

Combating Abuses Arising from Economic Dependency in the Algerian Legal System

التصدي للتجاوزات الناتجة عن وضعية التبعية الاقتصادية في النظام القانوني الجزائري

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Abstract :

In an effort to facilitate unobstructed competition within the market, the Algerian legislative body has enacted a prohibition, as outlined in Article 11 of Ordinance 03/03 concerning competition, against any entity that exploits the economic reliance of another entity acting as a client or supplier, particularly when such actions contravene the principles of free competition.

To establish the issue of prohibition concerning the abuse of economic dependency, it is essential first that both parties involved in the abuse are classified as entities under the definition provided in Article 3/1 of the order related to competition. Secondly, the existence of economic dependency must be confirmed, and it is also necessary for there to be an abusive exploitation of this dependency.

Keywords: *abuse; anti-competition; enterprises; economic dependence;*

ملخص:

في محاولة لتسهيل المنافسة دون عوائق داخل السوق، سنت الهيئة التشريعية الجزائرية حظراً، على النحو المحدد في المادة 11 من الأمر 03/03 المتعلق بالمنافسة، ضد أي مؤسسة تستغل الاعتماد الاقتصادي لمؤسسة أخرى تعمل كعميل أو مورد، لا سيما عندما تتعارض مثل هذه الإجراءات مع مبادئ المنافسة الحرة. ولتحقيق هدف الحظر بشكل فعال، الذي يتعلق بسوء المعاملة في الاستفادة من شرط التبعية الاقتصادية، من الضروري أن تكون الكيانات المشاركة في السلوك التعسفي مؤهلة كمؤسسات على النحو المحدد في المادة 1/3 من الأمر المتعلق بالمنافسة، علاوة على ذلك، من الضروري تحديد شرط الاعتماد الاقتصادي، بالإضافة إلى ذلك يجب أن يكون الاستغلال التعسفي لهذه الحالة واضحاً.

كلمات مفتاحية: *التعسف، تقييد المنافسة، المؤسسة، التبعية الاقتصادية.*

I. Introduction:

The legal framework of the Algerian economy has gone through several phases since independence. Algeria initially adopted a socialist economic approach in which the state exercised control over all economic sectors and used socialist enterprises as a means of implementing its policies aimed at improving the living standards of Algerians. This included

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the use of genuine long-term development strategies based on three- and four-year development plans to guide investment and cooperative organization².

Subsequently, Algeria transitioned to a market economy as a framework for regaining the economic efficiency lost during this period. This shift was in line with the global trend towards the application of market systems and rules to economic issues, through the liberalization of prices for goods and services and the abandonment of all forms of monopoly and dependency, particularly the new orientation towards a market economy based on free competition³, which had been unknown under the old socialist system⁴.

In order to uphold these rules, the Algerian legislator has been empowered to adopt regulations that respect the principles of industrial and commercial freedom enshrined in the Constitution, while recognizing the principle of freedom of contract as the basis of economic freedom⁵. This was evident in the adoption of the first law, number 89-12 of 5 July 1989, which aimed to define the conditions for setting the prices of goods and services based on the laws of supply and demand and market management, implicitly enshrining the principle of free competition⁶. This was later repealed by Ordinance No. 95-06 on competition, which ensured the prohibition of any practices that harm or restrict competition.

As of 2003, with the enactment of Ordinance No. 03-03 on Competition, an innovative market protection mechanism was put in place to protect entities from abusive behavior, particularly with regard to the abusive exploitation of economic dependency, which was prohibited under Article 11 of this Ordinance⁷.

From this premise, we ask the following question: How has the Algerian legislator organized the practice of abusive exploitation of economic dependence as a practice restricting competition?

In order to answer this question, we have adopted an analytical and descriptive approach, dividing this work into two main sections. In the first section we discuss the legal framework of economic dependence in the market, and in the second section we examine the manifestations of economic dependence in the market.

II. Section One: The legal framework of economic dependence in the market

In order to better understand the adoption of the concept of economic dependence by the Algerian legislator, we will first examine the possibility of recognizing economic dependence for the first time in Algeria (first section) and then focus on the legal characterization of this dependence in the market according to Algerian legislation (second section).

II .1. The possibility of recognizing economic dependence on the market

²- El Ouissat Jamal El-Din "Industrial Development in Algeria in Light of the Study of Iron and Steel 1968-1978," University Publications Bureau, Algeria, 1986, p. 19.

³- Presidential Decree No. 89-18, dated February 28, 1989, concerning the text of the constitutional amendment of 1989, Official Algerian Gazette No. 09 dated March 1, 1989.

⁴- Jawad Afaf, "Protecting Competition from the Abusive Exploitation of Economic Dependency," Doctoral Thesis, Faculty of Law, Constantine-1 University, 2017-2018, p. 4.

⁵- Belkhir Hanan, "The Concept of Abuse in Economic Laws (Competition Law and Commercial Practices Law)," Doctoral Thesis, Faculty of Law and Political Science, Mouloud Maameri University of Tizi Ouzou, 2019, p. 06.

⁶- Law No. 89-12, dated July 5, 1989, concerning prices, Official Algerian Gazette No. 29, dated July 19, 1989, repealed by ordinance No. 95-06, dated January 25, 1995, Official Algerian Gazette No. 09 dated February 22, 1995.

⁷- Ordinance No. 03-03 of 19 July 2003 on competition, Official Journal of Algeria No. 43 of 20 July 2003, amended and supplemented by Law No. 08-12 of 25 June 2008, Official Journal of Algeria No. 36 of 2 July 2008 and Law No. 10-05 of 15 August 2010, Official Journal of Algeria No. 46 of 18 August 2010.

As mentioned above, Algeria has experienced two significant phases in its economic landscape: the post-independence phase, during which the state adopted a socialist approach based on public ownership of the means of production, and the capitalist phase, based on a free economy, which coincided with the new constitutional amendment in 1989. This qualitative change in the national economy transformed the role of the State from a totalitarian form that monopolized all economic activities to a managerial State that facilitated economic liberation, allowing individuals the freedom to invest and participate in business activities. However, this required the establishment of legislation in line with this direction, such as commercial law, investment law and competition law, among others⁸.

The main aim of these measures is to protect the market and ensure the legitimacy of its activities, so as not to harm economic welfare, which is based on full freedom of competition, and thus to prevent economic entities from colluding to form monopolies⁹. It was also necessary to address another type of individual practice where economic entities may abuse their position by exploiting the dependency of other companies in the market, thereby avoiding any harm that could restrict competition¹⁰.

The study of this issue therefore requires a close examination of the stages of the Algerian legislator's view of competition and its relationship with the abusive exploitation of economic dependency.

II .1.1. The pre-1989 period

After independence, the Algerian State adopted a socialist system as the political and legal framework to guide the country's progress. This change of model was clearly articulated in the 1963 Constitution, in particular in Article 10, which explicitly declared Algeria to be a democratic socialist State. It also established a number of economic and social entities that were firmly rooted in socialist principles and focused on the public interest.

The 1976 Constitution further emphasized socialism as the choice of the people, devoting an entire section of the first chapter - containing 15 articles - to reaffirming the state's support for this system. It stated that State ownership was the highest form of social ownership, aimed to establish a fundamental principle of socialism regarding the means of production, and declared that foreign trade and wholesale trade were irrevocably state monopolies.

In the texts of both constitutions, there is no mention of competition; instead, there is a preponderance of public interest and State dominance over all activities and sectors, including economic ones, while rejecting all principles of freedom¹¹. This leads us to say that the issue of the abusive exploitation of economic dependency has not been considered or addressed¹².

However, this does not negate the fact that the Algerian legislator has touched upon competition, albeit modestly, particularly in the field of public procurement. Article 03 of Decree No. 67-90 on public contracts states that "public contracts shall, as a general rule, be

⁸- Mkhoutour Dalila, "Application of Competition Law Provisions in Distribution Contracts", Doctoral Thesis, Faculty of Law and Political Science, Mouloud Maameri University of Tizi Ouzou, 2015, p. 03.

⁹- Bachouche Dalila, "Protecting Free Competition from Prohibited Agreements under Competition Law Provisions", Doctoral Thesis, Faculty of Law, Mentouri Brothers University of Constantine, 2018-2019, p. 14.

¹⁰- Abir Mazghish, "Legal Mechanisms for Protecting Free Competition from Restrictive Practices and Economic Aggregations", Doctoral Thesis, Faculty of Law and Political Science, Mohamed Khider University of Biskra, 2015-2016, p. 137.

¹¹- Article 13 of Order 76-97. of 22 November 1976 on the Constitution of the People's Democratic Republic of Algeria, Algerian Official Gazette No. 94 of 24 November 1976.

¹²- Article 14 of Decree No. 76-97 on the Constitution of the People's Democratic Republic of Algeria.

awarded following a call for competition, the procedures for which are defined below”¹³. In addition, Decree No. 82-145, which regulates contracts concluded by public entities, refers to competition by describing the procedures for mutual agreement and specific calls for competition in Article 26 of the section entitled “Procedures for concluding contracts with public entities”¹⁴.

However, all this is far removed from the strategy adopted by the state and the position of the Algerian legislator during this period, which was to rely on free competition and to combat any abusive practices that could be exploited by institutions in a state of economic dependency. The socialist system imposed restrictions on efforts to promote open trade and operate within a market economy.

II .1.2. The post-1989 phase

This phase coincided with the adoption of the 1989 constitution, which marked a shift in the Algerian State towards popular participation in decision-making. It addressed freedom of opinion and expression, and allowed individuals to form associations, marking a real departure from the directed socialist system¹⁵. In another context, there was a direct and explicit recognition of the possibility for individuals to exercise private property rights, indicating the state’s new orientation towards a free economic system based on a market economy¹⁶.

This event coincided with the promulgation of the first legislative text aimed at defining the basic requirements for the liberalization of the prices of goods and services, the general guiding principles for the management of the market and the mechanisms of economic regulation by means of prices as an exception, under Law No. 89-12. This law is recognized as the first legislative text to recognize free competition and to penalize any practice or concerted action aimed at disrupting the balanced functioning of the market, whether explicitly or implicitly. It also prohibited any abusive exploitation resulting from a dominant position on the market or part of it. However, it did not mention abusive exploitation resulting from a state of economic dependence; instead, it referred to three forms of such exploitation in the same Article 27 of the Price Law¹⁷.

Subsequently, Ordinance No. 95-06 was issued, which introduced new forms of practices in addition to those mentioned in the previous article, specifically in the content of Article 07¹⁸.

When examining these two pieces of legislation, it is striking that the concepts of “economic dependence” and “abusive exploitation” were not mentioned at all. However, they were later included in the implementing text of Ordinance 95-06, in accordance with the provisions of its Article 7, represented by Decree No. 2000-314, which refers to them in

¹³- Decree No. 67-90 of 17 June 1967 on public contracts, Algerian Official Journal No. 52 of 27 June 1967.

¹⁴- Decree No 89-175 of 10 April 1982 on public contracts awarded by public entities, published in the Algerian Official Journal No 22 of 1 June 1982.

¹⁵- Presidential Decree No 89-18 of 28 February 1989 on the 1989 Constitution, published in the Algerian Official Journal No 09 of 1 March 1989.

¹⁶- Article 49, 1989 Constitution.

¹⁷- Law No. 89-12 of 5 July 1989 on prices (repealed), Official Journal of Algeria No. 29 of 19 July 1989, Article 27: “Any abuse resulting from the domination of a market or part of a market is considered illegal; the following are also considered illegal: - refusal to sell without legitimate justification - conditional or discriminatory sales - sales subject to a limited quantity,....”.

¹⁸- Ordinance No95-06 of 25 January 1995 on competition (repealed), Official Journal of Algeria No. 09 of 22 February 1995, Article 07 added new forms of conduct described as abusive which were not included in Article 27 of Law 89-12 on prices: “.... - Obligation to resell at a minimum price - Termination of commercial relations merely because the trader refuses to comply with unlawful commercial conditions - Any other action that limits or eliminates the benefits of competition in the market...”

Article 5, third paragraph: "...the absence of an alternative solution due to a situation of economic dependence"¹⁹. This indicates that the Algerian legislator began to pay attention to this concept, considering at the same time its impact on competition and the market.

The importance of these concepts was further emphasized by the adoption of Ordinance No. 03-03 on competition, which repealed the provisions of Ordinance No. 95-06. This was seen as a rebirth of transparent competition rules that seriously addressed economic dependence and explicitly prohibited any abuse that might exploit this situation. The ordinance recognized economic dependence as one of the anti-competitive practices that needed to be addressed. It brought together the six forms mentioned above in a single article, namely Article 11²⁰.

Thus, the recognition and regulation of competition for the first time in Algeria posed several challenges in terms of understanding the nature of anti-competitive practices and applying prohibitive measures against them. However, after a period of eight years following the enactment of the first legislation repealing Ordinance 95-06, namely Ordinance 03/03 on competition, which has been amended and supplemented, the main practices liable to hamper economic activity have been identified and require responses through the enforcement of competition law²¹.

II .2. The Concept of Economic Dependence in the Marketplace

The existence of economic dependence is realized through the relationship between a more competitively positioned enterprise and a weaker enterprise in the market, leading to a form of power and control that disturbs the system of free competition. In this section we will first define the concept of economic dependence, and then in the second part we will discuss the characterization of economic dependence between standard contracts and adhesion contracts.

II.2.1. Definition of economic dependence

The term "dependency" is derived from the verb meaning "a situation in which you need something or someone and are unable to continue normally without them"²²

In Arabic language the term (تبعية) is derived from the verb (تبع) means follow or to trail behind something. In the lexical framework, the term follow) means that one follows) "فَاتَّبَعَ سَبِيلًا" Kahf, verse 85-another. This is supported by the Quranic verse in SurahAl", which implies the action of following a path.

In an economic context, economic dependency refers to the subordination of a developing country's economy to that of a developed country²³. It is often described as an unequal exchange process between nations²⁴. The concept was first introduced into German

¹⁹- Decree no. 2000-314 of 14 October 2000 (repealed), which defines the criteria for an economic operator to be considered to be in a dominant position, and also the criteria for actions considered to be an abuse of a dominant position.

²⁰- Ordinance No. 03-03 of 19 July 2003 on competition, Official Journal of Algeria No. 43 of 20 July 2003, amended and supplemented by Law No. 08-12 of 25 June 2008, Official Journal of Algeria No. 36 of 2 July 2008 and Law No. 10-05 of 15 August 2010, Official Journal of Algeria No. 46 of 18 August 2010.

²¹- Mohamed Chérif Kettou, Anti-competitive practices in Algerian law: A Comparative Study with French Law, Doctoral Thesis, Faculty of Law, Mouloud Mammeri University, Tizi Ouzou, 2004-2005, p. 03.

²² <https://dictionary.cambridge.org/dictionary/english/dependency>

²³- Omar bin Al-Faihan Al-Marzouqi, Economic Dependency in Arab Countries and Its Treatment in Islamic Economics, Al-Rashid Library, First Edition, Beirut, 2002, p. 11.

²⁴- Ahmed Muhammad Abu Rab Challenges of Development in the Arab Homeland, Jordanian Press Foundation, 1st edition, Jordan, 1979, p. 64.

law in 1957, which highlighted the idea of economic dependence from an economic perspective.

From a legal point of view, economic dependence can be defined, according to Algerian legislation, in particular in the Ordinance No. 03-03, Article 03, as the interdependence between companies where one entity has no viable alternative to consider when it decides to refuse a contract under the conditions imposed by another entity. This reflects the imbalance of power that characterizes the relationship between dominant and dependent undertakings in the market²⁵.

The French legislator first referred to economic dependence in article 08, paragraph 02 of Ordinance no. 86-1243 of 1 December 1986 on price freedom and competition, as amended and supplemented. This decree emphasizes the prohibition of any abusive exploitation practiced by one entity against another, either as a client or as a supplier. Such practices may include abuses such as refusal to sell, tied sales, discriminatory conditions of sale and the termination of established commercial relations because of the refusal of a partner or contractor to comply with some or all of the unjustified commercial conditions²⁶.

Meanwhile, the French Court of Cassation has indicated that economic dependence is the situation in which a company is unable to dispense with its current suppliers and is entirely dependent on these commercial relationships to meet its supply needs. This company is unable to find alternative suppliers who can meet its requirements with the same quality and efficiency as its current suppliers²⁷.

II.2.2.Characterizing the Economic Dependency between Standard Contracts and Adhesion Contracts

The general principle of contracts is that they are binding; a contract becomes obligatory between the parties when both parties exchange obligations, as confirmed by Algerian legislation in Article 55 of the Civil Code²⁸. However, most important contracts, especially those relating to consumer matters, take the form of either standard contracts or adhesion contracts.

As a result, the prevalence of the first type of contract, commonly known as the standard contract in international trade, has become an important means of achieving the principle of self-sufficiency in international contracts. These contracts are based on a set of general terms and conditions in the form of documents that do not contain the details usually found in commercial contracts, such as the names of the parties, the price and some essential conditions such as signatures. They are recognized as binding contracts, based on respect for their terms, and play an important role in stabilizing the customs and realities of international trade in goods and services²⁹.

²⁵- Article 03 of Ordinance03-03 on Competition: "The state of economic dependence is the commercial relationship in which an entity has no alternative if it wishes to refuse to contract under the conditions imposed by another entity, whether it is a customer or a supplier."

²⁶- Art. 8 - Abusive exploitation by a company or group of companies is prohibited under the same conditions: from the state of economic dependence in which a customer or supplier company finds itself, which does not have an equivalent solution.

²⁷- Maktour Dalila, previous reference, p. 115.

²⁸- Law No. 75-58 of 26 September 1975, including the civil code, Algerian Official Journal No. 78 of 30 September 1975, as amended and supplemented.

²⁹- Bashar Qais Muhammad, Technology Transfer Agreements within the Framework of Private International Law. Doctoral thesis, Faculty of Law, Ain Shams University, Egypt, 2016, pp. 131, 132.

The standard contract therefore does not represent a consensus between the parties in the traditional sense. Instead, the legal term refers to a standardized model designed for use in future contractual arrangements³⁰.

The existence of the second type of contract, referred to as adhesion contracts, is a clear reflection of the emergence of investment contracts in their modern form, which allow a departure from the general principle of freedom of will. This has led to the monopolization of certain goods and services, especially those considered essential, enabling institutions to impose their authority, their will and their conditions on those who wish to contract with them, without leaving any room for negotiation. Negotiation has thus become part of the initial contracting phase, without the will of the parties intersecting in the definition of terms³¹. The result has been the acceptance of arbitrary conditions dictated by the unilateral will arising from the powerful position of one of the contracting parties³².

III. Section Two: Appearances of economic dependence on the market

The Algerian legislator's perspective is based on the protection of competition and the fight against any abuse that allows any entity with economic power to control and dominate the market. It was therefore essential to provide for the broad protection of the market system, in particular for the consumer, who is the final economic actor and who bears all the consequences of such abuses. Accordingly, it was appropriate for the legislator to enact laws to protect consumers from the abuse of this power. This led to the creation of Law No. 89-02, which includes consumer protection within the new liberal approach of the State³³.

It can therefore be said that abuse in situations of economic dependence is a relatively recent offence in Algeria, dating back to the emergence of large economic groups with the economic power to shape the market as they see fit. Although they do not always control or monopolize the market, they have a bargaining power that enables them to impose unjustified and unreasonable conditions on suppliers, particularly with regard to prices and payment terms³⁴. Therefore, in order to establish an abuse in a situation of economic dependence, a number of conditions must be met, the first of which is the existence of an unlawful situation of economic dependence which manifests itself as an abuse leading to a manifest infringement of the competition rules. This situation varies according to the nature and activity of the institution, whether it uses exclusionary or exploitative tactics.

III.1. Abusive exploitation in the context of economic dependence on the market

Initially, the concept of abuse was not linked to economic dependence and claims were limited to situations of economic dominance. However, with the passage of time, the Algerian legislator has recognized, through Ordinance No. 03-03 on competition law, that any abusive exploitation in a situation of economic dependence is punishable by law. The difference between them lies in the degree of economic power over the market - absolute in cases of dominance and relative when an institution is in a situation of economic dependence due to

³⁰- Bashar Qais Muhammad, same reference, p. 133.

³¹- Laachab Mahfoud Ben Hamid. The contract of adhesion in Algerian and comparative law, National Book Foundation, Algeria, 1990, p. 10.

³²- Yamina Belayman. Adhesion contracts and consumer protection. Human Sciences Journal, University of Mentouri Constantine, 2019, p. 536.

³³- Law No. 89-02 of 7 February 1989, Algerian Official Journal No. 06 of 8 February 1989, repealed by Law No. 09-03 of 25 February 2009, Algerian Official Journal No. 15 of 8 March 1989, on consumer protection and the fight against fraud.

³⁴- Dalila Maktour, previous reference, p. 114.

the lack of a real alternative for the weaker contracting party to do without the dominant institution.

The imposition of conditions on the contracting party, even if they are unfair, therefore indicates that the proof of such conditions requires, first of all, the existence of a vertical relationship between the parties at different levels. This relationship arises between economic operators based on loyalty between the supplier and the distributor. Such a situation cannot be considered if the relationship is horizontal, with suppliers or distributors at the same level. In this case, a weaker party emerges from the first relationship, which is subject to all the conditions imposed by the stronger party in the contract³⁵.

III.1. 1. Definition of abusive exploitation of economic dependence in the market

One of the bases of unfair competition in the market is the abuse resulting from the exploitation of economic dependence, which requires the demonstration of several conditions that contribute to the disruption of the internal organization of the business³⁶. These are the condition of infringement and damage to others, as well as the existence of the illegitimacy of the interest, in addition to the disparity between the benefit of exercising the right and the damage caused to the economic operator as a result of the abuse³⁷.

III.1.1.1. Expanding the concept of abuse in the context of economic dependence

The concept of abuse is a legal and philosophical idea with historical roots dating back to antiquity. In ancient societies, such as ancient Egypt and Mesopotamia, legal frameworks emerged to monitor the exercise of rights and to hold individuals accountable for overstepping boundaries. One example is the Babylonian Code of Hammurabi, which imposed penalties on those who exceeded property limits or abused their authority.

The development of legal and philosophical ideas developed the concept of abuse as Greek philosophers, including Aristotle, discussed the concepts of ‘justice’ and ‘rights’ and their importance in the structure of society. This led to the fundamental principle of the “rule of law”, which serves as a basic guideline for the exercise of authority and responsibility in cases of abuse.

Islamic jurisprudence contributed significantly to the development of the concept of abuse during the middle Ages. Jurists formulated rules that defined the scope of rights and prohibited unjust exploitation. Islamic law introduced the principle of “interest” as a criterion for determining actions considered abusive in the use of rights.

The establishment of the modern state in modern times has reinforced the principle of the “rule of law”, which protects individual rights and freedoms through constitutional provisions and laws, thereby thwarting any abuse of power.

From the point of view of the Algerian legislator, the concept of competition law defines the abuse of economic dependence in the market as any action by an institution possessing economic power that corresponds to the forms listed in Article 11. This means that such actions are among the practices that restrict competition and are prohibited³⁸.

³⁵- Jalal Massad. *The Impact of Commercial Practices on Free Competition*, Doctoral Thesis, Mouloud Maameri University, Tizi Ouzou, 2012, p. 160.

³⁶- Abdul Razak Al-Sanhouri, *The Mediator in Explaining the New Civil Law*, undated edition, Beirut, 1952, pp. 844, 847.

³⁷- Anwar Al-Amrousi, *Delictual and Contractual Liability in Civil Law*. 1st ed., Dar Al-Fikr Al-Jami'i, Alexandria, 2004, p. 326.

³⁸- Article 11 of Ordinance No 03-03, related to competition, refers to the major forms that may involve an institution in criminal prosecution: "It is prohibited for any institution to abuse its position of dependence on another institution as a customer or supplier if this violates competition rules. This abuse particularly includes: unjustified refusal to sell, tied or discriminatory sales, sales conditioned on

The French legislator has adopted a similar approach in order to clarify the main practices in which enterprises are in a state of economic dependency leading to potential abuse. This is reflected in article 08, paragraph 02 of the repealed law 86-1243 on price freedom and competition, which corresponds to article L420-2 of the French Commercial Code. It prohibits institutions from engaging in the same types of practices mentioned in Algerian legislation³⁹.

III.1.1.2. Recognising abusing clause in economic dependence

The situation of economic dependency between enterprises is not prohibited in itself, but rather any abuse in the exercise or exploitation of that dependency. Abuse is defined as the exercise of a right for purposes other than those permitted or with the intention of harming others. The contract of sale is considered the general manifestation of the condition of abuse in the exploitation of economic dependence, as the Algerian legislator outlines four cases in Article 11: unjustified refusal to sell, discriminatory sale, sale subject to the purchase of a minimum quantity and the obligation to resell at a lower price⁴⁰.

III.1.2. Criteria for Proving Abuse in Situations of Economic Dependency

Proving abuse in situations of economic dependence is a complex legal issue that requires a thorough assessment of the surrounding market and institutional circumstances. Its provisions are examined according to the reciprocal relationship between the producer or supplier and the distributor. Given this diversity of circumstances, it is not possible to define this abuse according to absolute standards, but it can be identified on the basis of the following elements:

III.1.2.1. The criterion of supply dependence

This criterion appears to be a tool for abusing the situation of economic dependency when several factors and variables link the relationship between the distributor and the supplier in the form of contracts and commercial agreements, aimed at ensuring the element of dependency. Typically, this is manifested in:⁴¹

- The contract contains financial rules and conditions, specifying deadlines for the delivery of goods and services and aligning them with payment operations. These are indicators of the distributor's commitment and discipline towards the supplier.
- Adherence to production standards in terms of demand and quantity, as well as performance standards in terms of product quality and the reputation of the supplier's brand according to the required criteria. In addition, the ratio of products distributed to those of the supplier is taken into account if it exceeds 75%, which is recognized by the French Competition Authority as creating a situation of dependency at this level.
- Adherence to the supplier's pre-established pricing and distribution policies, as well as the ability to provide innovation and development used to improve products and services in the market⁴².

purchasing a minimum quantity, obligation to resell at a minimum price, severing business relations solely for refusing to comply with unjust commercial conditions, and any other act that may reduce or eliminate the benefits of competition within the market."

³⁹- Franch Law No. 86-1243, dated December 1, 1986, concerning price freedom and competition, French Official Gazette No. 285 dated December 9, 1986, repealed by Order 2000-912 dated September 18, 2000, which includes the Commercial Code, French Official Gazette No. 219 dated September 21, 2000.

⁴⁰- L'Hour Badra, Mechanisms for Combating Commercial Practices Crimes in Algerian Legislation, op. cit., p. 92.

⁴¹- Khalil Victor Tadros, The Dominant Position of the Project in the Relevant Market in Light of Competition Protection Laws and Anti-Competitive Practices, Dar Al-Nahda Al-Arabiya, Cairo, p. 46.

⁴²- FRISON ROCH Marie-Anne and PAYET Marie-Stéphane, op. cit., pp. 133-136.

III.1.2.1.2. Purchase Dependency Criterion

This criterion is used to measure dependence in cases where the buyer or customer is satisfied and able to continuously turn to suppliers to purchase their products or services through large purchasing centres that have purchasing and marketing power⁴³.

This type of dependence arises when the contractual relationship favours the distributor on the basis of the purchasing rules enjoyed by the distributor, which affect the supplier's dependence on the distributor. The main criteria are the supplier's share of the distributor's turnover and the distributor's importance in marketing the manufacturer's products. The assessment also takes into account the supplier's ability to find alternative solutions, i.e. the existence of another outlet for selling its products. Consequently, it becomes a challenge for the supplier to find opportunities outside the distributor⁴⁴.

III.1.2.1.3. Criterion of the absence of equivalent alternatives

The general principle of the conclusion of a contract requires a serious commitment to the execution of its terms as agreed, as stated in Article 106 of the amended and supplemented Civil Code 75-58: "The contract is the law of the parties...". The aim of this principle is to increase stability and trust in transactions and commercial relationships, thus avoiding future misunderstandings.

However, there are situations in which the refusal to conclude a contract between the supplier and the client or distributor, or vice versa, can disrupt the financing relationship when the institution imposes abusive terms of use without offering a comparable alternative solution. This situation serves as a tool for proving and assessing economic dependence, as indicated by the Algerian legislator in article 03 of Ordinance 03-03 on Competition.

Similarly, the French legislator adopted this criterion in the laws on price freedom and competition, as well as in the Commercial Code, considering it a tool for proving economic dependence, until the adoption of Law No. 2001-420 of 15 May 2001, which introduced new rules on economic regulation. This law abolished the criterion of the absence of a comparable alternative solution as a means of recognizing economic dependence. Nevertheless, the French courts continued to apply this standard, emphasizing the brand recognition and the market financing ratios in relation to the turnover of the supplying institution, while requiring the absence of financing from other institutions in the market as a criterion to establish the existence of economic dependence⁴⁵.

III.2. The Behavior of Institutions Exploiting Economic Dependence Situations

The behavior that exploits economic dependence is manifested when a company imposes unfair trading conditions on other companies that are vertically dependent on it. It behaves arbitrarily or unfairly towards these economically dependent institutions by engaging in aggressive Behavior aimed at excluding other institutions from the market without legitimate justification. Alternatively, it may engage in attractive Behavior aimed at attracting important economic institutions within the same market⁴⁶.

⁴³- MALAURIE-VIGNAL Marie, *Law of Competition*, 2nd ed., Dalloz, Paris, pp. 197-199.

⁴⁴- Mekhancha Amina, *Mechanisms for Activating the Principle of Free Competition – A Comparative Study Between Algerian and French Legislations*, Doctoral Thesis, Faculty of Law and Political Science, Batna University, 2016-2017, p. 171.

⁴⁵- wad Afaaf, *op. cit.*, p. 22.

⁴⁶- It should be noted that these abusive practices or behaviors associated with the position of economic dependence, represented in the form of sales or specific conditions for sales and prices, do not constitute specific forms exhaustively but rather exemplarily. For more on this, see Bouhalais Ilham, *Legal Protection of the Market Under Competition Rules*, Doctoral Thesis, Faculty of Law, University of the Brothers Mentouri Constantine, 2016/2017, p. 229.

III.2.1.Exclusionary Behavior Manifesting Abuse in Situations of Economic Dependence (Aggressive Behavior)

This Behavior refers to practices described as aggressive acts used by an institution to impose unjustified coercive conditions on its economic partners⁴⁷. Contrary to a situation of dominance, where the abuse occurs between competitors, this Behavior reflects mechanisms for excluding the contracting party, whether a supplier or a client⁴⁸, as follows:

III.2.1.1.Termination of the commercial relationship

Abuse in a situation of dependency may take the form of the termination of a commercial relationship, due to the refusal to engage and comply with unjustified commercial conditions. For the termination of a commercial relationship to constitute a form of abuse in the context of economic dependence, it must be proven that the dependent institution cannot find another partner to establish an alternative commercial relationship within a reasonable time and at a reasonable cost. Furthermore, this termination must be for an unjustified reason; if it is justified, there is no room for discussion of abusive practices⁴⁹.

Thus, this scenario materializes when the dominant enterprise imposes unjustified conditions on the enterprise that is economically dependent on it. If the latter insists on refusing to comply with these unjustified commercial conditions, the dominant institution can abuse the economic dependence of the other institution by arbitrarily terminating the commercial relationship between them⁵⁰.

III.2.1.2.Refusal to sell or provide services without a legitimate reason

It is assumed that any good or service offered to the public in the market is available to everyone without discrimination. However, there are Behaviors of companies with economic power in the market towards their dependent entities under a contractual agreement, where they refuse to sell goods and services for illegitimate reasons. Their Behavior may be explicit when they are unable to meet demand or provide services, which affects supply, distribution and consequently financial returns. Alternatively, it may be implicit and threatening when they deny access and impose conditions on sales and prices without legitimate justification⁵¹.

It is clear that it is a legitimate right for a commercial organization to determine its policy with regard to the provision of services and the sale of goods. However, this right cannot be characterized as abusive if it is exploited, especially if it restricts customers' choices with regard to their needs. Therefore, companies must adhere to a sales ethic that prohibits refusing to sell or provide services without legitimate justification in order to ensure fairness and equity in commercial transactions.

III.2.1.3.Conditional or tied sales

This type of practice requires financing arrangements that allow the institution with economic power in the market to impose abusive conditions on a client institution to accept less popular goods that may be stagnating or nearing the end of their shelf-life, thereby forcing it to purchase them in exchange for the release of other widely demanded products. In addition, this type can include conditions that limit the quantities of products to a fixed ceiling

⁴⁷- Yvan Auguet, *Law of Competition*, Ellipses Edition, Paris, 2002, p. 92.

⁴⁸- Sami Ben Hamla, *Competition Law: A Study in Light of Algerian Legislation*, according to the latest amendments and compared to modern competition legislations, Numidia for Printing, Publishing, and Distribution, Constantine, 2016, p. 74.

⁴⁹- Bouhalais Ilham, *op. cit.*, pp. 231-232.

⁵⁰- Mazghich Abir, *op. cit.*, p. 169.

⁵¹- Yvan Auguet, *op. cit.*, pp. 111, 112.

that cannot be exceeded, especially when there is a shortage of these goods in the market, taking advantage of this situation to raise prices and make excessive profits⁵².

In addition to these cases, there are conditional sales linked to resale at a minimum or fixed price, where the supplying institution imposes certain prices, taking advantage of the weakness of the dependent institution due to the lack of alternatives. This forces the dependent institution to accept sales at prices lower than market conditions based on supply and demand. The elements of coercion and pressure are particularly evident when a penalty clause for breaching the price condition is included⁵³.

III.2.2. Abusive, exploitative and enticing Behavior

Abusive exploitative attractive Behavior in situations of economic dependence can take several forms, the most important of which are reward sales, discriminatory sales and loss-leading sales.

III.2.2.1. Reward sales

The Reward Sales strategy is an effective tool used by companies to encourage employees to achieve specific sales goals by offering additional financial incentives as motivation to increase sales volume. It is a pattern used by merchants to attract buyers by giving them gifts or prizes when they purchase certain products or services. This marketing approach aims to increase sales and customer loyalty, as stipulated in Article 16 of Law 04-02 on the rules applicable to commercial practices⁵⁴.

The aim of prohibiting sales with rewards is to prevent consumers from choosing a particular product or service based solely on the trivial desire to receive a reward, without taking into account quality and price standards. This could lead consumers to purchase items that are unnecessary or not useful. The main reason for this prohibition is therefore to protect the interests of consumers against the risk of being induced to increase their purchases in the hope of obtaining a reward, which the seller recovers by increasing the price of the goods sold or by reducing their quality⁵⁵.

Although this method may seem attractive to consumers at first, there are risks they need to consider, such as buying unwanted products just to receive rewards or incurring increased costs that are ultimately borne by the consumer. Consumers should therefore be cautious of these marketing techniques and carefully make purchasing decisions based on their real needs rather than being lured by gifts.

III.2.2.2. Discriminatory sales

Discriminatory sales are defined as the practice of an economic agent selling two products identical in terms of quality, grade, type or similar services at different discriminatory prices. The legal provision on the crime of discriminatory sales is broad and allows for a wide interpretation. It can therefore be said that the legal prohibition covers all sales contracts concluded by institutions, regardless of the sector in which they operate, whether in production or distribution, and whether the practice is regular or temporary⁵⁶.

⁵²- Samihah Allal, Sales Crimes in Competition and Commercial Practices Laws, Master's Thesis, University of Constantine, 2005, p. 21.

⁵³- Louis VOGEL, *Treatise on Commercial Law*, 18th ed., LGDJ, Paris, 2003, p. 660.

⁵⁴- Law No. 04-02, dated June 23, 2004, specifying the rules applicable to commercial practices, Algerian Official Gazette, No. 41, dated June 27, 2004.

⁵⁵- Khadiji Ahmed, "Rules of Commercial Practices in Algerian Law", PhD thesis in Private Law, University of Batna, 2016, p. 86.

⁵⁶- Jwad afaf "Protection of Competition from the Abusive Exploitation of Economic Dependence", PhD thesis, Faculty of Law, University of Constantine, 2016/2017, p. 44.

Discriminatory sales can also be understood as those where the dominant institution grants a set of advantages to one of its customers with whom it has a commercial relationship, which are not granted to other institutions. This means that special conditions are applied to this customer, which differ from the general conditions of sale and allow this particular customer to be in a better position than other customers and to improve its market position⁵⁷.

This form of discrimination is dealt with in Article 18 of the aforementioned law, which states that “When an economic operator exerts influence over another or obtains advantages in terms of prices, terms or conditions of sale that cannot be justified in transactions based on transparency and integrity”.

Price discrimination is a competitive pricing tactic used by companies and sellers that involves implementing different pricing structures for the same product or service in different customer segments. The practice is often used by incumbents to take advantage of discrepancies in consumer demand and supply.

A company’s profitability can be increased through the practice of extracting the maximum price that each customer is willing to pay, thereby eliminating consumer surplus. However, accurately setting prices for individual customers is often challenging. Successful implementation of price discrimination requires a deep understanding of the customer base and its needs, as well as familiarity with different price discrimination models.

III.2.2.3. loss-making sales

Price is defined as the monetary value required to acquire a particular good or service, determined in the marketplace based on supply, demand and various other factors. It serves as a strong motivating factor that influences the Behavior of both consumers and producers, guiding their decisions regarding production, consumption and investment. Consequently, it contributes to the equilibrium between supply and demand in the market and to economic stability⁵⁸.

Loss-leading sales are described as a situation in which the seller offers a product at a price that deviates from the costs associated with production, distribution and promotion. The intention behind these goods is primarily to create a specific ethical or natural image that consumers adopt for personal use, except in cases where the transaction is sanctioned as an exception by commercial practice laws. This Behavior is seen as a strategy to drive companies out of the market or to undermine potential competitors, regardless of the underlying motives of the seller⁵⁹. Thus, loss-leading sales are a form of abuse that can lead to unhealthy competition, aggressive sales practices and a reduction in value added for consumers.

IV. Conclusion

The prohibition of abusive practices in situations of economic dependence is primarily aimed at protecting free competition on the market and thus at safeguarding the entire economic system, in particular the market economy. This is because abuse in the exploitation of economic dependence can only be talked about in countries that have adopted a market economy where competition has its place.

This study has led us to a number of conclusions, which can be summarized as follows:

⁵⁷- Laarour Badra. "Mechanisms for Combating Commercial Practices Crimes in Algerian Legislation," Ph.D. thesis, Faculty of Law and Political Science, Mohamed Khider University of Biskra, 2013/2014, p. 107.

⁵⁸- Khadji Ahmed, "Rules of Commercial Practices in Algerian Law", previous reference, p. 11.

⁵⁹- Mkhancha Amna, previous reference, p. 178.

- Certain conditions must be met in order to assert the existence of abuse in situations of economic dependence. The first condition is the need for a situation of economic dependence, and the second is the need for abusive exploitation of this economic dependence.

- The Algerian legislator has not clarified the forms of abusive exploitation of economic dependence in Ordinance No. 03-03 on competition, and has imposed penalties that do not correspond to the severity of these anti-competitive practices.

Recommendations

The traditional concept of abuse is not sufficient to protect against the misuse of economic power. Therefore, the protection of enterprises against the abuse of economic dependence should be established through a specific provision in competition law.

It is advisable to amend the penalties prescribed for those who engage in anti-competitive practices and to increase them in line with the seriousness of these practices, while ensuring the protection of the weaker party in the commercial relationship.

It is also crucial to restore the Competition Council to its primary role as a market regulator. This can be achieved by expanding its powers and competences to enable it to effectively monitor anti-competitive practices.

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III- Conclusion:

The conclusion in the same format It contains the synthesis of the ideas that answer the question in the introduction, followed by the proposals made from this study.

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