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THE CONCEPT OF THE ENTERPRISE IN THE ALGERIAN COMPETITION LAW (Between the Legal and Economic Concept)

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ABSTRACT

In the context of competition law, the concept of an enterprise includes any entity engaged in economic activity, irrespective of the legal status of that entity and how it is financed.

From this definition of the company, we can see its characteristics, which are essentially the economic activity of this entity on the one hand and its legal independence on the other.

Any conduct in the market can only be considered if the undertaking concerned carries out an economic activity, i.e., an activity of production, distribution or import and export. It must also be independent of other companies in the same market. In other words, each company must be in a position to compete with the other to create perfect competition in the market. Therefore, competition law prohibits anti-competitive practices only if economic and independent entities commit them.

Through this study, we will highlight the concept of the institution in competition law, whether from a legal or economic perspective, and we will learn about the conditions for applying competition rules to the institution as a key element in the market.

INTRODUCTION

The importance of competition law appears in protecting the principle of free competition itself, thus protecting the market as the domain of this competition. This protection is achieved through the legislator's dedication to the principle of free competition between economic agents within the market, especially in the face of certain prohibited behaviors, and includes in this context the prohibition of arbitrariness resulting from the position of economic domination, the abuse of the status of economic dependence and anti-competitive agreements, etc. It falls under the phrase "anti-competitive practices".

The customer element is the essence of competition law, and the purpose of its existence, where competition is located between institutions located in the same market, and some jurisprudence believes[1] that the institution is the real subject of the rules of competition law.

The institution allows the determination of the field of application of competition rules, but the institution considers the "distinctive" concept of competition law.[2] This concept is based on general criteria that give competition authorities broad discretion.

1. ENTREPRISE CONCEPT

The use of the term enterprise has become commonplace at present by most legal legislations without delving into the concept of this term itself, but competition law is concerned with the concept of enterprise to define the scope of application of the prohibition of anti-competitive practices.

1.1. LEGAL AND ECONOMIC CONCEPT OF THE ENTERPRISE

The legal definition of the company is purely jurisprudential, and therefore, its definition differs from the multiplicity of jurists. Some jurisprudence defines[3] the institution as a legal person that includes a capital element on the one hand and a human on the other, where the first element contributes to the formation of the institution while the second element contributes to its management and management. Others define it as a harmonious group of people and money that is formed for a specific goal and directs its activity to achieve that goal.[4] Some consider it "an independent organization that includes a set of factors, with the aim of producing certain products or services for the market." [5]

In economic terms, the institution is considered the engine of the economy in the market, and therefore, some define it as every economic unit that has a potential gain from the economic activity it practices. But this does not mean that the legal concept of the institution is separated from its economic concept, but the institution may be based on both concepts,[6] as some jurisprudence considers the institution as a unit that includes human and material factors to produce and sell products or services in the market.[7]

The Algerian legislator also mixed the legal and economic concepts in its definition of the institution, as it stipulates that it is: "Any natural or legal person, whatever his nature, who permanently carries out the activities of production, distribution, services or import".

The Court of Justice of the European Community also affirmed that "an enterprise is composed of a body composed of personal elements, material and intangible, linked to a legally independent subject and continuously pursuing a certain economic objective" .[8] In another decision, it affirmed[9] that, within the content of the competition law, the enterprise means an economic unit from the point

1 Arcelin, L. (2009). The Concept of the Enterprise in Competition Law. Juris. Class.: com., conc. 1, Lexisnexis, (35), p. 2.

2 *Ibid*., p. 3.

3 Guevel, D. (2007). Commercial and Business law (3rd edition). L. G. D. J., France, p. 118.

4 Goldman, B. (1970). European Commercial Law. Dalloz, France, p. 263.

5 Ripert, G., Roblot, R. (1989). Treatise on Commercial Law (13th edition). L. G. D. J. France, p. 238.

6 Murat, A. (1967). Essential Notions of Political Economy (2nd edition). Sirey, Belgium, p. 117.

7 Pedamon, M. (2000). Commercial Law: Merchants and Business Assets, Competition and Commercial Contracts (2nd edition). Dalloz, France, p. 309.

8 C. J. C. E. 13 July 1962, Mannes man. Rec. 1965, p. 677 <www.eur-lex.europa.eu>

9 C. J. C. E. 12 July 1984, Hydrotherm/Compact. Aff. 170/83 Rec.1984, p. 2999 <www.eur-lex.europa.eu>

of view of the subject matter of the agreement in question, even if this economic unit is legally composed of several natural or legal persons.

Thus, restrictive competition practices can be carried out by companies, whatever their legal form, whether they are financial companies, companies of persons, professional organizations, trade unions, cooperative societies or groupings of the same economic interest.

1.2. Economic Activity of the Enterprise

It should be noted that the company concept cannot be separated from economic activity since both define the sphere of application of competition law. Some jurisprudence considers that[10] the practice of economic activity is an essential element in the definition of the institution in the competition law, where the latter focuses on economic activity while the commercial law uses the phrase "business", and some believe It replaces the term economic activity used in competition law with the term business provided for in the Commercial Code.[11] Economic activity is defined as the supply of goods or services in a particular market.[12]

The Algerian legislator has addressed the concept of economic activity by defining the activities to which the competition law applies, as the second article of Law No. 10-05 states: "... Production activities, including agricultural and livestock activities, distribution activities, including those carried out by importers of goods for resale as they are, agents, livestock brokers, wholesale meat sellers, service activities, handicrafts and fishing, and those carried out by public legal persons, associations and professional organizations regardless of their legal status, form and purpose;

– Public procurements, starting from the publication of the tender announcement until the procurement's final award.

However, applying these provisions shall not impede the performance of the public utility functions or the exercise of the powers of public authority. We note that the legislator has included activities related to imports, allowing distributors not directly supplied by producers to benefit from the same guarantees granted to other distributors, especially since most of the products distributed in the Algerian market are considered imported.[13]

The concept of enterprise is also not based on profit-making, as non-profit-oriented bodies can be adapted to institutions due to their economic activity, such as associations.[14] The competition law applies to the latter in the event of production or distribution activities.[15]

Thus, associations may be concerned with prohibiting anti-competitive practices when economic agents establish them to conduct economic activity in the market like other institutions. In this case, the association can issue orders and instructions to its members with the aim of unifying prices or sharing markets, so we are dealing with a prohibited practice, and therefore, the competition law is applied.

Therefore, no sector can be excluded, including banking, insurance, agriculture, etc. But what is the matter with social activities?

As for social insurance bodies, the Algerian Supreme Court has subjected the relations between the National Social Insurance Fund for wage earners and others to the ordinary rather than the administrative judiciary because they conduct business. The Court of Justice of the European Community also stipulated that these bodies be of a purely social nature, the latter embodied in the forced accession of the participants, the disproportion of the value of the subscription to the insured risk, its disproportion to the revenues of the participants and finally the lack of a direct relationship between the subscriptions and the services provided.[16]

10 Bertrel, J. P., Bonneao, T. Campana, M-J., Collard, C., Gury, G. (2001). Corporate Law: The Essentials to Understand. Lamy, p. 474.

11 Guevel, D. *Ibid.*, p.114.

12 ECJ, 18 June 1987, Case 118/85 Commission v Italian Republic. [1987] ECR 2599 <www.eur-lex.europa.eu>

13 Saintourens, B., Zennaki, D. (2011). Distribution Contracts: French law, Algerian law, Community Law. P. U. B, Algeria, p. 18.

14 Commission E.C. Dec. 19 Apr. 2001, aff. COMP/31.516, UEFA Broadcasting Rules. O. J. E. C. No. L 171, 26 June 2001.

15 [15] Touat, N. D. (2001). Associations and Competition Law in Algeria. Memorandum for obtaining a Master's degree in business law. Faculty of Legal and Administrative Sciences, Ben Aknoun, University of Algiers, p. 7.

16 Poucet, C. (1993). General Insurance of France and Mutual Fund. ECR, Belgium, p. 637 <www.eur-lex.europa.eu>

To draw the boundaries between social activity and economic activity, the European law authorities have resorted to solidarity, the latter being the engine of social behavior, and considered that the bodies responsible for the administration of social security systems are not a company and therefore do not fall within the economic activities,[17] due to their social and non-profit theme. Therefore, profit is not an element on which to base the adaptation of the enterprise, but it is sufficient to contribute to economic exchange to say that the institution is engaged in activity economically[18]

Economic activity, therefore, lies in producing or distributing goods and services. Some jurisprudence even considers that "the primary function of the enterprise lies in the production of goods and services in order to exchange them in the market".[19]

As for the French legislation, it does not define the concept of an enterprise but focuses on the nature of the activities carried out by it, as it stipulates that the provisions of the competition law apply to all production, distribution and service activities, including those issued by public authorities.[20] Jurisprudence has argued[21] that the prohibition should be applied to practices committed by persons exercising economic activity independently. The Court of Justice of the European Community affirmed that "within the scope of competition law, an enterprise means any entity engaged in economic activity independently of the legal framework of that entity and of how it is supplied".[22] In this regard, a fundamental problem arises concerning the applicability of competition law to public law subjects.

It should be noted that the provisions of the Competition Law apply even to the conduct of public enterprises when the latter carry out economic activity, provided that their activities are separated from their powers relating to public utilities. Algerian jurisprudence affirms that "if the commission aims to make a profit, it takes on a commercial and industrial character. If it is intended to achieve the public benefit in a field of national life,[23] this body is considered to be of an administrative nature". Some also assert that "...As soon as the latter intervenes in the economy, on the same terms as the private person, the same rules are imposed on them, including the rules of competition".[24] Administrative conduct is prohibited only if the law is allowed to be violated by an "institution".[25]

A public enterprise is defined in Algerian legislation as: "commercial companies in which the State or any other legal person subject to public law owns the majority of social capital, directly or indirectly. It is subject to the general Sharia.[26] Jurisprudence defines it as: "legal persons of an industrial and commercial nature, whose capital – in whole or most of it – is not subject to private ownership and is in a position of public dependency".[27]

Thus, the economic activities of public persons are subject to the control of the ordinary judge instead of the administrative judge, just like private persons, and the decision of the Supreme Court in its Administrative Chamber of February 14, 1969, concerning the case of the National Office for Agrarian Reform is the most prominent example in this area. The Court ruled that: "It is established that the National Office for Agrarian Reform is a public institution of an industrial and commercial character and that in the application of the provisions of Article 7 of the Code of Civil Procedure, the Judicial Council of Algeria, which decides on administrative matters, is not entitled to properly consider a case against this institution".

However, when public persons exercise the powers of public authority in the framework of

17 E. J. C. J. 17 Feb. 1993, aff. Poucet and Pistre, prev.

18 Behar, M. (1995). The Concept of the Enterprise in Community law. PUR, France, p. 26.

19 Ben Habib, P. T. (2009). Economics and Management of the Foundation(4th Edition). University Press Office, France, p. 14.

20 Art. L. 420-1 du C. Com. Fr.

21 Blaise, J. B. (2000). Business Law: Traders, Competition, Distribution (2th edition). L. G. D. J. France.

22 E.C.J. 23 Apr. 1991, Klaus Höfner and Fritz Elser, v. Macrotron GMB. Aff. Case C-41/90 [1991] ECR 1979 <www.eur-lex.europa.eu>

23 Zeraoui, F·, Salah, Al-K., Al-Q., Al-J. Business-Trader-Artisan-Organized, Commercial Activities-Commercial Register (2th edition). Publication, Ibn Khaldun, Algeria p. 132.

24 Berlin, D. (1995). Acts of Public Authority and Competition Law, A. J. D. A. (No. 4), p. 259.

25 Kovar, J. P. (2000). Subjection of Acts of Public Authority to French Competition Law. Dissertation presented with a view to obtaining the D. E. A. in business law, Robert Schuman University – Strastbourg III, Faculty of Law and Political Science, p. 83.

26 [26] Public Economic Enterprises, O. J., August 23, 2001, p. s4.

27 Dufau, J. (1973). Public Enterprises. Legal News Editions, France, p. 54.

their ordinary function, they are foreign to all economic activity, whether production, distribution or services and are therefore not subject to the provisions of competition law because the State acts, in this case, as a public authority and not as an economic agent.[28] In other words, in order to exclude the prohibition on public institutions, the latter must intervene in their capacity as public agent and public authority.[29]

Public persons may engage in economic activity but within the scope of the ordinary authority vested in them to achieve the public interest, so we are in a dual framework, an activity subject to the market on the one hand and foreign to it on the other. In this case, the provisions of the competition law shall apply unless such activity is necessary to achieve the desired public interest, but if this interest can be achieved without resorting to economic activity restricting competition, we are dealing with a practice prohibited by Competition rules.[30] The public authority's restrictive conduct of competition is embodied by subjecting the exercise of a particular activity to quantitative restrictions, which constitute a barrier to market entry by new customers and allowing the retention of the limited number of institutions present in the market, or by imposing uniform practices in the field of prices or conditions of sale, which is the most common practice.[31]

Article III of Presidential Decree No. 02-250 of 24 July 2002 regulating public procurements defines the latter as: "Contracts written within the meaning of the legislation in force, concluded in accordance with the conditions provided for in this decree, to carry out works and acquire materials, services and studies, for the benefit of the contracting authority". According to Article II of the same decree, the contracting authority is represented by "public administrations, independent national bodies, states, municipalities, public institutions of an administrative nature, research and development centers, private, public institutions of a scientific, cultural and professional nature, and public institutions of an industrial and commercial nature".

28 C. J. C. E. 18 March 1997, Diego cali et Figli SRL c / Servizi ecologica porto di Genova SPA. Aff. C-343/95, Rec. 1997, p.1547 <www.eur-lex.europa.eu>.

29 Kovar, J. P., *Ibid*., p. 10.

30 Frison-Roche, M. A., Payet, M. S., *Ibid*., p. 69.

31 Kovar, J. P., *Ibid*., p. 89.

In French law, this problem was resolved in one of the cases before the Court of Dispute in 1989, where one municipality decided to suspend the concession of the public service for the distribution of water granted to one institution in order to grant it to another institution.[32] The victim claimed that there was a restrictive competition agreement between the municipality concerned and the concessionaire institution, and she petitioned the French Competition Council to put an end to this restriction, but the Council rejected the case, reasoning its decision not to apply competition law to such cases,[33] while the Paris Court of Appeal considered that the distribution of water constitutes an economic activity and therefore subject to competition rules, and the Dispute Court took the same position, stressing the need to apply the prohibition related to agreements stipulated in the competition law, given the existence of economic activity represented in the distribution of water. Therefore, the lesson is not in the nature of the institution but the lesson in the nature of its activity.[34]

We note that economic activity constitutes a necessary criterion in the adaptation of the enterprise in both Algerian, French and European law, and the latter's use of the phrase "prejudice to trade between member states" does not lead to a narrow interpretation of the activity practiced by the institution, but rather means trade "exchange of an economic nature".[35]

2. INDEPENDENCE OF THE ENTERPRISE

Restrictive practices are practiced by economic units that can be in a competitive position among themselves. Therefore each institution is required to enjoy its economic independence, in other words, to have sufficient independence in making decisions related to the demonstration of

32 T. C. 6 June 1989, Ville de Pamiers. R. F. D. A. p. 465.

33 Decision of the French Competition Council No. 88-D-24 of 17 May 1988 on a referral and a request for interim measures from the Société of water exploitation and distribution (S. A. E. D. E.). Annual Report for 1988, p. 61 <www.autauritedelaconcurrence.fr>

34 C. A. Paris, 30 June 1988, B. O. C. C. R. F. of 9 July 1988 <www.lexinter.net>

35 Goldman, B., *Ibid*., p. 259.

its behavior in the market. They must be legally and economically independent and bear the risks of the operations they conclude.[36] This raises the question of whether it is possible to distinguish between the institution and the person who owns or exploits it, or in other words, about the practices concluded between companies belonging to the same group.

The different subsidiaries of a single group form a single entity in the event that the companies concerned do not independently determine their market behavior.[37] In this case, we are within the framework of a group of companies, which some consider be a group linked by common interests,[38] through which the parent company has authority over the rest of the branches and exercises control over them, thus ensuring the unity of decision. Some jurisprudence also asserts that when it is impossible for an institution to search for its own interest, and when its actions are just implementing the instructions of another institution, we are dealing with one entity due to its lack of independence and the need to abandon its goal of in order to follow that desired by the parent company.[39]

Thus, the problem of the branch in the competition law is raised in several aspects, the most important of which is that it is the fruit of an emerging accession through a cooperation agreement within a partnership framework, which gives the parent company the authority to control it on the one hand, and retains the authority to act as an economic customer in the market on the other hand.[40]

The problem of branch autonomy in competition law should be examined from two perspectives: the first is to determine the possibility of managing subsidiaries of the same group, i.e., can the parent company distribute markets among its branches or determine the prices of services or products provided by the latter?

The second is that restrictive practices are attributable only to the company that actually performs such actions.

A prohibited practice can only exist between independent institutions, and practices between a branch and a parent company fall within the scope of competition law only in the case of branch independence.[41] In other words, when the branch does not have effective autonomy in determining its own commercial policy and forms with the parent company a common economic unit, the adaptation of the agreement or orchestrated practice is excluded in which the criminalization of the latter requires multilateralism.[42] This independence is manifested through the presence of the branch in a competitive position with the parent company due to the lack of dependency between them, such as the branch manufacturing products with new technology compared to those manufactured by the parent company, so we are in the process of competition – current or probable – between them.[43]

It should be noted that the branch does not always have the freedom to act independently, without any control from the parent company, and the branch may carry out the latter's instructions. In this case, this dependent relationship must be proved, so how can the latter be proved?

The competition authorities refer to the presumption that the parent company owns the total or almost total capital of the branch. If this presumption is insufficient in proof, the authorities are forced to search for other evidence.

2.1. Capital Control and the Presumtion of Specific Impact:[44]

The presumption of the parent company's possession of the total capital of the branch was raised as evidence of the latter's lack of independence

36 Boutard Labarde, M. C., Canivet, G., Claudel, E., Michel-Amsellem, V., *Ibid*., p. 21.

37 Decocq, G. (2009), Cartels and Procedures: The Parent Company is Liable for Infringements Committed by its 100% Owned Subsidiary. R. J. C.: contrats, conc., cons., (No. 12), p. 28.

38 Kossentini, W. (2003). The Companies Group and Competition Law. Legal Studies, Revue published by the Faculty of Law of SFAX, (No. 10), p. 329.

39 Lamarche, T. (2006). The Concept of a Company. R. T. D. Dalloz, France (07), p. 21.

40 Brill, J. P. (1992). Joint Subsidiaries and Article 85 EEC: Study of recent decisions of the Commission of the European Communities. R.T.D. Dalloz France, (03). p. 85

41 Annual Report of the French Competition Council for 2006, Thematic Studies: The Proof of Agreements of Wills Constitutive of Agreements, p. 77.

42 Lamarche, T., *Ibid*., p. 23.

43 Brill, J. P. *Ibid*., p. 7.

44 Capitalist control and the presumption of determining influence.

by the Court of Justice of the European Community, which held in one of its cases that the branch necessarily followed the policy set by the parent company.[45] This presumption exempts the Committee from proving the existence of control on the one hand, and its exercise by the parent company on the other. Thus, the higher the percentage of capital owned by the parent company, the more difficult it is to prove the independence of the branch.[46]

Some even believe that the ownership by the parent company of a certain percentage of the branch's capital is a presumption of the latter's lack of independence, even if this percentage is small, as the independence of the institution assumes that it enjoys its financial disclosure.[47]

As for French law, the French Competition Council confirmed that the competition authorities could assume that the branch carried out the instructions of the parent company when it owned a large percentage of its capital without ensuring that it exercised this power.[48]

Therefore, the control exercised by the parent company and the decision unit is a key factor in excluding agreements concluded within the group from the scope of the ban, as although the branch has legal personality, it lacks independence.[49]

2.2. Additional Evidence

In the absence of a capital relationship between the parent company and the branch, the authorities must prove the existence of means through which the parent company monitors its subsidiaries and the actual existence of such control. These include the existence of the authority to decide within the branch, the identity of the managers, the instructions provided by the parent company, the commercial policy... In general, the parent company's doing the most important things or performing all the management functions related to its branch is evidence of the absence of the latter's independence. This is evident in one of the cases petitioned before the Court of Justice of the European Community, where it confirmed the absence of the independence of a branch of one of the institutions from the parent company even though the capital contribution did not exceed 55%, due to the presence of the same administrative members, and therefore relied on the presumption of members.[50] In another case, it ruled that all elements related to economic, regulatory and legal relations between the branch and the parent company should be considered.

The French Competition Council also considers that the intervention of the parent company in the matters of its branch constitutes an essential criterion for control, as well as for its intervention in contracts concluded between the branch and third parties, either by writing the terms of the contract or by interfering in negotiations between the branch and third parties.[51]

It should be noted that in most cases, clauses are included in partnership contracts between the parent company and its subsidiaries that are necessary for the conclusion of these contracts, but at the same time, may constitute a prejudice to competition, and perhaps the most important of these clauses: the non-competition clause, as this clause constitutes a presumption of the independence of the branch from the parent company.[52]

The non-competition clause may be included in favor of the parent company or vice versa, constituting an additional presumption that both the parent company and the branch are in a competitive position and, thus, a presumption of their independence.

CONCLUSION

It follows from the preceding that the subsidiarity of the branch to the parent company is a major reason for avoiding the application of the

45 C. J. C. E. 25 Oct. 1983, Allgememe Elektriziatats – Gesellshaft AEG – Telefunken AG c/commission C.E. Aff. C-107/82: Rec. C. J. C. E., p. 03151 <www.eur-lex.europa.eu>

46 Chaput, F. (2010). The Autonomy of the Subsidiary in the Law of Anti-Competitive Practices, R. J. C.: contrat, conc. Cons., (No. 1), p. 12.

47 Lamarche, T., *Ibid*., p. 24.

48 Report of the French Competition Council for 2006, note 3 <www.auauritedelaconcurrence>

49 Kossenttini, W., *Ibid*., p. 337.

50 C. J. C. E. 21 Dec. 1993, Sea Containers c/ Stena Sealink. Aff. 94/119, J. O. C. E 18 Janv. 1994, p. 8-19 <www.eur-lex.europa.eu>

51 Counsel Decision No. 96-D-44, June 18 1996, Advertising Sector: B. O. C. C. R. F. p. 564.

52 Brill, J. P., *Ibid*., p. 14.

prohibition relating to existing practices within the group, provided that it concerns an "effective" dependency. In other words, it must be ensured that there is insufficient commercial and financial independence to guarantee the independence of enterprises to make decisions in the economic field.[53]

But what about the case where the parent company delegates its powers to the branch?

When delegation aims to transfer all management powers to the branch, the idea of the autonomy of the latter can be invoked, but only if it is free from the control of the commissioner. Partial delegation of authority, which grants only part of the power to report, does not allow the autonomy of the branch to be derived.

As for the merger, it does not fall under the prohibition as it is considered a restructuring of the institution.[54]

Finally, it should be noted that contracts between commercial agents and their clients can constitute prohibited agreements, thus requiring their economic independence. Accordingly, the agency contract falls outside the scope of the prohibition if it is found that the agent does not contribute to the expenses related to supply or transportation and that he does not bear any responsibility towards third parties.[55] However, if the agent bears the risks of these expenses, he adjusts to the institution and is therefore subject to the provisions of the competition law.

53 Kossentini, W. *Ibid*, p. 340.

54 Brun, A., Gleis, A., Hirsh, M. *Ibid*, p. 69.

55 Arcelin, L. *Ibid*, p.47.

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