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## OECD Global Forum on Competition

### CONTRIBUTION BY TUNISIA

*This note is submitted by Tunisia as background material for the second meeting of the Global Forum on Competition, to be held on 14-15 February 2002.*

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## **CONTRIBUTION BY TUNISIA**

### **I. - RELATIONSHIP BETWEEN COMPETITION AND ECONOMIC DEVELOPMENT**

#### **1. Historical background**

Tunisia's economic development, like that of other developing countries and centrally planned economies, was marked up to 1986 by the omnipresence of the State in regulation, control and management of almost all economic activity.

This omnipresence manifested itself in the following ways:

1. Direct responsibility for the bulk of economic and industrial activities, especially in strategic sectors (or industrialising industry) such as oil, cement works, steel, transport, energy, etc.).
2. Direct control of marketing of basic products through offices created for that purpose: cereals and cereal products, oils, sugar, coffee, spices...
3. Control of private investment, both in terms of sector and geographical location of projects, by making investment subject to prior authorisation.
4. Protection of fledgling local industry through the introduction of import permits and high customs duties.
5. Price controls in the local market, with the administration fixing prices of basic products and defining profit margins for other products.
6. Regulation of wholesale and retail trade and distribution activities, such activities being subject to prior agreement and authorisation by the administration.
7. Protection of the Tunisian consumer against the vagaries of world prices for imported basic products, through the establishment of the general compensation fund designed to cover the difference between import prices and those applied in the local market (cereals, oils, milk, sugar, fertilisers, paper).

#### **2. Legislative, regulatory and institutional reforms introduced since 1986**

The adoption by Tunisia of the structural adjustment agreement (SAP) in 1986 in agreement with the World Bank and the International Monetary Fund, and its accession in 1994 to the World Trade Organization, together with the signing in 1995 of the free trade agreement with the European Union gradually brought about necessary and inevitable change to the Tunisian economy in the form of adjustment to international competition and its "harnessing" to the global economy through trade liberalisation and globalisation.

This transition from a protected economy to a market economy governed by rules of competition and competitiveness was achieved through a raft of legislative, regulatory and institutional reforms.

The objective of those reforms was to lay the foundations of an economy open to national and international competition by a progressive dismantling of tariffs, deregulation of the main economic activities and gradual withdrawal of the State from most sectors of the economy (production and services).

These reforms mainly concern the following aspects:

1. Liberalisation of investment in the framework of the 1993 investment code, prior authorisation being replaced by a system of fiscal incentives in favour of certain priority sectors and economically disadvantaged regions.
2. Progressive liberalisation from 1994 of some 80% of imports of foreign goods.
3. Gradual dismantling of tariffs by lowering the level of customs duties for the majority of imported goods.

On a transitional basis, for a limited period and with the agreement of Tunisia's foreign partner organisations (European Union, WTO, World Bank, International Monetary Fund), locally manufactured goods escaped this reduction.

1. The 1991 liberalisation of distributive trades and replacement of administrative authorisation by compliance with specifications for certain sectors or products.
2. The introduction of the principle of price freedom in 1991. Exceptionally, price-fixing by the administration was maintained for a list of basic products and for situations where certain economic sectors were dysfunctional and experiencing serious economic disruption.
3. The refocusing of the activities of the general compensation fund to limit its operations to staple products consumed by the most deprived social groups. Thus several products, such as fertilisers, seed potatoes, beef, lump sugar and animal feeds, no longer enjoyed support by the fund.
4. The progressive elimination of preferences granted to Tunisian companies in the award of government contracts.
5. The privatisation of 158 state enterprises by 31 October 2001.
6. The creation in 1991 of the *Conseil de Concurrence* (competition council).

The opening of the local market to foreign goods, the liberalisation of private enterprise in the manufacturing and service sectors, the introduction of competitiveness and competition as vectors governing economic life and the withdrawal of the State from direct management of the economy necessarily involved the creation of a body responsible for monitoring compliance with the rules of competition and thwarting any anti-competitive practices. Hence the creation by the Tunisian legislator, along the lines adopted in several other countries, of the *Conseil de Concurrence*.

The creation of this *Conseil* was accompanied by the introduction of the first core of Tunisian competition law. This legislation drew much of its inspiration from French law, but nevertheless differed on several important points.

It thus systematically prohibited certain anti-competitive practices while allowing a derogation to certain conduct which, although anti-competitive, generated technical or economic progress and thus gave rise to benefits for the consumer.

By these measures, the legislator affirmed the principle that competition is not an end in itself and that it is limited by the demands of technical and economic progress, and consumer interests, which are the ultimate goal of any economic policy.

Thus the 1991 law, as subsequently amended, systematically banned abuses of dominant position and abuses of economic dependency.

It also prohibited:

- exclusive distribution contracts.
- cartels with an anti-competitive purpose (limitation of market access, limitations and control of sales, investment, market sharing, etc.).

However, the law authorised the Minister of Trade to grant derogations for specific situations.

Furthermore, the Tunisian legislator made any concentration that might create or strengthen a company's dominant position subject to prior approval by the Minister of Trade.

### **3. Limitations of competition law as a vector of economic development**

It is, of course, unanimously accepted, in the light of the failure of the economic systems in the so-called socialist or centrally planned economies, that enterprise competition is the basis of all success and all economic development, albeit that total and unconditional compliance with the rules of competition as a necessary condition for economic development and the prohibition by so-called free-market countries of any form of anti-competitive practices and behaviour are more debatable.

Indeed, the eclipse of the State in economic matters in developing countries has not been replaced by domestic economic forces capable of taking over the economic activities abandoned by the State or creating new ones. Under these conditions, opening the local market to foreign goods is a real danger for still delicate economies and can lead to their collapse.

Moreover, the institution of competition as the only rule governing economic life runs the risk, with the withdrawal of the State, of leading to serious social repercussions in terms of jobs, especially considering that the State used to be the principal employer.

Tunisia, which opted irrevocably for a market economy based on free competition under its international commitments, suffered, like other emerging countries, a high social cost, reflected in particular in the liquidation of 37 state enterprises that could not be saved and the contraction of thousands of jobs either in the context of privatisation of certain state enterprises or the restructuring of state enterprises in difficulty.

Moreover, are developing countries like Tunisia protected and do they have the means to protect themselves from unfair competition from certain products from developed countries and anti-competitive practices by some companies in those same countries in developing countries' markets?

And even where this unfair competition such as dumping and where anti-competitive behaviour such as selective and even exclusive distribution in developing countries' markets are found to exist, do the latter have the means to sanction parent or holding companies given that they are located in developed countries and exert pressure on their subsidiaries or partners based in developing countries?

Moreover, do the so-called developed countries and free market economies, which have forced the rest of the world to introduce and observe the rules of free competition and open up markets, themselves honour the rules of free competition? Do they fully open their own markets to imports as developing countries demand?

The application of quotas to products, especially agricultural products, from developing countries, the introduction by developed countries of a variety of non-tariff barriers, the setting of limited periods during which imports are authorised (citrus fruits, vegetables, fruit...) so as not to disadvantage local production, are these not anti-competitive behaviour designed to restrict market access?

Under such conditions, would it not have been preferable, before demanding that developing countries open their markets to foreign products, first to draw up an international code or charter on competition law precisely defining the content of competition rules and anti-competitive practices, and establishing an effective mechanism to combat such practices and sanction any breach of competition?

Furthermore, and with a view to allowing developing countries to protect themselves against abuses by holding companies, which unquestionably occupy a dominant position in sectors or market segments where they operate and which abuse this position by imposing draconian anti-competitive conditions on their distributors in developing countries, would it not have been appropriate to establish an international legal aid agreement in respect of competition?

Would such an agreement not have helped developing countries to sanction anti-competitive behaviour by foreign companies in their countries by helping them to undertake investigations in countries where the parent companies had their registered office and enforce sanctions pronounced against them?

In the light of the foregoing, it would seem that free competition, even in developed countries, is not an end in itself and that it is limited by the need to protect the economic and social interests of the country concerned in the light of its particular characteristics and constraints.

It is against this background that the Tunisian legislator, as a precondition for the total opening of the Tunisian market to imports, established a series of accompanying measures and included some exceptions in competition law to the principle of free competition.

#### **4. Accompanying measures and exceptions to the rules of free competition**

A. The transition from a protected economy to a market economy necessarily involved preparing Tunisian companies to meet competition in their own market and to invest in foreign markets in order to alleviate the structures of the market. This preparation was effected through a series of measures:

### ***Upgrading***

A huge assistance programme has been in place since 1996 to support Tunisian companies and help them to improve their performance at all levels (management, production, acquisition and mastery of new technologies, etc.).

This programme, which continues until 2007, covers some 500 companies.

Up to 2001, the number of companies benefiting from the programme was 2000, for a total of 2000 million dinars. The programme, which initially involved manufacturing companies, was extended in 2000 to service companies.

### ***Fonds de développement de la compétitivité:***

Created in 1995, this competition development fund is intended to help companies to improve their management by granting subsidies of 10 to 20% of planned investment.

### ***Fonds de promotion et maîtrise de la technologie:***

This fund for the promotion and mastery of technology was instituted in 1991 to help finance acquisition and mastery of technology by industrial enterprises. The assistance takes the form of direct financial aid up to 50% of the cost of financing.

### ***Fonds de Promotion des Exportations:***

Created in 1984, this export promotion fund aims to assist companies in entering foreign markets, especially new markets, by financing market prospecting, advertising campaigns abroad and participation in foreign fairs and salons.

### ***Fonds d'insertion et d'adaptation professionnelle:***

Instituted in 1991, this vocational training and employment fund operates several schemes to help preserve jobs, stimulate the creation of new jobs and encourage labour mobility.

B. As free competition is a vector of economic development and not an end in itself, the Tunisian legislator laid down exceptions to that principle where the application of competition rules might dangerously disrupt a sector or where derogating from it would contribute to economic and technological development.

1. An exception to the principle of price-setting by market forces is contained in article 3 of the 1991 Act for a list of basic consumer products widely used by the most deprived sections of the population.
2. The Minister of Trade is authorised under article 4 of the Act to take temporary derogating measures for a period of 6 months when there is found to be serious disruption in an economic sector so as to combat excessive price rises.

3. The Tunisian legislator, who prohibited cartels and exclusive dealerships, allowed the Minister of Trade to authorise them when it was shown that such practices would lead to economic or technological progress and that they provided a benefit to the consumers.
4. Economic concentrations were made subject to prior approval of the Minister of Trade when they might cause or accentuate a dominant market position.

## II. - TECHNICAL ASSISTANCE IN THE AREA OF COMPETITION

Tunisia has been embarked since 1986 on economic reforms aimed at creating an environment to encourage the development of competition in the domestic market. Noteworthy among these reforms is the institutional system responsible for applying competition rules. It consists of the administration (Department of Competition and Domestic Trade and the Regional Departments of Trade) and the *Conseil de Concurrence*.

The administration is primarily responsible for the implementation of competition policy and consumer protection, as well as drawing up the related regulations, monitoring the operation of the market and conduct of economic surveys.

The *Conseil de Concurrence* has a dual role:

- A judicial role in which it is a judicial authority in respect of anti-competitive practices.
- An advisory role whereby it can be called on to give its opinion on draft legislation and regulations and all competition-related issues.

Despite the changing legal and institutional environment, the application of competition rules has proved difficult. In general, the causes are related to the structure of the market, the behaviour of economic operators and consumers and the lack of effective means of communication. Aware of this situation, the *Conseil* intends to introduce a broad programme with the following objectives:

1. Enhancing the *Conseil's* powers to intervene in the case of dysfunctioning of the domestic market.
2. Advocacy concerning competition rules aimed at economic agents and legal circles.
3. The programme consists of four key components:
  - training for the staff of the *Conseil*.
  - technical assistance in undertaking surveys and studies.
  - promotion of a competition culture.
  - equipment.

### 1. Training:

The aim is to enhance the skills of the staff of the *Conseil* in carrying out investigations and surveys into anti-competitive practices and passing judgement on the legality of the practices at issue. The activities envisaged in this context include, in particular, organising:

- conferences and seminars in Tunisia and abroad;

- regional seminars;
- workshops with small groups on specific technical subjects. These subjects could include:
- criteria for evaluating a competitive market;
- techniques for investigating anti-competitive practices;
- use of economic concepts to analyse a competitive market.

## **2. Sectoral surveys and studies**

This involves conducting sectoral surveys with the objective of creating a database on the structure of sectors to be used by the *Conseil* in its work.

Among the sectors that could be covered by these surveys, the following should be mentioned:

- the construction materials sector;
- the agro-food sector;
- the transport sector.

## **3. Competition culture**

The objective of this component is to disseminate competition policy, particularly among economic operators who would benefit from this policy.

This component should be centred on publicising the rules and benefits of competition through a publicity campaign aimed at:

- a broad audience (consumers);
- professional bodies through associations;
- economic operators and their professional organisations (sector by sector);
- government administration and local authorities;
- professions and bodies concerned with competition law (universities, lawyers, judges).

All possible media (radio, television, brochures, creation of a competition law association...) will be used for this campaign.

#### **4. Equipment**

It is planned in this context to acquire computer equipment to strengthen the *Conseil's* material resources, thus increasing the operational capacity of the staff of the *Conseil*. The computer equipment will consist of 10 desktop and portable computers.

It should be noted that the cost of this programme (excluding taxes) is estimated at 300,000 euros.

### III. - OVERVIEW OF THE TUNISIAN *CONSEIL DE CONCURRENCE*

Enforcement of rules against anti-competitive practices under Tunisian law is the responsibility of the *Conseil de Concurrence* together with the Department of Competition and Domestic Trade which effectively take on the powers of economic police.

Two issues are discussed below:

#### 1. **Description of the *Conseil de Concurrence* and overview of its relationship with the Department of Competition and Domestic Trade through the procedures applied by it:**

The *Conseil de Concurrence* was created by Law No. 95-42 of 24 April 1995 amending the Competition and Prices Act, Law No.91-64 of 29 July 1991, article 9 of which created the Competition Commission. This Commission did not operate on a continuous basis and was replaced by the *Conseil*, which is defined as an independent authority with judicial and advisory powers in competition matters.

#### A. *Composition*

The *Conseil de Concurrence* consists of 13 members appointed by decree.

1. A full-time chairman appointed from the judiciary or experts in economics, competition or consumer affairs for a period of 5 years, which is not renewable in the case of judges, and renewable once for the others.
2. Two vice-chairmen:
  - An adviser to the administrative court as first vice-chairman.
  - An adviser to one of the chambers of the court of auditors responsible for control of public institutions as second vice-chairman.

Their term is also 5 years, renewable once.

3. Four judges, 2nd grade or above.
4. Four persons who work or have worked in the manufacturing, distribution and service sectors for a term of 4 years not renewable.
5. Two persons chosen for their expertise in the field of economics, competition or consumer affairs, for a period of 6 years not renewable.

The composition of the *Conseil de Concurrence* is thus diverse and all parties concerned with the free play of competition are represented on it.

Alongside the judges, the present members include a professor of management, representatives of the economic and professional world and a representative of the consumer protection organisation.

A government commissioner is appointed to the *Conseil de Concurrence*, currently the Director of Competition and Domestic Trade or his representative.

Cases are drawn up by permanent reporters or contractual reporters appointed for one or more cases. These reporters are supervised by a reporter-general.

The secretariat consists of a permanent secretary with the rank of Director in the central administration.

The *Conseil* is currently chaired by a judge. He is assisted by two full-time vice-chairmen.

## **B. Functions**

The *Conseil de Concurrence* has a dual role: one judicial, the other advisory.

With respect to its judicial activity, the *Conseil* has powers to judge and sanction anti-competitive practices based on illicit cartels and abuse of dominant position, to which should be added abuse of economic dependency; 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.

Of course, this list is not exhaustive.

However, under article 8 practices which can be justified by their authors to the competent authorities as having the effect of securing an economic programme and that they produce for users a fair share of the resulting benefit are not considered to be anti-competitive. Such practices are subject to time limits.

Authorisation is granted by the Minister of Trade, who may seek the opinion of the *Conseil* on the matter.

With regard to its advisory mission, the *Conseil* has a very important role:

It gives its opinion on:

- competition law and regulations.
- proposed company mergers.
- any competition issue, especially exemptions.

The request for an opinion is optional for the Minister of Trade, except for authorisations of requests for concessions or exclusive representation.

Prosecution by the *Conseil* is subject to a number of rules, in both litigation and advisory matters.

## Procedure

Persons entitled to make application to the *Conseil*:

In litigation, only persons listed in the article 11(new) of the Competition and Prices Act can make application to the *Conseil de Concurrence*.

They fall into six categories:

- The Minister of Trade on his own initiative or at the request of the Government;
- Economic enterprises;
- Professional organisations;
- Trade unions;
- Accredited consumers' organisations;
- Chambers of agriculture or commerce and industry.

Enterprise must be understood in the broad sense: they are deemed to include not only legal persons in private or public law operating for profit but also all non-profit economic entities such as approved associations. A natural person who is self-employed or a member of a liberal profession is also deemed to be an enterprise.

Likewise, the *Conseil de Concurrence* may act on its own initiative where a plaintiff withdraws his action or if it discovers offences in other markets linked to the market concerned in a case before it.

## The case file

The procedures for application to the *Conseil de Concurrence* are set out in the above-mentioned article 11(new).

The proceedings are initiated by an application signed either by the Minister of Trade or the legal officer of the enterprise or the applicant organisation or by any person duly authorised for the purpose by the legal officer or a lawyer acting on his behalf.

- the application must be accompanied by preliminary evidence;
- the application may be lodged with the secretariat of the *Conseil* against receipt or sent by registered letter with a receipt.

The applicant is not required to inform the other parties to the proceedings nor to communicate the contents of the file to them.

Legal representation before the *Conseil* is optional and the procedure does not give rise to financial outlay. It results in a "decision" given by a section. It may be appealed to the administrative court.

The *Conseil's* decision has binding force. It is notified by an officer of the court and executed by the Minister of Trade.

**Advisory proceedings:**

The *Conseil de Concurrence* may be consulted by any of the persons entitled to submit complaints other than enterprises, through the Minister of Trade.

The *Conseil* sitting in full session issues an opinion, but it is not a binding opinion. In practice, however, the Minister has always taken the *Conseil's* opinion into account, especially in the area of company mergers where the *Conseil* is normally consulted as an expert solely on the competition issues arising from the merger.

In conclusion, the *Conseil's* advisory powers extend to all sectors of economic activity on all competition issues, but in litigation, it can only deal with so-called "anti-competitive" practices.

It therefore does not have the power to investigate and sanction so-called "restrictive" practices except in the context of cartels or when they result from an abuse of dominant position or economic dependency. It also does not have the power to hear complaints of unfair competition or actions for void of contract.