

The Licensing System as a Mechanism for Regulating Economic Concentrations

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Legitimate Research****University of Khenchela****zouagrithar@univ-khenchela.dz****Abstract:**

Economic conglomerates are one of the means that institutions resort to in order to increase their economic power and improve their competitiveness. However, they may

pose a risk to the application of competition rules in the market due to their dominance. For this reason, the legislator subjected them to prior oversight exercised by the Competition Council and sectoral regulatory authorities through the granting of licenses for economic conglomerates and fostering cooperation between the Competition Council and sectoral regulatory authorities in this area.

Keywords: Sectoral Regulatory Authority; Economic Conglomerate; Competition Council; Licensing; Market.

Introduction:

Economists have shown significant interest in the phenomenon of economic clusters at both national and international levels. Clustering presents an opportunity for small and medium-sized enterprises (SMEs) to band together with the aim of developing their projects and achieving economic efficiency by sharing resources and enhancing competitiveness, thereby supporting their growth and sustainability in the market.

However, these economic clusters can deviate from their intended path by violating competition rules, which subjects them to competition laws for the purpose of regulatory oversight. In response, legislations, notably led by the Algerian legislator, have established bodies tasked with monitoring the enforcement of competition laws in markets, such as the Competition Council and sectoral regulatory authorities. These bodies have been granted numerous powers to fully carry out their assigned roles, including the authority to grant licenses for economic

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clusters. No enterprise can merge into any cluster without obtaining a license from these bodies.

The licenses granted by economic regulatory bodies in the field of economic clustering are no less important than other licenses in the economic field, as they play a crucial role in protecting the market from violations of competition laws. If these clusters are deemed to have a negative impact on the economy and national development, the regulatory bodies may refuse to grant the clustering license. Conversely, if they believe that the cluster will generate positive effects for the national economy, such as improving the quality and diversity of local products, they may then grant the clustering license.

The aim of this study is to understand how the authority to grant licenses is distributed between the Competition Council, as a horizontal regulatory body overseeing all sectors, and sectoral regulatory authorities, which are vertical regulatory bodies each responsible for the economic sector they supervise.

Study problem

The problem of this study can be formulated in the following main question:

How is the authority to grant licenses for economic clusters distributed between the Competition Council and sectoral regulatory authorities?

To answer this question, a dual approach was used, combining descriptive and analytical methods. In the first section, we address the authority of the Competition Council to grant licenses for economic clustering. In the second section, we examine the authority of sectoral regulatory bodies to grant licenses for clustering.

Chapter I: The Authority of the Competition Council in Granting Licenses for Economic Clustering;

An economic cluster is defined as any legal consolidation between two or more companies aimed at improving their competitiveness or increasing their economic power in the market⁽¹⁾. However, these clusters may violate competition rules if they accumulate too much power, enabling them to independently influence markets. Therefore, the Competition Council intervenes to exercise preliminary oversight by granting licenses for such clusters.



1- Subsection One: Conditions and Procedures for Applying for a Clustering License with the Competition Council:

The Algerian legislator mandates that companies wishing to merge must provide prior notification of any project related to clustering that may affect competition rules. Article 03 of Executive Decree 05-219⁽²⁾ indicates that the clustering operations subject to license requests are those that strengthen a company's dominant position in a particular market, in addition to clusters that achieve a market share exceeding 40% of sales or purchases, in accordance with Articles 17 and 18 of the Competition Law⁽³⁾.

- The notification, which takes the form of a clustering license application along with its attachments, must be submitted to the Competition Council by registered mail, deposited at the Council's Secretariat in exchange for a receipt bearing the registration number of the submitted request. The Council then meticulously examines the request and makes its decision within a period not exceeding three months from the date of submission⁽⁴⁾.

- The application must include the following information: identification of the applicant(s), identification of the other participants in the application, the subject of the application, a declaration from the signatories, and an information form related to the clustering operation, as stipulated in the executive decree concerning the licensing of clustering operations.

The license application must be submitted before initiating the clustering, not after its formation, as confirmed by Article 20 of Ordinance 03-03, which states: "The parties to the clustering operation may not take any irreversible measure to consolidate the clustering during the period specified for the Council's decision⁽⁵⁾". "This is because the Council has the discretionary authority to approve, reject, or suspend the clustering. If the application is not submitted to the Council and the clustering is formed, the Competition Council may intervene upon notification by a qualified body or individual, or it may act on its own initiative if it becomes aware of the case⁽⁶⁾". Additionally, according to Article 61 of the Competition Law, the Council penalizes clustering operations as defined in Article 17, which are conducted without a license from the Competition Council, with a financial penalty that can reach up to 7% of the turnover, excluding taxes,



generated in Algeria during the last closed financial year, imposed on each company involved in the clustering or on the company formed by the clustering operation⁽⁷⁾.

2- Decisions of the Competition Council Regarding License Applications:

After evaluating a clustering project, the Competition Council may either approve and license the clustering or reject it. This is stipulated in Article 19 of Ordinance 03-03, which states, "The Competition Council may authorize or reject the clustering by a reasoned decision after consulting the Minister responsible for commerce and the Minister responsible for the sector concerned by the clustering operation." The Competition Council may also approve the clustering with conditions aimed at mitigating its impact on competition. Additionally, the companies involved in the clustering may voluntarily commit to undertakings that reduce the clustering's effects on competition⁽⁸⁾.

3- Approval of the Clustering License:

The preliminary oversight of economic clusters aims to balance the state's economic interests with the potential impact on competition, represented by the 40% threshold of sales and purchases. This balance is the purpose of the evaluation process, where the effects on competition are analyzed. The Council then uses these findings as material facts to justify its decision to grant the license.

4- Ordinary Clustering License:

The Competition Council may grant a clustering license if the operation does not harm competition, meaning it aligns with competitive requirements, or if the positive effects of the operation outweigh the negative ones. The decision to license the clustering is made after consulting both the Minister responsible for commerce and the Minister responsible for the sector involved in the operation. Some believe that the opinions of the two ministers do not necessarily have to align or be binding on the Council, but the Council is required to provide a reasoned decision under the oversight of the State Council⁽⁹⁾.

5- Conditional License:

Article 19 of the aforementioned Competition Law clarifies the powers of the Competition Council in making decisions regarding

clustering licenses. In addition to authorizing the clustering when a license is requested, if the Competition Council finds that the proposed project negatively affects competition rules, the law grants the Council broad powers to make amendments. These amendments can be imposed automatically by the Council, which may set conditions to mitigate the clustering's impact on competition, or they may be proposed by the companies involved in the clustering, who voluntarily commit to obligations that reduce the negative impact on competition⁽¹⁰⁾.

An example of this can be seen in the opinion issued by the French Competition Council in the Gaumont-Pathé case, where it was noted that the ownership of cinemas in major Paris streets by both companies, which play a significant role in the commercial success of films, combined with their dominant position in the film production market, would likely lead them to limit screenings in their cinemas to the films they produce, thereby restricting competition. As a result, the Competition Council recommended that the Minister of Economy approve the merger between the two companies on the condition that they sell their cinemas in the main neighborhoods to independent entities⁽¹¹⁾.

Similarly, the Algerian Competition Council accepted a clustering application but made it conditional on the submission of a registration certificate prepared by the Ministry of Health, Population, and Hospital Reform. After thoroughly examining the clustering application file between Sanofi S.A. and ChipaPharm, the Council accepted the license request in terms of both form and substance, but postponed its final decision until the document was submitted⁽¹²⁾.

It is noteworthy that, upon reviewing the laws, the legislator did not specify the conditions for suspending clustering or how to apply them but merely required the reduction of its negative effects on competition. Therefore, the Council has broad powers to impose conditions that serve the competitive interests of the market and drive the national economy forward.

6- Decision to Refuse the Clustering License:

The Competition Council may refuse to grant a clustering license if it determines that the clustering would have negative effects on competition, such as driving out competitors and eliminating competition in a particular market. However, the Council must provide

a reasoned justification for its decision to refuse the license, after consulting the Minister of Commerce and the Minister of the sector involved in the clustering⁽¹³⁾.

The decision to refuse the clustering license can be seen as a restriction on the freedom to establish an economic cluster in order to ensure the proper functioning of the relevant market. Additionally, the Algerian legislator has imposed a financial penalty on any company involved in clustering, or on the company formed as a result of the clustering, if the operation was conducted without a license from the Competition Council⁽¹⁴⁾.

Article 61 of the Competition Law states: "Clustering operations as defined in Article 17 above, which are conducted without a license from the Competition Council, shall be penalized with a fine that can reach up to 7% of the turnover, excluding taxes, generated in Algeria during the last closed financial year, against any company involved in the clustering or against the company formed by the clustering operation⁽¹⁵⁾."

An example of this is the Competition Council's refusal to license the merger between the Algerian company for automotive expertise and technical inspection, Spa-Sae Exact, and the Algerian expertise company, Spa-Exal. The Council based its decision on the fact that the clustering could directly affect competition within the Algerian market by strengthening a dominant position in the market, reducing competition in the insurance sector, standardizing compensation rates for damages, increasing prices, and lowering service quality in the absence of alternatives⁽¹⁶⁾.

7- Government Intervention in Granting Clustering Licenses:

While an economic cluster that negatively impacts competition laws in the market is generally considered illegal and is subject to oversight by the Competition Council, an exception exists where the government can authorize a cluster with negative effects on competition. This is outlined in Article 82 of Ordinance 03-03, which states:

"The government may, on its own initiative, authorize a clustering if public interest so requires, or at the request of the parties involved in the clustering that was rejected by the Competition Council, based on a report from the Minister responsible for commerce and the minister

overseeing the sector concerned by the clustering⁽¹⁷⁾.

"The legislator has used the term "public interest" in a broad sense, encompassing various meanings such as improving the productivity of companies, enhancing the creative capacity of enterprises, and boosting export capabilities, all of which serve the national economy. Moreover, it aims to achieve social benefits, such as creating job opportunities and improving production efficiency and quality⁽¹⁸⁾.

The delegation of authority to the government to grant clustering licenses by the Algerian legislator can be seen as undermining the independence of the Competition Council, as it constitutes direct interference in its decisions. Although this intervention is justified by the requirements of public interest, as mentioned earlier, the term "public interest" is broad and open to interpretation, giving the government discretionary power to determine its presence. This opens the door for illegal economic clusters to bypass the Council's oversight⁽¹⁹⁾.

A thorough examination of the provisions of Ordinance 03-03 concerning the licensing of economic clusters reveals that the legislator has granted the government broader powers than those held by the Competition Council. The government's intervention is not restricted by any formal constraints, which diminishes the independence of the Council compared to the founding ordinance (Ordinance 95-06), which had granted the Council full authority to accept or reject clustering licenses without government interference.

Chapter II: The Competencies of Sectoral Regulatory Authorities in Granting Economic Concentration Licenses:

The Algerian legislator has explicitly recognized the authority of sectoral regulatory bodies to conduct prior supervision over economic concentrations in certain vital and sensitive economic activities. This recognition, as stipulated in the first paragraph of Article 39 of Ordinance 03-03, aims to ensure effective monitoring and achieve market balance by enabling these bodies to oversee consolidation operations that may affect the principle of free competition in these sectors. Therefore, it is necessary first to define these authorities and then move on to identify the most important authorities with this competency, followed by assessing the extent of intervention by sectoral regulatory authorities under the prior supervision of the Competition

Council over economic concentrations.

1- Definition of Sectoral Regulatory Authorities:

Sectoral regulatory authorities are considered bodies tasked with regulating economic activities. They do not merely manage but also monitor specific activities in the economic field to achieve balance. These authorities have been granted various powers after the traditional administration proved inadequate in regulating this sensitive sector⁽²⁰⁾.

These bodies are characterized by their nature as independent administrative entities:

– **Authority:** The term 'authority' in this context refers to the powers granted to these bodies, which include decision-making, in addition to several other powers that align with their assigned tasks, such as granting licenses.

– **Administrative Nature:** The administrative nature of these authorities can be established through two criteria. The first criterion is that their activities aim to ensure the application of rules in the field designated to them by the legislator, and therefore, the decisions they issue represent an exercise of public authority privileges. The second criterion is that their decisions are generally subject to the oversight of administrative judges, although some may be subject to ordinary judicial oversight⁽²¹⁾.

– **Independence:** These authorities sometimes perform judicial functions, making them independent, similar to the judiciary. In principle, they are not subject to administrative subordination or hierarchical control⁽²²⁾. The independence of these authorities takes two forms:

•**Organizational Independence:** This involves ensuring special guarantees for the collective human composition of these authorities, ensuring a balance between different appointing entities, and guaranteeing the diversity and plurality of this composition to allow for collective deliberation⁽²³⁾.

•**Functional Independence:** pertains to the means by which these authorities intervene, particularly in financial matters. It emphasizes the necessity of finding revenue sources outside the budget, especially since these authorities are directly accountable to the ministries most

closely related to the nature of their area of intervention from a financial standpoint. This direct relationship could potentially compromise the principle of their independence⁽²⁴⁾.

The French legislator viewed the independence of sectoral regulatory authorities as a result of establishing a balance between public and private interests. These authorities do not emerge without the assistance of the state apparatus, but they must operate independently from governmental power. This perspective coincided with the decline of the state's role in direct participation in economic activities⁽²⁵⁾.

The establishment and adoption of these authorities in Algeria can be traced back to the 1989 Constitution, which recognized the state's withdrawal from the economic sphere. These authorities were considered a significant part of the structural reforms that most countries worldwide pursue within the framework of economic liberalization⁽²⁶⁾.

The most prominent sectors that adopted this type of authority are those governed by free competition rules, which include the following:

– Banking and financial activities, stock market activities, telecommunications, electricity, and mining. The first regulatory authority in the media field, named the High Council for Information, was established in 1990. Later that same year, the Monetary and Credit Law 90-10 was issued, which included the establishment of two bodies: the Monetary and Credit Council and the Banking Commission. This was followed by the creation of the Commission for the Control and Regulation of Stock Exchange Operations in 1993⁽²⁷⁾.

2- The Legal Basis for Granting Economic Concentration Licenses by Sectoral Regulatory Authorities:

Although the Competition Council is considered the authority responsible for granting licenses for economic concentrations, the Algerian legislator, similar to many comparative legal systems, has recognized the competency of sectoral regulatory authorities to conduct prior supervision in certain economic activities. These authorities are regarded as special regulatory bodies.

3- Authorities with the Power to Grant Licenses:

The authority to grant licenses for consolidation has been assigned

to sectoral regulatory authorities in specific areas, which are:

– **Banking and Financial Sector:** In this sector, consolidation occurs through mergers, which disrupt competition rules and therefore require prior oversight by the Competition Council, as well as by the Money and Credit Council, which serves as the sectoral regulatory authority for banking activities⁽²⁸⁾. In this context, Article 62 of Ordinance 03-11 related to money and credit states: "The council shall make the following individual decisions:

- Licensing the establishment of banks and financial institutions, amending their statutes, and withdrawing licenses.

- Licensing the establishment of representative offices for foreign banks⁽²⁹⁾.

"Furthermore, Article 94, paragraph two of the same ordinance, stipulates: "The governor must grant prior authorization for any transfer of shares in a bank or financial institution, according to the conditions outlined in a regulation issued by the council." The authority to grant licenses by the Money and Credit Council is organized in Chapter Four of this ordinance, through Articles 82 to 94.

Upon deeper analysis of these articles, it is evident that the Algerian legislator has granted this independent body the authority to conduct prior oversight on economic consolidations related to the banking and financial sector, which are realized through mergers that could potentially disrupt competition rules.

– **Insurance Sector:** The Insurance Supervision Committee was established under Law No. 06-04 related to insurance, as outlined in Article 209, which states: "An Insurance Supervision Committee shall be established, acting as a supervisory authority through the structure responsible for insurance under the Ministry of Finance⁽³⁰⁾." This authority has been assigned several tasks, chief among them being the granting of prior authorization for any contribution exceeding 20% of the capital of an insurance and/or reinsurance company. Additionally, any action aimed at consolidating insurance and/or reinsurance companies in the form of concentration or merger is subject to the approval of the supervisory authority⁽³¹⁾.

– **Electricity and Gas Sector:** Established under Law No. 02-01, the legislator did not specify the legal nature of this committee but assigned

it, under Article 10, the authority to grant licenses and even exemptions from licensing, as per Article 11. The procedures for granting licenses are detailed by the legislator in Articles 12 through 22 of the same law⁽³²⁾.

Regarding prior oversight of economic consolidations, Article 115 of the same law states that this committee must give its prior opinion on company conglomerations. It also adds the possibility of imposing oversight on one or more electrical companies by another company⁽³³⁾.

– **Postal and Telecommunications Sector:** The committee was established under Law 2000-03, and the Algerian legislator granted it the authority to issue individual decisions regarding the granting of licenses related to postal and telecommunications activities. The sector was opened to private investment in 1998, and due to the public service nature of this activity, the authority retained the requirement for its approval by granting licenses for investment in this field⁽³⁴⁾.

Additionally, the legislator, under Article 13, paragraph 2 of the aforementioned law, granted this authority the power to protect competition in the postal and telecommunications markets, ensuring the existence of legitimate and effective competition, and the possibility of taking any measures to promote and restore it. Therefore, any consolidation within the postal and telecommunications sector is subject to oversight by the sectoral regulatory authority, as it falls within its scope of activity⁽³⁵⁾.

4- Third Requirement: The Intervention of Regulatory Authorities Under the Supervision of the Competition Council:

Referring to the legal texts that establish sectoral regulatory authorities, it can be stated that each authority has its specific scope of jurisdiction within the sectoral market it supervises. Consequently, the Competition Council has the task of horizontally regulating all markets, including those under the jurisdiction of these sectoral authorities⁽³⁶⁾.

This dual oversight of sectors leads to dual oversight of economic consolidations within them, thereby creating common objectives in the field of competition protection between the Competition Council and sectoral regulatory bodies. Article 39 of the Competition Law, in its second paragraph, stipulates the necessity of strengthening cooperation, consultation, and information exchange between sectoral

regulatory authorities and the Competition Council. However, the mechanisms for this cooperation have not been defined⁽³⁷⁾.

In its 2003 annual report, the Competition Council emphasized the need to establish cooperative and complementary relationships between the Competition Council and sectoral regulatory bodies to ensure the proper functioning of market regulations. The sectoral regulatory bodies intervene proactively to achieve economic and political objectives, while the Council intervenes reactively to achieve purely economic objectives. The Council, as a specialized authority with legal personality and financial independence, is responsible for ensuring the proper functioning of competition in the market and effective regulation across all economic activity sectors. Similarly, the legislator has granted economic regulatory authorities the same supervisory role by allowing them to issue recommendations and decisions that enable them to technically and economically regulate their sectors in order to open up competitive markets. This is particularly important in areas where they possess technical expertise that the Competition Council may lack, such as in the electricity and gas sector or the insurance sector.

Thus, the Competition Law and sectoral laws must serve as the legal foundation that establishes the functional relationship between the Competition Council as a general regulatory authority and sectoral regulatory authorities as specialized regulatory bodies⁽³⁸⁾.

Conclusion:

In conclusion, through this research, we have explored how the Competition Council, as the primary authority responsible for granting economic consolidation licenses, handles such requests. The legislator has granted the Council discretionary power to assess the impact of consolidation on the market, whether it be positive or negative. Additionally, the legislator has granted part of this authority to the government as an exception in specific cases outlined in the Competition Law, which also specifies the jurisdiction of sectoral regulatory authorities in granting licenses, limited to certain sectors only. From this, we have reached the following conclusions:

- The legislator must establish specific conditions for suspending the granting of consolidation licenses and outline how these conditions should be applied. This would allow the Competition Council to impose

conditions that serve the interests of the competitive market and promote the advancement of the national economy.

- Assigning the authority to grant licenses to the government by the legislator constitutes an encroachment on the jurisdiction of the Competition Council, limiting its independence and placing it under the influence of the executive branch.

- It is essential to define the mechanisms of cooperation between the Competition Council and sectoral regulatory authorities to avoid overlapping jurisdictions between them.

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