when evaluating the efficacy of anti-competitive practices in economic growth. Anyone who seeks to attain good productivity ought to consider the disparity between the amount produced and the effort made and the money spent. High productivity may be

¹⁴ Renée GALENE, *Le droit de la concurrence appliqué aux pratiques anticoncurrentielles*, Ltec, Paris, 1995, p.308.

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attained through the reduction of global expenditures or via the enhancement of distribution efficiency, which causes prices and transportation costs to decline.

2. Technological growth and Creativity: The French technical committee admitted the fact that innovation may be viewed as a justification, as long as firms do not try to divest the other people of the advantages of technological progress. Justifications may come up in the case of an exclusivity that is due to an objective necessity. However, the progress observed cannot justify the exclusivity for an excessive period of time¹⁵.

Second: Terms for Economic Growth

A series of prerequisites are to be satisfied in order to consider economic growth as a reason for authorizing abuse arising from a dominant position¹⁶. Some of these are:

1. Proving Economic Progress in Practices: The Algerian legislator affirmed that the burden of proof is on those who allege the abuses¹⁷. The French legislator endorsed a similar precept in Article 10/2 of the French Competition Law (Article L.420-4-II, paragraph 2) and Article L.420-4-I (1986). The exemption can only be alleged by the perpetrator of the abuse through his demands before the competent court or with the Competition Council; it is not automatically brought up by the judicial authorities¹⁸.

The concerned party ought to provide evidence about whether a general or special exemption exists in order to prove the economic development. General exemption: No general provision exempting abuses resulting from a dominant position in specific economic sectors is included in the Algerian competition law of 2003. However, the French legislator, after absolving some anti-competitive agreements in Article 10/2 of the 1986 Law on freedom of pricing and competition by means of a Decree if these agreements satisfy the required prerequisites for this exemption, he gave way for authorizing a number of practices via a set of amendments in the year 1996. These amendments plainly authorized practices linked to agricultural products or all goods of agricultural origin with one brand name or trade mark for the purpose of regulating the amount and quality of production and trade policy, in addition to arrangements related to joint selling prices¹⁹.

Now, regarding the special exemption, if no existing decree asserts clearly an exemption for some anti-competitive agreements and practices, then the French legislator should bring evidence that these practices provide economic advantages that are capable of balancing the damage resulting from competition.

The stipulations in Article 09 of the Algerian Competition Law of the year 2003 may be viewed as depending on a specific exemption. Hence, the concerned firms can, through this exemption, call for authorization for abusive practices from the Competition Council if they

¹⁵ Véronique SELINSKY, Concurrence (Faits justificatifs des pratiques anticoncurrentielles), juriscasseur commercial, concurrence/consommation, fascicule 320, 1988, p. 10.

¹⁶ Article 09 of the Algerian Competition Law.

¹⁷ Article 9/2 of Ordinance 03-03 concerning competition states: "Agreements and practices may be permitted if their proponents can demonstrate that they lead to economic or technical development or contribute to improving employment...".

¹⁸ Renée GALENE, Le droit de la concurrence appliqué aux pratiques anticoncurrentielles, Litec, Paris, 1995, p. 308.

¹⁹ Article 10/02 of Ordinance No. 86-1243 of December 1, 1986, as amended by Law No. 96-588 of July 1, 1996, Article 03.

provide convincing proof that these practices enhance the economic and technical growth or generate new *job opportunities*.

The French legislator gives some other additional conditions, such as:

2.Attributes of Economic Development

Economic development ought to be substantial, favorable, and satisfactory. Here, the term "*tangible*" implies that the findings of the economic study of abuse must show that the contribution to economic growth has attained a tangible level. The justification of abuses should not have as its sole objective to achieve this progress. In addition, this should not be just a simple forecast, or a project that has not yet been completed.

Furthermore, the outcomes of the economic study of abuse ought to be positive as well. Indeed, there is no point for firms to simply try to evade some specific barriers because economic development aims at all innovations that seek to change some models and preceding conditions to make them better.

In addition, the economic growth that emanates from abuse must be acceptable. Hence, the advantages resulting from this economic progress have to overbalance the disadvantages engendered by the abusive practice being legitimized in regard to competition.

3.Assigning a Share of Returns to Consumers

Consumers are also expected to benefit, in an equitable manner, from the positive effects of this abuse alongside the companies involved and/or concerned. This leads to some sort of coexistence in transactions between two parties. In this case, consumers may be favored with lower prices, better after-sales services, and some other economic or technical advantages²⁰.

4.Relationship Between Economic Development and Justified Abusive Practices

The economic progress used to justify these abusive practices must be a direct consequence of these same practices. If the firm with abusive behavior can show that this practice, although it impedes the proper conduct of competition, resulted in favorable results that contributed to economic and technical development, *employment* creation, or to the improvement of the competitive position of small and medium-sized enterprises in the region where this firm operates, then the burden of proof lies with it. The firm must also prove the causal connection that links the positive results attained through the abuse and the limitation on competition. These abuses could be considered unjustifiable if the positive results attained could be achieved without the dominant firm engaging in abusive behaviour.

5.Equation Between Blocking Competition and the Engendered Positive Effect

The French legislator stipulates in Article 10/2 that obstruction to competition must be absolutely commensurate with the positive effect it has generated so that the justification can be acceptable.

Conclusion

In addition to the originality of the declaration of non-intervention that differentiates the Algerian legislator, exemption from the prohibition of anti-competitive monopoly can only be acknowledged if at least the following four conditions are fulfilled. In the first condition, the practice in question ought to contribute to enhancing economic or *technological development*,

²⁰ Michel PEDAMON, Droit commercial (commerçants et fonds de commerce, concurrence et contrats du commerce), 2^{ème} édition, Dalloz, Paris, 2000, p. 144.

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or to improving the production or distribution of products. Otherwise stated, this practice must create what are commonly called "*Efficiency gains*", such as, for instance, a reduction in expenses arising from economies of scale or economies of scope, or from the development of novel techniques and technologies. It should be noted that efficiency gains may also be assessed in terms of the quality of the goods considered through the provision of innovative or improved products. In this case, the environmental gains may also be taken into account.

As for the second condition, it suggests that a fair share of the benefits that result from the challenged agreement must be allocated to the customers. The idea behind this provision is in fact that the benefits arising from the anti-competitive practice must be passed on, in a substantial manner, to consumers. As regards the third condition, it alludes to the fact that it is necessary to apply some restrictions of competition in order to achieve efficiency gains. Alternatively stated, the goods or services under consideration would necessarily be manufactured or sold, less efficiently, in the absence of the restraints under consideration.

Finally, the fourth condition requires that the contested practice does not grant the firms concerned the option of excluding competition for a significant part of the products concerned. This condition aims primarily to maintain a residual competition. The restriction to be applied should be temperate in preference to drastic.