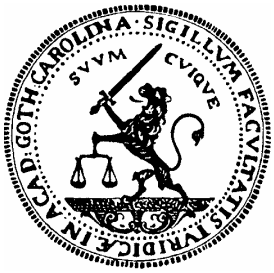

FACULTY OF LAW
University of Lund

Master of European Affairs programme, Law

Walid Ben Hammed

Adaptation of Tunisian competition law within the Euro-Mediterranean Free Trade Area

Master thesis

Pr Hans Henrik Lidgard

Competition law

2005-2006

Contents

Summary

This work is an analysis of the implementation of the Euro-Mediterranean Partnership and more particularly the negotiation of the association agreements, which aim to improve the conditions for carrying out trade by exploring new areas of cooperation in investment, trade facilitation and the approximation of legislation.

This study focuses on the association agreement contracted between the European Union and one of the nine of its Mediterranean Partners, which is Tunisia. Tunisia was the first Mediterranean country to sign an Association Agreement with the EU since 1995 and intended to cooperate for the establishment of an EU-Tunisia free trade area by the year 2010. Therefore, the aim of this paper is to pay special attention to the impact of these association agreements on the legislation of each Mediterranean river; the Community competition law and Tunisian competition law.

Objectives of competition policy differ from county to another. Whereas, the community competition system is based on the fair free trade, the Tunisian competition system remains a protectionist system despite of all its recent modifications.
In spite of the fact that the objectives are different, it is emphasized that by entering into the Association Agreement into force, the policy instruments became common on the two rivers, in general. These common instruments are the prohibition of anticompetitive agreements and abuse of dominant position. However, some important divergences remain but possible solutions are determined.

Because of these deviations, the EU and Tunisia have agreed an ambitious European Neighborhood Policy Action Plan, This Action Plan which is entered in force since 4 July 2005, sets out a comprehensive set of priorities for the next years. It contains jointly developed objectives adapted to the specific needs and priorities of the two systems. But, this Action Plan is not sufficient for the approximation of the Tunisian competition system to the European competition policy.

This paper starts by describing the Euro-Mediterranean Association Agreements. Then it sets out the characteristics of the Tunisian competition system explaining the functioning of the competition council and its case law. The third part is a comparative approach and concerns the implementation of the Association Agreement provisions into the two systems. The fourth part shows the important divergences between the two policies. Lastly, the fifth part tries to find solution for reducing the gap between the two Mediterranean rivers.

Preface

I would like to dedicate my first thank to God for holding me up during the difficult times in this year, to my parents, who always believed in me and whom I hope to fill with pride and joy in the future as well.

Also a thought to my sister and brother, my ever shining ray of sun, Sonya.

Thank you for being there when support was needed

Special thank to my friends and mates for the magnificent year we had together.

Professor *Hans Henrik Lidgard* for his securing advices and distressful guidelines, as well as Mr *Sven Norberg* who gave me the idea for this thesis and important landmark Cases to build up the subject in my mind.

Xavier Groussot for being the Friend-Teacher here in Lund. Thank You

Special thanks to the Tunisian Competition Council, in the person of its president Mr Ghazi Jeribi and to the staff of his office especially for their help during my researches, and to the Delegation of the European Commission established in Tunisia for their support as well.

Lund 17th May 2005
Walid Ben Hammed

Abbreviations

CARDS Community Assistance for Reconstruction, Development & Stabilization

CFI Court of first Instance

EC European community

ECJ European Court of Justice

EU European Union

ENPI European Neighbourhood Policy Instrument

FDI Foreign direct investment

FTA Free Trade Area

GATS General Agreement on Trade in Services

GATT General Agreement on Tariffs and Trade

MEDA Middle East and North Africa Program

SMC South Mediterranean Countries

TACIS Technical Assistance Community of Independent States

WTO World Trade Organisation

Introduction

Rationale

Because of trade liberalization, import restrictions or regulations on trade and investment have decreased substantially, and trans-border business activities face fewer barriers. At the same time, the role of trans-border business activities, especially those by so-called multinational or global enterprises, have become increasingly important and even dominant in some sectors.

In recent years, the degree of liberalisation of foreign investment legislation has been encouraging. SMC[1] governments are called to remove all remaining existing limitations and simplify administrative procedures in order to facilitate the flow of investment between the two Mediterranean rivers. However, this factor could have a huge impact on Competition policy within the internal market.

For theses reasons, Competition rules have been inserted in a series of regional or bilateral trade agreements concluded by the EC as it is the case for the association agreements with Tunisia; distinguished by a progressive character aiming to establish a FTA by the year 2010, and to approximate gradually the national legislation to EC law. In fact, a fair and free trade implies the adoption of harmonized rules in the aim to preserve the commercial stability between the two Mediterranean rivers.

Purpose

The purpose of this research is to analyse the competition provisions included in the Association Agreement establishing a Free Trade Area between the EU and Tunisia, and their impact on the Tunisian competition law. Indeed, this partnership will bring Tunisia to approximate and harmonise at least some parts of its domestic legislation. Therefore, this paper presents an overview of competition law in Tunisia explaining the similarities with the Community provisions included in the Association Agreement and taking account of this partnership's specificity.
The subject is of pertinent importance on two different perspectives:
First, from a legal perspective, each Non-member State contracting with the EC is therefore obliged to approximate its legal system by integrating, even partially, some of the *Acquis Communautaire*[2] arising from the text of the Association Agreements.

[1] South Mediterranean Countries
[2] A French term used in European Union law to refer to the total body of EU law accumulated so far.

Second, from a business prospective any European investor, projecting to establish a business on the Tunisian Territory, or is involved into the trade between the two Mediterranean rivers, is therefore concerned by the degree of development of the internal economy and the degree of enforcement of competition rules.

Methodology and Material

The methodology used is a comparative approach consisting of analyzing two different systems: The Communitarian Competition Policy and the Tunisian Competition Law. Indeed, this analysis is mainly based on the text of the Association Agreement and the Tunisian competition legislation.
It was set up on two main sources: The first includes either all official documents found in Europa website[3] or text documents deriving from both rivers of the Mediterranean to describing all relevant aspects of Competition Law within the subject of this thesis.
The second source mentioned above consists essentially of the Law 91/64[4] on competition and prices an all associated texts. It extends also to the case-law of the Tunisian competition council (*Conseil de Concurrence*) as published in its yearly official reports as well as an analysis of the impact of the Association Agreement on the Tunisian legal system in the competition law field and the potential amendments that could come into force in the near future.
Some other sources have been also used, for instance the WTO agreements.

Delimitations

This thesis is addressing an audience of legal professionals assumed to possess knowledge of basic EC law and EC competition law principles. The research is therefore directed at a fundamental level of competition law and the extraterritorial scope of EC law.

Similarly, some economic matters are addressed in order to give a comprehensive overview of the relationship established between the European Union and Tunisia.

This analysis is limited to Article 36 of the Association Agreement and to Article 5 of the Tunisian Law on pricing and competition, which fixes the Tunisian Competition Council competences excluding Mergers of undertakings and firms[5], as well as the state aid.

[3] http://www.europa.eu.int/
[4] Several times modified by Law No 93-83 dated 26/7/1993 ; Law No 95-42 dated 24/4/1995 ; Law No 99-41 dated 10/5/1999, law No 2003-74 dated 11/11/2003 and Law No 2005-60 dated 18/7/2005.
[5] In the Tunisian legal system, mergers belongs to the competence of the Minister of trade, the competition council has only advisory role in this matter.

This paper focus on anticompetitive practices and agreements within the meaning of Article 81 EC, on the one hand, and, the abuse of a dominant position as defined in Article 82 EC Treaty on the other hand.

However, it is worth noting that the research was not that easy due to the lack of literature related to the matter, apart from some thesis works, which were of a noticed help for the understanding of the competition policy in Tunisia and its background.

In addition, according to law No 93-64 dated 05/7/1993, only the Arabic version of the texts prevails. The French one is only informative.

1 The Euro- Mediterranean association agreements

1.1 Objectives

The Euro-Mediterranean Conference of Ministers of Foreign Affairs, held in Barcelona on 27-28 November 1995, marked the starting point of the Euro-Mediterranean Partnership, which had the vision of "*turning the Mediterranean basin into an area of dialogue, exchange and cooperation guaranteeing peace, stability and prosperity*[6]".

The Barcelona process was conceived as resting on three pillars: a political and security partnership, an economic and financial partnership, and a social, human and cultural partnership.

More specifically the second pillar is dedicated to the creation of an area of shared prosperity through the establishment of the Euro-Mediterranean FTA, which will be the world biggest free trade area by the target date 2010.

As part of this process, a new generation of bilateral agreements has been set up between the European Community and its Member States, of the one part, and the Mediterranean partnership countries of the other. It replaces the first generation of agreements, i.e. the cooperation agreements of the 1970s.
Although they are bilateral agreements and provide for specific arrangements with each State partner, the association agreements share a similar structure. They are intended to establish a "*Regular dialogue on political and security matters, providing an appropriate framework conducive to developing close relations between the parties; trade, with the gradual liberalisation of trade in goods, services and capital*"[7].
Developing trade will foster the growth of balanced economic and social relations between the parties. Science, culture and finance, will be subject to particular cooperation.
The partnership intends also to foster the development of regional cooperation between Mediterranean partner countries, as intraregional integration brings peace and stability, and economic and social development.

Besides the political dialogue, the Association Agreement provides for the gradual establishment of a Mediterranean free trade area where commitments to the GATT agreements[8] prevail.

[6] Full text available at: http://europa.eu.int/comm/external_relations/euromed/bd.htm
[7] http://europa.eu.int/scadplus/leg/en/lvb/r14104.htm
[8] The General Agreement on Tariffs and Trade (GATT), which was signed in 1947, is a multilateral agreement regulating trade among about 150 countries. According to its preamble, the purpose of the GATT is the "substantial reduction of tariffs and other trade barriers and the elimination of preferences, on a reciprocal and mutually advantageous basis."

With this in mind, a transitional period of no more than twelve years was foreseen, starting when the agreement entered into force.

The free movement of goods between the Community and the Mediterranean countries is to result from the prohibition of customs duties, which are to be gradually removed, the prohibition of quantitative restrictions on exports and imports, and the banning of any similar discriminatory measures between the parties.
The rules will have particular relevance for imports of industrial products and trade in agricultural products, processed or otherwise, and fisheries products. However, safeguard measures may apply, if they come under the scope of public interest, or intend to protect economic sectors that are particularly vulnerable.
Regarding the right of establishment and the supply of services, the parties reaffirm their commitments under the GATS[9] agreements, especially regarding the most favoured nation clause in trade in the services concerned.
The association agreements with Tunisia extend the scope of the agreements to the freedom of establishment for businesses from one of the parties to the territory of the other party. The principle of freedom of establishment is regulated by the principle of equal treatment to businesses.
Free movement of capital between the Community and partner countries is to be facilitated in order to promote the full liberalisation of the sector as soon as the necessary conditions are in place.

1.2 Euromed Cooperation

For helping the development of a fair trade between parties, obstacles that are incompatible with the agreements in areas of payments, capital and competition are to be identified.
The agreements set out the rules that govern trade practices, abuse of dominant positions, state aids, and liberalising public procurement. Intellectual property rights and industrial and commercial property rights in particular are protected in accordance with the highest international standards.
Economic cooperation on customs must support free trade areas and ensure fair treatment. Indeed, mutual interest and the spirit of partnership are the driving force of balanced economic cooperation, which in turn is a source of integration.
This economic cooperation is to focus in particular on the following:

- Areas that have suffered most because of trade liberalisation;
- Areas that generate growth and employment;
- Areas most likely to bring economies closer together.

[9] The General Agreement on Trade in Services (GATS) is among the World Trade Organization's most important agreements. The accord, which came into force in January 1995, is the first and only set of multilateral rules covering international trade in services. It has been negotiated by the Governments themselves, and it sets the framework within which firms and individuals can operate. The GATS has two parts: the framework agreement containing the general rules and disciplines; and the national “schedules” which list individual countries’ specific commitments on access to their domestic markets by foreign suppliers.

In accordance with the objectives of the agreement, cooperation should generate sustainable economic and social development in Mediterranean partner countries that respects the environment and the ecological balance of each Mediterranean partner.
This will be done through regular economic dialogue and joint actions in the fields of communication, advice, expertise and training.

Within the Association Agreement, there is a particular focus on regional cooperation. It is encouraged in all areas that have an impact on it such as regional economic integration, developing economic infrastructures, the environment, scientific and technological research, culture, customs and research. Regional integration in the Maghreb could involve establishing joint institutions and defining joint policies and programs.

1.3 The tunisian participation in the Euromed process

Considering the importance of the existing traditional links between the European Community, its Member States and Tunisia and the common values that the contracting parties share; the wish to strengthen those links and to establish lasting relations, based on reciprocity, partnership and co-development; and conscious of the importance of this Agreement, based on cooperation and dialogue, for lasting stability and security in the Euro-Mediterranean region; an association was thereby established between the Community and its Member States, of the one part, and Tunisia, of the other part[10].

The association is aiming to provide an appropriate framework for political dialogue between the Parties, allowing the development of close relations in all areas they consider relevant to such dialogue, establish the conditions for the gradual liberalization of trade in goods, services and capital, promote trade and the expansion of harmonious economic and social relations between the Parties, notably through dialogue and cooperation, so as to foster the development and prosperity of Tunisia and its people, encourage integration of the Maghreb countries by promoting trade and cooperation between Tunisia and other countries of the region, promote economic, social, cultural and financial cooperation.

As a matter of fact, and being one of the EU's most established trading partners in the Mediterranean region, Tunisia was the first Mediterranean country to sign an Association Agreement with the EU, in July 1995. The agreement entered into force on 1 March 1998 and for the most part operates smoothly.
Already before the date of entry into force, Tunisia started dismantling tariffs on bilateral EU trade.

[10] Preamble of Association Agreement.

This Agreement provides for tariff-free exports in industrial and agricultural goods to the EU.
It also aims to improve the conditions for carrying out this trade by exploring new areas of cooperation in investment, trade facilitation and the approximation of legislation.
Indeed, Title IV of the Association Agreement (articles 33 to 41) on Payments, Capital, Competition and other Economic provisions, includes in its Chapter II the competition rules that are the transposition of articles 81 and 82 of EC Treaty. They constitute the basis of market protection in the foreseen FTA.

2 Legal framework of Competition in Tunisia

Tunisia could not escape from the international tendency. It was on adopting the Structural Adjustment Program (S.A.P) that the country was effectively engaged in the economy liberalisation, in addition to the prerogatives brought by the adherence to the GATT in 1990, and to the WTO[11].

The opening of the free exchange zone with the EU enters in the planning of the global liberalization of the Tunisian economy and its anchorage to the world economy. A deepening of the reforms and a restructuring of the enterprises have already been undertaken in order to adapt the legislative and institutional frame to the European laws, especially in Competition matters, and to remain within the rules of the international economic game.

The first provision on competition in the Tunisian system was included in Article 139 Penal Code[12], which sanctioned by imprisonment and fines « *all those who practice or tend to practice on the market, individually or collectively, in assembly or coalition, an action that aims to obtain gains which couldn't be the natural result of the law of offer and demand*" [13].
For a long time, this article was the only provision that regulated infringements to competition.

With a view toward reconsidering the economic function of prices and granting greater responsibility to market players by subjecting them to the rules of competition, the Tunisian government legislated a new legal framework that made freedom of prices the rule and fixed prices the exception in order to keep pace with economic changes internationally.
The formation of the first competition reform body in Tunisia under Law No. 91-64 of 1991[14] with all the different modifications that came into force[15], is situated within this context.

2.1 Scope of application

The Tunisian competition law of 1991 is strongly inspired by the French Ordinance of 1986[16]. It establishes the principle of freedom of competition and curbs violations pertaining to competition[17].

[11] Tunisia has been a member of WTO since 29 March 1995.
[12] *Penal Code*, Promulgated by ordinance dated 9/7/1913, OJTR No 79 dated 1/10/1913 as modified by law No 2005-46 dated 6/6/2005.
[13] Article 139 (2) Ibid.
[14] Law No 91-64 dated 29/07/1991 on competition and prices. OJTR No 55 dated 06/08/1991. Page 1393
[15] Law dated 29/7/1991 on competition and prices has been modified several times by: Law No 93-83 dated 26/7/1993; Law No 95-42 dated 24/4/1995; Law No 99-41 dated 10/5/1999, law No 2003-74 dated 11/11/2003 and Law No 2005-60 dated 18/7/2005.
[16] Ordinance No 86-1243 of 1/12/1986 on freedom of prices and competition modified lastly by the NRE law of 15/5/2001.

The law has declared free competition with regard to prices as the primary rule for the domestic market, with some exceptions.
Indeed, the law precise that: "*market forces shall generally freely determine prices, except for basic commodities or services, activities where competition is lacking because of a monopoly position, of supply difficulties or due to the effect of legal or regulatory provisions*"[18].

In addition, "*prices may be administratively controlled for a maximum period of six months in a situation of crisis, exceptional circumstances and abnormal market behaviour in a given sector*"[19].
Thus, although price setting is free, the law has given the government the right to intervene and set prices in some situations. It is worth noting that the same provisions can be found in the French ordinance of 1986[20].

This provision, allowing for state intervention in price setting, has, in fact, been made for seasonally use, particularly for food products.
However, prices are still set by the government for subsidized goods, public utilities, pharmaceuticals and a few other goods and services.

The general scope of Competition law is to "*prevent any anti-competitive behaviour, ensure price transparency, and prevent restrictive practices and illicit price increases*"[21].
It has a general application since it applies to "*producers, traders, service providers and other agents*"[22]and "*organisations, groups or corporations, and all persons undertaking an economical activity, whether related to production, distribution or services, no matter were their forms or nature, corporate of factual body*"[23].

In addition, the competition law applies to all sectors: transport, energy, media, insurance, banks…and even liberal profession association without a lucrative aim in their statute.
Besides, although the text law is silent about Public bodies, the council established the principle that competition rules applies to Public persons as to private persons when they undertake an economical activity related to production, distribution or services[24]
The general objective is thus to protect the competitiveness on the market by preventing anti-competitive behaviour and the abuse of a dominant position. However, it leaves the space for some exceptions.

[17] Article 2 law 1991
[18] Article 3.
[19] Article 4.
[20] *See Note 17*
[21] Article 1 *Ibid.*
[22] *Ibid*.
[23] Decision No 2137 dated 27/03/2003. Report 2003
[24] Decision No 2137 Ibid & Decision No 1/2000 dated 6/11/2002.

2.2 Fundamental principles of Competition

The Tunisian Competition system is based on the prohibition of anticompetitive practices both by bilateral or unilateral behaviour.

2.2.1 Bilateral behaviour

Article 5 of the law on competition and prices concerns vertical and horizontal agreements. Indeed, three forms of agreements are endorsed, "*the concerted actions, collusions and tacit or express agreements, which have an anticompetitive object or effect that aims to*[25] *:*

1. Impede market price formation
2. Restrict market access for other firms,
3. Restrict or control production, market outlets, investment or technical progress,
4. Share markets or sources of supplies."

The list is identical to Article 81 EC Treaty and to the provisions of Article L.420-1 of the French *Code de Commerce*.
The express and tacit agreements between undertakings are prohibited based on the existence of two different conditions, that is to say: the Intention and the Effects.

The first condition is the Intention. Indeed, "*It has been established according to the case law of the Competition Council that the absence of intention does not prevent the prosecutions against the infringer*"[26].
The second condition is the effects generated of those practices since the agreements between undertakings are in principle not prohibited unless it affect competition or would have serious consequences on the market.

The new wording of Article 5 is more general than the old version. It encloses the prevention, restriction or distortion of competition on the market to reach all kind of practices and agreements "*which have an anticompetitive object or effect*".
This form enlarges the scope of application of the competition law in the protection of the domestic market.
On the other hand, although "*decisions by associations*", is not expressly mentioned in the actual Article 5, they are caught by the prohibition included in that article since, as it has been developed above, the scope of application of the law targets concerns also the associations. Therefore, we can admit that the *decision by association* is intended by the prohibition integrated in Article 5.

[25] As modified by law of 18/07/2005.
[26] Decision No 2145 dated 25/12/2003. Report 2003.

According to the Competition Council's Case law, the infringement of competition provisions through anticompetitive agreements is determined by the establishment of the existence of an agreement between undertakings that aims to obstacle the proper functioning of the market; on the one hand, and, or, The effective realisation of such agreement.

This position means that the infringement of Article 5 does not require the subordination of the legal act (the agreement) to the fact (realization of the agreement), since one of these two conditions is enough for the Council to assess the existence of the infringement[27].

Moreover, the Council, held that the provisions of the aforesaid Article, are applicable even on agreements concerning a field where the System of Maximum price[28] applies, since there is a margin of profit left to competitors to be taken observed when establishing their price strategies without exceeding the settled Maximum price

2.2.2 Unilateral behaviour

The prohibition included into article 5 of the Tunisian competition law, is applicable at the same time to the abuse of a dominant position, and to the abusive exploitation of economic dependence.

2.2.2.1 Abusive exploitation of a dominant position

The provisions of Article 5 catch the abuse of a dominant position, indeed, it states that: "*are also prohibited the abusive exploitation of a dominant position on the domestic market or a substantial part of it*".

According to the Tunisian competition law, abuse consists of the refusal to sell, tie-in clauses, the imposition of minimal prices or discriminatory sale conditions. This bears a great resemblance to the content of Article 81 EC Treaty.

Indeed, a company is said to be in a dominant position when "*is holding such economical power that allows it to act and behave independently toward its potential customers, competitors or consumers, in accordance to its own initiative without being subject to market pressure or demands in a specific field; in such way that enable it to imply its own conditions and control on the relevant market mechanism because of an important market share, a technological development, commercial methods, financial resources or geographical situation*."[29]

[27] Decision No 2137 dated 27/3/2003. Report 2003.
[28] Decision No 2139 dated 25/9/2003. Report 2003.
[29] Ibid

This definition is inspired by the ruling of the ECJ since 1978 in *United Brands* as being "*the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers.*"[30]

On the other hand, the structural approach of the dominant position used in the community system; having 50 % market share or more, is an evidence of the existence of a dominant position[31].

However, this approach is missed in the Tunisian Case Law, since the fact of having exactly 50% of the market share, does not represent a dominant position. It is only when a company holds more than 50% of market share that is considered being in a dominant position.

Moreover, having a dominant position is not an infringement of competition law. It is conditional by an abuse of that position with an aim to eliminate potential or actual competitors or to harm the natural functioning of competition principles.

In addition, influenced by the communitarian system, the Tunisian Competition Council is also considering the collective dominance that could be held by several undertakings that adapt their strategies to each other's on a specific relevant market without that merge into a single entity.[32]

In assessing the abuse of a dominant position, the Council uses the same methods used in the EC system by defining the relevant market, "*where meet the offer and the demand concerning exchangeable products or services*"[33], by assessing the relevant product market and the relevant geographic market in concern.

2.2.2.2 Abuse of economic dependence:

Next to the abuse of a dominant position, the Tunisian competition law, following the example of the French legislation, includes in its prohibitions brought by Article 5: "*the abuse of an economic dependence of an undertaking on another being a buyer or a supplier that would not dispose of alternative solutions for the marketing, supplying or service providing.*"

Infact, this notion has been introduced by the reform of 1999[34]. Indeed, the appearance of new economical powers, and the introduction of new commercial players on the local market like some important distributors or so-called "*Grande Surface*", that are imposing commercial conditions on producers and distributors; changed completely the meaning of the notion of

[30] Case 27/ 76 *United Brands Co v Commission*, 14 February 1978, [1978] ECR 207.
[31] Case 68/86, Akzo Chemie v Commission, 3 July 1991.[1991] ECR I-3359.
[32] Decision No 2142 dated 25/9/2003.
[33] Opinion No 2266 dated 24/9/2002. Annual Report 2002.
[34] See note 15.

dominance on the market according into a new and modern economic situation on the Tunisian market.

The definition of the abuse of an economic dependence, as giving no alternative solutions for the harmed party, is better elaborated in the French legislation.

Article L.420-2 of French *Code de Commerce*, establish three cumulative conditions in order to assess the abuse of an economic dependence.

First, there must be a situation of an economic dependence; second, an abusive exploitation of this dependence and lastly a real or potential affectation of the functioning or the structure of competition on the market.

For the first condition, the existence of an economic dependence, the new Article L 420-2 does not define the state of economic dependence as it was in the earlier text, namely a commercial relation in which one of the partners, being a buyer or a supplier "does not dispose of alternative solutions".
This criterion, although disappeared from the wording of the new text, is fundamental to assess the abuse of the economic dependence.

In this matter, the criterions held by the French jurisprudence are as following:

1- "The part of a firm in the turnover of one or more of its partners;
2- The notoriety of the trademark and its market share;
3- The existence or not of alternative solutions; and
4- The factors that conducted to the establishment of the economic dependence"[35] :

These criteria must be present simultaneously to lead to such qualification.
Article L.402-2 enumerate in paragraph 2, the anticompetitive practices susceptible to constitute an abuse of economic dependence, that is to say: the refusal to sell, tied sells, discriminatory practices[36]

Ordinarily, market actors should be entitled to determine with whom and on what terms and conditions they are prepared to deal. In a free market, there are alternatives if one actor refuses to do business with another.
However, in the oligopolistic or monopolistic market, these alternatives may not exist and the question then becomes whether the dominant company has

[35] Example of strategic choice.
[36] Article L.442-6 law No *2001-420 dated 15/5/2001 art. 67 OJFR of 16/5/2001.*
"Is punished by imprisonment of four years and a fine of 75000 euros the fact, for any physical person taking fraudulently a persona land determinant part, in the conception, organisation or the implementation of the practices aimed by Articles L. 420-1 & L. 420-2.
The tribunal can order the publication on a designated press, on the expenses of the condemned, of the integral decision or extract of it".

a special responsibility to deal with those whom they would not have dealt under normal conditions[37].
Of specific concern, is the question of the extent to which a dominant enterprise can refuse to deal.

Advocate General Warner said in *Commercial Solvents*[38] that he had no doubt that "…if an undertaking has a dominant position in the market for raw material, that undertaking abuses that position if, without reasonable justification, refuses to supply a particular user of the raw material…
It must, a fortiori, be an abuse for a dominant undertaking to place another trading party at a disadvantage by refusing to supply to him a raw material which the dominating undertaking supplies to others in an equivalent position"

In addition, a reverse interpretation of the competition council case law, demonstrates that the abuse can take the form of refusal to purchase of a company from another undertaking that is economically dependant on the other, if it aims to eliminate or harm competition on the market.

Indeed, the council held in that "*based on the assumption that the supplier was economically dependent on the customer, the bureau's refusal to purchase the product of the Sack Spinning Bank is not subject to Article 5 of the Competition and Prices Law as long as the petitioner participated in the tender and was excluded due to the high price of his product.*" [39]

2.2.3 Individual Exemptions

Article 6 of the law on competition and prices establishes a system of exemptions founded on preliminary authorisation, which, contrary to Community law[40], concerns without distinction, the agreements and the abuse of dominant and economic dependence positions. Indeed, this Article provides that " *are not considered anticompetitive, the agreements and the practices*".
These agreements and practices have to be justified pursue to two different conditions:
- *Having as objectives, an economic or technical progress*
- *Allowing equitable sharing of the benefits with users",*
which lays on the burden of the parties to the request of authorisation.
However, we should notice that, neither the two negative conditions provided by Article 81(3) (a) and (b)[41], nor the Block exemption system, are intended by the text.

[37] Pr Hans Henrik Lidgard.Economic policies and competition. Text Book 2005. Page 320
[38] Joined Cases 6 &7-73, *ICI & Commercial Solvents Corp. v EC Commission*. 6/3/74, 1974 ECR 223-0261.
[39] Decision No 1/2001 *The Sack Spinning Company vs. The Grain Bureau*. Report 2001, page 35.
[40] As it is the case of French law. Article L.420-4 of *Code de commerce*.
[41] The agreements should not impose restrictions that are not essential for the attainment of the beneficial objectives and they should not offer the firms involved the possibility to eliminate competition for a substantial part of the products in question.

2.3 Implementation Rules

The enforcement of competition rules in the Tunisian system is the existence reason of the Competition Council, however some competences are granted to the administration. In addition, special procedural rules are also enclosed.

2.3.1 Institutional framework

The enforcement institutions in the Tunisian legal system for competition law have a special statute; a specialized competition authority on the one hand and the administration shares this function, on the other hand.

2.3.1.1 Specialised authorities

The two specialised authorities competent to enforce the competition rules are the Competition Council and the directorate general of competition and economic investigations.

2.3.1.1.1 The Competition Council

Created by the 1991 Law as a Competition commission, it became the Competition Council in 1995. There is a complete chapter (Articles 9-21) devoted to defining this institution, including its composition, functions, and procedures The Council hold a broad range of competences in order to protect the public economic system.

Indeed, it is an independent body enjoying legal personality and financial autonomy, which budget's attached by order to the budget of Ministry of trade[42].

Headed by a judge or an expert in the area of competition, as a President practicing in full time, it comprises two vice presidents, a permanent secretary, general reporter, and a government representative, seven judges and legal advisers (including the president if he is a judge), four representatives of the business community and two experts[43].

It carries out a judiciary[44] and an advisory function .the first is practiced by means of one or more judiciary sections (or Chambers), determined every new year by the president.

Each section, headed by the President of the Council himself or one of the Vice-presidents must have at least three other members.

The General Assembly (or Grand Chamber) has the advisory function, that is to give opinions on questions submitted by the Minister of trade, or the re-examination of decisions that has been appealed before the Administrative court.

---

[42] Article 9 as modified by law 2005-60 dated 18/7/2005. OJTR No 57 dated 19/7/2005. Page 1753.

[43] Ibid.

[44] Decision No 2138 dated 31/12/2002. Report 2002 *"The judicial function of the competition council is limited in cases concerning anticompetitive practices that have effect on the general balance of the market, and those that affect its natural functioning according to the normal rules that usually command that market»*

The permanent secretary has to keep hold of documentation, inscription of requests, petitions…etc..., and all relevant documents to any cases pending before the Council, while the General Reporter is heading a group of reporters that carry out competences of investigations on the market under the control of the President of the Council. They are appointed either from the judiciary body, or, from public officials.[45] In addition, the President can appoint contractual reporters if necessary.
The government representative represents the Minister of trade, and assures the protection of the Public interest when cases are brought before the Council.

The advisory function find its sources in the provisions of Article 9 (New) of Law of 1991[46] on Competition and Prices authorizes the Minister of Trade, upon his own initiative or upon the government's request, to consult with the Competition Council on draft legislative and regulatory provisions concerning all issues bearing on competition.
Again the council is approached when matters concerns the authorisations of the exclusive commercial representation contracts or the allowance of individual exemptions essential to ensure technological or economic progress and that they yield a fair share of profit to users[47].

On the other hand, the council is obligatory consulted for projects of regulation texts aiming to impose particular conditions for the exercise of an economic activity or a profession, or those aiming to establish new restrictions that would harm access to markets[48].

The right to seek the council's opinion on competition matters is in addition granted to professional and union organizations, approved consumer organizations[49], and chambers of agriculture or industry and commerce through the tutor of Minister of Trade.

In all cases, regardless of the nature of the consultation, obligatory or optional, the opinion expressed by the Council is not binding on the party that requests it.

Following foreign competition laws, and filling the gap, the Tunisian legislator by the means of the last reform of 2005, empowered the Council to order interim measures in case of risks of imminent and irreparable damages that would impede the general economic interest[50].
The most important, is that the Council's decisions are susceptible of appeal before the Administrative Court; however, the appeal the council can demand the provisory execution of its decision, since the provisions if competition law aims to protect the economy in a whole[51].

[45] Appointed from type A, the highest degree of public officials
[46] As modified in 2005.
[47] See Article 6
[48] Article9 (3)
[49] So far, No cases brought by consumer organisations before the Council.
[50] Article 11(3)
[51] Article 21.

2.3.1.1.2 The Directorate General of Competition and Economical Investigations

This administrative body under the tutor of the minister of trade was created by the order No 2966 dated 20/12/01. It is responsible for the execution of regulations and texts related to competition and prices.
On the other hand, it carries the prerogative to develop and root the competition rules by the economic entities on the market.
However, and according to its denomination, it is also responsible for collecting all indexes for any kind of anticompetitive behaviour or practices on the domestic market.
When cases are to be brought by the Minister of trade before the Competition Council, this directorate is responsible for preparing all documents and information needed for the case.
In addition, the President of the Competition Council can request the Directorate general for specific investigations occasionally to cases pending before the council.
It is mainly an inspection body for the enforcement of Price control and the respect of competition on the market.

2.3.2 Principle procedural rules

Different types of seizure of the Council characterize the procedure before the Competition council; also, it is worth noting the variety of the sanctions in the competition field in order to ensure the economical balance on the market.

2.3.2.1 Seizure of the Council

Article 11 of law 91 as amended in 95, 99, 2003 and lastly 2005, regulates the seizure of the competition council.
This article gives a limited list of persons that can bring cases before the Council. We can distinguish three different types of seizure, the ministerial, the undertakings and the self-seizure. Compared to bringing cases before the EC Commission, this right is given to any physical or moral personal or association that is involved in economical activity within the community.

Being the "*bondsman of public order and the responsibility of the competition policy as well as the good functioning of the market*"[52], the minister of trade can bring cases before the competition council directly, if he estimates from the investigations of inspectors of the "*Directorate general of competition and economical Investigations*" that some practices have impeded the freedom of competition on the market.
This provision is identical to Article L.462-5 of the French Code of Commerce[53].

[52] Article 1 decree No 2001-2965 dated 20/12/2001, fixing the attributions of the Ministry of trade
[53] Ex Article 11(1) of ordinance 1986, and here you can notice the resemblance even in article numbering.

The second type of seizure is the one most used in practice and that incorporate, according to the same article 11, Firms, professional Organisations and Unions, consumers protection organism legally established, commerce and industry chambers, regulation authorities and local authorities.[54]
In its case law, the Council has often given a definition of "*Enterprise*" or "Undertaking", "*which is not defined according to the strict legal norms, but on the bases of economical rules that does not imply necessarily the existence of the legal personality*."[55]
Furthermore, the council confirms that "*Article 5 concerns all companies, associations, organisations, grouping, and all type of persons public or private, physical or moral exercising an economical activity related to production, distribution and services, independently from their forms, nature or the existence of their practice*."[56]

The last type is the Self-seizure (*Saisine d'office*) recognized for the Competition Council. This provision introduced by the reform of 10/5/1999 as one of the most important competences granted to the Council, however, it used to be limited by two conditions. Indeed, the council could not declare its self-seizure only if the parties withdraw the case, or, when the investigations made for such pending case reveals prohibited practices on another market closely related to the relevant market subject to earlier investigations.[57]
The old version of Article 11(2) states that: ""*the Council may undertake a complaint on its own accord by summoning the parties to an action, or it may initiate an action if the investigation in a case before it indicates practices that harm competition in a market linked directly to the market that is the subject of the case.*"

Due to important criticism made by the doctrine in about the competences of the competition council as the main institution for the enforcement of competition rules in the country, the reform of 2005 took place. With respect to the competition council, Article 11(2) (new) provides that: "*The competition Council, grounded on report of the general reporter, and after hearing of the government representative, gets hold automatically of anticompetitive practices on the market. In this case, the President of the Council informs the minister of trade, and if necessary, regulation authorities of this self-seizure*…"

2.3.2.2 Enforcement

In principle, all the prohibited practices included in article 5, "*are considered null and void all agreements or clauses enclosing one of the prohibited practices by virtue of this article*".

[54] Added by reform of 2005.
[55] Competition Council, Decision No 2137 dated 17/3/2003
[56] Competition Council's Annual report 2003. Part I, Page 38
[57] Decision No 1/2002 dated 6/11/2002. Report 2002, page 24

This differs from EC law provisions, since the nullity concerns all the anticompetitive practices either resulting from bilateral or unilateral behaviour.

In terms of sanctions, the Council may address Injunctions to the violating firm to cease its anticompetitive practice, close its business for a maximum period of three months during which the firm has the obligation to cease the condemned practice or delegate the case to Court [58].

"*According to the general principles of competition law, the possibility to enlarge the subject of a case pending before it, without being limited to the parties claims or to the legal qualifications made by the applicant, and without limitation to the parties in the case*"[59], and can impose fines on the infringers up to 5% of the turnover realised during the last exercise.

If the incriminated party, being a moral personality, organisation, does not have a proper turnover, a fine varying between 1000 and 50000 Tunisian dinars, would be imposed instead.[60]

The fines can go up to "*imprisonment of a period extended from 15 days to 1 Year or a fine from 2000 to 100000 Dinars for any person using indirect ways, would have taken an important part into the violation of the provisions of Article 5 of the law*"[61].

According to the Council's case law, the fine is calculated upon four criteria: "*the gravity of the committed infringements, the importance of the prejudice on the economy, the position of the undertaking on the market, and the amount of benefits realised through the practice of the infringement*".[62]

However, the Council applies a leniency system similar to the one used in EC law, but that is not that much developed. This principle is ambiguous since it is only mentioning that the Council can, while calculating fines, takes into account the cooperation of an undertaking during the investigations by presenting sufficient documents that are helpful for delivering the judgement.

[58] Article 20.
[59] Decision No 1/2001 dated 6/11/2002.
[60] Article 34.
[61] Article 36.
[62] Decision No 2145 dated 25/12/2003.

3 Competition rules included in the Association Agreement

Chapter 2 of the Association Agreement, namely "*Competition and other economic provisions*" in Title IV relative to payments, capitals, competition and other economic provisions define the prohibited anti-competitive practices.
Article 36 of the agreement confirm the prohibition of two type of anticompetitive behaviour, that is to say the anticompetitive agreements between undertakings and the abuse of a dominant position, by almost adopting the same constitutive elements taken by the Tunisian legislator in the competition law of 1991[63]. However, the Association Agreement adds two supplementary conditions to the criteria of anticompetitive practices compared to the Tunisian law.

3.1 Confirmation of the prohibition of anticompetitive practices

Although an important part of the Tunisian Competition law has been inspired from EC law, there are some deviations between the two systems.

The Association Agreement in Article 36 considers that agreements and abuse of a dominant position are incompatible with the proper functioning of the agreement[64].
This article is structured in the same way than Article 81 and 82 (Ex 85 and 86) of EC Treaty. Moreover, the text provides explicitly that "*Any practice contrary to this Article shall be assessed on the basis of criteria arising from the application of the rules of Articles 85, 86 of the Treaty establishing the European Community.*"

3.1.1 The prohibited agreements

The Association Agreement takes up the three conditions used in Article 81 to declare the infringement and which are:

[63] Law N° 91-64 on 29 July 1991 on competition and prices is the basic text for competition in Tunisia.
[64] Article 36 of Association Agreement stipulates:
1. The following are incompatible with the proper functioning of the Agreement, insofar as they may affect trade between the Community and Tunisia:
(a) all agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition;
(b) abuse by one or more undertakings of a dominant position in the territories of the Community or of Tunisia as a whole or in a substantial part thereof;

1- The connection between undertakings in form of agreements, decisions by associations or concertations,
2- The affectation of competition either actually, potentially, intentionally or not,
3- The affectation of trade between Tunisia and the Community

Concerning the establishment of the agreement, the Association Agreement, as it is the case for Article 81 EC and as confirmed by the ECJ case law, distinguishes the notion of "concerted practices" from "agreements between undertakings".

This distinction is made in order to "*bring within the prohibition a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition*[65].

According to the ECJ, the concerted practice "*by its very nature, does not have all the elements of a contract but may inter alia arise out of coordination, which becomes apparent from the behaviour of the participants"*[66].
Such cooperation constitute a concerted practice notably when it permit to undertakings to benefit from the freedom of movement of goods on the common market or the FTA and take control of freedom of consumers and suppliers. It can take place even by the adaptation of two competitor behaviours to each other, which would affect directly or indirectly the free game of competition on the market.

For the establishment of an agreement in the sense of Article 36, it is sufficient that undertakings would express their common will to behave according to a determined way as established in EC law.

In fact, in *Adalat*[67] , the CFI found that "*The proof of an agreement between undertakings within the meaning of Article 85(1) of the Treaty must be founded upon the direct or indirect finding of the existence of the subjective element that characterises the very concept of an agreement, that is to say a concurrence of wills between economic operators on the implementation of a policy, the pursuit of an objective, or the adoption of a given line of conduct on the market, irrespective of the manner in which the parties' intention to behave on the market in accordance with the terms of that agreement is expressed"*[68].

However, the establishment of an agreement in itself is not sufficient to be declared incompatible with the competition provisions, there must be an

[65] Case 48/69 *ICI v EC Commission*. 14 July 1972 [1972] ECR 619. pg 64.
[66] *Ibid.*
[67] Case T- 41/96 *Bayer v EC Commission.*
[68] See, in particular, Case 41-69 *ACF Chemiefarma NV v EC Commission*, 1970 ECR 661. Paragraph 112; and Joined Cases 209/78 to 215/78 and 218/78 Van Landewyck and Others v EC Commission, [1980] ECR 3125. Paragraph 86.

expressed intention to behave on the market in accordance to such agreements to establish the violation of competition.

Furthermore, the competition system established by the Association Agreement is based on a "planning system"[69]. The purpose is to be seen as two-fold: it should ensure that companies are not able to recreate the boundaries between the contracting parties with their consequent obstruction to trade within the FTA, which the Member States and Tunisia have sought to eliminate by creating this common bilateral market. Secondly, the competitive system should vitalize commercial activities.
In prohibiting agreements, decisions or practices not only for their object, but also for their effect, Article 36(1) of the Association Agreement implies the necessity to observe the consequent effects in their economical and legal context, where they have been produced.

As it has been discussed, an agreement would infringe the provisions of the Association Agreement, and declared incompatible with its proper functioning it affect trade between the two contracting parties.
In that sense, an agreement made between undertakings from the EU and competitors in a third country could fall under the Community jurisdiction, when the implementation of such prohibited agreement is within the common market[70] or has effect within the Community.[71]
The condition of affecting trade is not limited in the agreements, but concerns also the situation of abuse of dominant position.

3.1.2 Abuse of dominant position and abusive exploitation

The dominant position targeted by Article 36(1b) of the Association Agreement concerns all economical positions that allows an undertaking to make obstacle to the maintenance of an effective competition on the market, since that economical power generate the possibility to act independently in an appreciable effect *vis à vis* its competitors, buyers or consumers.

3.1.2.1 Determination of the relevant market

The determination of the relevant market is pertinent in Competition law and it is an essential element of the prohibition included in the Association Agreement.
The relevant market is not limited and can be extended to affect different States; therefore, it is important to try to put delimitations according to the Community methods to determine the relevant market when assessing prohibited practices.

[69] Pr Hans Henrik Lidgard.Economic policies and competition. Text Book 2005. page 50
[70] Joined cases 89, 104, 114, 116, 117 and 125 to 129/85 judgement of 27 September 1988, Ahlström Osakeyhtiö and others v Commission of the European Communities, ECR [1988] page 5193, cited as Woodpulp II, paragraphs 16-18).
[71] Notice on Community Dimension, paragraph 100.

3.1.2.1.1 The geographical market

In the sense of Article 36 of the agreement, the geographical market has to be delimited to determine if a company is holding a dominant position in the FTA or in a substantial part of it.
This market, by virtue of Article 36(2) comprises the territories of the European Community and, or the Tunisian territory or a substantial part of it.

According to the Commission notice, "*the relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.*" [72]

The question that can rise from this discussion, is defining the substantial part of the relevant market. As an answer, we can consider that any Member State or the Tunisian territory as a substantial part of the geographic relevant market to assess the abuse of a dominant position or abuse of exploitation within the meaning of Article 36 of the Association Agreement.

3.1.2.1.2 The abusive exploitation

The notion of dominance in itself is not forbidden,[73] but Article 36 of the Association Agreement catches the abuse of such dominance.

Indeed, the text is aiming to prohibit the behaviour of "*an undertaking in a dominant position which is such as influence the structure of the market where, as the result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition*" [74].

3.1.2.1.3 Affectation of trade

The interpretation and the application of this condition included in Article 36, has to start from the aim of this condition, which is to determinate the applicable competition law when assessing the prohibited abuse.
For this, any practice would fall under the Association Agreement rules when it aims to harm the realisation of the objectives of establishing a FTA

[72] Commission notice on the relevant geographic market, pg 8
[73] Case 322/81, *NV Nederlandsche Banden Industrie Michelin v Commission*, ECR [1983] page 3461.
[74] Case 85/76 *Hoffman- La Roche* [1979] ECR 461, 541:3 CMLR 211, page 290

either by partition of the national markets or by modifying the structure of competition in that area.
From that perspective, it is sufficient that the abuse is affecting the trade between Tunisia and the EC to state on the applicability of Article 36 of this agreement.

3.2 The additional conditions of prohibition

According to the text of article 36, and compared to the Tunisian legislation, there are two additional conditions to consider a practice as anticompetitive, that are the infringement of competition on the Tunisian territory or on one of the European member states, and the affection of trade between the two parties.

3.2.1 Infringment of competition on the Tunisian territory or the EU

As international trade knows no boundaries, article 36[75] adopting the same approach, prohibits the anticompetitive practices that may affect trade between Tunisia and the EU.
These practices are settled by Pg1 & 2 of the same article[76] which precise that the prohibition concerns the agreements between undertakings, decisions and concerted practices which have as objective or effect the prevention, restriction or distortion of competition.
The provisions of article 36 use the two criterion of object or effect.
In fact, the effect's criteria are broader than the competitive climate ("Competition criterion") in the European community[77] in the sense that the effect may go beyond the EU or the Tunisian territory.

In *Haecht,*[78] the ECJ underlined that it is only to the extent to which agreements, decisions or practices are capable of affecting trade between Member States that they fall under Community prohibitions. "*In order to satisfy this condition, it must be possible for the agreement, decision or practice, when viewed in the light of a combination of the objective, factual or legal circumstances, to appear to be capable of having some influence, direct or indirect, on trade between Member States, of being conductive to a*

[75] Art 36 (1) of Association Agreement: The following are incompatible with the proper functioning of the agreement, insofar as they may affect trade between the Community and Tunisia…
[76] all agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition;
(ii) abuse by one or more undertakings of a dominant position in the territories of the Community or Tunisia as a whole or in a substantial part thereof.
[77] Pr Hans Henrik Lidgard.Economic policies and competition. Text Book 2005. page 50
[78] Case 23/67, *Brasserie de Haecht SA v Wilkin-Janssen*, 12 December 1967, [1967] ECR 407, page 415.

partitioning of the market and of hampering the economic interpenetration sought by the Treaty"

Within the scope of the Association Agreement, the subject matter overtakes the provisions of the Rome treaty, which are limited to the community territory according to Article 299[79].
Furthermore, it passes the subject matter of the Tunisian legislation, which according to Article 5 of the law, is only applicable on the Tunisian internal market.

This approach is confirmed by the ECJ case law, in the sense that when trade between two or more Member States, or even with foreign States[80], is effected, this effect could be direct or indirect.
Indeed, any effort to isolate or fragment markets has such an indirect impact. Generally, when a practice only influences trade in a single Member State or a third country, the legislation of that State will govern.[81]
However, as the Court has repeatedly underlined, it is just the direct and actual effect, which must be taken into account. Indirect and potential effects must also be considered.
An agreement, which appears to have impact only in a specific country, may still foreclose foreign companies from entering that market and thereby affect trade in the Community[82].

The anticompetitive operation can have an internal or external character. Indeed, the ECJ estimate since *Grundig Consten*[83] that an agreement between non-competitor undertakings that has effect on third party is susceptible to retrain competition.

From the above analysis, it is clear that article 36 is regulating the anticompetitive practices that may have as object or effect to harm of trade between the two parties. However, the Association Agreement does not precise the criteria to assess the intensity of the infringements, although it is left for the Association council according to Article 36 pg 3[84], to adopt the necessary rules for the implementation of the prohibitions brought by pg 1 and 2.

Still, I think that the latter is left to the subcommittee of Industry, Trade and Services[85] to clear this question.

---

[79] Ex article 227.
[80] In this case, the trade between Tunisia and the EU.
[81] Pr Hans Henrik Lidgard.Economic policies and competition. Text Book 2005. page 69.
[82] Case C-309/99, *Price Waterhouse*, fn. 64; Case 8/72, Cementhandelaren, fn 77.
[83] Joined cases 56, 58 &64 *Consten & Grundig v EC commmission*, 13 July 1966. ECR[1966] 429-506.
[84] The Association Council shall, within five years of the entry into force of this agreement, adopt the necessary rules for the implementation of paragraphs 1 and 2.
[85] The Agreement is overseen by regular ministerial (Association Council) and senior official (Association Committee) level meetings. In the trade domain, the Association Council decided to explore further ways of enhancing cooperation by establishing the Sub-committee for Industry, Trade and Services (as well as other committees, in the following areas: internal market; transport, environment and energy; research and innovation; agriculture and fisheries; and in matters of justice and security). The first trade sub-committee meeting was held in November 2004.

In that matter, the EC Commission holds in the De Minimis notice[86] that agreements between undertakings which affect trade between Member States do not appreciably restrict competition if the aggregate market share held by the parties to the agreement does not exceed 10% on any of the relevant markets affected by the agreement, where the agreement is made between undertakings which are actual or potential competitors on any of these markets; or if the market share held by each of the parties to the agreement does not exceed 15% on any of the relevant markets affected by the agreement when the parties are not competitors[87].

3.2.2 Affectation of trade between the EU and Tunisia

Article 36 of the agreement, condemns only the anticompetitive practices that affect trade between both parties. An agreement that would infringe competition, that is made within the Tunisian territory and that has no effects on trade between the EU and Tunisia is falling out of the agreements' scope, and is therefore assessed according to the Tunisian legislation.

This condition is essential to draw lines between the applicability of the national law and the provisions included in the international agreement between the two parties.
It is a transposition of the applicability condition of Article 81 & 82 of EC Treaty, which is the attenuation of trade between Member States.
The provisions of the Association Agreement are only applicable to practices that affect the market within the FTA established between the EC and Tunisia notwithstanding the locality of the companies involved in the agreement.

In that sense, any agreement is susceptible to fall under this prohibition, if it is influencing directly or indirectly, actually or potentially, the degree of trade between the EU and Tunisia with a potential harm to the establishment of the FTA projected by the two parties.

In the case of *Javico v YSLP*[88] concerning a Selective distribution system with obligation to export to non-member country and a prohibition of re-importation into, and of marketing in, the Community; the ECJ considered that such agreement; in which the reseller gives to the producer an undertaking that he will sell the contractual products on a market outside the Community; cannot be regarded as having the object of appreciably

[86] Commission notices on agreements of minor importance, which do not appreciably restrict competition under Article 81(1) of the Treaty Establishing the European Community (De minimis). OJ 2001, C368/13
[87] Ibid. II. Pt 7(a) & (b)
[88] C-306/96 *Javico Int and Javico AG v Yves Saint Laurent Perfums SA.* 28 April 1998

restricting competition within the common market, or as being capable, as such, of affecting, trade between Member States.

Consequently, the agreements at issue, in that they prohibit the reseller *Javico* from selling the contractual product outside the contractual territory assigned to it, do not constitute agreements which, by their very nature, are prohibited by Article 85(1) of the Treaty.

Similarly, the provisions of the agreements in question, in that they prohibit direct sales within the Community and re-exports of the contractual product to the Community, cannot be contrary, by their very nature, to Article 85(1) of the Treaty.[89]

This condition of affecting trade is an important notion to enable drawing the line between the Tunisian legislation and EC law as it was the case between Community law and national laws in Member States, and for this reason, the Court has always tried to fix the constitutive elements of this notion. The association council or the sub-committee created within the institutional bodies implementing the Association Agreement in issue has to get inspired from community case law, because the condition of affectation does not exist in the Tunisian system.

3.3 The implementation of competition provisions included in the Association Agreement

The Agreement has a homogenous character in the sense that is applicable to intergovernmental relationship and to relations betweens private parties. Therefore, it is important to assess the provisions that might have direct effect and especially the competition rules included in the Association Agreement.
On the other hand, it is also important to find out how does theses provisions will be implemented in both partner's legal systems.
To find the answer of these interrogations, it is of an issue to analyse the direct effect of article 36 of the Association Agreement and its implementation in community legal order on the one side, and in the Tunisian system on the other side.

3.3.1 Article 36 in Community legal order.

Direct effect is a principle of EC law according to which, certain pieces of European legislation are enforceable by citizens of the Member States.

[89] Ibid. Pg 20- 21.

Direct effect is not mentioned in any of the EC Treaties, and was established by the ECJ in *Van Gend en Loos*[90] in which the court held that rights conferred on individuals by European Community legislation (treaties, regulations, directives etc) should be enforceable by those individuals in national courts.

The Court laid down the criteria (commonly referred to as the "*Van Gend en Loos* criteria") for establishing direct effect:

- The provision must be sufficiently clear and precisely stated,
- It must be unconditional or non-dependent,
- The provision must confer a specific right for the citizen to base his or her claim on.

If these criteria are satisfied, then the citizen is able to enforce the right(s) in question in the national courts.

Four principles govern the domestic legal effect of international agreements. These principles are the following: 1) direct application, 2) direct effect, 3) supremacy, and 4) interpretation. The ECJ developed a common conception for each of these principles except direct effect.

For example, the ECJ adopted a monist conception of direct application so that international agreements and Community law form part of a single legal system[91]. The ECJ also held that international agreements are supreme over all secondary Community law[92].

In fact, since, according to Article 228 (2) of the EC Treaty, the Member states are bound in the same manner as the institutions of the community, by the international agreements which the latter are empowered to conclude, they fulfil, in insuring respect for commitments arising from an agreement concluded by the community institutions, an obligation not only in relation to the non-member country concerned but also and above all in relation to the community which has assumed responsibility for the due performance of the agreement. That is the way the provisions of such an agreement form an integral part of the community legal system.

It follows from the community nature of such provisions that their effect in the community may not be allowed to vary according to whether their application is in practice the responsibility of the community institutions or of the member states and, in the latter case, according to the effects in the internal legal order of each member state which the law of that state assigns to international agreements concluded by it.

---

[90] Case 26/62 *Van Gend en Loos v. Nederlandse Administratie der Belastingen*; [1963] ECR 1; [1970] C.M.L.R. 1.
[91] *See* Case 181/73, *R.&V. Haegeman v. Belgian State*, 1974 E.C.R. 449, *and*, Joined Cases 21-24/72, *International Fruit Company NV and Others v. Produktschap voor Groenten en Fruit*, 1972 E.C.R. 1219.
[92] *See* Case 104/81, *Hauptzollamt Mainz v. C.A. Kupferberg & Cie. Kga.A.* 1982 E.C.R. 3641, *and*, International Fruit Company.

Therefore, it is for the court, within the framework of its jurisdiction in interpreting the provisions of agreements, to ensure their uniform application throughout the community[93]

According to the general rules of international law, there must be bona fide performance of every agreement. Although each contracting party is responsible for executing fully the commitments, which it has undertaken, it is nevertheless free to determine the legal means appropriate for attaining that end in its legal system unless the agreement, interpreted in the light of its subject matter and purpose, itself specifies those means.

Subject to the reservation on the fact that the courts of one of the parties to an international agreement concluded by the community consider that certain of the stipulations in the agreement are of direct application whereas the courts of the other party do not undertake such direct application is not itself such as to constitute a lack of reciprocity in the implementation of the agreement.

Finally, the ECJ held that similarly, worded provisions contained in both the EC Treaties and international agreements do not have to be interpreted in the same manner[94]. This ruling finds its basis in the different context of each agreement and especially its purpose.

Getting back to the Association agreement, Article 36 is very close in its wording to the provisions of EC Treaty which the Court has already expressly accepted the direct effect of articles 81 (1) and 82[95]; it is clear that the said article is addressed to States and not to individuals. Paragraph 6 confirms that in case of infringement detected by Tunisia or the Community, one of the parties may refer to the Association Committee to act appropriately[96].

I think that the provisions of the Article in question should have direct effect in community law. Indeed, the fact that the Court considered the association agreements as being an integrated part of Community legal system. Furthermore, pg 2 of the said article[97] states that assessment of the

---

[93] Ibid

[94] *See* Case 270/80, *Polydor Limited and RSO Records Inc v. Harlequin Record Shops Limited and Simons Records Limited*, 1982 E.C.R. 329, *and*, Case 70/87, *EEC Seed Crushers' and Oil Processors' Federation (FEDIOL III) v. EC Commission*, 1989 E.C.R. 1781.

[95] Case C-127-73, *BRT v. SABAM*, [1974] ECR 51.

[96] Article 36(6): If the Community or Tunisia considers that a particular practice is incompatible with the terms of paragraph 1, and:
- is not adequately dealt with under the implementing rules referred to in paragraph 3, or
- in the absence of such rules, and if such practice causes or threatens to cause serious prejudice to the interest of the other Party or material injury to its domestic industry, including its services industry, it may take appropriate measures after consultation within the Association Committee or after 30 working days following referral to that Committee.

[97] Article 36 (2): Any practices contrary to this Article shall be assessed on the basis of criteria arising from the application of the rules of Articles 85, 86 and 92 of the Treaty establishing the European Community and, in the case of products falling within the scope of the European Coal and Steel Community, the rules of Articles 65 and 66 of the Treaty establishing that Community, and the rules relating to state aid, including secondary legislation.

prohibited practices is to be done based on criteria arising from the application of the rules of Articles 81, 82.
However, for the time being, the competition provisions included in the Association Agreement has no direct effect and cannot be invoked by parties before the court of justice.

3.3.2 Implementation of competition provisions of the Association Agreement in the Tunisian legal system

The implementation on the competitions provisions included in the Association Agreement is depending on the constitutional system in Tunisia.
Indeed, article 32 of the Tunisian constitution[98] as lately modified[99], specifies that the President of the Republic ratify the international treaties. However, this ratification power is conditioned by the approbation of the Deputy Chamber when it is concerning:

1- Treaties concerning State Borders.
2- Commercial treaties.
3- Treaties related to international organisation.
4- Treaties concerning financial engagement for the State.
5- Treaties including provisions of a legislative character.
6- Treaties concerning personal statute[100].

The Tunisian constitutional approach is mainly based on Hans Kelsen pyramid[101].
Indeed, when ratified, treaties have a superior statute than national laws and are implemented in the Tunisian legislation on the principle of reciprocity as a fundamental condition for the application of the convention.

In fact, the Association Agreement has been ratified by the Tunisian Deputy Chamber since 1996[102], and came into force in both territories on the first Mars 1998, after its adoption by all Member States.
Consequently, from that date, being an international convention, the Association Agreement in issue, started to produce effects, and therefore is

[98] Law 59-57 dated 1/06/ 1959 promulgating the Tunisian Constitution. OJTR Nb 30 , 1 june 1959 , page 746.
[99] Law 2002-51 dated 01/06/2002 modifying some provisions of the Constitution. OJTR: 045 du 03/06/2002. page 1302.
[100] Article 32, pg2 Tunisian Constitution.
[101] According to *Kelsen*, most concrete applications of legal rules (that is to say where legal rules apply to specific factual situations) derive their authority from less specific and therefore more general legal rules. Theoretically, this investigative process can be extended backwards until the most fundamental, general and authoritative legal rule or standard (or "*norm*" as Kelsen called rules) is reached. Following from this, the logical structure of law can be likened to a pyramid with the most fundamental and authoritative norm (the "Grundnorm") at the top and the most particular norms (those which applied to particular concrete situations) at the base.
[102] Law 96-49 of 20 June 1996, ratifying the Association Agreement Euro-Mediterranean between Tunisia and EU. OJTR Nb 51 of 25 June 1996, page 1357.

susceptible to be applied by the Tunisian jurisdictions since it has a superior authority then national laws as it is explained above.

The problems arising from the applicability of duly ratified conventions before the national jurisdictions, is the possibility of conflicts with national laws.

In fact, the integration of the competition provisions included in Article 36 of the Association Agreement into the Tunisian legal order, suppose a deep analysis of this article.
The Tunisian competition law and the Tunisian legislation will reject these provisions if they do not have the same nature than the EC law included in the Association Agreement, that have the same concepts and technique used in the community system. Eventually, the Tunisian Competition council has often referred to the Community principles and to the French law.

4 Deviations of Tunisian Competition law

The Tunisian System of competition has some specificity compared to the European example, in the sense that it prohibits the Concession contracts and exclusive commercial representation on the one hand, and on the other hand, as it has been seen the competition council has three types of power for the enforcement of competition. In addition, the right to compensation does not enter under the scope of the council competition.

4.1 Prohibition of exclusive agreements

Pursuant to Article 5 of the Tunisian law on Competition and prices, "*Les Contrats de Concession*" or exclusive distribution agreements including Franchise are, prohibited in principle. However, in special circumstances, the Minister of Trade can authorise such contracts after consulting the Competition Council[103].

This prohibition has a general scope in the sense that it applies "*in all cases*", and was therefore, justified by the fear of the Tunisian government from the liberalisation risks. Indeed, the opening of the Tunisian market will allow foreign undertakings and their Tunisian collaborators to profit exclusively from such liberal situation, which would limit access to market for other competitors pursuant to such exclusive distribution agreements.

However, under the effect of the criticism made to such categorical prohibition, the legislator brought to completion this prohibition by subordinating it to the authorisation of the minister of trade, "*in exceptional cases*", after consulting the competition council.

This authorization does not prevent from rising up problems related to procedural rules of such authorisations, or to the criteria taken by the Minister of trade and the Competition Council for the approval of such requests. Such system is similar to the system of individual exemption in the communitarian legal system, whereas, the European Commission provided for the conclusion of certain exclusive agreements a series of block exemption of most common use in the following areas:

- exclusive distribution agreements
- exclusive purchasing agreements
- franchising agreements
- patent and know-how licensing
- research and development contracts
- specialization agreements,

[103] Modification of 1999 of the law on competition and prices.

However, it should be noted that the case is different in practice. In fact, franchising agreements are currently used in Tunisia in the field of pharmaceutical industry, hostelry, car industry…but parties try to bypass the law by inserting fictive clauses in order to prevent the nullity of their agreements.

4.2 Large and mixed jurisdictional powers of the Council of competition

As mentioned in the top of this paper, the *Conseil de Concurrence* has a dual role: one judicial, the other advisory. With respect to its judicial activity, the Council has powers to judge and sanction anticompetitive practices based on illicit cartels and abuse of dominant position, to which should be added abuse of economic dependence, unreasonable limitation of market access by choosing selective or exclusive distribution channels, fixing of minimum prices, sales on discriminatory terms, refusal to sell and conditional sales, segmentation of markets or sources of supply.

By reading the Tunisian Law of competition and prices, it may be noted that the council has three types of jurisdictional power. It is in fact a civil, administrative and penal court at the same time.

4.2.1 The competition council as a civil jurisdiction

It is up to the Competition Council, as an authority of regulation of the market, to insert into the decisions that it pronounces, orders to make or to refrain. It can so subordinate the pursuit of the activity of a company, and to fix it a delay to comply with it, or still order involved companies to cancel an agreement or certain clauses of a contract infringing the law. It can send an order to the condemned company, ordering it to publish at its expenses the device of the decision in two daily newspapers. Such competences and powers, may give the competition council the characteristics of a civil court.

Despite the explicit provisions included in Article 5(5) New[104] that: "*any commitment, agreement or contractual clause relating to one of the prohibited practices is null and void*"; the council has always considered, that it was not competent to pronounce the nullity of contracts, confirming the belonging of such power to the civil judge, and the administrative one, when it concerns a public service contract.[105]

[104] As modified by law 2005.
[105] Jaouida Guiga – Le droit tunisien de la concurrence à l'ère de la mondialisation C.P.U-page 111.

4.2.2 The Competition Council as an special administrative jurisdiction

In its 2002 yearly report, the competition council declared itself as an independent authority which decisions have a judicial character. Indeed, some controversial indexes show that the most suitable nature that can be given to this institution is that it is a special administrative jurisdiction.
In fact, the Competition Council has been created by a law that fixes its competences, composition and procedures; enjoys independency, legal personality and financial autonomy in accordance to article 9.
In addition, the general principles of the judicial procedures, such as reasoning its decisions have to be respected[106].
Furthermore, the appeal proceedings against its decisions are not an appeal for abuse of power (*Excés de Pouvoirs*)[107] which is usually made against decisions taken by the administration.
Moreover, the decisions rendered by the Council have a *res judicata* and executable in accordance to the provisions of the code of civil and commercial procedures.[108]
Finally, it is composed in majority of magistrates (7 out of 13) that carries out the settlement of litigations, and it is a collegiate institution and a decision maker.[109]

4.2.3 The Competition Council as a penal jurisdiction

The competition Tunisian law allows the Competition Council to transfer files to the public prosecutor (*Parquet*), so that he can engage legal proceedings, against persons who infringed the Article 5 of the said law. These persons incur punishments of detention going from sixteen days to one year and of a fine from 2.000 Dinars to 100.000 Dinars or of one of these two punishments only. Besides, fines up 5 % of the turnover realized on the national market can be imposed.
The Competition Council holds powers of examining magistrate. Indeed, permanent and contractual reporters, under the authority of the Council president, have free access to files, possibilities to interrogate workers in suspected firms…etc.
From this perspective, we can admit that the Council acts as penal judge and exercise an excellent dissuasive role to ensure the efficiency of competition.

[106] Article 14 and 15 of the law on competition and prices.
[107] Article 21.
[108] Article 21.
[109] Articles 16, 19 and 20.

5 Conclusion: Impact of the Association Agreement on Tunisian competition legislation

The partnership between the EU and Tunisia has a considerable impact on the domestic competition legislation. As it was shown, the competition law of 1991 was the subject of several amendments that took place on the average of three years. The last in date was the in July 2005, which has been lately implemented, and still without known effects at this date.
It has to be notified that the Tunisian legislator was always foreseeing the impact of the liberalisation of the economy and the freedom of competitiveness on the market. However, it is worth noting the action plan published by the EC Commission and the degree of approximation of the Tunisian system to the Community law, and further, some criticism and suggestions for potential modifications of the actual system.

5.1 Adaptation to the action plan proposed by the Commission

The delegation of the European Commission established in Tunisia, and within the framework of the structural adjustment of the Association Agreement;[110] led to the amendment of the Tunisian competition law in 2005.
Indeed, in its action plan[111] concerning Tunisia, the European Commission after the enlargement, revealed the will of the two parties to give a new dimension to every aspect of the Association Agreement through the deepening of their political, economic, social, cultural and scientific ties and cooperation on security and environmental questions. Cross-border, trans-national and inter-regional cooperation and shared responsibility for conflict prevention, conflict resolution and disaster management also form part of the new European neighbourhood policy.
The EU and Tunisia will review the content of the Action Plan and decide on any adaptations and updates required.

[110] Interview with Fabian SEIDERER, Delegation of European Commission. Section Structural adjustment, Education, Private sector & Social Modernisation. Tunis 17/4/06.
[111] Action plan EU-Tunisia published on 01/12/2004.

After three years, the EU and Tunisia may decide on the next step in the development of bilateral relations, including the possibility of new contractual links. This could take the form of a European Neighbourhood Agreement whose scope will be defined in the light of progress in meeting the priorities set out in the Action Plan.

As regard competition policy, the plan proposes action at short and medium terms.
At the short term, many actions are projected. It concerns the Adoption of a decision of the Association Council on the implementing provisions of Article 36(3) of the Association Agreement.[112]
Indeed, during the period of five years, no procedural provisions for the implementation of paragraph 1 & 2 of Article 36, has been adopted.
On the other hand, in order to Implement and consolidate undertakings made on competition law (Article 36 of the Association Agreement) and develop legislation and a control mechanism compatible with those in the EU
– Assess the current Tunisian legislative framework and its implementation, in particular respect for the principles of non-discrimination, transparency and procedural fairness;

– Consolidate the status of the Competition Council, in particular by:

(a) Guaranteeing its independence and ensuring adequate staffing levels and budgetary resources;

(b) Endowing it with appropriate powers, notably for decision-making, enforcement orders and effective sanctions (e.g. fines); the possibility in the medium term of own-initiative investigations;

(c) Ensuring appropriate training for competition authority staff;

– Ensure the right of appeal to an independent court against decisions on anti-trust;
– Ensure specialist training for judges dealing with competition cases.

It has to be notified that before the adoption and the official applicability of the action plan, Tunisia has modified the Competition law of 1991 by the law of 18/7/2005, which allocated the self-seizure competence to the Competition Council, and the opening of the right to appeal its decisions before the administrative Court.
In addition to this plan, we should mention the program of support to the implementation of the Association Agreement. This program is a part of the MEDA program[113].

[112] Article 36(3): 3. The Association Council shall, within five years of the entry into force of this Agreement, adopt the necessary rules for the implementation of paragraphs 1 and 2.
Until these rules are adopted, the provisions of the Agreement on interpretation and application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade shall be applied as the rules for the implementation of paragraph 1(c) and related parts of paragraph 2.
[113] A financial support for the Mediterranean countries basin covered by Regulation No 2698/2000. MEDA II for the period 2000-2006.

One of the objectives of this program concerns the application of Competition law. In fact, a twinning project has been launched having as object to "consolidate the Tunisian efforts in the improvement of the economy competitiveness, notably the reinforcement of institutional capacities of the structures charged of the implementation of competition policy.
More specific, the Directorate General of Competition and Economical Investigations and the Competition Council in the implementation and protection of Competition rules.
The project aims also to develop the institutional capacities, technological infrastructure and necessary know how of those two institutions to insure the mission of widening the competition culture and the promotion of competition policy

5.2 Potential modifications in the near future

For ensuring a better functioning of the Association Agreement as it is the will of both parties of this association, I think that some efforts have to be made by both Mediterranean partners.

Indeed, one important factor for the enforcement of the competition rules is the cooperation between competition authorities.
In Europe, the regulation 1/2003 has established a Network of competition authorities NCA under the control of the Commission. However, no cooperation is intended with the competition authorities in the SMC, as it is the case for Tunisia. Such cooperation should be strengthened to benefit from developments of competition on both sides, and to wrestle more effectively against anticompetitive cross-borders practices which impact would be more important on the Tunisian economy, than the Community internal market.

In this particular case, we should notice that the law on competition and prices, Article 61 *bis* in its last version of 2005, states "*Subject to the principle of reciprocity and as part of cooperation agreements, the competition council and the competent services of Ministry of trade, within the limit of their competences and prior to notification of the minister of trade, are allowed to proceed to exchange of experiences, information, files related to competition cases with foreign counterparts, with respect of confidentiality of the exchanged information*".

It means that Cross-border, trans-national and inter-regional cooperation and shared responsibility for conflict prevention, conflict resolution and disaster management form part of the new European neighbourhood policy.

On the other hand, Article 5 prohibits concession contracts and the exclusive commercial representations. However, the minister of trade, after

having the opinion of the competition council, can authorise such agreements in exceptional cases.
No indications are given about the nature or the conditions of these "*exceptional cases*". It is left to the discretionary power of the minister of trade, since, as we already saw, the opinion of the council is not binding.
It is worth saying that the form of the text, should be reviewed and why not abrogated by allowing theses contracts, since such agreements does not mean inevitably to have anticompetitive effect on the economy.

5.3 Damages claims

The economic operators who undergo damages, because of the violation of a legal rule of the competition, incline the possibility to bring an action before the civil courts to obtain repair of the damages[114]. It means that undertakings who have suffered a loss caused by an infringement of the competition rules have to prove the infringement, the damages and the relationship between these two elements[115]. The evidence of the infringement is established by the council decision in the sense that it declares the concerned practice as anti competitive. Nevertheless, the proof of damage may require the investigation of a broad set of facts.

Consequently, the proceedings are stringent and long. Indeed, the claimant has to bring two actions in order to be compensated. The first one is brought before the Council of competence because it has the sole and exclusive competition to declare whether or not an agreement is anti competitive. The second is brought before the civil courts for obtaining the compensation.
In addition, these proceedings are not efficient for the injured party. In fact, the civil judge may need to appoint experts for the quantification of damages…whereas such task may be made the competition council in order to reduce all these obstacles.

5.4 Conclusion

To conclude, it is worth to say that, contrary to Community System, where competition provisions are considered as constitutional principles, the Tunisian example, as it is the case for main emerging countries, the competition provisions take a more social approach. It is not a goal in itself, but rather a mechanism for the creation of different levels of balances, such as balance between quality and prices, or the protection of public health or economic advantages.

---

[114] Decision No 3150 dated 25/6/2004

[115] Articles 96 to 98 of the Tunisian Code of obligations and contracts require the evidence of these three elements to obtain repair.

Moreover, since competition is a mean, its provisions will be continuously changing in accordance to the economy development and the necessities brought by the internal and external development of the Tunisian economy Therefore, the success of the economical development is dependant on the accomplishment by the competitions institutions of their duties, to establish a legally secured environment for foreign investments.

Supplement A

Competition-related extracts from the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and The Republic of Tunisia, of the other part

Decision of the Council and the Commission
of 26 January 1998
(98/238/EC, ECSC)[116]

[...]

CHAPTER II

COMPETITION AND OTHER ECONOMIC PROVISIONS

Article 36
1. The following are incompatible with the proper functioning of the agreement, insofar as they may affect trade between the Community and Tunisia:

(a) all agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition;
(b) abuse by one or more undertakings of a dominant position in the territories of the Community or of Tunisia as a whole or in a substantial part thereof;
(c) any official aid which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, with the exception of cases in which a derogation is allowed under the Treaty establishing the European Coal and Steel Community.

2. Any practices contrary to this Article shall be assessed on the basis of criteria arising from the application of the rules of Articles 85, 86 and 92 of the Treaty establishing the European Community and, in the case of products falling within the scope of the European Coal and Steel Community, the rules of Articles 65 and 66 of the Treaty establishing that Community, and the rules relating to state aid, including secondary legislation.

3. The Association Council shall, within five years of the entry into force of this Agreement, adopt the necessary rules for the implementation of paragraphs 1 and 2.

[116] OJ L 97, 30.3.1998, p.1.

Until these rules are adopted, the provisions of the Agreement on interpretation and application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade shall be applied as the rules for the implementation of paragraph 1(c) and related parts of paragraph 2.

4. (a) For the purposes of applying the provisions of paragraph 1(c), the Parties recognize that during the first five years after the entry into force of this Agreement, any State aid granted by Tunisia shall be assessed taking into account the fact that Tunisia shall be regarded as an area identical to those areas of the Community described in Article 92(3) (a) of the Treaty establishing the European Community.
During the same period, Tunisia may exceptionally, as regards ECSC steel products; grant State aid for restructuring purposes provided that:

- It leads to the viability of the recipient firms under normal market conditions at the end of the restructuring period,
- The amount and intensity of such aid are strictly limited to what is an absolute necessity in order to restore such viability and are progressively reduced,
- The restructuring programme is linked to a comprehensive plan for rationalising capacity in Tunisia.

The Association Council shall, taking into account the economic situation of Tunisia, decide whether the period should be extended every five years.

(b) Each Party shall ensure transparency in the area of official aid, inter alia by reporting annually to the other Party on the total amount and the distribution of the aid given and by providing, upon request, information on aid schemes. Upon request by one Party, the other Party shall provide information on particular individual cases of official aid.

5. With regard to products referred to in Chapter II of Title II:

- The provisions of paragraph 1(c) do not apply,
- Any practices contrary to paragraph 1(a) shall be assessed according to the criteria established by the Community on the basis of Articles 42 and 43 of the Treaty establishing the European Community, and in particular those established in Council Regulation No 26/62.

6. If the Community or Tunisia considers that a particular practice is incompatible with the terms of paragraph 1, and:

- is not adequately dealt with under the implementing rules referred to in paragraph 3,

or

- in the absence of such rules, and if such practice causes or threatens to cause serious prejudice to the interest of the other Party or material injury to its domestic industry, including its services industry, it may take appropriate measures after consultation within the Association Committee or after 30 working days following referral to that Committee.

In the case of practices incompatible with paragraph 1(c) of this Article, such appropriate measures may, where the General Agreement on Tariffs and Trade applies thereto, only be adopted in accordance with the procedures and under the conditions laid down by the General Agreement on Tariffs and Trade and any other relevant instrument negotiated under its auspices which is applicable between the Parties.

7. Notwithstanding any provisions to the contrary adopted in accordance with paragraph 3, the Parties shall exchange information taking into account the limitations imposed by the requirements of professional and business secrecy.

Article 37

The Member States and Tunisia shall progressively adjust, without affecting commitments made under the GATT, any state monopolies of a commercial character so as to ensure that, by the end of the fifth year following the entry into force of this Agreement, no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of the Member States and of Tunisia.

The Association Committee will be informed about the measures adopted to implement this objective.

Article 38

With regard to public enterprises and enterprises which have been granted special or exclusive rights, the Association Council shall ensure, from the fifth year following the entry into force of the Agreement, that no measures which disturbs trade between the Community and Tunisia in a manner which runs counter to the interests of the Parties is adopted or maintained. This provision shall not impede the performance in fact or in law of the specific functions assigned to those enterprises.

Article 39

1. The Parties shall provide suitable and effective protection of intellectual, industrial and commercial property rights, in line with the highest international standards. This shall encompass effective means of enforcing such rights.

2. Implementation of this Article and of Annex 7 shall be regularly assessed by the Parties. If difficulties which affect trade arise in connection with intellectual, industrial and commercial property rights, either Party may request urgent consultations to find mutually satisfactory solutions.

Article 40

1. The Parties shall take appropriate steps to promote the use by Tunisia of Community technical rules and European standards for industrial and agri-food products and certification procedures.

2. Using the principles set out in paragraph 1 as a basis, the Parties shall, when the circumstances are right, conclude agreements for the mutual recognition of certifications.

Article 41

1. The Parties shall set as their objective a reciprocal and gradual liberalisation of public procurement contracts.
2. The Association Council shall take the steps necessary to implement paragraph 1. [.]

Supplement B

Loi n°2005-60 du 18 juillet 2005, modifiant et complétant la loi n°91-64 du 29 juillet 1991 relative à la concurrence et aux prix.

Au nom du peuple,

La chambre des députés ayant adopté,

Le Président de la République promulgue la loi dont la teneur suit :

Article premier. - Les dispositions des paragraphes 1 et 5 de l'article 5, du paragraphe 3 de l'article 7, des paragraphes 3 et 5 de l'article 8, de l'article 9, des alinéas deuxièmement et troisièmement de l'article 10, des paragraphes 1 et 2 de l'article 11, de l'article 17, des paragraphes 2 et 3 de l'article 21, du deuxième tiret du paragraphe 1 de l'article 37 et de l'article 39 de la loi n°91-64 du 29 juillet 1991, relative à la concurrence et aux prix, sont abrogées et remplacées par les dispositions ci-après :

Article 5 paragraphe 1 (nouveau). Sont prohibées, les actions concertées, les collusions et les ententes expresses ou tacites ayant un objet ou un effet anticoncurrentiel, et lorsqu'elles visent à :

1/ faire obstacle à la fixation des prix par le libre jeu de l'offre et de la demande,

2/ limiter l'accès au marché à d'autres entreprises ou le libre exercice de la concurrence,

3/ limiter ou contrôler la production, les débouchés, les investissements, ou le progrès technique,

4/ répartir les marchés ou les sources d'approvisionnement.

Paragraphe 5 (nouveau). - Est nul, de plein droit, tout engagement, convention ou clause contractuelle se rapportant à l'une des pratiques prohibées en vertu des paragraphes 1 et 2 du présent article.

Article 7 paragraphe 3 (nouveau). - Les dispositions de l'alinéa précédent s'appliquent à toutes les entreprises concernées par l'opération de concentration qu'elles en soient parties ou objet ainsi qu'aux entreprises qui leur sont économiquement liées, et ce, sous l'une des deux conditions suivantes :

Article 8 paragraphe 3 (nouveau). - Le silence gardé par le ministre chargé du commerce pendant six mois à compter de sa saisie vaut acceptation

tacite du projet de concentration ou de la concentration ainsi que des engagements qui y sont joints.

Paragraphe 5 (nouveau). - En cas de notification au ministre chargé du commerce de tout projet ou opération de concentration, il incombe aux parties de présenter un dossier, en deux exemplaires, comprenant :

Paragraphe 9 (nouveau). Il est institué une commission dénommée conseil de la concurrence, qui jouit de la personnalité morale et de l'autonomie financière et dont le budget est rattaché pour ordre au budget du ministère chargé du commerce, son siège est à Tunis.

Le conseil de la concurrence est appelé à connaître des requêtes afférentes aux pratiques anticoncurrentielles telles que prévues par l'article 5 de la présente loi et à donner des avis sur les demandes de consultation.

Le ministre chargé du commerce peut soumettre à l'avis du conseil les projets de textes législatifs et toutes les questions afférentes au domaine de la concurrence.

Le conseil est obligatoirement consulté par le gouvernement sur les projets de textes réglementaires tendant à imposer des conditions particulières pour l'exercice d'une activité économique ou d'une profession ou à établir des restrictions pouvant entraver l'accès au marché.

Les modalités de cette consultation sont fixées par décret.

Les organisations professionnelles et syndicales, les organismes ou groupements de consommateurs légalement établis et les chambres de commerce et d'industrie peuvent également requérir l'avis du conseil par l'intermédiaire du ministre chargé du commerce sur les questions de concurrence dans les secteurs relevant de leur ressort.

Les utorités de régulation sectorielles peuvent soumettre à l'avis du conseil les questions afférentes au domaine de la concurrence.

Le ministre chargé du commerce soumet tout projet de concentration ou toute opération de concentration visé à l'article 7 de la présente loi au conseil de la concurrence qui doit donner son avis dans un délai ne dépassant pas trois mois.

Article 10
Paragraphe 2) (nouveau). Deux vice-présidents :
- un conseiller au tribunal administratif ayant une ancienneté de cinq ans au moins dans le grade en tant que premier vice-président exerçant ses fonctions à plein temps,
- un conseiller auprès de l'une des deux chambres chargées du contrôle des entreprises publiques à la cour des comptes ayant une ancienneté de

cinq ans au moins dans le grade en tant que deuxième vice-président exerçant ses fonctions à plein temps.
Les deux vice-présidents sont nommés pour une durée de cinq ans renouvelable.

Paragraphe 3) (nouveau). Quatre magistrats de deuxième grade au moins, nommés pour une durée de cinq ans renouvelable une seule fois.

Article 11
Paragraphe 1 (nouveau). Les requêtes sont portées devant le conseil de la concurrence par :
- le ministre chargé du commerce ou toute personne ayant délégation à cet effet,

- les entreprises économiques,

- les organisations professionnelles et syndicales,

- les organismes ou groupements de consommateurs légalement établis,

- les chambres de commerce et d'industrie,

- les autorités de régulation,

- les collectivités locales.

Paragraphe 2 (nouveau) - Le conseil de la concurrence peut, sur rapport du rapporteur général et après avoir entendu le commissaire du gouvernement, se saisir d'office des pratiques anticoncurrentielles sur le marché. Dans ce cas le président du conseil informe le ministre chargé du commerce et, le cas échéant, les autorités de régulation concernées de cette auto-saisine. Le ministre chargé du commerce informe le conseil des enquêtes en cours de réalisation par les services du ministère.

Article 17 (nouveau). - Le rapporteur général, le rapporteur ainsi que le secrétaire permanent assistent aux séances du conseil de la concurrence à l'exception de la séance de délibération.

Article 21
Paragraphe 2 (nouveau). - Les décisions rendues par le conseil de la concurrence sont susceptibles d'appel devant le tribunal administratif conformément à la loi n°72-40 du 1er juin 1972 relative au tribunal administratif. Le conseil peut, le cas échéant, ordonner l'exécution provisoire de ses décisions.

Paragraphe 3 (nouveau) : Le président du conseil de la concurrence ou, le cas échéant, l'un des vice-présidents, revêt de la formule exécutoire les décisions du conseil qui sont devenues non susceptibles de recours ou

celles assorties de l'exécution provisoire, conformément aux dispositions du code de procédure civile et commerciale.

Article 37
Paragraphe 1 deuxième tiret (nouveau). - le défaut de facturation, ou défaut de délivrance de factures ou délivrance de factures illégales ou la non présentation des factures à la première demande ainsi que le non établissement ou la non communication du barème de prix et des conditions de vente ou la non détention d'un contrat écrit comportant les primes et les avantages accordés, tels que prévus respectivement aux articles 25 et 27 de la présente loi.

Article 39 (nouveau). - La revente à perte, l'offre de la revente à perte, la publicité de la revente à perte, l'imposition d'un prix minimum de revente et la pratique de conditions de vente discriminatoires ainsi que l'obtention ou la tentative d'obtention d'un avantage commercial ne correspondant pas à la valeur du service commercial effectivement rendu telles que prévues respectivement par les articles 26, 28, et 29 de la présente loi, sont punies d'une amende allant de 200 à 20.000 dinars.

Article deuxième. - Sont ajoutés aux articles 5, 11, 20, 27, 29 et 34 de la loi n°91-64 du 29 juillet 1991, relative à la concurrence et aux prix, les paragraphes suivants :

Article 5
Dernier paragraphe. - Est également prohibée, toute offre de prix ou pratique de prix abusivement bas susceptible de menacer l'équilibre d'une activité économique et la loyauté de la concurrence sur le marché.

Article 11
Paragraphe 3. - Le conseil de la concurrence doit, également, demander l'avis technique des autorités de régulation lors de l'examen des requêtes, dont il est saisi, et qui sont afférentes aux secteurs relevant de leur ressort.

Dernier paragraphe. - Le conseil de la concurrence peut, en cas d'urgence, et après avoir entendu les parties et le commissaire du gouvernement, ordonner les mesures provisoires nécessaires et susceptibles d'éviter un préjudice imminent et irréparable pouvant affecter l'intérêt économique général ou les secteurs concernés ou l'intérêt du consommateur ou celui de l'une des parties, et ce, jusqu'à ce qu'il statue sur le fond du litige.

Article 20
Dernier paragraphe. - Le conseil de la concurrence peut ordonner la publication de ses décisions ou d'un extrait de celles-ci dans les journaux qu'il désigne, et ce, aux frais du condamné.

Article 27
Paragraphe 3. - Les services de coopération commerciale fournis par le détaillant ou le prestataire de services au fournisseur doivent faire l'objet

d'un contrat écrit, rédigé en deux exemplaires et détenu par les deux parties, comportant particulièrement les conditions relatives à la prime ou les avantages accordés en contre partie de ces services.

Article 29
Paragraphe 5. - d'obtenir ou de tenter d'obtenir, d'un partenaire commercial, un avantage non justifié par un service commercial effectif ou ne correspondant pas à la valeur réelle du service rendu. Cet avantage peut consister en une participation au financement des opérations d'animation commerciale ou un investissement dans l'équipement des locaux commerciaux, et ce, sans l'existence d'un intérêt commun.

Article 34
Paragraphe 3. - Est puni également, de la même amende prévue par les paragraphes 1 et 2 du présent article toute personne ne respectant pas l'exécution des mesures provisoires ou les injonctions prévues par les articles 11 (nouveau) et 20 (nouveau) de la présente loi.

Article troisième. - Sont ajoutés à la loi n°91-64 du 29 juillet 1991, relative à la concurrence et aux prix, les articles 52 bis et 61 bis libellés comme suit :
Article 52 bis. - Les services administratifs et les autorités de régulation sont tenus d'informer les services du ministère chargé du commerce de tout indice dont ils ont eu connaissance et relatif à des pratiques anticoncurrentielles ou à des opérations de concentration économique telles que définies aux articles 5 et 7 de la présente loi.

Article 61 bis. Sous réserve du principe de réciprocité et dans le cadre d'accords de coopération, le conseil de la concurrence ou les services compétents du ministère chargé du commerce peuvent, dans les limites de leurs compétences et après notification du ministre chargé du commerce, procéder à l'échange avec des institutions étrangères homologues, des expériences, des informations et des pièces relatives à l'instruction des affaires de concurrence, et ce, à condition d'assurer la confidentialité des informations échangées.

Art. 4. - Sont abrogées, les dispositions du paragraphe de l'article 5 de la loi n°91-64 du 29 juillet 1991, relative à la concurrence et aux prix, et par conséquent, les paragraphes de cet article sont réordonnés.

La présente loi sera publiée au Journal Officiel de la République Tunisienne et exécutée comme loi de l'Etat.

Tunis, le 18 juillet 2005.
Zine El Abidine Ben Ali

Bibliography

International law:

The General Agreement on Tariffs and Trade (**GATT**)

The General Agreement on Trade in Services (**GATS**)

Tunisian Legislation:

Tunisian constitution promulgated by law 59-57 dated 1/06/ 1959. OJTR No 30, 1 June 1959.

Tunisian Penal Code, Promulgated by ordinance dated 9/7/1913, OJTR No 79 dated 1/10/1913 as modified by law No 2005-46 dated 6/6/2005.

Law dated 29/7/1991 on competition and prices has been modified by:

- Law No 93-83 dated 26/7/1993 ;
- Law No 95-42 dated 24/4/1995;
- Law No 99-41 dated 10/5/1999,
- law No 2003-74 dated 11/11/2003
- Law No 2005-60 dated 18/7/2005.

Law 2002-51 dated 01/06/2002 modifying some provisions of the Constitution. OJTR No 045 of 03/06/2002.

Law 96-49 of 20 June 1996 on ratification of the Association Agreement Euro-Mediterranean between Tunisia and EU. OJTR No 51 of 25 June 1996.

"Code des obligations et des Contrats", promulgated by Decree of 15 December 1906. OJTR No 1000. December 1906

EC Legislation :

Primary Legislation

Treaty establishing the European Community as amended in accordance with the treaty of Nice consolidated version ([2002] OJ C325/1)

Secondary Legislation

EURO-MEDITERRANEAN AGREEMENT establishing an association between the European Communities and their Member States, of the one part, and the Republic of Tunisia, of the other part. OJ L97/2 dated 30.3.98

Action plan EU-Tunisia published on 01/12/2004.

Commission notice on the relevant geographic market, pg 8

Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty Establishing the European Community (***De Minimis***). OJ 2001, C368/13

COMMISSION NOTICE on the definition of the relevant market for the purposes of Community competition law pg 8, *OJ C 372 on 9/12/1997*

French law:

Ordinance No 86-1243 of 1/12/1986 on freedom of prices and competition modified lastly by the NRE law of 15/5/2001.

"*Code de commerce Français* ", promulgated in 15 September 1807.

Litterature

Professor Hans Henrik Lidgard. "Economic policies and competition". Text Book 2005.

"*Le droit tunisien de la concurrence à l'ère de la mondialisation.*" Jaouida Guiga. Centre de publication Universitaire. Tunis

Articles & reports:

Tunisian Competition Council reports : 2001, 2002, and 2005

OECD Global Forum on Competition (February 2004). Tunisian contribution: "Challenges/Obstacles faced by competition authorities in achieving greater economic development through the promotion of competition."

"*L'expérience du Conseil de la Concurrence Tunisien*". Ghazi Jeribi president of Tunisian Competition Council

"*L'influence du droit Français sur le droit tunisien des concentrations économiques*". Riadh Jaidane

Report of "*Cinquième conférence des Nations Unies charges de revoir tous les aspects de l'ensemble de principes et de règles équitables convenus au niveau multilatéral pour le contrôle des pratiques commerciales restrictives"*. Antalya (Turquie), 14-18 novembre 2005

"*Le rôle du pouvoir judiciaire dans l'application du droit et de la politique de la concurrence* ". Contribution of Tunisia

Report of “Expert group meeting on competition laws and policies: Identification of common grounds in the ESCWA region”. Abu Dhabi 28, 29, 30 January 2002

Links:

http://www.europa.eu.int

http://www.curia.europa.eu

http://www.cnudst.rnrt.tn/

http://www.jurisitetunisie.com

http://www.lexinter.net

Table of Cases

European Court of Justice

Case 26/62 *Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1; [1970] C.M.L.R. 1

Case 12/86 *Meryem Demirel v Stadt Schwäbisch Gmünd*. [1987] ECR 3719, 1987

Case 322/81, *NV Nederlandsche Banden Industrie Michelin v Commission*, ECR [1983] page 3461.

Case 85/76 *Hoffman- La Roche & Co.AG v EC Commission* [1979] ECR 461. 3 CMLR 211, page 290

Case 41-69 *ACF Chemiefarma NV v EC Commission*, 1970 ECR 661 paragraph 112;

Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck and Others v EC Commission*, [1980] ECR 3125. Paragraph 86

Case 23/67, *Brasserie de Haecht SA v Wilkin-Janssen*, 12 December 1967, [1967] ECR 407, page 415.

Case 181/73, R.&V. *Haegeman v. Belgian State*, 1974 E.C.R. 449

Joined Cases 21-24/72, *International Fruit Company NV and Others v. Produktschap voor Groenten en Fruit*, 1972 E.C.R. 1219.

Joined Cases 6 & 7/73, *ICI & Commercial Solvents Corp. v Commission.* 6/3/74, 1974 ECR 223-0261.

Joined cases 89, 104, 114, 116, 117 and 125 to 129/85 judgement of 27 September 1988, *Ahlström Osakeyhtiö and others v Commission*, ECR [1988] page 5193, cited as Woodpulp II, paragraphs 16-18.

Case 104/81, *Hauptzollamt Mainz v. C.A. Kupferberg & Cie. Kga.A.*, 1982 E.C.R. 3641

Case 270/80, *Polydor Limited and RSO Records Inc v. Harlequin Record Shops Limited and Simons Records Limited*, 1982 E.C.R. 329, *and,*

Case 70/87, *EEC Seed Crushers' and Oil Processors' Federation (FEDIOL III) v. EC Commission*, 1989 E.C.R. 1781.

Case C-127-73, *BRT v. SABAM*, [1974] ECR 51.

Case C-306/96 *Javico Int and Javico AG v Yves Saint Laurent Perfums SA.* 28 April 1998. [1998] ECR I-1983

Case C-309/99, *J.C.J Wouters, J.W.Savelbergh, Price Waterhouse Belastingadviseurs BV and Algemene Raad van de Nederlandse Orde van Advocaten*, 19 February 2002 [2002] ECR I-1577

Case 8/72, *Vereeniging van Cementhandelaren v EC Commission*, 17 October 1972 [1972] ECR 977, [1973] CMLR 7,

Joined Cases 56& 58/64 *Consten & Grundig v EC commmission*, 13 July 1966. ECR[1966] 429-506

Court of First Instance

Case T- 41/96 *Bayer v EC Commission*.

Tunisian Competition Council Case Law:

Case No 1/2001 *The Sack Spinning Company vs. The Grain Bureau*.

Opinion No 2266 dated 24/9/2002.

Case No 1/2002 dated 6/11/2002.

Case No 2138 dated 31/12/2002.

Case No 2137 dated 27/3/2003.

Case No 2139 dated 25/9/2003.

Case No 2142 dated 25/9/2003.

Case No 2145 dated 25/12/2003.

Case No 3150 dated 25/6/2004