Deterring restrictive practices
(A comparative study between Algerian and French competition law)
ردع الممارسات المقيّدة للمنافسة (دراسة مقارنة بين قانون المنافسة الجزائري والفرنسي)

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Abstract:

Restrictive practices are among the most dangerous practices that would restrict competition in the market, harming competitors on the one hand and consumers on the other.

Therefore, the Algerian legislature has approved strict penalties against the perpetrators of these prohibited practices, and we distinguish between the administrative penalties issued by the Competition Council, as an administrative body, and the judicial penalties issued by the judicial authorities.

We will address the penalties prescribed in Algerian and French law.

key words: Competition restriction, Competition Council, Administrative sanctions, Judicial sanctions

ملخص:

تعد الممارسات المقيّدة للمنافسة من أخطر الممارسات التي من شأنها عرقلة المنافسة في السوق، مما يضر بالمنافسين من جهة والمستهلكين من جهة أخرى.

لذلك أقر المشرع الجزائري عقوبات صارمة ضد مرتكبي هذه الممارسات المحظورة، ونميز بين العقوبات الإدارية الصادرة عن مجلس المنافسة كهيئة إدارية، والعقوبات القضائية الصادرة عن السلطات القضائية. وسنتناول العقوبات المنصوص عليها في القانونين الجزائري والفرنسي.

الكلمات المفتاحية: تقييد المنافسة، مجلس المنافسة، العقوبات الإدارية، العقوبات القضائية

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Introduction:

Competition law aims to protect the market from practices that harm competition by limiting economic efficiency. This protection takes the form of the prohibition of anti-competitive practices, which are collective or individual conduct by undertakings in a relevant market, tending to limit competition.

Anti-competitive practices cover a wide range of practices of various seriousness (abuse of dominant position, vertical or horizontal cartels, etc.). And since competition law is a repressive law, many penalties are therefore attached to its violation.

The importance of this study lies in the danger of restrictive practices of competition for competitors and consumers, resulting in market disruption.

This study aims to highlight the penalties established for anti-competitive practices.

But what are the penalties for combating anti-competitive practices?

To address this issue, we will distinguish between two main types of sanctions that can be used separately or jointly: administrative sanctions imposed by the competition authority, and judicial sanctions imposed either by civil or criminal courts. And we will carry out an analytical and comparative study between Algerian and French law.

Title of the first Topic :Sanctions imposed by the competition council

The Competition Council is an independent administrative authority and not a court, so it can only impose administrative sanctions.

These administrative penalties are: injunctions and fines.

The first requirement: Injunctions

The power of injunction is the council's first mode of intervention[1]. This sanction is very useful when it is not a company but a professional association or organization with limited resources.

It is also effective when the harm to competition results from a contractual provision, as it is considered to be a "remodelling technique" of the contract[2] .

The Competition Council has a very broad power to issue injunctions. It may order the operators concerned to put an end to the practices, within the period it determines, or it may impose special conditions. It is therefore a real means of restoring competition in the hands of the Conseil de la concurrence, which is of a

[1] M-C. Boutard Labarde, G. Canivet, E. Claudel, V. Michel-Amsellem, J. Vialens, *The application in France of the law on anti-competitive practices*, L.G.D.J., France, 2008, p.482.

[2] M. Chagny, *Competition law and the common law of obligations*, Dalloz, France, 2004, p.414.

"reparation and prevention" nature[1], and injunctions can be issued before any decision.

First section: Variety of injunctions

A wide variety of injunctions can be issued by the Competition Council: an injunction to cease the anti-competitive practice within a specified period, an injunction to suspend a practice, an injunction to modify a contractual clause, an injunction to communicate information, etc. Ect...

Article 45 of Ordinance 03-03 on competition provides: "In the event that the applications and cases submitted to it or referred to it fall within its jurisdiction, the Competition Council shall issue reasoned injunctions aimed at putting an end to the restrictive practices of competition found ... ». And according to Article L.464-2 of the French Commercial Code:

"The Authority de la concurrence may order the parties concerned to put an end to the anti-competitive practices within a specified period of time or impose special conditions."

It is a genuine instrument for the restoration of competition in the hands of the competition authority, which is intended to provide redress and prevention. As soon as the prohibited practice has not ended, the Competition Council orders the operators concerned to put an end to it.

This type of injunction is generally found in the area of agreements where the Commission may order the parties to amend their distribution agreement to remove the contentious clauses[2].

The Competition Council may also order the parties concerned to take certain measures in order to protect competition in the market.

Injunctions must be formulated in clear and precise terms, and the Competition Council must determine its injunction in detail[3]. In the event of doubt as to the meaning of the injunction, it is for the undertaking concerned to refer the matter to the institution which issued the injunction in order to obtain clarification of its terms.

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[1] L. Arcelin, *Competition law: anti-competitive practices in national and Community law*, P.U.R., France, 2009, p.213.

[2] Nabila AREZKI, *The Repression of Restrictive Practices of Competition*, Master's Thesis in Public Business Law, University of Bejaia, Algeria, 2015-2016, p.52.

[3] M-C. Boutard Labarde, G. Canivet, E. Claudel, V. Michel-Amsellem, J. Vialens, *ibid.*, p.486

The Second section: Limits to the power of injunction

The injunctions issued by the Competition Council must not exceed the aim sought, i.e. the restoration of legality and free competition. Therefore, the Competition Council can only take the necessary measures to deal with the emergency.

In the event of non-compliance with the injunctions, the Competition Council may impose financial penalties[1].

The second requirement: Fines

Obviously, the fine has a punitive aspect and has a strong deterrent effect[2]. The higher the fine, the less likely economic operators are to harm competition.

According to the French Competition Council[3], the financial penalty has a dual nature: punitive and preventive. For this reason, the fine must be set at a sufficiently deterrent amount.

And practices restricting competition are punishable under Algerian competition law by a fine not exceeding 12% of the amount of the pre-tax turnover achieved in Algeria during the last financial year, or by a fine equal to at least twice the unlawful profile achieved through these practices without it being more than four times this illicit profit, and if the offender does not have a defined turnover, the fine will not exceed six million dinars[4].

As for French law[5], the maximum amount of the penalty is, for a company, 10% of the amount of the highest worldwide turnover excluding tax achieved during one of the financial years ending since the financial year preceding the year in which the practices were implemented. If the accounts of the undertaking concerned have been consolidated or combined in accordance with the provisions applicable to its legal form, the turnover taken into account shall be that shown in the consolidated or combined accounts of the consolidating or combining undertaking.

The maximum amount of the penalty is, for an association of undertakings, 10% of the amount of the highest worldwide turnover excluding tax achieved during one of the financial years ending since the financial year preceding the financial year in which the practices were implemented.

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[1] Article 45-2 of Ordinance 03-03 relating to competition and Article L.464-3 f.

[2] L. Arcelin, *ibid*, p. 216.

[3] See Council Report for 2005, *Thematic Study on Financial Penalties and Injunctions*, p. 102.

[4] Article 56 of Ordinance 03-03 on competition.

[5] Article L.464-2 of the c. com. Fr.

Where the infringement of an association of undertakings relates to the activities of its members, the maximum amount of the financial penalty shall be equal to 10% of the sum of the total worldwide turnover of each active member on the market affected by the association's infringement.

First section: Criteria for setting the fine

There are a few criteria that must be taken into consideration by the Competition Council when setting the amount of the fine. The amount of the fine is assessed on the basis of the seriousness of the acts complained of, that is to say, the extent of the competitive damage, or the situation of the undertaking penalised.

As for the seriousness of the practices, the Conseil de la concurrence takes into consideration the extent of the damage caused to the economy. "Damage to the economy" refers to the seriousness of the harm to competition caused by the prohibited practices[1].

The French competition authority considers that this damage "*can theoretically be analysed as the consequence of a sub-optimal allocation of resources and a diversion of all or part of a collective surplus to the benefit of the perpetrators of anticompetitive practices."*[2]*Tags:*

The situation of the undertaking concerned may be taken into consideration by the Competition Council in determining the fine. And to assess this situation, the board takes into account the size of the company[3]and its financial situation.

The financial situation of the company may justify the absence of sanctions, for example when the company concerned is in receivership or judicial liquidation[4].

Second section: Fine reduction

The difficulties in detecting and proving anti-competitive practices have led the competition authorities[5] to encourage companies - parties to the prohibited practice - to denounce it, through "leniency".

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[1] W. PASCAL and L. FECHICHE, *Procedures for the control of anticompetitive practices (proceedings before the Autorité de la concurrence),* juris-classeur conc. Cons., n°03, LexisNexis, France, 2014, p. 302.

[2] Report of the French Competition Council for 1997, p. 112.

[3] The most representative factor is its turnover.

[4] M-C. Boutard Labarde, G. Canivet, E. Claudel, V. Michel-Amsellem, J. Vialens, *ibid, p.512.*

[5] The U.S., then the French and national authorities.

Article 60 of Ordinance 03-03 on competition provides: "The Competition Council may decide to reduce the amount of the fine or not impose a fine on companies which, during the investigation of the case concerning them, admit the infringements of which they are accused, cooperate in the acceleration of the latter and undertake not to commit any further offences related to the application of the provisions of this Ordinance".

The leniency procedure tends to increase the effectiveness of competition law[1], because it encourages the company to denounce the practice prohibited by the company - part of that practice - by exempting it, in whole or in part, from the financial penalty.

In order for the company to benefit from this procedure, it must be the first to report the infringement, and the competition authorities must not have previously had any information and evidence concerning the anti-competitive practice.

The company that first denounces the infringement and provides the necessary evidence can obtain full immunity from fines (this is known as the first rank). Companies that apply at a later stage may be subject to a reduction in the fine depending on their arrival rank and cooperation (second-tier leniency).[2]

Title of the second Topic Sanctions imposed by the judicial courts:

Sanctions imposed by the courts mean the enforcement of competition law by the courts, either by the civil courts or by the criminal courts.

The first requirement: Civil penalties

Competition law texts give little place to civil penalties for anti-competitive practices. These texts[3] merely refer to two types of civil sanctions: nullity and compensation for competitive damage.

First section: Nullity

Nullity is a sanction falling within the jurisdiction of the courts and not of the Competition Council because of the administrative nature of the latter.

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[1] Report of the French Competition Council for 2005, p. 142.

[2] French Competition Authority, What is the leniency program? www.autoritédelaconcurrence.fr, on 05-08-2022 at 15:44.

[3] Art. 13 of Ordinance 03-03 on competition and Article L.420-3 of the French Competition law.

Nullity affects any commitment intended to harm competition. As for the nature of this nullity, it is an absolute nullity because it punishes an offence that affects public order. As a result, any person who has a legitimate interest can apply for nullity.

The texts do not provide any guidance on the scope of nullity, so it is up to the trial judges to determine it[1].

But the question arises as to the nullity of contractual clauses inserted in contracts that harm competition?

The nullity of a contractual clause entails the nullity of the agreement only if it constitutes the impulsive and decisive clause of the agreement. Therefore, nullity may be total or partial depending on the nature of the agreement.

The principle of the "retroactivity" of nullity must be taken into consideration, since the nullity of an agreement has the effect of retroactively depriving it of all effect, which entails reciprocal restitution, in kind or in value.

It can be seen that the sanction of nullity is considered to be a "necessary evil" in the case of anti-competitive practices[2] .

Second section: Compensation for competitive harm

Competitive harm is defined as any harm to competition in a relevant market. And the conditions for redress in the case of anti-competitive practices are the classic conditions cited in the common law.

The victim must prove: the fault, the damage and the causal link between them.

The plaintiff in the action for damages must prove the fault of the infringer, as is the case of foreclosure caused by anti-competitive agreements.

And in order to assess the harm caused by the anti-competitive practice, the victim of that practice must calculate his financial situation during the period at issue and the period that would have prevailed in a competitive situation[3].

The second requirement: Criminal sanctions

Criminal penalties shall be applied to perpetrators of restrictive practices of competition in accordance with legal conditions, and this will be detailed in detail**.**

First section: The persons concerned:

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[1] M-C. Boutard Labarde, G. Canivet, E. Claudel, V. Michel-Amsellem, J. Vialens, *ibid.,* p.581.

[2] M. Chagny, *ibid*, p. 65.

[3] M-C. Boutard Labarde, G. Canivet, E. Claudel, V. Michel-Amsellem, J. Vialensmm *ibid.,* p.594.

Criminal sanctions are mainly aimed at natural persons. These sanctions are essentially aimed at the directors of the company concerned, unless the director proves that he or she has provided his or her powers to another person.

The employees of the offending company are also concerned, such as the sales manager, the sales manager, the engineer or simply the secretary if the conditions of incrimination are met against them.

But what are the conditions of incrimination for the imposition of a criminal sanction?

Second section: The conditions of incrimination:

Penal sanctions in the area of anti-competitive practices shall only be applied when certain conditions are met, and this will be addressed.

Firstly: Personal participation:

This condition is the direct consequence of the principle of "specific nature of offences and penalties", in order for the criminal sanction to be valid, the person concerned must personally participate in the prohibited practices.

This participation can be ascertained by several elements: participation in meetings on anti-competitive points, telephone calls, signing of a document, transmission of information on prices,... Ect...

Secondly: Decisive participation and Fraudulent participation

This condition is difficult for judges to assess, as it depends on the degree of harm to competition, in other words, the harm to competition.

According to one author, this condition can be assessed by calculating "economic efficiency", i.e. "without the intervention of the person in question, the cartel could not have been carried out".[1]

This condition is certainly "the key to criminalisation", it is the fraudulent nature of the practice that justifies the criminal sanction[2].

This condition makes it possible to exclude mere negligence on the part of the person complained of, as to the determination of the exact meaning of this condition remains a point of view. That condition must therefore be assessed by the court itself. But a very common example in the field of anti-competitive agreements is that of "parallelism of conduct", where the authors of the cartel try to conceal their prohibited practice by means of similar conduct without concluding any agreement. This is the case with concerted practices.

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[1] M. Pédaman, *Commercial law*, Dalloz, France, 2000, p. 465.

[2] M-C. Boutard Labarde, G. Canivet, E. Claudel, V. Michel-Amsellem, J. Vialens, *ibid., p.618.*

Conclusion:

Whether it is the administrative sanctions imposed by the Competition Council, or the judicial sanctions imposed by the civil or criminal judge, the specialized courts aim to protect competition in the market.

We found that the nature of the sanction depends on the nature of the specialized court. The Conseil de la concurrence has limited powers in relation to its administrative nature, and it is its nature that makes it "rigid" in relation to the powers granted to the judicial courts.

Nevertheless, the role of the competition authority remains undeniable in the area of anti-competitive practices.

However, the prohibition of anti-competitive practices is not absolute, because there are grounds in competition law for exemption that led to the justification of such practices.

The texts clearly stipulate that certain practices are not subject to prohibition when they result from a legislative text or a decree issued for the practices; and whether these practices contribute to economic progress. [1]

Despite the efforts made by the Algerian legislator in developing the Competition Council, the latter remains unknown in our economic reality, which translates into the lack of decisions issued by it as a result of not being notified by the bodies in charge of this, in addition to not providing the Council with its own headquarters to exercise its powers.

Based on the above, we can propose the following recommendations:

- The need to provide the Competition Council with its own headquarters to facilitate the exercise of its legally vested powers, while urging the bodies charged with notifying the Competition Council to petition it when there is a prohibited practice instead of resorting directly to the judiciary, which does not have the same powers as the Council.

- Activating the role of the Competition Council by using its right to automatic notification when it devises actions contrary to competition principles without waiting for notification by the competent authorities, in order to speed up the process of market regulation on the one hand and activate its role on the other.

- Work to raise awareness and sensitize economic agents and consumer protection associations by various means to the need to petition the Competition

[1] Article 09 of Ordinance 03-03 on competition, Article 101§3 of the T.U.E., Art L.420.4 of the competition law French.

Council in the field of anti-competitive practices in order to activate its control and deterrence activity.

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