# COMPETITION LAWS IN MENA
# AN ASSESSMENT OF THE STATUS QUO AND THE RELEVANCE OF A WTO AGREEMENT

Mohamed El Hédi Lahouel

**Working Paper 2011**

**Abstract**

Competition policy plays an increasing role worldwide, both at the national and international level. The number of countries with competition laws has increased to about seventy as of 1999, against less than thirty only three decades earlier. One of the many reasons that lie behind this renewed interest in competition policy is the deregulation and privatization that has become increasingly important throughout the world, particularly in developing countries and countries in transition This in turn has drawn attention to the need for strengthening competition at the national level. MENA countries have not been out of this liberalization trend, although, to date only three countries have enacted competition legislation. The objective of the paper is to assess the state of competition legislation and enforcement in some of the MENA countries and the relevance of some ideas being discussed concerning eventual international negotiations on competition within the WTO.

## Introduction

Competition policy plays an increasing role worldwide, both at the national and international level. The number of countries with competition laws has increased to about seventy as of 1999, against less than thirty only three decades earlier. Debates and discussions have intensified on the opportunity to negotiate a plurilateral or even multilateral competition framework. In 1996 the WTO Ministerial Conference meeting in Singapore decided to establish a working group on competition and trade, mandated to "study issues raised by members relating to the interaction between trade and competition policy, including anti-competitive practices, in order to identify any areas that merit further consideration in the WTO framework".

Many reasons lie behind this renewed interest in competition policy: globalization and the intensification of mergers, especially cross-border mergers; trade liberalization which has resulted in significant reductions of tariff barriers and has shifted some of the attention among WTO members from tariff reductions to other impediments to market access, among which business anti-competitive practices are considered as serious restraints. In addition, the policy of deregulation and privatization, which has taken an increasing rôle throughout the world, particularly in developing countries and in countries in transition, has drawn attention to the need for strengthening competition at the national level.

MENA countries have not been out of this liberalization trend, even though the pace of their reforms has been slow. While it is true that the public sector is still too large by comparison with most Latin American or East Asian countries, the private sector's share in production and investment has risen, significantly, since the mid-eighties, thanks to the deregulation of many activities that had been previously reserved for the public sector as well as to privatization. Price regulation has also been lifted on the bulk of goods and services in most countries of the region and there is an increasing reliance on markets in their determination. These major shifts in the control of production and prices from the public sector to private firms have drawn attention to the importance of establishing a competition system serving the objectives of efficiency and fairness.

It is generally recognized that competition policy should not be construed in the narrow sense of anti-trust law, but in the larger sense of all policies preventing barriers to entry and fostering market contestability. Trade liberalization is considered as a major component of these policies, particularly in countries with small markets captured, under protection, by a small number of firms. Such is the case of almost all MENA economies where the number of firms tends to be very small in the industrial sector and in modern services. Under such domestic market structures import liberalization would exert enough pressure on domestic firms to ensure that markets function competitively, regardless of whether a competition law is enacted and enforced or not. Trade policy is thus a crucial factor in competition that can never be too overemphasized. Quantitative restrictions need to be removed and duties reduced to reasonable levels. Other restrictions such as excessive and non-justifiable technical or other types of control have to be removed.

Trade liberalization, important as it is, remains insufficient to discourage anti-competitive behavior. As practiced by developed and developing countries alike, it does not mean that all discrimination against imports are removed. Even in the OECD countries where tariffs have been reduced to very low levels, falling below 3 percent on the average, other regulatory measures are in use, often to serve legitimate national objectives, but sometimes having the effect of unduly restrict imports: standards and norms, sanitary and phyto-sanitary control and, more seriously, anti-dumping. Restrictive measures other than tariffs are as prevalent, if not more, in most developing countries, including MENA countries.

Furthermore, practices by exporting firms may still impair competition in importing countries, even if there are no government restrictions. In the absence of domestic competition law, these firms may enter into exclusive or selective arrangements and impose the prohibition of parallel imports on their branded products.

Markets for non-tradables will be unaffected by trade policy. Activities such as telecommunications, distribution, banking and insurance and other services need other policies for markets to be competitive: liberalization of foreign investment, privatization and removal of competition-stifling regulation. All these reforms do not, however, weaken the case for the enactment and enforcement of a competition law.

Competition law is part of a much more comprehensive competition policy. Of course the first question to be resolved is that to have competition legislation in the first place. As it will be shown, very few of these countries indeed have enacted competition laws.

The objective of this paper is to assess the state of competition legislation and enforcement in some of the MENA countries and the relevance of some ideas being discussed concerning eventual international negotiations on competition within the WTO. The paper is divided in three sections. The first section addresses the state of competition in some of the MENA countries. The second section analyzes competition legislation and enforcement in countries having enacted competition laws. The third section deals with the effects and relevance of regional agreements and eventual multilateral negotiations

## I. The Extent of Competition in MENA Economies

Potentially, anti-competitive behavior may depend on both of the degree of concentration and of openness or market penetration. If three or four firms hold a very large share of a market, then it would be easier for them to agree on collusive actions to fix prices, rig bids or share the market. However, if imports represent a relatively large share of domestic demand and are allowed to respond freely to domestic restrictive actions, then imports will play more or less the same dissuasive role against anti-competitive practices that a large number of domestic competitors would have played. Thus, both high market concentration and low import penetration are significant indicators of potential impairment of the competition process.

Market concentration has been challenged on the ground that what matters from the competition standpoint is not the number of firms per se, but whether there are barriers to entry to a market that would make the incumbents' situation and power uncontestable by potential entrants. Nevertheless, it is still an important indicator of market power that competition authorities throughout the world use in their surveillance of the competition process.

Information on market concentration in MENA countries is not readily available. However, some rough estimates can be made based on results of business surveys conducted in some of these countries on a yearly basis. These surveys are not exhaustive and may give different results for various years, depending on the rate of firm's participation and whether major firms respond or not. In general,. relatively large firms tend to respond. The results given in Table (1) in the Appendix show the degree of concentration across Tunisian industries for the year 1993. Concentration is measured by the shares of the four largest firms in total employment and value added for the industry (columns (2) and (3))[1].

As expected, Table (1) shows that most Tunisian industries are highly concentrated, which is due to the limited size of the domestic market as well as to the legacy of investment licensing which was in application until the late eighties. The most concentrated industries are food and beverages, where the share of the four largest firms in total value-added stands at about 88 percent on the average, chemicals (86 percent) and the mechanical and electrical industries (85 percent). The least concentrated are textiles, clothing and leather (about 54 percent) which are, interestingly, the most export-oriented industries in Tunisia. The construction materials industry is heterogeneous, with tile making the least concentrated and cement manufacturing the most concentrated activity (87 percent for the four largest firms which until recently were all state owned).

### *I.1 Import Penetration*

Markets may be highly contestable even if domestic activities are highly concentrated, provided there they are sufficiently open to competition from foreign goods and services. Import penetration, a measure of openness equal to the ratio of imports to domestic demand, significantly increased in the early phase of structural adjustment (1988-91) which included among other actions the easing of restrictions on imports. In the following period (1992-97) it showed little change in food processing and the mechanical and electrical industry. Import penetration declined, particularly in recent years (1995-97), for construction materials, ceramics and glass, chemicals and miscellaneous manufacturing. The only industry showing steady increase in import penetration is textile, clothing and leather, from 51 percent in 1988 to over 61 percent in 1997 (Table 2 of the Appendix). This points to increasing import competition facing producers in this sector. The latter are also exposed to domestic competition since this sector is one of the least concentrated of all manufacturing.

---

[1] Although the total for each industry is calculated over responding firms, the estimated shares are highly correlated with the degree of concentration, particularly for industries where the total number of firms is very limited, due to economies of scale and the small size of the Tunisian market. Almost all of the firms of those industries respond to the survey.

The preceding analysis brings out two important factors that may weaken domestic competition pressure in Tunisia, a high degree of concentration and little improvement in import penetration since 1992.

A study on industrial competition and competitiveness in Morocco has found similar results, i.e. high degrees of concentration in Moroccan industrial activities (Belghazi, 1997). Industries are analyzed at the four-digit level and ventilated over four market-structure categories based on the Herfindahl concentration index (H): H less than 15 percent: the market is competitive, H:15-43 percent: the market is concentrated; 43-90 percent: the market is oligopolistic and, finally, for a value of H greater than 90 percent, the market is dominated by a monopoly. Based on this classification, the study finds that only 26 percent of the four-digit activities are characterized by competitive market structure. One third are concentrated, another third are oligopolistic and 8 percent hold monopoly power.

## II. Competition Laws in the Region

### *II.1 Overview*

Three MENA countries have so far enacted competition laws, Tunisia in 1991, Turkey in 1994 and Algeria, which is not yet a member of WTO in 1995. Competition is regulated in Tunisia by a law enacted in 1991, which was amended in 1995, and more recently in 1999. The Tunisian law is very much influenced by the French competition ordinance of 1986.

*Objectives of competition law*

Several objectives can be found in competition laws throughout the world, the ultimate objective being that of efficiency. Other objectives are fairness, high profits being considered unfair to the extent they redistribute wealth from consumers and small firms to large firms, the limitation of economic power, the protection and development of small and medium sized firms, regional market integration, etc. (UNCTAD, 1997).

The Tunisian law of 1991 states its purpose as preventing any anti-competitive behavior, ensuring price transparency, preventing restrictive practices and illicit price increases. The general objective is thus to prevent anti-competitive behavior. There is no explicit mention of ends such as efficiency or fairness.

In Algeria the competition law of 1995 is more explicit about objectives. They are to foster economic efficiency, to improve consumers' welfare and to organize transparency and the loyalty of commercial practices. Interestingly, it explicitly states that its provisions apply both to private and to public entities firms.

*Anti-competitive practices*

Even though the Tunisian competition law is supposed to deal with anti-competitive behavior, it paradoxically allows the government to fix prices in some cases. It states that prices shall generally be freely determined by market forces, with the following exceptions: basic commodities or services, activities where competition is lacking because of a monopoly position, of supply difficulties or because of the effect of legal or regulatory provisions. In addition, prices may be administratively controlled for a maximum period of six months in the following cases: a situation of crisis, exceptional circumstances and abnormal market behavior in a given sector. 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. This provision, allowing for state intervention in price setting, has in fact been made use of seasonally, particularly for food products. Prices are also still set by the government for subsidized goods, public utilities, pharmaceuticals and a few other goods and services.

Concerning anti-competitive behavior, the Tunisian law prohibits all concerted actions and agreements aiming at impeding, or restricting competition, in particular those that impede market price formation, restrict market access for other firms, restrict or control production, market outlets, investment or technical progress, share markets or sources of supplies. These agreements are essentially the same as the horizontal agreements proscribed by Article 85 of the Treaty of Rome. The abuse of a dominant position is also prohibited if it involves the domestic market. Abuse consists of the refusal to sell, tie-in clauses, the imposition of minimal prices or discriminatory sale conditions. These provisions bear great resemblance to the content of Article 86 of the Treaty of Rome. A feature shared with almost all anti-trust laws, the abuse of a dominant position on foreign markets, is not prohibited by the Tunisian law.

The Tunisian law allows exemptions from anti-competitive conduct for all agreements or uses of dominant positions motivated "by the objectives of economic or technical progress while allowing equitable sharing of the benefits with users". The Treaty of Rome exempts from anti competition rules agreements between firms if they "contribute to improving production or distribution of goods or to the promoting technical or economic progress" (Article 85 of the Treaty of Rome), but not dominant positions contributing to the same objectives. In that respect the French Ordinance of 1986 and Articles 85 and 86 of the Treaty of Rome differ. However, the Tunisian law does not subject the exemptions to two conditions provided for in the EU and French legislation: the agreements should not impose restrictions that are not indispensable 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.

Vertical agreements are not dealt with explicitly in the 1991 law. The amendment of 1995 brought an outright prohibition of selective and exclusive agreements. This amendment runs against the dominant arrangements between foreign suppliers and local distributors. It also differs from the practice in the EU, the USA and many other countries where vertical agreements are dealt with through a rule of reason. The new amendment brought by Law 99-41 of 1999 allows exceptions to this prohibition after consultation of the Competition Council by the minister of commerce and authorization of the latter but it is not at clear whether that implies a rule of reason approach or not.

The Algerian law of 1995 is not explicit concerning vertical integration. It prohibits collusive behavior preventing market entry by "another producer or distributor", which implies the interdiction of exclusive agreements.

As for mergers the Tunisian law of 1991 did not make any reference to them. This omission was remedied in the 1995 amendment, which set the concentration threshold for mergers requiring prior approval at 30 percent of total sales on the domestic market and exceeding a certain amount to be decided by decree. This threshold is not far from that set in the French law which allows the government to take to the competition council any concentration or merger case that results in the direct control of more than 25 percent of sales or purchases on the domestic market or total sales exceeding seven billion French Francs (approximately $1.4 billion).

To our knowledge the other countries of the region have not enacted competition laws as yet. Egypt, Jordan and Morocco have prepared drafts that have been under discussion for several years[2]. The Moroccan draft is not very different from the Algerian and the Tunisian laws which both have borrowed extensively from the French and the EU legislation. As in the other two Maghreb countries, the Moroccan draft prohibits anti-competitive agreements and the abuse of a dominant position. It also provides for the surveillance of concentrations[3].

*Competition authorities: organization, composition and prerogatives*

In Tunisia the anti-competitive cases may be brought before the Competition Council. The minister of commerce may also consult the Council on any draft legislation pertaining to competition. The Council is of a hybrid composition. Headed by a judge or an expert in the area of competition, it comprises seven judges and legal advisers (including the president if he is a judge), four representatives of the business community and two experts[4]. In principle cases can be taken before it by the minister of commerce, firms, professional organizations, unions, consumers associations or chambers of agriculture or commerce.

The Council's prerogatives have been enlarged by the amendment introduced in 1995. Exemptions from anti-competition law are submitted by the minister of commerce to the Council's opinion before taking any decision. The Council may only be consulted on concentration and merger issues that may impede competition by creating or strengthening a dominant position. The recent amendment of 1999 also allows professional organizations, unions, chambers of consumers and consumer associations to consult the Council on competition

[2] Kuwait amended its 1980 commercial law in 1996 by introducing a section dealing with anti-competitive conduct (Law 68 of 1996). The law prohibits business practices that restrict competition and consist of price collusion, preventing market entry or creating any market perturbation with the aim of hurting another operator or operators. The law also prohibits abusive use of a dominant position consisting of restricting competition, the withholding of existing quantities of goods from the market or excessive prices. Thus the Kuwaiti law prohibits horizontal agreements and the abuse of dominant position. Unlike the Tunisian and the Algerian laws, it does not allow for any exemptions conditioned on the fulfillment of objectives considered welfare enhancing for society at large. Vertical agreements seem to be tolerated. Another difference is that the Kuwaiti law does not provide for the creation of specialized enforcement body such as the Algerian or the Tunisian Competition Councils.

[3] (UNCTAD Trade Policy Review of Morocco, 1996).

[4] It is worth noting that in spite of the heavy economic content of competition issues, the Council does not include any economists.

issues via the minister of commerce. However, the law does not allow the Council to decide on its own to open investigation of cases of anti-competitive conduct.

In terms of sanctions, the Council may address injunctions to the violating firm to cease its anti-competitive 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.

In Algeria the prerogatives of the Competition Council are wider than in Tunisia. The law obliges the government to seek its opinion on any draft legislation related to competition. It also allows it to undertake studies and make suggestions concerning the promotion of competition.. The Council may take the initiative to undertake surveys and studies on the conditions of enforcement of laws related to competition and act on its own initiative to redress anti-competitive behavior by taking corrective decisions. In addition to taking up cases or complaints brought before it by the minister of commerce or private operators, it holds the right to act on its own initiative, which is not the case of the Tunisian Council.

### *II.2 Enforcement of Competition Laws*

Evaluation of the degree of enforcement is limited to the Tunisian experience. A salient feature of the Council's record is its low level of activity since its creation and the very small number of cases brought to it by the ministry or private firms. Over a six-year period, from its creation in mid-1991 to mid-1997, it issued only three decisions, two of which were rejections of the complaints and one a condemnation of abusive conduct of a dominant position (involving a domestic poultry company). It also issued its opinion on five occasions on draft legislation submitted for consultation by the Ministry of commerce[5]. Eleven cases were pending as of mid-1997.

This is indeed a very low level of activity for an institution that was assigned the task to protect and foster competition in a country that has been undergoing profound economic restructuring and where economic power has been shifting from the public to the private sector. It is hard to believe that Tunisian markets are free of collusive behavior and abuse of dominant positions, particularly in view of the high degree of concentration observed in many sectors. This record shows that developing a competition tradition and culture is a slow process and that the enactment of a competition law is only a starting point in that process.

[5] See Charrier, G (1997)

## III. National Competition Laws, Multilateral Negotiations and the Euro-Med Agreements

### *III.1 Commitments Made Within the Euro-Med Agreements and National Competition Laws*

Regional trade agreements generally do not cover the issue of harmonizing competition laws and even rarely contain cooperation provisions in this area. There are two exceptions, the European Common Market where the European Commission acts as a supranational competition authority and the Australian New Zealand Free Trade Area which provides for regulation of unfair trade by use of competition law rather than by trade measures such as antidumping.

From the beginning all provisions of the Treaty of Rome, including those related to competition, were motivated by the objective of facilitating integration of the common market. The harmonization of national competition laws and the creation of a European Competition Commission with the judicial power to prevent and sanction business anti-competitive practice were considered essential to the implementation of the free trade policy within the Common Market.

Neither the European Agreements signed by the EU with the CEEEs nor the Euro-Med Agreements (EMAs) include close cooperation provisions, such as the comity agreements signed with the US which deal with anti-competition business practices originating in one country that result in adverse effects on the welfare of another member country. Competition is referred to only in so far as business conduct impairs market access to each other's market. In that regard, as with respect to most others, the two agreements (EMAs) signed with Tunisia and Morocco contain the same provisions related to competition. Article 6 of the Agreement with Tunisia is based on the criterion of the trade-effect and not on efficiency considerations either in Tunisia or in EU countries. It is the market access objective that lies behind the inclusion of a competition provision in the EMAs. It is also worth noticing that whereas Article 85 and 86 of the treaty of Rome prohibit anti-competitive agreements and abuse of a dominant position within the EC, Article 6 of the Tunisian EMA states only that such conduct is inconsistent with the good working of the Agreement. Article 92 of the Treaty of

Rome on state aid is also included under Article 6 of the Tunisian EMA which considers inconsistent with the Agreement any state aid which distorts or threaten to distort competition by favoring certain enterprises or the production of certain goods. The same exemptions given in Article 92 of the treaty apply also to the EMA. A period of five years is granted to all parties to enforce the competition provisions of the Agreement. In the meantime Article VI dealing with anti-dumping, Articles XVI and XXIII of the GATT are applicable between partners of the agreement.

Finally, exchange of information on anti-competitive practices does not cover confidential information provided by business to the competition authorities of its country of domicile. The Agreements signed by the EU with the CEECs are more explicit on the limits imposed on the exchange of information. It is stated that the Commission and the competent authority undertake to notify one another of the cases they are handling and which concern the other authority but are not obliged to communicate information if its law does not allow it or it is incompatible with the interests of its country.

These limitations on the exchange of information are not in tune with the minimum cooperation called for in several documents of the European Commission stating the case for a multilateral competition framework. The Cooperation Agreement signed by the EU and the US in 1991 call for closer exchange of information and notification than either the Euro-Med Agreements or the agreements signed with the CEECs. Article II of the US-EU agreement states that each party is required to notify the other whenever the enforcement activities of one of the parties may affect the important interests of the other party. More importantly, the agreement contains provisions of positive comity. It is, however, true that even in this case the issue of exchange of confidential information remains a major obstacle to closer cooperation even between the US and the EU.

### *III.2 Effects and Relevance of Proposals for Multilateral Agreements under WTO*

Since most MENA countries still do not have competition laws it may appear premature to discuss in this context the relevance of eventual multilateral agreements on competition. However, the discussion is still highly relevant for the following reasons. The first is that many of these countries are in the process of drafting their own competition laws, even though it has taken much longer than needed. The second reason is that those who are members of WTO should still develop positions on the opportunity to put competition on the negotiating agenda and on the principles that should be agreed on. The third reason is that if a multilateral agreement is reached, it will apply to all member countries regardless of whether they have national competition laws or not.

Before discussing the relevance of alternative proposals it is worth raising the question as to why multilateral disciplines on private anti-competitive practices are desirable. The reasons may vary across WTO members: enhance WTO market access commitments, constrain the use of anti-dumping, set up a global competition code in order to prevent global multinationals from using their market power, unify competition provisions in order to prevent member countries from circumventing their WTO obligations, etc.

Globalization has increased the importance of issues that transcend national borders: international cartels, export cartels, mergers on a world scale, abuse of a dominant position, etc. Divergent competition laws and practice increase transaction costs and increase uncertainty. Some countries have extended the application of their laws to outside their territories, leading to conflicts. Developing countries may be more exposed to restrictive business practices following the liberalization commitments they have taken. In the absence of appropriate domestic rules and international rules, they run the risk of being particularly subjected to the extraterritorial application of other countries' laws.

Following Hoekman (1997) and Hoekman and Holmes (1999) the discussion may be organized around the following ideas:

*Anti-trust principles and rules*

Various proposals have been put forward, based on the objective of harmonizing competition laws among members of the WTO. Projects of deep harmonization call for the creation of an international anti-trust authority which would have the task of enforcing a set of common anti-trust rules in all contracting parties through the offices of national competition authorities. In a project put forward by Scherer, the minimum standards to be agreed on are related to import and export cartels, serious abuses of dominant positions in the world market, and merger approval procedures.

The EU is in favor of a multilateral framework without going as far as the setting up of a supranational competition authority. The van Miert Report (1995) emphasizes that progress be made on two fronts. First, existing bilateral agreements should be deepened through the integration of comity agreements similar to those concluded between the EU and the US, and the strengthening of some provisions such as the sharing of information protected by confidentiality rules. Secondly, a pluri-lateral framework should be developed using some of the elements of the bilateral agreements and adding a mechanism for settling disputes between competition authorities, based on a minimum set of competition rules. The pluri-lateral agreement will first be signed by major trade partners under Appendix 4 of the WTO Agreement and extended gradually to other WTO members. The Expert Report (van Miert Report) as well as the EC communications to the WTO Working Group on Trade and Competition point to a EU position according to which agreement should be sought on specific business practices that impede trade without creating an international institution. The EU would be in favor of a prohibition on horizontal restraints and export cartels complemented by a rule of reason approach to other practices. In addition, the proposal calls for notification requirements as well as for positive and negative comity obligations.

A consensus on minimum standards on horizontal restraints is feasible since most laws deal adequately with the latter. However, there are exemptions from competition law that vary across countries. As the EC proposal shows, negotiations on vertical restrictions would be very difficult to gather much support among developed countries which are not willing to give up the rule of reason approach. In fact the most important differences among OECD countries concern vertical restrictions (exclusive or selective agreements between firms). A ban on export cartels has not gathered much support among OECD countries either.

OECD stance on a multilateral agreement is of course going to be a determining factor in the next round of negotiations. From the standpoint of developing countries interests in general and those of MENA countries in particular, such an agreement would increase market access and reduce oligopolistic behavior in their own markets, provided it deals with vertical restraints. Most of the industrial firms of the MENA region are small or medium-sized and cannot establish their own distribution channels in developed countries. Exclusive arrangements may prevent them from entering those markets or increasing their sales. Exclusive arrangements may also weaken competition on their own home markets. The argument that these arrangements may increase efficiency and welfare in so far as they are needed to develop distribution networks, needs to be qualified. Vertical restrictions may indeed result in excessive distribution margins, even if some range of similar branded products are available on the market.

The issue of vertical restrictions is related to that of dealing with parallel imports. A ban on the latter may be justified on the ground of protecting the development of efficient distribution networks. However, constraints on imports may result in wide price differences and in excessive distribution margins. Allowing parallel imports is only one form of arbitrage between markets. The EU position is contradictory in that regard in the sense that parallel imports are allowed across its member countries but not with respect to other countries.

The TRIPs Agreement also involves competition. This Agreement commits countries to protect patents and copyrights. Some argue that this will serve the interests of developing countries, as MNCs would be more willing to transfer technology and even to undertake more R&D in those countries. However, there will be important income transfers to the developed countries. A strict adherence to TRIPs will, if the international exhaustion principle is not adopted, lead to international market segmentation.

TRIPs explicitly authorizes the use of competition policy against the abuse of IPRs. In that respect MENA countries should insist on applying the international exhaustion rule lest patent and copyright holders will segment markets, which may entail heavy costs to them. The national exhaustion rule and practice is a market segmentation device which EU members do not apply among themselves.

Of course, if only horizontal restraints are covered (with no ban on export cartels), then, as Hoekman argued (1997), an agreement on minimum anti-trust standards is unlikely to improve market access either in developing countries, where more important trade and investment impediments are pervasive, nor in the industrialized countries markets where the minimum standards on horizontal restrictions are already in place.

A multilateral agreement may also deal with merger rules. There are many merger cases that do not have much of an effect on market shares in the countries where firms are domiciled but which result in significant concentration in LDCs markets

(UNCTAD, 1997). A developing country could insist on divestiture of assets located in its own territory (Brazil did it in cases involving toothpaste and vacuum cleaners) but such action may have negative effects on FDI).

Developing countries are generally not consulted when cross-border merger issues arise. Consultation takes place only between major developed countries. Only powerful countries or groups of countries can deal directly with large MNCs. The Boeing-MacDonald Douglas merger was challenged by the EU on the ground that Boeing had long-term-sole-sourcing contractual arrangements with airlines that risked excluding Airbus. Boeing accepted in the end not to enforce the sole-sourcing contracts. There is a need to address the problem of mutually exclusive demands made by different national authorities on a merger entity, including sometimes demands made by developing countries.

*Anti-dumping and competition*

Anti-dumping is increasingly used by many countries as an instrument of restricting imports in order to protect local firms producing certain products. Contrary to competition law, which protects competition, anti-dumping protects competitors. Several countries of the region have introduced in recent years anti-dumping laws that are consistent with the GATT (Tunisia and Egypt in 1998). Egypt has in fact enacted an anti-dumping law while a competition law is yet to be enacted. There are concerns among trade economists and experts in international organizations that anti-dumping practices become widespread, thus restricting international trade and weakening the world trading system.

Developing countries stand to lose more from anti-dumping practice than developed countries as many of them, including MENA countries, seek to enter or expand their shares on markets of developed countries. Being emerging exporters, developing countries are more likely to be the targets of anti-dumping. Another argument is related to the bias against the variable cost content of anti-dumping practice (Krueger, 1999). In that respect, developing countries tend to more vulnerable because they produce goods the marginal cost of which is a much larger share of total cost than in developed countries. However, it is worth noticing that many anti-dumping actions originate in the developing countries themselves and against each other (in Latin America for instance between members of the MERCOSUR).

Views on anti-dumping vary across countries. For some countries, notably the East Asian countries of Japan, Hong-Kong, Singapore, it should be integrated into competition law and taken out of trade agreements. Others defend the status quo, arguing that it is allowed under GATT in order to protect local industries against distortions in international trade. The EU position is that anti-dumping rules should be looked at more like countervailing duty measures than predatory pricing rules and thus should be kept separated from anti-trust concerns.

There is a strong opposition in most developed countries to linking anti-dumping to anti-trust rules. Most regional trade agreements have in fact kept anti-dumping rights untouched with no concessions made by signatories. Anti-dumping is not applied between members of the EU but is enforced towards partner countries under free trade agreements. There is however a difference between agreements with CEECs and the Euro-Med agreements. In the former anti-dumping will be discontinued once competition and state aid policies are implemented to the satisfaction of the EU. No such provision is found in the latter.

Developing countries have a lot to gain from competition authorities being involved in anti-dumping because their concern is, in principle at least, to protect the competition process rather than local firms, contrary to the trade authorities in charge of dumping (Hoekman and Holmes, 1999). However, domestic lobbies in developed countries, and in developing countries as well including in the MENA region, are too strong to accept subjecting anti-dumping to the competition process and criteria.

*Use of the WTO 'non violation' dispute settlement mechanisms in competition*

Article XXIII: 1 of the GATT allows a member country to challenge actions taken by governments that nullify or impair commitments taken by the latter in trade negotiations. The only case brought to the WTO dispute settlement mechanism under this article is the Kodak-Fuji case. The panel rejected the US complaint, concluding that the exclusivity agreements between Fuji and film wholesalers and the alleged administrative guidance role played by the Japanese government cannot be interpreted as resulting in the nullification or impairment of any of the commitments made by the Japanese government towards GATT.

As the Kodak-Fuji case shows, the ‘non violation’ GATT provision is very difficult and unlikely to be applied to restrictive business practices because the GATT deals with government policy and behavior and not with firms. Unless there is some multilateral agreement on minimum competition rules, the link between the non-violation provision and anti-competitive business behavior would be very difficult to establish.

*A competition advocacy role for WTO*

The trade policy review mechanism could be expanded to include anti-trust practice and law, in addition to the traditional areas covered and which are subject to WTO disciplines. Such action may be useful in bringing to the fore differences and problems of anti-trust practice. It may thus contribute to more transparency at the international level. Such action would, however, be difficult to justify within WTO, given that the review of government policy with regard to trade issues is an instrument of monitoring the degree of compliance of the government with its GATT commitments. The competition policy review would have no effect, just like the introductory review of the macroeconomic situation that the trade review procedure allows for. The inclusion of a competition review would then be useful only as an exercise for future effective use by WTO in case multilateral commitments are made in the area of competition. Finally, there may be a risk that a competition review be misused in the enforcement of the GATT non-violation dispute settlement provision.

*Export cartels and exemptions from national anti-trust laws*

Collusive conduct may take place between exporting firms in developed countries but with restrictive effects in some developing countries, not in their home countries or in the countries where they are domiciled. Restrictive conduct by firms is thus left out of the international trade system. It is only some international competition agreement that can deal with this very important issue.

Such practice is excluded from anti-trust law. The most important exemptions are indeed those that are already granted to export cartels that have no effect on the domestic market. One general argument is that competition policy tends to be much stricter when firms’ conduct concerns the domestic market than foreign markets. Competition authorities tend to turn a blind eye on collusive behavior or the abuse of a dominant position when it comes to foreign markets. On this issue the US position is in favor of a voluntary agreement to prosecute hard core cartels through the strict enforcement of national competition laws. However, it is unlikely that existing arrangements, today considered lawful, be declared unlawful even if such a voluntary agreement is adopted (Hoekman and Holmes, 1999). Furthermore, the US proposal concerns worldwide price fixing and market sharing rather than the dominant position on one particular market.

A ban on export cartels would be beneficial to developing countries as they generally have very little market power in international trade. Petroleum is the most obvious exception although the oil cartel has lost, until recently, most of its power over international prices. The issue of whether prices have been close to competitive market equilibrium prices is debatable, but in principle MENA oil producing countries stand to lose from a ban on export cartels.

**Conclusion**

As liberalization proceeds, the enforcement of competition laws becomes more and more important for the development of strong market economies and for fostering efficiency and fairness. Competition legislation is particularly needed in countries where markets are highly concentrated and where barriers to imports are still high, which is the case of almost all MENA countries. Further trade and investment liberalization will go a long way towards enhancing competition, but will not be sufficient and there is a need to address anti-competitive behavior in a direct way. In this region only three countries (Tunisia, Turkey and Algeria) have enacted such legislation. The experience shows that establishing and developing an efficient and dynamic competition system is a long process and that enacting a law is only the starting point, but it is an important start that has to be made by the other MENA countries. National laws should proscribe horizontal agreements between firms and the abuse of monopoly power aiming at restricting competition. A rule of reason approach should be applied to vertical arrangements.

Like other developing countries, countries of the region should insist on allowing parallel imports of branded products and applying the international rather than the national exhaustion rule. Concerning multilateral negotiations, most of these countries would gain from an agreement on a multilateral competition framework comprising a set of rules and principles, particularly if it is extended to anti-dumping.

## References


European Commission. 1995. “Competition Policy in the New Trade Order: Strengthening International Cooperation and Rules.” *Report of the Group of Experts* (*Van Miert Report*). Brussels.

Graham, E. and Richardson, J.D. 1997. “Global Competition Policies”, Washington D.C.: Institute for International Economics.

Hoekman, B. 1997. “Competition Policy and the Global Trading System.” *The World Economy*, Vol. 20: 383-406.

Hoekman, B and Holmes, P. 1999. “Competition Policy, Developing Countries and the WTO.” Working Paper, World Bank. April.

Souty, F.J.L 1998. “Libéralisation, Concurrence et Développement en Tunisie.” Genève: CNUCED.

UNCTAD. 1997. *World Investment Report*. Geneva.


## Appendix

### Table 1: Degree of Concentration in Tunisian Manufacturing, 1993

**(For each industry: share of the four largest firms)**

| (1) Industry | (2) % share in total employment | (3) % share in total value added |
|---|---|---|
| **Food and Beverages:** | | |
| 111 Canned meat | 100 | 100 |
| 121 Milk industry | 78 | 81 |
| 131 Grain milling | 45 | 65 |
| 132 Pasta and couscous | 66 | 85 |
| 134 Biscuits | 84 | 84 |
| 142 Oils (other than olive oil) and fats | 100 | 100 |
| 151 Canned vegetables, fruits, marmalades | 50 | 63 |
| 152 Canned fish | 78 | 96 |
| 161 Sugar industry | 92 | 93 |
| 162 Chocolate and candy industry | 100 | 100 |
| 171 Miscellaneous food industries | 70 | 86 |
| 172 Animal feed | 67 | 85 |
| 181 Non alcoholic beverages | 69 | 78 |
| 183 Brewery | 100 | 100 |
| 184 Alcohol distillation | 100 | 100 |
| 191 Tobacco industry | 98 | 99 |
| **Mean industry** | | **88.4** |
| **Construction Materials:** | | |
| 212 Marble | 45 | 42 |
| 221 Cement and plaster | 81 | 87 |
| 222 Cement-based products | 46 | 54 |
| 231 Brick industry | 52 | 60 |
| 232 Tile industry | 25 | 29 |
| 241 Glass industry | 60 | 73 |
| **Mean industry** | **51.5** | **57.5** |
| **Mechanical & Electrical Industries:** | | |
| 311 Iron and steel | 100 | 100 |
| 313 Foundries | 88 | 89 |
| 323 Metallic wrapping | 95 | 98 |
| 324 Quincaillerie | 71 | 73 |
| 325 Metallic household appliances | 53 | 85 |
| 331 Agricultural machinery | 100 | 100 |

**Table 1: Contd.**

| (1) Industry | (2) % share in total employment | (3) % share in total value added |
|---|---|---|
| 332 Industrial machinery | 52 | 57 |
| 341 Spare parts (for cars) | 69 | 77 |
| 361 Electrical equipment | 75 | 85 |
| 362 Miscellaneous electrical equipment | 56 | 69 |
| 371 Electronic professional equipment | 68 | 73 |
| 372 Electronic household equipment | 100 | 100 |
| 381 Household appliances | 100 | 100 |
| **Mean industry** | | **85** |
| **Chemicals:** | | |
| 411 Fertilizers (sulfuric acid & phosphate-based) | 100 | 100 |
| 412 Other fertilizers | 100 | 100 |
| 422 Base chemical products | 100 | 100 |
| 431 Paint, ink, glue and colorants | 48 | 57 |
| 432 Soap, detergents and disinfectants | 60 | 65 |
| 433 Perfumes and toiletry | 50 | 57 |
| 434 Miscellaneous para-chemicals | 100 | 100 |
| 441 Pharmaceuticals | 100 | 100 |
| 451 Tires and rubber products | 96 | 99 |
| **Mean industry** | | **86.4** |
| **Textile. Clothing and Leather:** | | |
| 511 Textile: spinning | 68 | 80 |
| 512 Textile: weaving | 59 | 77 |
| 513 Other textiles (pressing, etc.) | 40 | 38 |
| 531 Underwear | 32 | 32 |
| 541 Apparel | 7 | 11 |
| 551 Leather and skin work | 93 | 91 |
| 552 Other leather and plastic products | 60 | 65 |
| 553 Footwear | 36 | 37 |
| **Mean industry** | | **53.9** |
| **613 Wood Furniture** | **64** | **62** |

Source: Unpublished data of "Enquête d'Entreprises Manufacturières". Institut National des Statistiques (1993)

## Table 2: Changes in Import Penetration by Sector: 1987-97(%)

| Sector | 1987 | 1988 | 1989 | 1990 | 1991 | 1992 | 1993 | 1994 | 1995 | 1996 | 1997 |
|---|---|---|---|---|---|---|---|---|---|---|---|
| Agriculture & Fishing | 10.1 | 19.8 | 16.3 | 11.1 | 7.4 | 7.6 | 8.2 | 15.7 | 20.7 | 9.3 | 12.1 |
| Food Industry | 11.6 | 12.7 | 14.7 | 13.0 | 12.1 | 12.7 | 13.7 | 14.4 | 13.9 | 12.0 | 11.9 |
| Construction Materials. Ceramics, Glass | 10.3 | 10.8 | 10.9 | 12.0 | 9.6 | 10.6 | 9.2 | 11.1 | 9.7 | 8.4 | 8.5 |
| Mechanical, Electrical industry | 62.6 | 65.0 | 67.2 | 69.9 | 68.2 | 69.9 | 66.8 | 69.0 | 68.3 | 68.6 | 67.9 |
| Chemicals | 43.5 | 43.0 | 44.5 | 45.6 | 43.0 | 45.4 | 43.5 | 42.3 | 40.6 | 39.6 | 40.4 |
| Textile, Clothing, Leather | 48.6 | 50.9 | 56.5 | 58.6 | 56.8 | 57.6 | 57.3 | 60.0 | 60.6 | 60.3 | 61.0 |
| Misc. Mfgs | 29.6 | 31.5 | 50.9 | 46.2 | 42.3 | 40.1 | 38.1 | 35.2 | 29.0 | 29.5 | 29.9 |

Source: Calculations based on annual input-output tables, Institut National des Statistiques (INS), Ministry of Economic Development of Tunisia.