An Evaluation of the Performance of Competition Agencies: The Case of Maghreb Countries.

A Thesis Submitted to Brunel University for the award of the degree of Doctor of Philosophy

By

Souheyr Rim Hamacha

College of Business, Arts and Social Sciences

Department of Politics, History and the Brunel Law School

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Abstract

A competition agency represents an independent regulatory institution, which takes the form of an administrative body. A competition authority enables the development of markets and displays to market operators and new players a dedication to the principles of free markets and fair competition. In other words, a competition authority should intervene in a timely manner to correct any anti-competitive behaviour and implement the necessary remedies; it should be equipped with an adequate knowledge of the market in order to make its decisions. Moreover, its involvement should be predictable, that is, it should have a positive influence on markets. Furthermore, a competition agency should continuously evaluate its role as public institution and law enforcer by following the economic and legal evolution of the jurisdiction in which it operates.

Until recently, the debate has predominantly revolved around the substance of competition law. However, in recent years, the evaluation of the performance of competition agencies has been embraced by numerous countries, including developing ones. This is because most emerging countries around the world have progressively been opening their domestic markets to competition, which led to giving more power to competition agencies to monitor markets. As this perspective has not been explored in the context of Maghreb countries, which also represent developing economies, this research endeavours to do so. Therefore, the aim of this research is to analyse the extent to which the performance of competition agencies in Maghreb countries influences the enforcement of competition law.

Declaration

I declare that the work presented in this thesis is my own; any information originating from the other works have been quoted and referenced.

Souheyr Rim Hamacha

Acknowledgments and Dedication

Khalil Gibran once said, "You have been told that even like a chain, you are as weak as your weakest link. This is but half the truth; you are also as strong as your strongest link, to judge you by your failure is to cast blame upon the seasons for their inconsistency."[1] As a self-funded international students, this PhD has been a learning journey which taught me the meaning of perseverance.

This thesis would have not been possible without the support of some outstanding individuals. First, I would like to express my gratitude to Brunel University academic and administrative staff members including, my supervisor, Dr Jurgita Malinauskaite, Miss Donna White and Mr Jose Sanchez and his team for their support and assistance. Second, I would like to express my greatest appreciation to my brother, Faiz who has supported me throughout this process; I will forever be thankful for having you. I would also like to thank my sister Ilhem and my parents who have encouraged me to persevere through hardship. Finally, I would like to thank my wonderful friends and colleagues at Brunel University for their support and kindness.

I would like to dedicate this thesis to my nieces and nephews.

[1] Khalil Gibran, 'The Prophet'.

List of Acronyms

ACM: Authority for Consumers and Markets

AMU: The Maghreb Union

ARPT: Agency for the Regulation of Postal and Telecommunication

CMA: Competition and Market Authority

DCCA: Danish Consumer and Competition Authority

DCFTA: Deep and Comprehensive Free Trade Area

DG: Directorate General

DOJ: Department of Justice

ECN: European Competition Network

EFTA: European Free Trade Association

ENP: European Neighbourhood Policy

EU: European Union

EURO MED: The Euro Mediterranean

FTC: Federal Trade Commission

GAFTA: Greater Arab Free Trade Area

GATT: General Agreement on Tariffs and Trade

GDI: Gross Domestic Income

GDP: Gross Domestic Product

ICN: International Competition Network

MENA: Middle East and North Africa

NART: National Agency for the Regulation of Telecommunications

NIE: New Institutional Economics

NIT: National Instance for the Telecommunication sector

Oftel: Office of Telecommunications

UfM: Union for the Mediterranean

UK: United Kingdom

UNCTAD: United Nations Conference on Trade and Development

WTO: World Trade Organisation

Table of Cases

- Decision n°14/SP/PC/ARPT of the 22/04/2007 regarding the regulation of prices Orascom Telecom Algeria.
- Case 13/77 GB-Inno-BM v. ATAB [1997] ECR 185.
- Case T-5/02 Tetra Laval v Commission [2002] ECR 4381.
- Case T-342/99 Airtours v Commission [2002] ECR 2585.
- Case C-280/08 P - Deutsche Telekom v Commission [2010] ECR I09555.

Table of Legislation

EU Legislation

- Association Agreement (Algeria-European Union) (adopted April 2002, entered into force December 2005) OJ L265 1.
- Association Agreement (European Union-Tunisia) (adopted 17 July 1995, entered into force 1 March 1998)
- Association Agreement (Morocco-European Union) (adopted 26 February 1996, entered into force 1 March 2000) OJ L70 2.
- Commission Notice on Cooperation within the Network of Competition Authorities [2004] OJ C 101/43 para 1.
- Commission Regulation (EU) No 651/2014 on Declaring Certain Categories of Aid Compatible with the Internal Market in Application of Articles 107 and 108 of the Treaty Text with EEA relevance [2014] OJ L187/ 1.
- Communication (EU) Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45/7.
- Council Regulation on the control of concentrations between undertakings [2008] C265/1.
- Decision (EU) 764/2008 on Fixing the Definitive Amount of the Periodic Penalty Payment Imposed on Microsoft Corporation **[**2008] OJ C 166/20.
- Directive (EU) No 104/2014 of the European Parliament and of the Council on Certain Rules Governing Actions for Damages Under National Law for Infringements

of the Competition Law Provisions of the Member States and of the European Union Text with EEA relevance [2014] OJ L 349/1.

- Directive (EU) No 2002/19 of the European Parliament and of the Council of 7 March 2002 on Access to and Interconnection of Electronic Communications Networks and Associated Facilities [2002] OJ L 108/7.
- Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings [2004] OJ C31/1.
- Notice (EU) on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 101 and 102 TFEU [2016] OJ C 127/13.
- Recommendation (EU) on Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States Concerning Violations of Rights Granted Under Union Law [2013] OJ L 201/60.
- Regulation (EU) No 1/2003 on the Implementation of the Rules on Competition Law down in Articles 81 and 82 of the Treaty [2002] OJ L 1/1.
- Regulation (EU) No 139/2004 on the Control of Concentrations between Undertakings [2004**]** OJ L24/1.

Foreign Legislation

Algeria

- Law n° 31-96 relating to the creation and functioning of the fund, modified and complemented by Law n° 05-16.
- Law n° 06-99 regarding freedom of pricing and competition, amended and completed by Law n° 104-12 relating to freedom of prices and competition.
- Law n° 02-03 in relation to the regulation of post and telecommunications.
- Law n° 08-12 in relation to the Competition Council.
- Law n° 89-12 of the 5 July 1989 in relation to pricing.
- Ordinance n° 01-03 in relation to investments.

Morocco

- Law n° 1-74-467 of the 11 November 1974.
- Law n° 31-05 modifying and completing Law 17-97 in relation to the protection of industrial property.
- Law n° 104-12 in relation to freedom of prices and competition.
- Law n° 20-13 in relation to the Competition Council and its competences.
- Ordinance n°95-06 of the 25 January 1995 concerning competition.
- Decree n°1-11-91 (29 July 2011) promulgating the constitution.

Tunisia

- Law n° 2005-60 modifying and completing law n° 1991-64 in relation to competition and pricing.
- Law n° 2015-36 in relation to competition and pricing.
- Ordinance n° 03-03 of 19 July 2003 relating to competition modified and completed by Law n° 08-12 in Arts 06 and 10 regarding practices that restrict competition.

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Chapter One: Introduction

1. Research Background

The Organisation for Economic Cooperation and Development (OECD) secretariat observed that, 'the basic objective of competition law is to maintain and encourage the process of competition in order to promote an efficient use of resources while protecting the freedom of economic actions and various market participants'.[2] Therefore, handing over the task of competition law to a specialised agency that has the capacity to understand the complexity of competition is the next coherent move after having enacted competition provisions in a legislative form.[3]

A competition agency represents an independent regulatory institution, which takes the form of an administrative body. A competition authority enables the development of markets and displays to market operators and new players a dedication to the principles of free markets and fair competition.[4] In other words, a competition authority should intervene in a timely manner to correct any anti-competitive behaviour and implement the necessary remedies; it should be equipped with an adequate knowledge of the market in order to make its decisions. Moreover, its involvement should be predictable, that is, it should have a positive influence on markets.[5] Furthermore, a competition agency should continuously evaluate its role as public institution and law enforcer by following the economic and legal evolution of the jurisdiction in which it operates.

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[2] Organisation for Economic-Cooperation and Development, 'Global Forum on Competition: The Objectives of Competition Law and Policy' (*OECD*, 2003) CCNM/GF/COMP, 1 < www.oecd.org/competition/globalforum/GlobalForum-February2003.pdf> accessed 11 September 2015.

[3] Philip Lowe, 'The Design of Competition Policy Institutions for the 21st Century: the Experience of the European Commission and DG Competition' [2008] 3 Competition Policy Newsletter 1, 5< http://ec.europa.eu/competition/publications/cpn/2008_3_1.pdf> accessed 17 October 2016.

[4] Imelda Maher, 'The Institutional Structure of Competition Law' in Michael W Dowdle, John Gillespie and Imelda Maher (eds), *Asian Capitalism and the Regulation of Competition: Towards a Regulatory Geography of Competition Law* (Cambridge University Press 2013) 61.

[5] Philip Lowe, 'The Design of Competition Policy Institutions for the 21st Century: the Experience of the European Commission and DG Competition' 5 note 3 < http://ec.europa.eu/competition/publications/cpn/2008_3_1.pdf> accessed 17 October 2016.

It is argued that since competition law was first enacted, it featured a continuing search for 'optimal statutory commands, institutional designs and operational techniques'.[6] Therefore, the quality of supporting institutions influences the efficiency of its activities.[7] This is to say that the effectiveness of a competition authority has an impact on the efficiency of substantive laws, prospective legislations and sector reforms. Therefore, it is important to evaluate the performance of a competition authority as it helps the agency identify its strength and weaknesses and acquire a better understanding on how to improve its internal organisation and procedures. In addition, it enhances the confidence of the public in the way by which a competition agency conducts its functions and reinforces its legitimacy as a public administration. Furthermore, performance assessment reflects the importance of demonstrating the significance of competition law to a larger public.[8] However, some competition agencies may be reluctant to participate to an assessment, because the evaluation can shed light on some malfunctions.[9]

Until recently, the debate has predominantly revolved around the substance of competition law. However, in recent years, the evaluation of the performance of competition agencies has been embraced by numerous countries, including developing ones. This is because; most emerging countries around the world have progressively been opening their domestic markets to competition, which led to giving more power to competition agencies to monitor markets. As this perspective has not been explored in the context of Maghreb countries, which also represent developing economies, this research endeavours to do so.

Therefore, the aim of this research is to analyse the extent to which the performance of competition agencies in Maghreb countries[10] influences the enforcement of competition law. By doing so, this research investigates the similarities and differences of competition

[6] William E Kovacic, 'Using Ex Post Evaluations to Improve the Performance of Competition Policy Authorities' [2006] 31 Journal of Corporation Law 503, 505.

[7] Eleanor Fox and Michael J Trebilock, *The Design of Competition Law Institutions: Global Norms, Local Choices* (Oxford University Press 2013) 9.

[8] William E Kovacic, 'Using Ex Post Evaluations to Improve the Performance of Competition Policy Authorities' note 6.

[9] United Nations Conference on Trade and Development (UNCTAD), 'Criteria for Evaluating the Effectiveness of Competition Authorities' (Intergovernmental Group of Experts on Competition Law and Policy, Geneva, 17-19 July 2007) UN Doc TD/B/COM.2/CLP/59, 6 < http://unctad.org/en/Docs/c2clpd59_en.pdf > accessed 19 December 2015.

[10] Maghreb countries are Morocco, Algeria and Tunisia. These jurisdictions will be analysed in chapter 4.

authorities in Morocco, Algeria and Tunisia in order to unveil the strengths and weaknesses of each authority and uncover areas that require improvements.

Performance evaluation takes the following forms: First, periodic comprehensive review, this form of evaluation is concerned with assessing the characteristics of public enforcement institutions and enforcement results.[11] Second, *ex post* evaluation, wherein past policies and the value of current administrative procedures are assessed.[12] This research relies on the techniques used in the comprehensive review method. This is because a comprehensive review presents a holistic evaluation of a competition institution. In this context, this research evaluates the institutional design, governance and relationship with sector regulator of competition agencies in Morocco, Algeria and Tunisia.

There is no consensus on who should conduct a performance assessment. The following represents the main players that usually evaluate the performance of competition agencies: 1) Competition agencies 2) Auditors 3) International organisations and researchers.[13]

An evaluation conducted by a competition authority is called self-assessment. The latter represents a valuable tool for an agency in order to reveal its shortcomings. Nonetheless, it is important to acknowledge that self-assessments are costly in terms of financial resources and the use of expert staff members, especially in the case of developing countries where there is a shortage of experts and financials means. Thus, performance evaluation may not represent a priority for these agencies.[14] However, evaluating the quality of public regulatory agencies should not be considered an option that depends on the discretion of the agency. It should become a norm and form part of its internal process.

In regards to external auditing, other government agencies or private firms are legally designated to audit competition authorities. Because of their special auditing status, auditors are granted significant access to internal records and therefore are able to evaluate the state of

[11] This sort of evaluation should take place every ten years of the creation of the institution and every five years after the competition agency has started expanding its activities.

[12] William E Kovacic,'Achieving Better Practices in the Design of Competition Policy Institutions' (Seoul Competition Forum 20 April 2004) 5 note 6.

[13] Researchers can be hired as external consultants. International organisations are utilised in the context of a technical assistance programme.

[14] UNCTAD, 'Criteria for Evaluating the Effectiveness of Competition Authorities' (Intergovernmental Group of Experts on Competition Law and Policy, Geneva, 17-19 July 2007) UN Doc TD/B/COM.2/CLP/59, 5 note 9< http://unctad.org/en/Docs/c2clpd59_en.pdf > accessed 19 December 2015.

a competition agency. However, auditing is often limited to a particular area such as the financial state of the agency. Furthermore, some experts argue that critical results cannot be obtained from a performance conducted by external sources. According to this view, an efficient evaluation must be from within, because a competition agency often represents the most reliable source of information regarding its strengths and weaknesses.[15] Nonetheless, a performance assessment conducted by outsiders such as international organisations and researchers brings an in depth perspective on the functioning of a competition agency. Assessments directed by international organisations provide practical advice because they consult with experts such as academics, practitioners and consumers' protections associations. Furthermore, evaluations conducted by researchers are regarded as offering constructive analysis on the current state of a competition agency and the direction that it should pursue.[16]

2. Research Aims and Question

The aim of this research is to investigate the extent to which the performance of competition agencies influences the enforcement of competition law in Maghreb countries. This research uses the comprehensive review technique to assess the effectiveness of competition agencies. This method examines the characteristics of an agency in terms of institutional design and governance in order to understand the enforcement outcome, which results from such choices. As the performance of competition agencies is also linked to its relationship with sector regulators. Therefore, this research includes an additional criterion, which is the level of cooperation between competition agencies and sector regulators. Therefore, this research aims to evaluate the institutional design and governance of competition agencies in Morocco, Algeria and Tunisia. This research also includes an assessment of the relationship with sector regulators because of its impact on enforcement outcomes.

[15] William E Kovacic, 'Rating the Competition Agencies: What Constitutes Good Performance' (2009) 16(4) George Mason Law Review 903, 514.

[16] It should be noted that a competition agency might collaborate to a certain degree. UNCTAD, 'Criteria for Evaluating the Effectiveness of Competition Authorities' 6-7 note 09 < http://unctad.org/en/Docs/c2clpd59_en.pdf > accessed 19 December 2015. The Global Competition Review has been publishing an annual ranking of competition agencies, Global Competition Review, 'GCR Rating' (Global Competition Review) <http://globalcompetitionreview.com/edition/1000401/rating-enforcement-2016> accessed 21 December 2015.

First, evaluating the institutional design aims to determine the extent to which the leadership, regulatory and enforcement structures selected by Maghreb countries represent an adequate choice for the requirements of these markets and influence the performance of these agencies in terms of enforcement outcome.

Second, as governance has a significant impact on the effectiveness of public institutions. Thus, investigating governance represents an important factor to assess whether Maghreb competition agencies meet the standard requirements in terms of good governance.

Third, due to the increasing promotion of competition rules in regulated markets, national competition authorities and sector regulators are both in charge of ensuring compliance with such rules. Consequently, it is important to investigate this relationship and identify the level of cooperation between sectoral and competition agencies, especially, in Maghreb countries.

Moreover, Maghreb countries have been discussing the idea of establishing a competition regime at a regional level in order to help the performance of their national competition agencies. Therefore, this research explores the benefits and drawbacks of regional competition agreements. Because of the commercial and historical links with the EU, this research assesses the performance of the EU DG Competition Commission to determine whether having a regional competition agency modelled on the EU, constitutes a suitable option for Maghreb countries.

Overall, this research investigates the level of similarity and difference in the institutional design and governance of competition authorities in Morocco, Algeria and Tunisia in order to unveil the strengths and weaknesses of each authority and uncover areas that require improvements.

This research aims to address the following question:

- To what extent does the performance of competition authorities in Maghreb countries influence the enforcement of competition rules?

There are multiple objectives behind this study:

- First, this research examines the competition law regimes in Maghreb countries.
- Second, this research seeks to investigate the institutional designs and governance of competition authorities in Morocco, Algeria and Tunisia in order to assess their effectiveness.

- Third, this research explores the extent to which the relationship between competition authorities and sector regulators influences the enforcement of competition law.
- Fourth, this research assesses the effects that should be considered while implementing a regional competition regime in Maghreb countries.

3. Research Significance and Limitations

As part of the obligations stated in their statutory mandates, competition agencies in Morocco, Algeria and Tunisia publish self-assessment reviews within their annual reports. In these sections, those competition agencies pinpoint their objectives and functions and the extent to which they fulfilled their responsibilities. However, this technique is not considered sufficient as it only assesses whether a competition agency achieved the requirements of its mandate, it does not offer a profound evaluation of its performances.[17]

Although Maghreb countries participate to voluntary peer reviews, which allow comparing experiences with other jurisdictions, this technique maybe considered as imposing foreign practices and implies an obligation to convergence to international best practices, which these competition agencies may not yet have the capacity to achieve. In addition, this method has been criticised for offering a one size fits all solution and not providing an in-depth analysis of the real performance of these agencies.[18]

Therefore, the novelty of this research resides in the fact that assessing the effectiveness of these agencies in Maghreb countries has not been the subject of in depth analysis by outsiders. This thesis sheds light on the institutional obstacles that hampers the performance of competition authorities and consequently impedes the effective enforcement of competition law. In addition, this research is significant because of the lack of literature on the subject of competition law and institutions in this region. Moreover, Maghreb countries remain largely unexplored from the perspective of competition law. Furthermore, the researcher studied law in one of these countries, namely, Algeria, which offers familiarity with legal issues in these countries.

[17] UNCTAD, 'Criteria for Evaluating the Effectiveness of Competition Authorities' UN Doc TD/B/COM.2/CLP/59, 8 note 09 < http://unctad.org/en/Docs/c2clpd59_en.pdf> accessed 25 December 2016.

[18] Ibid 5.

Morocco, Algeria and Tunisia share geographical proximity in addition to common cultural, linguistic and historic aspects, which work in favour of the comparative methods. In addition, the researcher comes from this region and is therefore familiar with the legal and economic systems in place.

It is important to note that this research faces limitations. The first restriction has been access to information. This is due to the protectionist nature of Maghreb jurisdictions. Although since the beginning of this research, a number of competition authorities and regulatory bodies have improved their presence on modern communication platforms. A limitation on the number of available resources has had a restrictive effect on this work. The second restriction resides in the impossibility of conducting field research in order to provide the viewpoint of representatives of competition authorities, sector regulators and other professionals concerned with competition issues. Thirdly, because of time constraint, it has not been possible to undertake surveys to provide a practical approach on the benefits of the proposed recommendations. Nevertheless, the aforementioned factors do not diminish the value of this research.

3.1. Research Scope

This research explores the jurisdictions of three countries, namely, Morocco, Algeria and Tunisia. As it will be demonstrated in this research, these countries share similarities in their legal systems in addition to having resemblances in terms of economic prospects. Consequently, exploring the performance of competition agencies in these jurisdictions represents a step forward in addressing competition issues faced by these countries. Additionally, these countries aim to attain EU standards in terms of competition law. Therefore, the EU model is discussed in the context of legal transplant and supranational authority. Moreover, Libya was excluded from this research because it shares fewer features with these countries. Besides, Morocco, Algeria and Tunisia have expressed their desire to create a regional market within the Maghreb region whereas Libya has been oriented towards the Sub-Saharan common market.

4. Methodology

This research uses a comprehensive review to assess the performance of competition agencies in Maghreb countries as the main objective is to analyse the institutional characteristics of each of these agencies. Consequently, this research utilises combined methodologies. First, critical analysis; this methodology is utilised to reflect on the origin and status of competition law in Morocco, Algeria and Tunisia. In addition, this research uses critical analysis to assess the interplay between sector regulators and competition authorities. Furthermore, critical analysis is also used to evaluate the idea of having a supranational competition regime in the Maghreb region.

Second, the input and output approach. This approach is usually employed to determine the quality of public institutions, it utilises a set of indicators to measure the effectiveness of an agency. This approach has been utilised in numerous research and studies conducted by international organisations such as the World Bank,[19] the United Nations[20] and the OECD.[21] Third, this research uses comparative law to identify similarities and differences among the performances of competition agencies in Morocco, Algeria and Tunisia in order to determine the strengths and weaknesses of these institutions and assess the extent to which each competition agency attempts to improve its effectiveness.

It is important to note that the methodologies used will be explained in subsequent sections. The rationale for employing these approaches to assess the performance of competition agencies in Maghreb countries is due to the interdisciplinary aspect of this research. Moreover, because of the evolving nature of regulations, additional elements were also analysed in this research including, historical, legal and economic factors that shaped the current competition law regimes in Maghreb countries as well as the institutions in charge of applying them. Furthermore, it is important to acknowledge that choosing an adequate

[19] Examples of publications include, World Bank, 'Reforming Public Institutions and Strengthening Governance: A World Bank Strategy' (World Bank, 2002) < http://www1.worldbank.org/publicsector/StrategyUpdate1.pdf> accessed 26 December 2016.

[20] United Nations Department for Economic and Social Affairs, 'Public Governance Indicators: A Literature Review' (2007) UN Doc ST/ESA/PAD/SER.E/100 < https://publicadministration.un.org/publications/content/PDFs/E-Library%20Archives/2007%20Public%20Governance%20Indicators_a%20Literature%20Review.pdf> accessed 26 December 2016.

[21] OECD peer reviews constitute a good example of studies that assess competition agency from an institutional perspective.

methodology represents an essential part of research; this is because the value of any research is determined by its validity. Similarly, selecting the elements that form the methodology affects the legitimacy of the research, as every methodology comprises strength and weaknesses.

The strength of this research and the selected methodologies is defined by the fact that assessing the effectiveness of public agencies in general and competition authorities in particular represents a valuable tool to help isolate the core issues faced by these agencies and establish norms and rules that should render them less prone to errors and fix any serious malfunctions.[22] It also supports these agencies in learning from one another experiences as they share reasonably similar legal and economic systems. Furthermore, as mentioned in this work, Morocco, Algeria and Tunisia are classified as developing countries; therefore, a further strength is that the findings resulting from using these particular methodologies in this research can be used as a benchmark for other developing countries.

The weakness of this research is that it relies solely on public data. Information were collected from annual reports, public conferences, workshops, renowned national newspapers and legislations, which may cast doubt over the veracity of certain information. It should also be noted that, the validity of these data could not be verified against the opinions of representatives of the competition agencies in question. However, conducting interviews with agencies' representatives does not signify that the opinions provided would have reflected the true state of competition agencies in Maghreb countries. This is because, in a number of countries, including Morocco, Algeria and Tunisia, confidentiality represents a sensitive issue. Thus, the opinions of agencies' representatives are often limited to official statements, which do not differ in their content from information found in public data. Therefore, the researcher believes that conducting empirical research would have not significantly changed the outcome of this research. Furthermore, this research was conducted by an outsider and independently from any interests. Consequently, this research can be considered as providing more objectivity on the state of competition agencies in Maghreb countries. The next sections aim to explain the methodologies in question.

4.1. Critical Analysis

[22] William E Kovacic, 'Using Ex Post Evaluations to Improve the Performance of Competition Policy Authorities'.

Critical theory refers to a research practice that relies on explicative interpretations and comparative estimations. Critical theory is believed to be an open and innovative discipline because it incorporates various methodological approaches in addition to accepting empirical techniques, as Harvey suggests 'Critical social research is clearly not constrained by its data collection techniques'. [23]

The rationale behind the openness of critical theory is to support the use of non-empirical techniques in order to enhance argumentation, as the aim of critical analysis is to conceptualise formal logic, which can then organise an argument. Consequently, an identifying feature of critical analysis is that choices that are made to match theories are a continuous evolving process, which must be connected to context; it is not related to technicality and therefore is not linked to the notion of scientific logic.[24]

The most relevant model of critical analysis began with the classical sociological analysis. The most famous theorists recognised for putting the foundation of this theory are Karl Marx, Max Weber and Emile Durkheim. Marx has been considered as offering a natural 'science of society' or 'science of history' in his attempt to explain societal evolution. On the contrary, Weber tried not to explore the social procedures in their historical settings; he stressed the evolving nature of sociological concepts. Durkheim is regarded as the founder of empirical methods because he perceived social evidence as facts. Under his interpretation of critical theory, critical analysis evolved to include other factors such as social order.[25]

Later, the Frankfurt School helped developed the notion of critical theory which suggested that a substitute concept of social sciences should be introduced, an approach which would understand the concept of society as a historical entirety rather than a collection of 'mechanical determinants'. In addition, experts from the Frankfurt School suggested that critical theory should evolve to contemplate the process of transformation of society instead of merely contemplating societal realities.[26] The Frankfurt School later developed from its tradition, which identified with Marxist theory to borrow from non-Marxist theories and

[23] Lee Harvey, *Critical Social Research* (Routledge 1990) 196.

[24] Raymond A Morrow and David D Brown, *Critical Theory and Methodology* (Sage Publications 1994) 226-227.

[25] Ibid 13.

[26] The leading theorist in the Frankfurt School were Max Horkheimer, Theodor Adorno and Herbert Marcuse.

attempted to explore cultural industries. The theory later flourished in different contexts and legal traditions.[27]

In the context of this research, critical theory is employed as explicative interpretation to understand the evolution of competition law in Maghreb societies wherein competition law developed from an optional choice for governments to becoming a necessity to regulate market behaviours. In addition, critical analysis is used as a comparative estimation of the similarities and differences between these markets. Moreover, this research uses critical analysis to understand the relationship between sector regulation and competition law. First, in its broad sense, then, in the context of Maghreb countries to demonstrate whether competition authorities and sector regulators work together to improve market functioning or if they are evolving in different directions. Moreover, critical analysis is used to explore the trouble waters of implementing a regional competition regime.

4.2. Input and Output Approach

Among the methodologies utilised to measure the quality of public institutions such as competition authorities are the input and output approach. In the context of this research, this approach is utilised to assess the performance of competition agencies in Morocco, Algeria and Tunisia as public regulatory agencies and enforcement authorities. The first form of measurement that is the input, aims to assess the condition of the agency's internal activities and the efforts that the agency puts to enhance its institutional design and governance, which represent important factors that influence the quality of an agency's work.

The second form, that is output, is concerned with assessing the commitments of the agency to communicate about competition law to the wider public. Therefore, the input and output perspective deals with establishing the extent to which an institution achieves its goals. It is also important to note that these techniques are interrelated as the inputs of the agency have a direct impact on the quality of its outputs.[28] According to Professor Kovacic, 'Good performance has two dimensions. One focuses on the output of initiatives-litigation and non-

[27] Raymond A Morrow and David D Brown, *Critical Theory and Methodology* 14-17 note 24.

[28] Michael W Nicholson, 'Antitrust Law Index for Empirical Analysis of International Competition Policy' (2008) 4(4) Journal of Competition Law and Economics 1009, 1015-1016.

litigation activities that improve economic performance. The second involves capital investments in long-term capability'.[29]

Moreover, the input and output approach utilises a number of indicators to determine the effectiveness of agencies. It is important to understand the role of indicators. The latter are utilised to organise information and determine the issues that hinder the progress of an agency. Indicators also aim to inform the agency on how to adjust its performance in order to achieve its intended objectives.[30]

For the purpose of this research, the input approach includes the following indicators: leadership structure, regulatory and enforcement powers, independence, transparency, accountability, availability of resources, strategic planning and prioritisation, whereas the output approach comprises the promotion of competition culture and advocacy. The rationale for selecting these specific indicators is to help identify good performance in Maghreb competition agencies and the areas that require improvement. The input and output method is utilised in chapter five, wherein these indicators are explored in more details and applied to measure the performance of competition agencies in Maghreb countries.

Furthermore, the aim of this research is to assess the performance of competition agencies in terms of impact on enforcement. Therefore, it is important to mention that in this context, enforcement is measured in terms of the number of cases handled by the competition agencies of each country starting from the year these agencies began to publish their cases online. Thus, the number of cases handled includes cases wherein a decision was published in addition to opinions. Nevertheless, it is worth noting that assessing the outcomes through this method can be pervasive because it may push an agency to neglect some aspects of its activities and concentrate only on the areas that improve enforcement.

4.3. The Comparative Approach

Comparative law aims to investigate the foundations and practices of legal systems in order to unveil their similarities or differences and provide an in-depth knowledge into a particular

[29] William E Kovacic, 'Rating the Competition Agencies: What Constitutes Good Performance' 924 note 15.

[30] Roberto Mosse and Leigh Ellen Sontheimer, 'Performance Monitoring Indicators Handbook' [1996] World Bank Technical Paper 334, 1-3.

area. In other words, comparative law seeks to present a comprehensive analysis of existing legal systems.[31] Experts classify comparative law into the following categories:

- Examination of similarities and differences between a local and foreign legal system;
- Investigation of a legal problem and the solutions applied by different legal systems;
- An analysis of the fundamental connection between different legal systems;
- A study that compares the phases of different legal systems;
- An assessment of the development of the law in different systems and period of time.[32]

Yves Chevrel claims that comparison is 'indispensable to the progress of knowledge'.[33] This is because it gathers numerous aspects of one or more subjects in order to analyse the level of resemblance and draw deductions that an individual assessment would have not permitted.[34] Professor Legrand argues that comparative legal studies are dedicated to learning about 'the other'. [35] According to him, assertion of differences is not a call for segregation, it is rather utilising a different perspective to build a relationship. Therefore, comparative law offers an attractive perspective for researchers, because it helps identify the value of other legal systems, it improves knowledge of one's own legal system; it also allows evaluating the system in place, enhancing existing standards and understanding how external social and political factors shape the law.[36]

Therefore, the rationale for employing comparative law in this research is to examine the similarities and differences in the institutional designs and governance of competition agencies in Morocco, Algeria and Tunisia in order to assess the performance of each

[31] Andrew Harding and Peter Layland, 'Comparative Law in Constitutional Context' in Esin Orucu and David Nelken (eds), *Comparative Law: A Handbook* (2nd edn, Routledge 2010) 314-317.

[32] Peter de Cruz, *Comparative Law in a Changing World* (3rd edn, Routledge Cavendish 2007) 5.

[33] Geoffrey Samuel, An *Introduction to Comparative Law Theory and Methods* (Hart Publishing 2014) 11.

[34] Ibid.

[35] David Nelken, 'Comparatists and Transferability', in Pierre Legrand and Roderick Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (Cambridge University Press 2003) 443.

[36] Andrew Harding and Peter Layland, 'Comparative Law in Constitutional Context' 318 note 31.

institution. This research also uses the comparative approach to investigate the approaches taken by each jurisdiction of Maghreb countries to improve their effectiveness. Moreover, the lessons learnt from one jurisdiction can be implemented into another one.

4.3.1. What to Compare?

Although the nature of comparative law is not the subject matter of this research, the simple questions of what constitutes comparative law have raised endless debates, while some experts regard it as a method or technique of study.[37] Others perceive comparative law as an independent scientific field.[38] Another group considers that the subject matter of the study determines the core purpose of comparative law. Additionally, the quest to improve legal systems is among the objectives of comparative legal studies because it offers the possibility to select a model, which has proven its effectiveness in finding solutions to problems. [39] It is worth to note that it is suggested that any comparative research must end with the description and start with the facts instead of a hypothesis. Nevertheless, explanation does not represent the ultimate point in a comparative study, the research will not be acceptable until all results are authenticated and validated.[40]

Additionally, comparative legal studies represent a complex area as it poses crucial methodological and epistemological concerns. Experts such as Professor Legrand suggest that any comparative legal studies must comprise a commitment to theory and interdisciplinarity.[41] One agrees with the view that any comparative study must contain elements of theory and interdisciplinarity, for that reason, this research analyses the

[37] Simone Glanert, 'Method?' in Pier Giuseppe Monateri (ed), *Methods of Comparative Law* (Edward Elgar 2012).

[38] Edward J Eberle, 'The Method and Role of Comparative Law' (2009) 8(3) Washington University Global Studies Law Review 451.

[39] Werner F Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (Cambridge University Press 2006) 68.

[40] Andrew Harding and Peter Layland, 'Comparative Law in Constitutional Context' 318 note 36.

[41] Pierre Legrand, 'How to Compare Now' (1996) 16(2) Legal Studies 232.

traditional theories that constitutes the discipline of competition law. This research also undertakes an interdisciplinary approach as it investigates institutions from an institutional perspective.

4.3.2. Functionalism, Harmonisation and Categorisation as Rationale of Comparative Studies

Moreover, some experts assert that functionalism is the methodological foundation of the law because it investigates the function of an institution.[42]According to this view, comparison is meaningful only when the legal institutions subject matter of the comparison are equivalent naturally or functionally. A comparison can take place between selected aspects of institutions or branches of two or more legal systems.[43] They claim that comparative law is said to be 'a comparison of comparable legal institutions or of the solutions to comparable legal problems in different systems'.[44] This research is in line with this reasoning as its compares institutions which have similar functions.

Furthermore, the question of harmonisation of laws has triggered numerous debates in comparative law. The definition of harmonisation defers. For instance, Goldring perceives harmonisation as a practice, in which 'the effects of a type of transaction in one legal system are brought as close as possible to the effects of similar transactions under the laws of other countries'.[45] David explains this concept as understanding the meaning of particular concepts according to specific types of promulgating rules and acknowledging certain 'authoritative sources'.[46]

While supporters of harmonisation consider that there is a common ground to comprehend laws, opponents of the unification process suggest that comparative law should value legal diversity as well as legal cultures. For example, Legrand claims that similar rules applied in different legal cultures do not lead to the same result. In other words, harmonisation does not always trigger unification of legal practises. Therefore, he advocates that lawyers 'must

[42] Geoffrey Samuel, 'Comparative law and its methodology' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (Routledge 2009).

[43] Peter de Cruz, *Comparative Law in a Changing World* 5.

[44] Konrad Zweigert and Hein Kotz, *An Introduction to Comparative Law* (3rd edn, OUP 1998) 34-44.

[45] John Goldring, 'Unification and Harmonisation of the Rules of Law' [1978] 9 Federal Law Review 284.

[46] René David, 'The Methods of Unification' (1968) 16 (1) The American Journal of Comparative Law 13, 15.

purposely privilege the identification of differences across the laws they compare, lest they fail to address singularity with authenticity'.[47] In the context of harmonisation, this research demonstrates that Maghreb countries have been attempting to implement a regional market wherein a common competition regime would be applied.

Finally, the notion of comparative law acknowledges the principle of categorisation, that is, if one compares legal systems, legal traditions or legal cultures. One must organise and identify them according to their characteristics.[48] Although there are divergent opinions on the core content of these features, Zweigert and Kotz summarise them as follow, 'historical background, ideology and mode of thought, institutions, and sources of law'.[49] This research follows this categorisation as it investigates the historical background of Maghreb countries and its impact on the legal systems in place, it explores the different mode of thought that inspired the different economic systems that were put in place since the independence of these countries, which included moving from a planned economy to the progressive opening of markets. Moreover, this research examines competition agencies as institutions and the different source of laws that shaped the modern competition law in Morocco, Algeria and Tunisia.

5. Research Structure

This thesis is divided into eight chapters. Chapter one explores the research background, research aims, question, significance and limitations. Additionally, this chapter investigates the methodologies utilised, which are the input and output approach, the critical analysis and the comparative approach.

Chapter two investigates the theoretical and conceptual frameworks which form the basis of this research. First, the theoretical framework examines the importance of institutions in the literature, more specifically, from the perspective of economics and management. Therefore, this chapter investigates the new institutional economics and the new institutionalism

[47] Mathias Siems, *Comparative Law* (Cambridge University Press 2014).

[48] Orucu and Nelken, *Comparative Law: A Handbook*.

[49] Zweigert and Kotz, *An Introduction to Comparative Law*.

theories. In addition, this chapter examines the organisational and contingency theories. Second, this chapter examines the concept of public regulatory agencies and the rationale for delegation, which in this case comprise the function of regulatory agencies as rationale and the contextual elements. In particular, this chapter investigates the function and contextual elements as rationale for delegating to regulatory agencies in Maghreb countries. Furthermore, this chapter explores the concept of competition law and the different schools that influenced the progress of competition law these are the classical and neoclassical, the Harvard and Chicago Schools and the European School. Finally, this chapter investigates which school influenced competition law in Maghreb countries.

Chapter three investigates the implementation of competition law in developing countries; this chapter is significant because it explores the challenges facing developing countries in terms of legal and policy framework and the extent of political and state interference. In addition, this chapter explores which provisions should be added in the legal provisions while drafting competition law for developing countries. Additionally, this chapter explores the goals of competition law in addition to examining whether developing countries have additional goals that they should focus on. Moreover, this chapter investigates the arguments in favour and against the implementation of competition law in developing countries. Furthermore, as most developing countries choose to transplants competition law models. Therefore, this chapter reviews the concept of legal transplants and the models available for developing countries.

Chapter four aims to explore the motivations for Maghreb countries to implement competition law. First, this chapter offers an overview of the Maghreb region. Second, this chapter demonstrates the rationale for Maghreb countries to sign trade agreements. Consequently, this chapter explores the two main agreements in the region, which are the Arab Maghreb Union and the Euro-Mediterranean partnership and association agreements. Third, this chapter investigates the nature of legal systems in Maghreb countries. Fourth, this chapter offers an overview of the reforms undertaken by each Maghreb countries in an effort to render their market more competitive. Fifth, this chapter examines the legal, economic and historical justifications for implementing the EU competition law model in Maghreb countries. Sixth, this chapter offers a background on the creation of the EU competition law model.

Chapter five assesses the institution design and governance of competition agencies in general and Maghreb countries in particular. First, this chapter explores what constitutes the institutional design. Consequently, this chapter explores the forms of leadership structure, regulatory and enforcement powers. Additionally, this chapter investigates the institutional design of competition agencies in Maghreb countries. Second, this chapter examines the indicators that constitute the standards by which governance should be investigated in public regulatory institutions including competition agencies. Therefore, this chapter explores the concept of independence, transparency, accountability, the availability of financial resources, strategic planning and prioritisation, the promotion of competition culture and advocacy in addition to the management of cases. Furthermore, this chapter assesses these standards in the context of competition authorities in Maghreb countries.

Chapter six explores the relationship between sector regulators and competition agencies as an additional standard to assess the performance of competition agencies. In order to understand this relationship, this chapter explores the concept of market regulation, which revolves around two perspectives of regulation, namely, government and self-regulation. Second, this chapter explores the theories of regulation, that is, whether the market aims to achieve public interest or is motivated by the interest of private groups. Third, this chapter explores sector regulation and competition law as legal means to regulate markets. It investigates the scope and forms of intervention. Moreover, this chapter examines the relationship between sector regulations from two perspectives. The first one explores sector regulation and competition law as complementary. The second one investigates competition law and sector regulation in divergence. Moreover, this chapter considers the concept of having competition law as sole regulatory measure. Fourth, this chapter explores the intersection between competition agencies, sector regulators, and the different forms of cooperation between those agencies. Fifth, this chapter investigates the forms of cooperation between competition agencies and sector regulators in Maghreb countries.

Chapter seven aims to investigate the idea of reinforcing regional integration through the implementation of a regional competition agreement between Maghreb countries. As national competition agencies in this region discussed this idea, it worth investigating the effects of having a regional competition agreement. In addition, the entity in charge of enforcing competition law at a supranational level in the EU represents a viable option for a supranational model in the Maghreb region. Therefore, this chapter aims to assess its institutional design and governance.

Finally, chapter eight provides conclusion and recommendations.

Chapter Two: Theoretical and Conceptual Frameworks

1. Introduction

This chapter aims to examine the theories and concepts over which this research will be based. Having a theoretical and conceptual framework represents an important step for this research because it determines its intent and direction. First, this chapter aims to investigate the new institutional economics and new institutionalism. These theories were selected because they are concerned with the importance of institutions in society. These theories were borrowed from two important but distinctive fields of social sciences. The reasoning behind this selection is that the field of competition law does not contain relevant theories that may help investigate the concept of institutions. Therefore, it was necessary to understand this concept from the viewpoint of economics and management. As this research relies mainly on exploring the institutional and governance structures of competition agencies and how one element can improve or decrease the performance of an agency. Consequently, this chapter reviews the organisational theory, particularly, the contingency theory.

Second, this chapter examines the concept of regulatory agencies. As competition agencies are classified under this category. Therefore, it is important to understand the rationale for delegation to regulatory agencies. The rationale for delegation takes two forms, functional and contextual. In the context of Maghreb countries, it is important to investigate which elements had a significant impact on delegation. Third, this chapter aims to examine the concept of competition law. This concept is significant for this research because it represents the purpose for which competition agencies exist. Additionally, this chapter aims to review the school of thoughts that influenced the evolution of the concept of competition law.

2. Theoretical Framework

Over the past years, a shift has been witnessed in the role of the state in society. The post war era in Western Europe and the fall of communism in many countries changed the role of the state from rebuilding economies to implementing policies that deal with interconnected political, economic and social issues. Consequently, regulatory agencies were established to assist in dealing with such problems. As a result, there was a need to analyse the growing role of institutions in society. Therefore, the concept of institutions started to be analysed under

different disciplines, significant contributions were made from the perspective of social sciences and economics. Especially, two theories proved influential in putting institutions at the heart of the regulatory debate. These are new institutional economics in the economics[50] field and new institutionalism in management studies.[51] These two theories did not flourish until the late 1980's because economic development, especially in developing countries including Maghreb did not consider the importance of institutional change.[52] As this research endorses the idea that effective institutions leads to better enforcement. Thus, these theories help strengthen the hypothesis of this research.

It should be noted that both theories comprise a number of different views, analytical approaches and perspectives. Therefore, these two theories are utilised in their general sense to provide a structure for this work and understand the angles that this research is employing. In the context of this research, new institutional economics is utilised in order to understand the importance of having regulatory institutions such as competition agencies in the market. Thus, new institutional economics is used from the perspective of market regulation whereas new institutionalism is employed to test the role of specific institutions in certain societies namely competition agencies in Maghreb countries and analyse what the outcome of their performance entails.

In addition, this research is concerned with investigating the organisational aspects of these agencies, and how their organisational choices influence enforcement outcomes in terms of case management. Therefore, this research also uses the organisational theory, in particular, the contingency form of organisation. This is because this research suggests that elements such as governance, institutional designs and external relationship with other agencies, which are in this case sector regulators, can improve or alter the effective functioning of competition agencies.

Consequently, the next sections aim to explain the foundation of each of the abovementioned theories. Furthermore, it is worth mentioning that seldom, one theory suffices to analyse and

[50] Fabrizio Gilardi, 'Delegation to Independent Regulatory Agencies: Insights from Rational Choice Institutionalism' (2002) 8(1) Swiss Political Sciences Review 93, 97.

[51] Dietmar Braun, 'State Intervention and Delegation to Independent Regulatory Agencies' (2002) 8(1) Swiss Political Sciences Review 93, 93. Giandomenico Majone, 'The Regulatory State and Its Legitimacy' (2002) 22(1) West European Politics 1, 1-24.

[52] Gwenaëlle Otando, 'Institutions, Governance and Economic Development: Problems, Reforms and Orientation of the Gabonese Economy' (2011) 14(2) Markets and Organisations Revue 129, 137-138.

explain questions that have a cross-disciplinary nature. Therefore, blending different theories aims to reinforce this research.

2.1. New Institutional Economics

Before reviewing the concept of new institutional economics, it is important to mention institutional economics as a background for the evolution of the new institutional economics theory. Institutional economics perceives the market as a complex mechanism, which interacts with rules, norms and organisations that organise it. The viewpoint of institutionalists is that the economy represents a system of powers and therefore, the economic role of a government is scrutinised.[53] One of the fundamental question in institutional economics is concerned with the existence and characteristics of an institution, the aim behind its creation and the changes it faces. Institutional theory aims to illustrate, rationalise, forecast the effects of rules, and explain how amending certain rules can improve or obstruct outcomes in the market. For that reason, institutional economics is believed to be part of positive science, one that contributes to policy-oriented knowledge and influences certain economic goals.[54]

However, institutional economics was criticised for being too abstract and relying on 'intellectual fiction'.[55] Therefore, economists introduced new institutional economics. The latter incorporates the importance of institutions into economics and focuses on their role for the sake of market analysis. In other words, new institutional economics aims to define the role and objectives of institutions and how they can improve the market. New institutional economics is described as the effective rules of a social game in which individuals and their organisations are the players.[56] Among the findings of new institutional economics is the

[53] Wolfgang Kasper, Manfred E Streit and Peter J Boettke, *Institutional Economics: Property, Competition, Policies* (Edward Elgar Publishing 2012) 37.

[54] Warren J Samuels, 'Institutional Economics' (1984) 15(3) The Journal of Economic Education 211, 212. Institutionalism was first initiated by Thorstein Veblen and John R Commons in the United States after the multiple industrial changes that took place in the country at the beginning of the twentieth century.

[55] Nathan L. Silverstein, 'an Appraisal of Institutional Economics: Comment' (1932) 22(2) The American Economic Review 268, 269. Douglas C North is considered as one of the most prominent contributors to NIE literature.

[56] Thráinn Eggertsson, 'Quick Guide to New Institutional Economics' (2013) 4(1) Journal of Comparative Economics 1. It is worth noting that modern institutional economics comes with the novel idea of having a multi-dimensional perspective; the most noticeable influence has been to acknowledge the role of transaction

relationship between economic progress and the performance of institutions.[57] New institutional economics comprises crucial assertions. Among which considering the foundation of institutions which would allow investigating how institutions change and consequently modify the choices available to individuals in a society.[58] Institutions revolve around a set of customs and rules, which are enforced through codes of ethics and behaviours or via a third party, which would have the role of monitoring their behaviour. This means that analysing institutions also includes an indirect analysis of government.[59]

New institutional economics employs different angles; each one of them gives general accounts of institutions, the prevalence of changes in addition to explaining the rationales behind these alterations.[60] The first level of analysis is implemented in the social viewpoint, which takes into consideration customs, norms and other informal institutions. The remaining perspectives are the institutional environment, and the institutional arrangement. Institutional environment refers to the role of political institutions and the impact on economic performance.[61]

The next point is known as institutional arrangements and the regulatory contract approach which deals with the perception of regulations from the parties' point of view. It recognises regulation as an administered contract between consumers and organisations with a degree of government oversight. Regulation offers a protection for parties from the regulatory relations,

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costs in managing an economic system. NIE recognises the fact that transaction costs are established if one obtains safeguards or assigns property rights.

[57] Kathryn McMahon, 'Competition Law and Developing Economies: Between Informed Divergence and International Convergence' in Ariel Ezrachi (ed), *Research Handbook on International Competition Law* (Edward Elgar 2012) 210.

[58] Eirik J Furuboton and Rudolf Richter, *Institutions and Economic Theory: The Contribution of New Institutional Economics* (2nd edn, The University of Michigan Press 2005) 230.

[59] Ibid 231.

[60] Oliver E Williamson, 'the New Institutional Economics: Taking Stock, Looking Ahead' (2000) 38(3) Journal of Economic Literature 595.

[61] Ronald Coase and Claude Menard, 'The New Institutional Economics' (International Society for New Economics, Paris, 03-06 September 1998).

thus, guaranteeing the mutual respect of commitments. The administered contract approach confirms the importance of both reciprocity and the relational elements of regulation.[62]

New institutional economics also refers to the government using power to dominate markets. In this context, governments would act in a restrictive manner by imposing direct or indirect restrains, which aim to restrict investors' activity. For example, establishing financial and regulatory constraints or expropriating assets from firms, whereas traditional economic theories are concerned with the behaviour of firms towards dominating markets, NIE deals with governments and private behaviours. For that reason, experts have pointed out the importance of governance structure, especially, the need to have regulatory agencies independent from political interventions as well as make those regulators accountable for their decisions.[63]

Although modern institutional economics has brought an original perspective on markets, regulatory agencies and regulation, it is important to note that this concept has encountered criticisms on both theoretical and practical bases. On the one hand, institutional environments are said to value the independence of market regulators above other good governance practices, although most regulators possess a certain level of independence, while designing a regulatory framework, governments must strike a balance between the importance of having an autonomous market regulator able to use its discretion and other principles of good governance. On the other hand, within the context of institutional arrangements, new institutional economics uses markets as the focal point for analysing the evolution of governance. As one commentator suggests 'the search for non-market mechanisms is often framed as a response to market failure and not as part of a larger governance failure'.[64] In the context of Maghreb countries, new institutional economics began to be applied with the liberalisation process because of the importance that institutions started to have in the

[62] Ian R Macneil, 'Reflections on Relational Contract Theory after a Neo Classical Seminar' in David Campbell, Hugh Collins and John Wightman (eds), *Implicit Dimensions of Contract* (Hart Publishing 2003) 7-9.

[63] Brian Levy and Pablo T Spiller, *Regulations, Institutions and Commitment: Comparative Studies of Telecommunications* (Cambridge University Press 1997).

[64] Marc Allen Eisner, Antitrust and the Triumph of Economics: Institutions, Expertise and Policy Change (University of North Carolina Press 1991); Marc R Toll and Paul Dale Bush (eds) *Institutional Analysis and Economic Policy* (Springer 2003).

domestic markets of these countries. Therefore, this theory has been used to assess the performance of institutions and their impact on Maghreb economies.

2.2. New Institutionalism

Before investigating the meaning of new institutionalism, it is important to mention that this theory emerged as a response to the theory of institutionalism, which entails that that organisations are technical vehicles intended as a means to specific objectives. Thus, an organisational structure is an adaptive instrument formed as a response to the features and commitments of participants in society.[65]According to experts such as Selznick, 'Institutional theory speaks to issues of social concern and does so without accepting conventional models of organization or the unreflective premises of management'.[66] However, opponents of this theory consider that institutionalism does not view institutions as independent variables; they claim that institutionalism regards institutions as rational actors whose sole role is to coordinate activities. Therefore, this theory evolved to take into account the internal as well as external environment.[67]

New institutionalism is concerned with how institutions are built and their influence on policies and political choices. The main objective of this theory is to understand what the rationale for the existence of these institutions is. One of the specifics of this theory is to begin with analysing the structure and conclude with the impact. In addition, new institutionalism defines the concept of institutions as structures which set up independent causes for actions through sets of rules which are accepted collectively, such rules can be formalised or not. Institutions are consolidated through the existence of authoritative organisations, mandatory rules and regulations.[68] Moreover, new institutionalism recognises

[65] Richard W Scott, 'The Adolescence of Institutional Theory' in Guy B Peters and Jon Pierre (eds), *Institutionalism* (Sage Publications 2007) 130-131.

[66] Philip Selznick, 'Institutionalism Old and New' (1996) 40(2) Administrative Science Quarterly 270, 272,

[67] Ibid 273.

[68] Ronald L Jepperson, 'Institutions, Institutional Effects and Institutionalism' in Walter W Powell and Paul J Dimaggio (eds) *The New Institutionalism in Organizational Analysis* (The University of Chicago Press 1991) 143.

organisations as a degree of conventions or constitutions, which forms part of the larger institutional and regulatory framework.[69]

The concentration is on institutional elements because they are relevant to political decisions and policies that enhance legal frameworks and the application of rules in general. New institutionalism recognises three main variations of its theory: rational, historical and sociological. These sub categories have similar basis, they all aim to provide an analysis that differ from the old institutionalism theory. From an analytical approach, they rely on the idea that institutions represent the dominant factor to determine policy analysis; therefore, institutions are a constant in the political and legal framework of the society. Moreover, these categories emphasize on institutional neutrality to explain some unintended results.[70] In the context of Maghreb countries, new institutionalism represents a managerial method to assess the structure of institutions, especially in the current policy framework, wherein the performance of public institutions plays a significant role in the future of policy.

2.3. The Organizational Theory

The debate around the structure of an organisation has been dominant in the organizational theory. An organisation is defined as an instrument used to coordinate actions in order to achieve a certain objective. The structure of these organisations changes in order to accommodate new requirements. An organisation aims to produce goods or services, which occur in an organisational setting, these settings, develop with the aim of maximising the efficiency of the organisation. The main aim of an organisation's design is to monitor, that is to control the way actions are coordinated in order to achieve the objectives of the organisation. Thus, an effective design is one that provides effective responses to problems. If well applied, this theory can help meet the expectations of stakeholders and solve recurrent organisation problems. There are several sub-categories to the organizational theory including bureaucracy, modernisation, division of labour and contingency. In the perspective of this research, the contingency theory is utilised to understand the relationship between some features of the organization and its competence.[71]

[69] Richard W Scott, 'The Adolescence of Institutional Theory' in Guy B Peters and Jon Pierre (eds), *Institutionalism* (Sage Publications 2007) 130-131.

[70] Martino Maggetti, *Regulation in Practice: The de Facto Independence of Regulatory Agencies* (ECPR Press 2012) 23-27.

[71] Gareth R Jones, *Organizational Theory: Text and Cases* (Prentice Hall 2010) 8-10.

2.3.1. The Contingency Theory

The main idea of the contingency theory is that some elements identify how the organisation achieves high efficiency and better performance. For example, the structure, governance, employees, size, the level of bureaucracy, the technology used or the resources available. Changes in these contingency factors results in the organization modifying its structure and adopting a new structure that aims to improve its performance.[72] At its basis, this theory states that the outcome of one variable on another is contingent on a third variable, therefore, an alteration in contingency leads to a change of structure, and therefore, different aspects of an organization work together.[73]

3. Conceptual Framework

Competition agencies are recognised as public regulatory authorities. Therefore, it is essential to investigate and understand this concept, the reasoning behind delegating to public regulatory agencies and the theories that support the deployment of regulatory agencies in society.

3.1. The Concept of Public Regulatory Agencies and Rationale for Delegation

Public regulatory agencies are organisations that perform public duties at arm's length of the government and enjoy a degree of autonomy. It is argued that the reasoning behind the creation of public regulatory agencies is to 'populate the policy area with actors … who have their own priorities, interpretations and influence'.[74] Because of the degree of autonomy given to these agencies, they are expected to offer higher quality of services. Additionally, the size of these agencies, which is less significant than that of ministries, is supposed to decrease transaction costs.[75] Moreover, regulatory agencies are foreseen to modernise their

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[72] The organic theory and the bureaucracy theory are considered influential within the organization theory literature; Lex Donaldson, *the Contingency Theory of Organizations* (Sage Publications 2001) 07-22.

[73] Lex Donaldson, *The Contingency Theory of Organizations* (Sage Publications 2001) 8.

[74] Stephen Wilks and Ian Bartle, 'The Unanticipated Consequences of Creating Independent Competition Agencies' (2002) 25(1) Western European Politics 148, 148.

[75] Sjors Overman and Sandra Van Thiel, 'Agencification and Public Sector Performance: A Systematic Comparison in 20 Countries' (2016) 18(4) Public Management Reviews 611, 613.

structure in order to meet the administrative and policy objectives of the jurisdictions in which they perform.[76]

Supporters of the separation between politics and administration believe that expert and neutral institutions such as regulatory agencies have a significant impact on the functioning of markets, because they only intervene when there is a requirement to do so. Thus, they reduce the bureaucratic process and help the government focus on important issues, which as a result enhances the credibility of the principal that is the government and the agent that is, the regulatory authority. However, the delegation process to regulatory agencies has not always been accepted. Although regulators have the expertise and are involved in the technical side of the market, decisions cannot only be about the technical aspects.[77] Therefore, the creation of these agencies requires that elected officials have additional reasonable justifications to transfer a certain degree of their powers.

3.1.1. Function as a Rationale for Delegating to Independent Regulatory Agencies

As mentioned above, establishing a regulatory agency requires that elected officials pass on some of their powers to an actor that is legally autonomous and defends an interest that differs from that of the ministry it is affiliated with. In many instances, the main reason for setting up regulatory agencies is the usefulness of the function that these agencies perform. Regulatory agencies often deal with specific and delicate situations, which include the restriction of certain behaviours or the imposition of difficult decisions such as tariff increase; these decisions are not always popular with the business community or the wider public. Therefore, it is believed that regulatory agencies help shift the blame from governments and legislatures. In addition, regulatory agencies reinforce the sentiment of safeguard from external intervention because of their semi-independent status, which means that the government or private groups will have a limited ability to interfere to change a situation and disfavour investors, operators or end users. This represents an essential element that aims to offer more stability in the markets and enhance the confidence of investors and the wider

[76] Sandra Van Thiel, 'Comparing Agencies across Countries' in Koen Verhoest and others (eds), *Government Agencies: Practices and Lessons from 30 Countries* (Palgrave 2012) 4.

[77] Fabrizio Gilardi, *Delegation in the Regulatory State: Independent Regulatory Agencies in Western Europe* (Edward Elgar 2009) 21-24.

public, especially in countries where governments or private groups have a tendency to intervene in an unexpected way.[78]

Nevertheless, using the functionalist reasoning as a rationale for the existence of regulatory agencies presents limitations. The correlation between institutional arrangement and functional pressures is one-dimensional; this is because regulatory agencies do not represent the only method to resolve specific market problems. Governments have the option to reinforce the technical knowledge of their ministries and departments, which would in turn reinforce the commitment, and credibility of governments. In addition, most governments can put legal guarantees in place to prevent unnecessary interventions in the markets.[79]

Moreover, there is a variation in the creation of regulatory agencies and models among countries and sectors. Liberalised countries such as the UK established regulatory agencies in almost all sectors. In developing countries, the creation of regulatory agencies often represents a purely symbolic activity. In some instances, governments set up these agencies but do not expect them to make a significant contribution. Countries, which suffer more from instability and government intervention in the market, tend to allocate fewer powers to their regulatory agencies and have more control over their functioning.[80]

3.1.2. Contextual Elements for Delegation to Regulatory Agencies

The use of the contextual perspective takes into consideration political, institutional and economic factors to determine the rationale for establishing regulatory agencies. These factors include, policy learning and institutional isomorphism, state tradition, political leadership and reforms. Policy learning and institutional isomorphism refer to the idea that if a policy or regulatory model is successful in one country or sector, it will spread to other jurisdictions and domains. Organisations have a tendency to model themselves after other organisations which are in the same field and are regarded as successful.[81] For example, the establishment of the Office of Telecommunication Oftel in the UK, paved the way to the

[78] Stephen Wilks and Ian Bartle, 'The Unanticipated Consequences of Creating Independent Competition Agencies' (2002) 25 (1) Western European Politics, 148, 156-157.

[79] Mark Thatcher, 'Analysing Independent Regulatory Agencies in Western Europe: Functional Pressures Mediated by Context' (2002) 8(1) Swiss Political Sciences Review 93, 106-107.

[80] Ibid.

[81] Walter W Powell and Paul Dimaggio, *The New Institutionalism in Organizational Analysis* (The University of Chicago Press 1991) 70.

creation of a number of other regulators in different sectors. Oftel was also used as a model in other European countries. State tradition relates to whether the rules and regulations in place aim to simplify or inhibit the creation of regulatory agencies in a country. In some countries such as the UK, there was a tradition of regulatory commissions, which goes back to the nineteenth century, and this facilitated the delegation of powers. However, in other countries where, independent agencies are not well accepted or the market tends to self-regulate, the concept of regulatory agencies might be more challenging to establish. [82]

Moreover, being able to allow regulatory agencies in a jurisdiction requires a strong political leadership. This is because a strong government has the ability to respond and adapt to market demands whereas an unstable government will be more preoccupied with internal political issues. Furthermore, creating regulatory agencies goes along with broader economic reforms and liberalisation process to boost competition. For instance, the liberalisation of the electricity sector in France led to the creation of the State Council.[83]

3.1.3. Function and Contextual Rationale for Delegating to Regulatory Agencies in Maghreb Countries

Having public regulatory agencies that enjoy a degree of autonomy from the state is fairly recent in Maghreb countries. These countries shared a tradition of utilising Commissions, which had a consultative role. Similar to other developing countries, which underwent structural changes, Maghreb countries started establishing regulatory agencies at the end of the twentieth century. These institutions first had an advisory role. The investigative and enforcement powers were later added to their responsibilities. Maghreb countries created regulatory agencies in priority sectors of the economy such as banking. The trend later extended to more specific regulatory domains. Although the principle of independence is cited in the mandatory statute of these agencies, it is often difficult to ascertain that all of the regulatory agencies across the region exercise their independence or if the concept is not just borrowed from the French legal and administrative traditions inherited by these countries.

In Morocco, the first regulatory agency appeared in 1993 with the modification of the statute of the Moroccan Central Bank. The national agency for the regulation of telecommunications

[82] This was reflected in the railways sector. Fabrizio Gilardi, 'Delegation to Independent Regulatory Agencies: Insights from Rational Choice Institutionalism' (2002) 8(1) Swiss Political Sciences Review 93, 97.

[83] Mark Thatcher, 'Analysing Independent Regulatory Agencies in Western Europe: Functional Pressures Mediated by Context' (2002) 8(1) Swiss Political Sciences Review 93, 108-109.

was established in 1997 followed by the competition Council in 2000 and the high authority for audio-visual communications in 2002. More recently, two agencies were added to the list, the authority for the protection of personal data in 2009 and the high Council for consumers' protection in 2011.

Algeria was a state planned economy, therefore, there was no real requirement to have regulators in the market until the economy started to liberalise in the early 1990's. The Central Bank had its powers redefined and became a regulator in 1990. The Competition Council was established in 1995, the Post and Telecommunications agency was not set up until 2000. The late player in the regulatory game was the audio-visual contents regulator in 2005, however, the audio-visual sector was not liberalised until 2012.

In Tunisia, surprisingly, the first agency that was assigned regulatory powers was the competition Council in 1991. The Central Bank was allocated regulatory and then control powers in 1994. The Telecommunications regulator was created in 2001. Other regulators such as the High Independent Committee for the audio-visual were not set up until 2011.

Maghreb countries applied the principle of separation between state and administration. The main reasoning behind having these agencies was to establish expert institutions that would respond to market requirements. Regarding the issue of usefulness, there is no established evidence to prove that regulatory agencies have been used for purposes other than regulatory; all of these agencies have had a supporting role for their market economies that were transitioning to a more liberalised one.

In regards to preventing state interference, most governments in these countries still exercise interfering powers when reasoned by economic or political instability. For instance, the Algerian government intervened in the telecommunications sector and bought 51% of the shares of a foreign telecommunication company operating in the market[84]and reinstated monopoly on landlines and internet services after fully liberalising this sector in the early 2000's.[85]

Concerning the contextual rationale for delegation, it is worth to note that institutional isomorphism applied to regulatory authorities across Maghreb countries. Most regulatory agencies copied existing French models for their respective sectors. For instance, the

[84] Djezzy Orascom, the Algerian state applied its pre-emption right in 2009.

[85] A recent draft law has been submitted to reopen the telecommunication market.

Algerian Telecommunications regulator is also responsible for post office services; this system was copied from the French authority for electronic communications and mails. Additionally, most regulators across different sectors put in place a similar leadership structure. For instance, most of these agencies are formed of a Chairman or a President and a Committee of experts.

Furthermore, the state tradition in most of these countries has been suspicious of having independent agencies. However, the necessity to join the globalisation and liberalisation movement, especially in internationalised sectors such as the telecommunications, obliged most of these countries to adopt regulatory agencies. These institutions have not only been created to meet international standards, they now have an effective role to meet market needs.

4. The Concept of Competition Law

In the context of this research, it is important to examine the concept of competition law and its evolution throughout the different schools of thought, this section will lay the basis for this research especially when investigating competition law in developing economies and Maghreb countries. John Vickers considers that the idea of competition 'has taken on a number of interpretations and meanings, many of them vague'.[86] Competition among market players represents the foundation of the free market. The latter takes place when the distribution of resources relies on the law of supply and demand with a limited or non-existent regulatory guidance from governments; in this case, competition is regarded as a trusted means to attain efficiency and consumer welfare.[87] As professors Blake and Jones claim, the aim of competition law 'is to maintain an economy capable of functioning effectively without creating an abundance of supervisory political machinery'.[88] Competition also encompasses collaboration among the chain of market players, which includes wholesalers, retailers and consumers. Cooperation takes two forms, horizontal and vertical.

[86] John Vickers, 'Concepts of Competition' (1995) 47(1) Oxford Economic Papers 1, 3.

[87] Alison Jones and Brenda Sufrin, *EU Competition law* (Oxford University Press 2011) 4. Adam Smith is regarded as the founder of the free market theory. According to Smith, governments ought to eliminate barriers, which will lead to a blossoming competition, Adam Smith, *The Wealth of Nations* (Metheun and Co 1904).

[88] Harlan M. Blake and William K. Jones, 'In Defence of Antitrust' [1965] Columbia Law Review 377, 383; Maurice E Stucke, 'What is Competition?' in Daniel Zimmer (ed), *The Goals of Competition Law* (Edward Elgar 2012) 27.

The former refers to agreements entered into amongst firms, which are active in the same product line, but do not operate in the same geographic market. The latter, takes place among companies, which are at different levels of the supply chain.[89]

Competition is divided into the following categories: perfect competition, dynamic efficiency, allocative and productive efficiency. Perfect competition refers to a model in which efficiency is capitalised on to a degree whereby the use of competition law would be superfluous. In other words, within a perfectly competitive market, manufacturers and service providers use the most effective methods to make and deliver their products and services. In addition, sellers and buyers are at a comparable level and share a similar access to information. Moreover, barriers to enter or exit the market are non-existent. As a result, sellers are not regarded as price makers, they are considered as price takers.[90]

Productive efficiency takes place when an economy reaches equilibrium between its short and long-term interests. In that case, long-term goals are of significant importance since they interact with central economic concerns including, research and development, innovation and investment. Dynamic efficiency represents a focal point in the economy because it allows adapting to market demands, which is extremely relevant in many instances such being the case for producers and manufacturers.[91]

Allocative efficiency represents the concept in which a seller and a buyer cannot be made better off without having one been made worse off.[92] The process takes place when a supplier extends the production of goods to the level in which both marginal cost and price will fall together. Consequently, there will be a market balance. Besides, consumers will acquire the

[89] Ariel Ezrachi and Ulf Bernitz, *Private Labels, Brands and Competition Policy: The Changing Landscape of Retail Competition* (Oxford University Press 2009). Competition regulators differentiate between competition on the merit and unfair competition; these terms are subject to extensive interpretation in the literature and will therefore be excluded from the discussion, Organisation for Economic Co-operation and Development (OECD) 'What is Competition on the Merits?' (OECD Policy Brief 2006).

[90] Maher M Dabbah, *EC and UK Competition Law: Commentary, Cases and Materials* (Cambridge University Press 2004) 4.

[91] Maher M Dabbah, *International and Comparative Competition Law* (Cambridge University Press 2010) 24.

[92] Christopher Decker, *Modern Economic Regulation: An Introduction to Theory and Practice* (Cambridge University Press 2015) 99.

product or service at a price they are willing to pay. Productive efficiency comes from perfectly competitive markets in which firms have to produce at the lowest cost. In such market, information is symmetric; therefore, if one producer employs a technique to cut costs, it will be used by market competitors and in turn generates lower market prices.[93]

The core principle of competition law is to deter any practices or policies that would hamper the functioning of markets. For instance, if a sector is isolated from competition, it allows businesses in that industry to impose higher charges, limit production in addition to restraining profitable earnings. Consequently, it creates an unfavourable business climate that harms the economy.[94] Therefore, competition law ought to operate over all sectors without distinction between privately and state owned companies.[95] Although some sectors were deemed to have a natural monopoly, they have progressively fallen under the regulatory scope of competition law, these sectors comprise but are not restricted to energy, telecommunications and broadcasting to name but a few. [96]

Among the motives that lead governments to implement competition law is the provision of quality products and services at affordable prices.[97] Since its inception, competition law has extended to cover economic, social and political ends.[98]Although competition law intends to monitor behaviours deemed anti-competitive, the core objectives may differ from one country

[93] Piet Jan Slot and Angus Johnston, An *Introduction to Competition Law* (Hart Publishing 2006).

[94] Gregory Gundlach, 'Competition policy and Antitrust Law: Introduction to the Special Issue' (2001) 20 Journal of Public Policy and Marketing 1.

[95] In the past, the state held control over most of the large infrastructure firms. For example, in France, the Gas and Electricity, the Postal Services and even the aircraft engines were state firms; OECD, 'The Role of Competition Policy in Regulatory Reform' (*OECD*, 2003) 6 < https://www.oecd.org/regreform/32481170.pdf> accessed 23 January 2015.

[96] Monopoly takes place when there is only one firm that supplies a particular product and there is no substitute. The barriers to enter this market can be legal, technical or natural, for example, if the government has given the rights to one company in a particular area; Alina Kaczorowska-Ireland, *Competition Law in the Caricom Single Market and Economy* (Routhledge 2015) 28-29.

[97] Shyam R Khemani, 'Application of Competition Law: Exemptions and Exceptions' (*UNCTAD*, New York, 2002) UN Doc UNCTAD/DITC/CLP/Misc.25, 5 < http://unctad.org/en/Docs/ditcclpmisc25_en.pdf> accessed 20 February 2015.

[98] Ioannis Lianos, 'Some Reflections on the Question of the Goals of EU Competition Law' in Ioannis Lianos and Damien Geradin, *Handbook on European Competition Law: Substantive Aspects* (Edward Elgar 2013) 1-3.

to another; this is due to the historical, institutional and financial state of the economy.[99] While in some jurisdictions, the underlying objective is to encourage economic efficiency and maximisation of consumer welfare, other countries aim to achieve the wider public interest. Therefore, the next sub-section aims to analyse the goals of competition law.

4.1. Schools of Thought in Competition Law

The different schools of economic thought have evolved over time to tackle the challenges facing competition law. The next sections aims to explore the evolution of competition law according to each of the schools, which influenced this discipline, namely, the classical and neoclassical, the Harvard, Chicago and Post Chicago and the European Schools.

4.1.1. Classical Theory of Competition

As mentioned previously in this research, the notion of competition is traced back to the classical theory, particularly to the classical views of Adam Smith who based the idea of competition on the concept of freedom. Competition enables companies to obtain gains. In addition, freedom also consists of the ability of consumers to choose between the different options offered on the market. According to Smith, the invisible hand has the power to bring together self-interest behaviours; the end of end result was to achieve maximum social welfare for the nation. Nonetheless, government interference disturbs this coherence. According to this school, if the government restrains from intervening, a competitive economy is capable of achieving efficiency. The government has a supporting role in which it offers an adequate framework to simplify the performance of markets such as preventing monopolistic practices.[100] This perspective evolved with the birth of the neo-classical school, which provided a further perspective.[101]

4.1.2. The Neo Classical School

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[99] Shyam R Khemani, 'Application of Competition Law: Exemptions and Exceptions' (*UNCTAD*, New York, 2002) UN Doc UNCTAD/DITC/CLP/Misc 25, 5 < http://unctad.org/en/Docs/ditcclpmisc25_en.pdf> accessed 20 February 2015.

[100] It is important to distinguish between temporary and permanent monopolies. The former is believed to decrease welfare and restricts the natural freedom of individuals. The latter is accepted, as it supports building long-term trade relationships with other countries.

[101] Adam Smith, *The Wealth of Nations* (New York 1976) 456.

Although some elements, which pertain to the view of this school, have already been mentioned in the section that introduced competition law, it is important to review these principles in order to understand the standpoint of the neo classical school. The latter holds the view that markets can take two forms: perfect competition and complete monopoly. Perfect competition refers to the fact that players in the market have at their disposition perfect and complete information. All producers are independent and have equal influence on the market. The products they provide to consumers are similar. None of them can affect prices by modifying the output. [102]

Moreover, it is also assumed that all firms operating on the market aim to maximise profits and there are no entry barriers. Therefore, economic efficiency is attained directly. Prices are almost similar to the marginal cost of producing optimal quantity; consumers do not pay above the real price of producing the product. Additionally, firms do not have profits over the set competitive rate of return. Under certain provisions, for example, the absence of external effects and increasing returns of scale creates a pareto allocation of resources wherein a firm will not be better off without making another firm worse off.[103]

Contrary to the perfect model, the monopoly model refers to a system where a market has only one producer; the producer can increase product prices without exhausting his profits. He represents the price maker. In addition, the market has high entry barriers, in monopolistic markets, the firm has downward marginal revenue curve. Therefore, the monopolistic firm can maximise its profits only when its revenue additional units are equal to the extra cost of producing the last unit of output.[104] However, both models have proven to be inapplicable in real life situations. Their theoretical contents are considered too abstract for policymaking. However, they can still be used as backgrounds to analyse economic behaviours operating under certain conditions. As this perspective was considered static, modern antitrust witnessed the birth of the Chicago and Harvard schools in the United States.[105]

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[102] Alina Kaczorowska-Ireland, *Competition Law in the Caricom Single Market and Economy* (Routhledge 2015) 27.

[103] Ibid.

[104] Marginal revenue equals marginal cost. Alina Kaczorowska-Ireland, *Competition Law in the Caricom Single Market and Economy* (Routhledge 2015) 29.

[105] Anestis S. Papadopoulos, *The International Dimension of EU Competition Law and Policy* (Cambridge University Press 2010) 271.

4.1.3. The Harvard School

Supporters of the Harvard school argue that, there is a causal relationship between the structure in which the market operates the conduct of firms and their performance in terms of profit, efficiency and the satisfaction of consumers' needs. In other words, the structure has a significant impact on the conduct of businesses.[106] They concluded that each market structure has a different impact on the degree of social welfare, it would be maximised in a perfectly competitive market and very low in a monopolistic one. They also concluded that US markets were more concentrated than what was needed and barriers to entry were very high, therefore, they suggested that antitrust should be utilised to decentralise markets from the economic powers of industries. However, this concept faced criticism as it was regarded as a simplified evaluation of the relationship between conduct, structure and performance.[107]

4.1.4. The Chicago and Post Chicago Schools

According to the Chicago school, governments should not interfere in markets. Competition in industrialised markets is perceived as beneficial even in markets with high concentration ratio because markets are self-regulatory providing that entry barriers do not restrict markets. Consistent with this perspective, differences in concentrations ratios result from a range of cost structures, especially, regarding economies of scale. In addition, this school claims that allocative efficiency should be the fundamental objective of competition policy as it maximises consumer welfare. Supporters of this theory believe that distribution of wealth between producers and consumers is neutral as long as there is a maximisation of aggregate welfare of producers and consumers. Moreover, the defender of this school of thought claim that competition among a smaller number of firms may be as successful as competition among a larger number of companies. However, this school of thought was challenged by the number of financial crises which demonstrated that markets do not correct themselves.[108]

[106] This concept is also known as the SCP paradigm.

[107] The contribution of the Harvard School is still regarded as essential for the progress of competition law, for example, the structural analysis of the relevant market represents an important part in the evaluation of anti-competitive behaviours. Alison Jones and Brenda Sufrin, *EU Competition Law* (4th edn, OUP) 22.

[108] Alina Kaczorowska-Ireland, *Competition Law in the Caricom Single Market and Economy* (Routhledge 2015)35.

After recognising that the Chicago school relied on a simplistic model and lacked empirical evidence, the Post Chicago relied on new industrial economics theories including game theory, principal-agent, the transaction cost theory and behavioural economics.[109]

4.1.5. The European School

The idea of competition law was developed in Europe to protect markets from political and ideological influence. The Freiburg School following its ordo-liberal notion of competition law had a major influence on the modern form of EU competition law. According to this view, economic stability and performance must be based on competition. In relation to this concept, the state is required to offer the structures in which the economic process works. The state has to set and maintain the conditions for competition. This school was supportive of liberalism and regarded a competitive market as the basis for a fair and free society.[110]

In addition, scholars of this school believed that the law should protect a competitive market. Therefore, markets have to operate a form of control. Moreover, they claim that economic analysis is needed because it provides rules that allow markets to operate effectively. This form of analysis is utilised in economic policy decisions whereas legal orders ensures that governments puts this economic model in practice.[111]

4.2. Which Influence on Maghreb Countries?

From the perspective of Maghreb countries, one observes that the influence of the European School is more significant. This is because; these countries have been transitioning from centralised economies to liberalised markets. Consequently, the state has to ensure that competitive conditions are created in the market. Moreover, because the notion of competition has been gradually introduced and therefore, markets are more prone to information asymmetry and control by private interest groups, a form of market control must be provided to prevent anti-competitive practices. Additionally, the implementation of the EU

[109] Ibid 36. For an in-depth analysis, Daniel A Crane, 'Chicago, Post Chicago and Neo Chicago' (2009) 76 University of Chicago Law Review 1911.

[110] Doris Hildebrand, *The Role of Economic Analysis in the EC Competition Rules (*Wolters Kluwer 2009) 159.

[111] Ibid.

model, which will be discussed at a later stage in this research, signifies that Maghreb countries are more inclined to adopt the Freiburg perspective.[112]

5. Conclusion

The main aim of this chapter was to set the theoretical and conceptual frameworks of this research. This chapter reviewed the main theories of institutions. First, new institutional economics. In the context of this research, new institutional economics is used to determine the role of agencies in the market. The main finding is that the performance of an institution influences market behaviour. Second, this chapter investigated the theory of new institutionalism. New institutionalism deals with how institutions develop and the extent to which they affect political and policy choices. The main finding is that institutions have a great capacity in influencing policy choices.

Third, this chapter reviewed the organisational theory. The latter is concerned with the internal organisation of an agency. The main finding is that the design of an organisation can be utilised to monitor the efficiency of an agency. Consequently, an effective design offers effective solutions to issues. Fourth, this chapter explored a derived version of the organisational theory that is the contingency theory. The latter considers that effectiveness can be achieved by organisational elements including institutional, governance or bureaucratic.

Moreover, this chapter investigated the concept of independent regulatory agencies and the rationale for delegation. Delegation can be linked to the function of the agency or the environment in which the agency evolves. Concerning Maghreb countries, the main findings were that Maghreb countries implemented the principle of separation between administrations and the state. Regulatory agencies were used to support the transition period for these markets. It was also noted that the level of state interference is still relevant, however, governments try to intervene only when there is a necessity to do so. Regarding the contextual rationale for delegation, the majority of regulatory agencies followed a model copied from the French system. Moreover, it was concluded that similar to many developing countries that embarked in the liberalisation process, Maghreb countries had no choice other than implement regulatory agencies, which are now utilised to respond to regulatory demands.

[112] See chapter four for a detailed discussion on the application of the EU model in Maghreb countries.

Finally, this chapter explored the concept of competition law and the main school of thoughts. The main findings were that the classical theorists held the view that without government interference, an economy is able to achieve efficiency. The neo-classical school established the concepts of perfect competition and monopoly in the market; these ideas have been modified by the rationale of the Harvard school, which claimed that there is a causal relationship between the structure in which the market operates the conduct of firms and their performance in terms of profit, efficiency and the satisfaction of consumers' needs. This view was criticised for being too unrealistic. Moreover, the Chicago school claimed that competition among a smaller number of firms could lead to a similar ratio of success among larger firms. This view was consequently challenged by different market crises, which proved that markets cannot auto-correct. Furthermore, the European School believed that markets must function under a certain form of control. In addition, economic analysis should be utilised in order to offer rules that make markets operate effectively. One can observe that these schools shaped existing competition law models, especially the European and US models. Because of their practicality, these models are often replicated in other jurisdictions, especially, in developing countries. Therefore, the next chapter aims to review how developing markets adopt competition law.

Chapter Three: Adopting Competition Law in Developing Countries

1. Introduction

Since it was first enacted in Canada and the United States,[113] competition law has expanded over most economies and legal systems. Although competition law represents a very specific area of the law, it has acquired high significance in the regulatory arena. This rapid progress has been facilitated by the expansion of the free market doctrine in addition to growing concerns on achieving economic efficiency and consumer welfare. Therefore, a significant number of developing countries have also implemented competition law and a growing number is contemplating the idea of adopting a competition law regime. Moreover, competition law is perceived as assisting developing countries in advancing their economic growth and helping to decrease poverty.[114] In this regard, this chapter aims to explore the rationale for adopting competition law in developing countries. This analysis is relevant to the framework of this research because Maghreb countries belong to the group of developing countries that seek to give competition law a more critical role to regulate domestic economies.

Therefore, this chapter aims to review the challenging that developing countries face. In addition, this chapter evaluates elements that a competition law regime should comprise in order to be implemented in developing markets. Although competition law brings a number of benefits to developing economies, it faces a strong opposition from certain groups, who perceive the adoption of competition law as unnecessary for these markets. Thus, it is important to explore the reasoning behind their rejection of this important area of the law. Furthermore, there is no single form of competition regime that developing countries can implement. Most of these countries transplanted their current laws from established models

[113] The first modern form of competition statute appeared in Canada in 1889 under the Wallace Act, this acted was regarded as a political gesture without significant meaning. The act prohibited behaviours considered as unlawful and restricted any form of competition. The United States passed the Sherman Act in 1890 because there were concerns regarding the power of big businesses, in particular, cartels and large firms as they were charging prices that were too low or too high. Aditya Bhattacharjea, 'Who Needs Antitrust?' in Daniel D Sokol, Thomas K Cheng and Ioannis Lianos, *Competition Law and Development* (Stanford University Press 2013) 5-6.

[114] Stefan Voigt, 'The Economic Effects of Competition Policy: Cross Country Evidence Using Four New Indicators' (2009) 45(8) Journal of Development Studies 1225.

such as the US or the EU. A variation in the local implementation of such models exists. Therefore, this chapter aims to investigate the different options available.

2. Challenges Facing Developing Countries

The classification of countries as 'developing' may be regarded as controversial. This is because creating a distinction between developed and developing countries may simply be considered as inappropriate. Consequently, a number of international organisations prefer to utilise the terms 'Less Developed Countries,' 'Newly Industrialised Countries' or 'Emerging Economies'. [115] Conventional analysis, which utilises normative indicators to assess markets, demonstrates that some countries fall under the developing category because of the efficiency level by which their domestic markets operate.[116] In the context of this research, market categorisation is important because it helps understand the nature of the difficulties faced by the local markets of Maghreb countries.

2.1. Ineffective Legal and Policy Framework

It is reasonable to link some of the common issues faced by developing countries to incoherence in the legal framework and policies in place, which consequently lead to high market concentration, fragmentation, exploitation of market powers and rent seeking. For example, the majority of businesses in developing countries face heavy bureaucratic burden, costly legal procedures and high barriers to enter or exist the market.[117] In addition, a number of developing countries favour international firms over small companies in terms of provision of finance because they are regarded as bringing more benefits to local markets. Consequently, cartels and exclusive distribution agreements are common practice.[118]

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[115] Dabbah, *International and Comparative Competition Law* 275.

[116] Ignacio L De Leon, 'What Features Measures Economic Competition in Developing Countries' in Michal S Gal, Mor Bakhoum, Josef Drexel and Others, *Economic Characteristics of Developing Jurisdictions: Their Implications for Competition Law* (Edward Elgar 2015) 34-35. Among the indicators used to assess the level of development, is the gross national income per capita (GDP). Each international organisation has a specific categorisation of developing countries. World Bank, 'World Data Bank: World Bank Development Indicators' <http://databank.worldbank.org/data/reports.aspx?source=world-development-indicators> accessed 27 May 2016.

[117] Simon J Evenett, 'Competition law and the Economic Characteristics of Developing Jurisdictions' in Michal S Gal, Mor Bakhoum, Josef Drexl and Others, *Economic Characteristics of Developing Jurisdictions: Their Implications for Competition Law* (Edward Elgar 2015) 26-28.

[118] Ajit Singh, 'Competition and Competition Policy in Emerging Markets: International and Developmental Dimensions' (*United Nations Conference on Trade and Development*, 18 September 2002).

Most developing countries encounter a variable degree of obstacles in developing a competition law culture, applying competition law to cartels or even enhancing compliance practices. One of the most critical issues that developing economies deal with regarding the breach of legal provisions involves international cartels. Among the reasons cited in the increase of international cartels is the tightening of regulation in developed markets and weak of absent enforcement laws in the regulatory landscape of developing countries. Furthermore, some competition agencies in these markets are reluctant to cooperate and exchange information with their counterparts as information exchange is not rooted in their legal culture.[119]

Moreover, the institutional structures that aim to support the enforcement of the law is absent or very weak. Most agencies do not have the financial resources, expertise or the practical experience required. Additionally, there is a lack of investment in general infrastructure. For example, weak transportation systems considerably restrain the market over which companies can compete. This was illustrated by a recent logistics performance index run by the World Bank, which demonstrated that the infrastructure linked to transportation was likely to be lower in countries with lower average income per capita.[120]

2.2. State and Political Interference

Another common feature of developing countries is state dominance in the majority of the essential sectors. In some cases, this position is deliberate in order to allow the state to be in a favourable position to negotiate agreements to offer services, which results in state companies having exclusivity on some products, services, preferential interest rates and tax benefits. In addition, corruption and a lack of good governance poses further constraints on these markets and their institutions, this may consist of capture and privileges to firms close to politicians. Therefore, it is important to provide some guarantees to newly implemented regulatory and competition authorities, such as independence and provision of adequate

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[119] Lawan Thanadsillapakul, 'The Harmonisation of ASEAN: Competition Laws and Policy from an Economic Integration Perspective' in Josef Drexl and Others (eds), *Competition Policy and Regional Integration in Developing Countries* (Edward Elgar Publishing 2012) 15-17.

[120] Jean-François Arvis, Daniel Saslavsky, Lauri Ojala and Others, 'Connecting to Compete: Trade Logistics in the Global Economy' (*World Bank*, 2016).

resources. [121] Developing countries witness frequent influence of political classes, which give rise to collaborative arrangements and preferential treatments. These rent-seeking groups usually lobby the government to keep their interest and support rules that work in their favour. Therefore, domestic political forces may resist economic reforms, as they are perceived as taking the power away from the centralised government, politicians and firms that enjoy particular privileges. Consequently, rent-seeking behaviours become a norm.[122]

Furthermore, most developing countries do not apply the rule of law. The judicial system is considered too weak because the decisional powers reside in the hands of a small number of decision makers. In addition, there is a lack of transparency in the procedural steps, uncertainty in relation to the regulations and doctrines applied and a shortage in the sources of alternative dispute resolution. Therefore, if courts cannot be trusted, the judicial system becomes powerless and ineffective. Consequently, market operators pursue other means to protect themselves from the precarious state of the law, which can be via other legal sources such as customary and religious rules or illegal paths including bribery.[123]

Therefore, the idea that certain law models utilised in high-income economies can indisputably be transferred to developing countries is often questionable. Priorities and rightly directed analysis will consider certain elements and circumstances differently. However, this does not mean that the methods used in developed countries to implement laws cannot be adaptable to developing countries. In addition, it is important to understand what the objectives of having a particular competition law model are and consequently develop the tools to consider whether those objectives have been achieved when a model is selected for a country. A case-by-case analysis that utilises sensible information and recommend which parts can be used in designing laws for developing countries willing to open their economies to competition is more likely to bring positive outcomes.

[121] Eleanor M Fox, 'In Search of a Competition Law Fit for Developing Countries' (2011) New York University Law and Economics Research Paper 2. Marcus Kilzmuller and Martha Martinez Licetti, 'Competition Policy: Encouraging Thriving Markets for Development' <http://siteresources.worldbank.org/EXTFINANCIALSECTOR/Resources/282884-1303327122200/VP331-Competition-Policy.pdf> accessed 20 May 2016.

[122] Ibid.

[123] Ibid.

3. Designing Competition Law for Developing Countries

Before selecting a competition law model for any jurisdiction, there must be a reasonable assessment of the degree of development of the country. In other words, it is necessary to recognise the attributes that would offer the most adequate competition regime according to the economic and institutional needs. In the case of developing countries, it is also important to bear in mind that an effective competition law aims to maintain a balance of power within society. In recent years, the number of developing countries, which implemented competition provisions, has considerably increased, it is estimated that approximately 75 per cent of countries that established a competition regime are emerging or developing economies.[124]

In terms of implementing competition rules, the consensus is that there are pre-determined universal competition provisions that if applied, would assist in improving the state of competition regardless of the legal system.[125] These provisions have an economic basis and aim to enhance consumer's welfare. Hence, they are less concerned with other external factors such as the political state of the country. The fundamentals of competition law have at their core the maximisation of market opportunities by removing any barrier that would restrain the market and thus harm consumers. It is also important to note that these set of competition principles go along with other regulatory policies, which aim to achieve a similar objective. Universal competition principles comprise the following: Preclusion of any practice that would exclude other market players or put them at disadvantage. 1) Prevention of price-fixing, cartels and any form of abuse 2) Avoidance of mergers that could lead to monopoly 3) Progressive removal of market barriers or unnecessary forms of protectionism.

3.1. The Provisions of Competition Law

Competition law is regarded as an efficient tool to distribute resources. Unless stated otherwise, the majority of economic activities must comply with competition rules. These rules are classified into three groups. Firstly, competition rules inhibit concluding anti-competitive agreements between two or more undertakings in the market. Secondly,

[124] Eleanor Fox, 'Economic Development, Poverty and Antitrust: The Other Path' [2007] 13 Southwestern Journal of Law and Trade in the Americas 211, 214. Taimon Stewart, Julian Clark and Others, *Competition Law in Action: Experiences from Developing Countries* (International Research Centre 2007) 4.

[125] George L Priest, 'Competition Law in Developing Nations' in D Daniel Sokol, Thomas K Cheng and Ioannis Lianos (eds), *Competition Law and Development* (Stanford University Press 2013).

competition law prevents a firm or firms from abusing a dominant or a monopolistic position. Thirdly, competition law aims to prevent mergers, which would significantly affect competition. Additionally, it is important to identify what constitutes market barriers in a market. Furthermore, competition law employs governmental and specialised bodies among which, competition institutions. The latter must apply competition rules in compliance with the jurisdiction they belong to; the rest of the institutions are assigned a specific task, which may comprise nuances from one jurisdiction to another.[126]

3.1.1. Prohibition of Cartels

With reference to proscriptions, one of the most significant for the design of competition law in developing countries is the prohibition of cartels between undertakings, the rationale behind such provision is to safeguard competition and prevent firms from distorting or restraining competition by colluding with their current or potential competitors. Prohibition of cartels covers any horizontal agreements or practices among firms such as price fixing, limiting access to resources and bid rigging. It should be noted that some horizontal agreements can be considered beneficial to competition and society and are therefore subject to specific exemptions, they include agreements, which deal with standard setting, research and development.[127]

In addition to horizontal agreements, other forms of arrangements also fall under the scope of prohibition by competition law, namely, vertical agreements; which refer to arrangements concluded among firms that function at different levels of the market. For example, distribution agreements between suppliers and distributors. Under competition law, the prevention of vertical agreements usually contains provisions, which set particular thresholds in the market for suppliers and distributors in order to determine the size of the exemption. [128]

[126] Damien Geradin, 'Competition Law and Regional Economic Integration: An Analysis of the Southern Mediterranean Countries' [2004] 35 World Bank Working Papers 1.

[127] Van Bael and Bellis, Competition Law of the European Community (Kluwer Law International 2005) 385.

[128] Katalin Judit Cseres, Competition Law and Consumer Protection (Kluwer Law International 2005) 52.

3.1.2. Prevention of Abuse of Dominant Position

Another important provision is the abuse of dominant position. This prohibition is regarded as complementing the prevention on colluded practices. In substance, competition law does not restrain market power, instead, it insists in proscribing abuse in the market. The rationale behind it is to safeguard accessible entry to market, guarantee fair competition for all market players, and prevent market abuse. Thus, the issue revolves around defining an abuse of market power without reprimanding market participants, which hold a dominant position in the market. The basic rule is that a threshold must be respected in terms of the shares that a firm can hold in a market. Nonetheless, it is argued that market shares do not represent a fair benchmark due to their link to the degree of use of the product.[129]

Additionally, small market shares may be coherent with market power whereas large market shares represent a low market power.[130] Therefore, establishing an abuse of dominant position in a market requires agreeing on a single definition for the relevant market. For that reason, legislators often impose rigorous conditions with regard to abuse of a dominant position. It is important to note that the relevant market incorporates the product market as well as the geographic market definition.[131]

The definition of the relevant product market relies on three important attributes of competitive restraints that must be considered when firms exercise their power on a market; these are substitutability in price, interchangeability of product or service features and purpose of use. In some cases, the relevant product market may also comprise products or services which are not direct substitutes. Relevant geographic market signifies that the conditions of competition in the area wherein firms deal with the supply and demand of products and services are consistent enough and can easily be discerned from the neighbouring geographic area.[132]

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[129] Lawan Thanadsillapakul, 'The Harmonisation of ASEAN: Competition Laws and Policy from an Economic Integration Perspective' 33 note 119.

[130] Ibid 34.

[131] Moritz Lorenz, *an Introduction to EU Competition Law* (Cambridge University Press 2013) 212-213.

[132] In many instances, the definition of product market and geographic market can be interlinked, this because both concepts aims to answer a similar question, Alina Kaczorowska-Ireland, *Competition Law in the Caricom Single Market and Economy* (Routhledge 2015) 38-42. If the switch is made by the manufacturer, this is referred to as supply side substitution, if the switch comes from the customer; it is denoted as demand side substitution.

3.1.3. Merger Regulation

Merger regulation represents another significant area for developing markets. The underlying principle behind firms' merger is to develop the state of market structures which would in turn benefit consumers. The majority of legal regimes around the world use merger control as a tool to control firms' behaviour. A merger can take different shapes; the traditional form known as amalgamation, in which two or more firms merge and become one entity or an acquisition whereby control goes to a joint venture. Although mergers aim to improve market conditions and enhance consumers' experience, some mergers may result in anticompetitive behaviours.[133] In view of that, competition law makes certain concessions to benefit an economic or a social purpose. These exemptions are granted for specific industries or to cover certain categories of agreements such as research and development or product standardisation.

3.1.4. Identifying Market Barriers

There are two categories of market barriers, artificial and natural. The first one refers to the regulations imposed by governments; the second one indicates the production, technology and scale of economies. Seldom utilised is the strategic, that is, the scrutiny of companies' profits, which entails that a company with a high earning may be abusing the market. However, it should be noted that putting a limit on market profits for companies might induce price increase from firms with higher profits. Therefore, it is advisable to consider efficiency while implementing competition policies in emerging economies; this is because, market participants would be more preoccupied with conforming to market shares requirements instead of focussing on enhancing their efficiency on the market.[134] As efficiency forms also forms parts of the goals of competition law, the next section aims to identify the different goals of competition law. As the identification of competition goals has been a controversial debate for developing countries, this research will review the opinions that constitute the different options.

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[133] OECD, 'Glossary of Industrial Economics and Competition Law'< http://www.oecd.org/regreform/sectors/2376087.pdf> accessed 23 November 2015.

[134] Ibid.

4. The Goals of Competition Law

The goals of competition law can be divided into three categories: economic, social and political.[135] The first type deals with issues regarding economic efficiency and maximisation of consumer welfare, economic efficiency is concerned with allocative, productive and in some instances dynamic efficiency. However, there is no agreement as to which of these should be more emphasised on while implementing competition law; whereas measuring welfare in the discipline of competition law should follow the idea of consumer benefits. It is claimed that the more adequate welfare norm to be utilised should be total welfare, in other words, providing that welfare be maximised in a complete context and not only in consumer-specific sense, this should be satisfactory.[136]

The second type, which is social goals, is concerned with different areas that comprise the concept of consumer protection but do not include the technical aspects of economic efficiency and maximisation of consumer welfare. Further social goals include, protecting consumers from unjustified exercise of market power, the distribution of socio-economic power of large companies, guaranteeing the interests of small and medium sized firms. Safeguarding public interest and additional non-economic values, ensuring market fairness and distribution of wealth in society.[137]

The third category, that is political, refers to the influence of governments and politicians in the application of competition law. In some instances, government decisions may triumph over the decisions of competition authorities or the courts because such decisions may be related to national matters, which can range from economic developments, market integration and financial stability.[138]

The question of what should constitute the goals of competition law in a country has been debated among scholars since the beginning of this discipline. Regarding developing

[135] Dabbah, *International and Comparative Competition Law* 37.

[136] Ibid 40, the consumer welfare vs total welfare has been highly controversial in the field of competition law.

[137] Ibid 43-44. Although political goals forms part of competition law, the majority of experts including lawyers and economists oppose including any political dimension to competition law because it adds an element of uncertainty. An example of state prevalence to maintain financial stability has been the consequent intervention of the state to aid banks.

[138] Ibid.

countries, opinions have been divided between two major trends, namely, economic efficiency and public interest. First, competition law in developing countries should aim to achieve economic efficiency in order to encourage efficient allocation of resources and ensure the freedom of actions for market operators in newly liberalised markets, thereof, maximising national welfare. Nonetheless, opponents of this view believe that governments in emerging countries should consider more important conditions that pertain to social objectives.[139]

They argue that social objectives are significant especially in the transitioning period, as they comprise empowerment and distributional aims, which are more legitimate than efficiency and reduced government intervention as a mean to produce. Therefore, they advocate having public interest as the main objective of competition law in developing economies. This is because a competition law, which is based on public interest, comprises exemptions and permissions that ensure economic freedom, justice and fairness. These objectives can be weighed against the reduced costs of competition as they bring benefits to public policies.[140]

However, an important factor to consider while attempting analysing the goals of competition law in a jurisdiction is to comprehend the intent behind choosing a certain competition law model over another. In other words, was there a specific legislative motivation to enacting such rules? Additionally, it is noteworthy to evaluate whether competition law has evolved in a similar direction as the general legal framework of a country because competition law is not confined to particular areas but rather forms part of the wider economic, social and legal structure. Moreover, markets are not supposed to be static in nature; therefore, the goals of competition law are not conclusive and may change over time.[141]

4.1. Are There Additional Goals for Competition Law in Developing Countries?

As observed, some experts place great importance on efficiency and consumer welfare. Others prefer to consider public interest as the ultimate goal. Additionally, a third group goes

[139] OECD, 'The Objectives of Competition Law and Policy' (OECD, 2003) 3-4 < http://www.oecd.org/daf/competition/2486329.pdf> accessed 06 February 2017.

[140] Eleanor Fox, 'Economic Development, Poverty and Antitrust, the Other Path' [2007] 13 Southern Journal of Law and Trade in America 112, 113.

[141] Judge Robert Bork argued against the standpoint of Warren Court in the United States, together with other members of the Chicago School, he asserted that antitrust ought to have economic efficiency at its heart and stands as its sole purpose, Robert R Bork and Ward S Bowman, 'Goals of Antitrust: Dialogue on Policy' (1965) 65(3) Columbia Law Review 363.

further and emphasises that the objective of competition law for developing economies should be to mitigate governmental barriers to entry. They claim that the government holds monopoly over markets.[142]

Consequently, competition law should pursue anti-competitive intervention from the government, which helps shed light on the anti-competitive effects of entry restrictions proposed.[143] Moreover, developing countries must work to boost their economies; as a result, they should implement a competition law that takes into consideration the development of small and medium businesses and ensure transparency in their pricing.[144]

5. Implementing Competition Law in Developing Countries

Up until the last decade of the twentieth century, the majority of developing countries did not have a formal competition law in place. One of the main reasons was that economic activities were under the direct control of the state. Since then, privatisation and deregulation of markets have become more common. Important organisational changes have taken place, generated by political and technological progress. International development theory links market-oriented reforms and competition law as having a sound competition regime is perceived as a strong component of market liberalisation.[145]

However, opinions still differ as to whether developing countries should adopt competition law. Although a competition regime brings numerous advantages by promoting innovation, enhancing the allocation of resources, and offering consumers better choices at lower prices, developing countries may be tempted to protect certain sectors as competition law may maximise consumer welfare but eliminate producers' surplus. Some countries including China and India put their competition law on hold while favouring industrial policies. In addition, developing countries may face difficulties while trying to implement competition law due to a lack of resources or because competition law does not represent a priority in the economic and political agendas. Moreover, the global financial crisis has casted doubt on the

[142] Ibid.

[143] Ross C Singleton, 'Competition Policy for Developing Countries: A Long Run, Entry Based Approach' (1997) 15 Contemporary Economic Policy 4.

[144] Ibid.

[145] Others factors such as the rule of law and independence of the judiciary constitute important elements of economic development and market liberalisation. Paul Cook, Raul Fabella and Cassey Lee, *Competitive Advantages and Competition Policy in Developing Countries* (Edward Elgar 2007).

value of neoliberal markets. Furthermore, developing countries are increasingly concerned with environmental issues because over-production has negative externalities that cannot be sustained.[146] Therefore, it is important to analyse these opposing views in the literature.

5.1. Arguments in Favour of Implementing Competition Law in Developing Countries

According to this view, competition law represents an asset to the economies of emerging countries. This is because establishing a competition regime means setting up an enforcement system that will be in charge of controlling infringement, which should also be beneficial for market stability and investors' confidence, because this framework provides legal boundaries on the type of practices that firms must avoid. In other words, competition law offers a form of protection to new entrants, foreign firms entering the national market for the first time and existing market operators.[147]

Developing countries suffer from a high degree of concentration and the entry barriers in these countries can lead to collusion and a higher risk of abusing dominant positions. In addition, these markets are known to be oligopolistic. Consequently, having competition rules and an authority in charge of applying them will help prevent such issues. Furthermore, having competition agencies in developing countries enable advancing competition advocacy, even when these agencies do not have the required resources, they can still advocate for the removal of regulatory barriers in different sectors of the economy.[148]

Supporters of this theory claim that for developing countries, competition law must take into consideration the development side, which in instances means fostering competition and in other times, putting restrictions. In order to achieve economic development, developing countries should pursue high rates of productivity, which would lead to more competition on the market, if there were a high degree of competition, then, emerging countries must set up

[146] Kathryn McMahon, 'Competition Law and Developing Countries: Between Informed Divergence and International Convergence' in Ariel Ezrachi, *Research Handbook on International Competition Law* (Edward Elgar 2012) 214. Michal S Gal, 'The Ecology of Antitrust: Preconditions for Competition Law Enforcement in Developing Countries' (United Nations Conference, 2004) 20-38.

[147] Damien Geradin, 'Competition Law and Regional Economic Integration: An Analysis of the Southern Mediterranean Countries' 23-24.

[148] Ibid.

competition rules to control it.[149] Therefore, each country should aim to find an optimal level of policy, which varies according to the institutional framework and the willingness of the state to support such laws and the degree of development.[150]

Although policymakers and experts alike claim that enforcing competition, rules in developing economies can be an intricate and costly process, establishing competition authorities in such countries is expected to bring greater benefits to the local economy as the principle role of such institutions is to monitor anti-competitive practices. Several studies have managed to quantify the advantages of having competition agencies within the national regulatory landscape of developing economies, the two main outcomes were the following: First, having an efficient national competition agency renders the country less exposed to the weights of international cartels. Second, the cost of having a competition authority is likely to be small compared to the harm brought by anti-competitive behaviours. For example, the Organisation for Economic Co-operation and Development (OECD) and the CUTS 7-Up project[151] estimated the costs of implementing the competition agencies of South Africa and Mexico to be in the range of USD 9 to 10 million. The report concluded that within this budget and by international standards, both competition authorities have had an efficient enforcement of competition law. Therefore, it is likely that the annual budget of a competition agency would pay for itself, if these competition authorities only worked on preventing cartel operations. [152]

However, it is fair to say that in the case of the smallest economies and least developed countries, for example, Caribbean states or sub Saharan countries, the budget to set up a national competition agency may be more significant than the resources available in the country. Moreover, because of the small size of the markets in those countries, one would believe that the handling of competition issues at a regional level might provide results that are more effective. Therefore, countries that are willing to implement competition law should

[149] OECD, 'Implementing Competition Policy in Developing Countries: Promoting Pro-Poor Growth: Private Sector Development' (*OECD,* 2006) 37-40.

[150] Ibid note 147.

[151] OECD, 'Implementing Competition Policy in Developing Countries: Promoting Pro-Poor Growth: Private Sector Development' (*OECD,* 2006) 37-40.

[152] Claudia Schatan, 'The Dynamics of Competition Policies in Small Developing Economies: The Central American countries' Experience' in Richard Wish and Christopher Townley (eds), *New Competition Jurisdictions: Shaping Policies and Building Institutions* (Edward Elgar 2012) 100.

consider the particular characteristic of their national markets, if the market is small sized, they should adapt competition policy to address welfare maximisation problems, which differ from those of larger countries.

5.2. Arguments against Implementing Competition Law in Developing Countries

As to the question of whether emerging economies should implement competition law, some experts have opposed it because of the environment of developing markets. In other words, their concern is whether developing markets can absorb competition law in their legal and economic systems.[153] For example, Laffont puts forward the idea of second best, which pertains that competition is beneficial only when all elements of an ideal market are put together, which assumes no externalities, no information asymmetries, no natural monopolies, reasonable economic agents, a considerable participation from firms in all industries and a government that achieved redistribution of wealth. However, the existence of rent seeking and the lack of transparency render the task impossible. As emerging countries do not attain this ideal, therefore, competition should not be encouraged in these countries. The rationale behind this theory is that if some of the conditions of a perfect market were not present, a second best solution would entail restricting competition.[154] In illustration of this view, Paul Godek claims that, 'Exporting antitrust (…) is like giving a silk tie to a starving man. It is superfluous; a starving man has much more immediate needs'.[155]

Views against the existence of competition law in developing countries also argue that institutions do not exist or are weak. Therefore, enforcing competition will be unsound if the necessary institutions are under developed.[156] Moreover, it is argued that as competition law comprises a complex economic analysis and competition authorities in developing economies

[153] Maher M Dabbah, 'Competition Law and Policy in Developing Countries: A Critical Assessment of the Challenges to Establishing an Effective Competition Law Regime' (2010) 33(3) World Competition 457.

[154] Jean-Jacques Laffont, 'Competition, Information, and Development' (World Bank Annual Conference on Development Economics, Washington, D.C., April 20–21, 1998) 237-257 < http://siteresources.worldbank.org/INTABCDEWASHINGTON1998/Resources/laffont.pdf> accessed 25 October 2016.

[155] Paul Godek, 'One US Export Eastern Europe Does not Need' (1992) 15 Regulation 20.

[156] R D Willig, 'Anti-Monopoly Policies and Institutions' in C Clague and G C Rausser (eds) *Emergence of Market Economies in Eastern Europe* (Oxford Blackwell 1992) 187-195.

are often not equipped with the required expertise, which may lead to errors in decisions. Consequently, having a competition law regime may generate more harm than benefits.[157]

Some experts argue that developing economies are not in need of having a competition law framework or a competition authority to enforce it. It is claimed that free trade can safeguard competition. This argument presents weaknesses; first, although having a liberalised market can bring a certain discipline to companies operating on the market because free trade brings competition to local products and services, some of those products and services can be non-tradable, therefore, the suppliers of those products and services will not be controlled by import competition. In addition, removing barriers to trade such as tariffs and quotas permit foreign firms to enter the market, in some instances, these entries can be challenging in terms of anti-competitive procedures. Even though some measures such as restrains on cross border cartels are supposed to protect national markets, they can have an opposite effect and set them apart.[158]

Although competition law is not considered an urgent issue for developing countries, one should reflect on the benefits competition law brings to an economy, if a country decides to take the path of liberalisation reforms, it is important to consolidate those reforms by establishing the appropriate legal framework that restrains anti-competitive behaviours and any form of market abuse. Regarding the issue of the lack of expertise and resources, competition authorities can concentrate on priority cases and promote capacity-building initiatives. The process of setting up a competition regime may not be an easy task, as countries need to pay attention to the features of their market and the institutional capacity. One option could be that competition regimes should be established gradually.

After examining the drawbacks and highlighting the benefits of competition law for developing countries, this research turns to investigate the origins of competition law, as most emerging economies rely on transplanting foreign laws to their national economies. In addition, it is important to examine the models of legal transplants available.

[157] Ibid note 147.

[158] Frédéric Jenny, 'Globalisation, Competition and Trade Policy: Issues and Challenges' in Roger Zäch (ed) *Towards WTO Competition Rules, Key Issues and Comments on the WTO Report on Trade and Competition (* Kluwer Law International 1998).

6. The Concept of Legal Transplants

Transplant refers to a transfer or relocation from one place to another. In legal terms, transplant is concerned with bringing a concept from a foreign jurisdiction and applying it locally; as Watson argues, legal transplant refers to 'the moving of a rule from one country to another or from one people to another'.[159] Therefore, legal transplant is recognised as the constant borrowing of rules.[160] According to Watson, legal transplant is a relatively straightforward task as there is no requirement to consider the societal environment; he claims that those who chose to compare ought to have regard to the rules without reflecting on their impact on society.[161] Watson's reasoning considers that laws are only rules which are transferred and implemented in other jurisdictions, as these rules are not socially connected, any difference in historical or culture aspects do not interfere with their capacity to be transplanted, therefore, a rule is 'potentially equally at home anywhere'.[162] Opponents of this view believe that this explanation is irrelevant, and if applied, the concept of legal transplant in this particular context would be unachievable, laws cannot be considered as an independent body, because laws are not merely rules that can travel without being affected by culture and society. In fact, when rules travel across, they embrace the local culture.[163]

Legal codes are transplanted from three families: The civil system which derives from the French and German legal tradition. The common law which finds its origins in the English legal system and the mixed legal system which merges different elements.[164] During the waves of independence that followed the Second World War, colonised countries formed new states and established their legal systems from European and US systems. After the disintegration of the Communist bloc, many jurisdictions including former soviet countries and allies implemented the European and US models in order to reinvigorate their local

[159] Alan Watson, *Legal Transplants: An Approach to Comparative Law* (2nd edn, University of Georgia Press 1993). David Nelken and Johannes Feest, *Adapting Legal Culture* (Hart Publishing 2001) 93-96.

[160] Pierre Legrand, 'The Impossibility of Legal Transplant' (1997) 4 Maastricht Journal of European and Comparative Law 11.

[161] Alan Watson, 'Comparative Law and Legal Change' (1978) 37 Cambridge Law Journal 313, 314-315.

[162] Ibid.

[163] Pierre Legrand, 'The Impossibility of Legal Transplant'.

[164] Eleanor M Fox, 'Economic Development, Poverty and Antitrust: The Other Path' (2007) Southwestern Journal of Law and Trade in the Americas 112, 113.

economies.[165] These models are considered beneficial to recipient countries because they take into consideration factors such as history, ideologies and economic changes.[166] Transplants of these models have also extended to the field of competition law. The primary reasons for developing countries to select one of these models are costs efficiency, as these rules have been tested both theoretically and in practice. Therefore, their applicability and legal certainty have been demonstrated. Moreover, the EU and US models have proved their efficacy in terms of developing their own economies. Finally, foreign firms that invest in new markets consider the soundness of the domestic legal system, including competition provisions.[167]

It is worth noting that some experts argue that the efficiency of a transplanted system is concerned with the legal tradition from which the law is transplanted. This theory considers that a law transplanted from a Common law tradition would be more efficient if assessed against the civil legal tradition.[168] Others argue that the way by which the recipient country implemented the transferred law, determines its efficiency.[169] However, it is important to note that both views emphasise on the fact that local institutional structure plays a significant role in determining the efficiency of the transplanted system.[170]

Legal transplant can bring various advantages to a jurisdiction; including, facilitating trade with the jurisdiction from which the model was imported as the legal environment would be more familiar for foreign firms, thus establishing confidence and a sense of trust. Additionally, legal transplant helps reduce compliance efforts for companies from the emerging economy that wish to trade with the followed jurisdiction or for firms from the developed jurisdiction willing to do business in the developing country.[171] Moreover, legal

[165] Daniel Berkowitz, Katharina Pistor and Jean Francois Richard, 'Economic Development, Legality and the Transplant Effect' (2003) 47 European Economic Review 168.

[166] Michal S Gal, *Competition Policy in Small Market Economies* (Harvard University Press 2003).

[167] David Fidler, 'Competition Law and International Relations' (1992) 41 International and Comparative Law Quarterly 563.

[168] Armando E Rodriguez, 'Does Legal Tradition Affect Competition Policy Performance' (2007) 31 International Trade Journal 417.

[169]Daniel Berkowitz, Katharina Pistor and Jean Francois Richard, 'Economic Development, Legality and the Legal Transplant Effects' (2003) 47 European Economic Review 165.

[170] Tay Cheng Ma, 'Legal Transplant, Legal Origin and Antitrust Effectiveness' [2013] Journal of Competition Law & Economics 1.

[171] Michal S Gal and Jorge A Padilla, 'The Follower Phenomenon: Implications for the Design of Monopolisation in a Global Economy (2010) 76(3) Antitrust Law Journal 899.

transplant may foster cooperation among competition authorities on both sides to join forces in the fight against international cartels and other cross border anticompetitive behaviours.[172] Legal transplant can also be beneficial in terms of exchange of expertise, and information in cross border enforcement.[173] Furthermore, implementing one of these systems would significantly assist developing markets in entering the global market and attract foreign investment.[174] Furthermore, many developing countries aspire to create free-trade zones with the US and the EU and legal transplant is regarded as the first step to facilitate trade. It should be noted that legal transplant can also be indirectly imposed through trade agreements or be a condition that a country has been subjected to in order to receive loans from international lending organisations.[175]

Nonetheless, legal transplant does not automatically constitute a viable solution for developing markets. In some cases, it can be detrimental because transplanted laws have standards that do not necessarily match the legal and economic needs of the country or do not fit into the political agenda of national governments.[176] Consequently, laws that were primarily chosen with the purpose of creating legal and economic prosperity would have the reverse effects. Moreover, while developed countries apply a range of complex rules that are adapted to the demands of the market, the institutions in charge of applying and enforcing these rules enjoy a high level of expertise, which facilitates the implementation and interpretation of such multi-layered laws. However, applying similar rules in developing countries may be time consuming and financially unviable. For instance, the definition of market power in competition law necessitates economic analysis, which in turn entails

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[172] Michal S Gal and Eleanor M Fox, 'Drafting Competition Law for Developing Jurisdictions: Learning from Experience' in Michal S Gal and others (eds), *The Economic Characteristics of Developing Jurisdictions: Their Implications for Competition Law* (Edward Elgar Publishing 2015) 299-307.

[173] Michal Gal and Jorge A Padilla, 'the Follower Phenomenon: Implications for the Design of Monopolization Rules in a Global Economy' 903.

[174] David J Gerber, *Global Competition: Law, Markets and Globalisation* (Oxford University Press, 2010) 203.

[175] Michal S Gal and Eleanor M Fox, 'Drafting Competition Law for Developing Jurisdictions: Learning from Experience' 299-307.

[176] ICN, 'Capacity Building and Technical Assistance: Building Credible Competition Authorities in Developing and Transition Economies' (*ICN*, 2003) <http://www.internationalcompetitionnetwork.org/uploads/library/doc364.pdf> accessed 26 May 2016.

economic expertise that calls for financial, and human resources that developing countries may not possess.[177]

In terms of competition law, the EU and US competition laws are the most transplanted legal models. However, there is no agreed approach that should be followed to transplant such laws. For instance, should countries only implement some aspects of competition law and adapt them to the requirement of the local market and economic reforms that follow or adopt a model that aims to reflect the local political influence of the national market? Therefore, three derivatives models have been established, namely, the cut and paste, the contextualising model or the tailor made model.

6.1. Models of Legal Transplants in Competition Law

Although there is some scepticism that legal transplants can offer a viable solution for developing countries, the experience of most countries have proven that the EU and US models in specific areas of the law including competition law can be transferred with a certain degree of success. This section aims to review the spin-offs that developing countries implement as an interesting categorisation has been made in the literature.

6.1.1. The Cut and Paste Model

The cut and paste model entails importing parts or the totality of competition law from advanced economies.[178] As mentioned, experts argue that laws can be transplanted without considering the historical and economic conditions in which these laws were created. Legal transplant can be beneficial to the recipient country, as mentioned previously; such laws have already been tested, and provide legal certainty and positive network externalities to the country that transplanted them. In addition, they offer guidance on the legality of certain conducts. A number of countries have adopted the cut and paste model. For instance, EU accession countries, which later became member states, implemented this model as part of the convergence requirement.

[177] Michal S Gal and Eleanor M Fox, 'Drafting Competition Law for Developing Jurisdictions: Learning from Experience' 299-307.

[178] Heba Shahein, 'Designing Competition Laws in New Jurisdictions: Three Models to Follow' in Richard Wish and Christopher Townley (eds), *New Competition Jurisdictions: Shaping Policies and Building Institutions* (Edward Elgar 2012) 36-45.

However, the cut and paste model can have negative effects on the country that directly imported the laws. For example, the jurisdiction in which they are transplanted may be encountering economic and social challenges and these laws may impose stricter conditions.[179] In addition, the laws that were cut and pasted may not support the objective for which they were transplanted. That is, if the country of origin implemented these laws for reasons, which differ from the receiving country, this may create repercussions in terms of implementation and enforcement.

Copying an entire model without considering the needs of domestic markets rarely leads to positive results. This is because direct transfer does not resolve the deeply rooted institutional and structural weaknesses of developing countries. In addition, experts argue that models such as the EU and the US were implemented for large economies whereas most developing countries have small economies. Furthermore, it is believed that implementing new laws should always consider the opinion of local experts because they are aware of the issues that may hinder the success of a domestic market.[180]

6.1.2. The Contextualised Model

The second model of legal transplant, which is known as the contextualised model for competition law, considers that countries, which import a law, must put the transplanted law into context. Unlike the first model, this version does not apply laws directly; it borrows general legal concepts, values, and attempts to implement them according to the needs of the borrowing country. In this regard, the surrounding environment influences the laws. This model has a significant impact on the notion of legal transplants of the law because in case the significance of the transplanted law is not clear, the law will not be implemented; and if the law is implemented, it may not be coherent. Therefore, this model stresses the need to take into account the conditions in which these laws will evolve.[181]Arguments in favour of

[179] Alan Watson, *Legal Transplants: An Approach to Comparative Law* (University of Georgia Press, 2nd edn, 1993).

[180] Manisha M Sheth, 'Formulating Antitrust Policies in Emerging Economies' [1998] 86 Georgetown Law Journal 451.

[181] Heba Shahein, 'Designing Competition Laws in New Jurisdictions: Three Models to Follow' 36-45 note 178.

this form of legal transplant claim that the law should come from within as the foreign law will be subject to scrutiny and not entirely fit the requirements of the country.[182]

One of the countries that chose to use the contextualised model is Singapore in section 47 of its competition Act in relation to the abuse of dominant position. This particular section reproduces article 102 of the TFEU. Nonetheless, the Singaporean legislator introduced some modifications to meet the conditions of its national market. For instance, the Singaporean competition law does not prohibit charging higher prices because sector regulators are in charge of monitoring market conducts in relation to sectors such as utilities.

Nonetheless, this model faced criticisms. First, this approach is considered as time consuming because it requires a number of attempts to find the right system to implement. Thus, creating a waste of valuable welfare gains. Second, there is a need to undertake profound country analysis to identify the market context and establish the correct restrictions, merger practices and exemptions. However, such investigation entails considerable allocation of resources and expertise. Third, taking into consideration the different aspects of the legal and economic environment of a country can result in endless debates and private parties who attempt to modify the law for their own interest.[183]

6.1.3. The Tailor Made Model

The last suggested approach is the tailor made. This model focuses on national priorities and particularities, which may differ from those of the country of origin of these laws. Such elements can be historical, religious, ideological or policy concerns. For instance, the South African Competition Act attempted to implement this method by considering the unequal distribution of resources, as stated within the sixth objectives of its Competition Act, to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.[184]

To sum up, implementing competition law by using legal transplants means that the advantages of the applied law should offset its weaknesses. In addition, it is not only a matter

[182] David J Gerber, 'Constructing Competition Law in China: The Potential Value of EU and US Experience' (2004) 3 Washington University Global Review 331.

[183] Ibid.

[184] South African Competition Act 1998, Chapter 1, s 2.

of adapting the transplanted laws to the local conditions, it is also important to have competition authorities and a judiciary mechanism that effectively applies these rules. In other words, the process of transplantation would have effective outcomes if the receiving country establishes effective legal institutions.[185]

7. Conclusion

This chapter reviewed the debate revolving around the implementation of competition law in developing countries. This chapter first presented the challenges that developing countries face. This chapter observed that most of these countries suffer from deeply rooted legal, policy and institutional issues. Policy makers and legislators must consider these defects when drafting competition laws. Therefore, it is important for developing countries to implement simple competition rules, which ensure that the institutional and judicial structures in place will be able to support the enforcement of these laws.

Second, this chapter investigated the design of competition law. This chapter demonstrated that there is universality in drafting competition rules. Therefore, provisions that prohibit cartels, abuse of dominance and monitor mergers should form part of a reliable competition system regardless of the legal system. Additionally, this chapter reviewed the different goals and objectives associated with competition law. These objectives are divided between economic, social and political. The main finding is that developing countries should try to strike a balance between efficiency and respect of the wider public interest. More importantly, one must understand the intent behind implementing competition rules. Furthermore, competition law is not static; consequently, the goals of competition law should also evolve according to the economic and legal needs of a domestic market.

Third, this chapter investigated the arguments in favour and against the adoption of competition law in developing countries. The main finding was that the benefits of having a competition law regime offset the disadvantages. Although developing countries may not have the financial resources to establish a complex competition regime, having the basic version of these laws is economically more beneficial. Fourth, this chapter examined the concept of legal transplants; the literature has focussed on whether a legal transplant is feasible and what the conditions of its success are. On the one hand, it is claimed that legal

[185] Ugo Mattei, 'Efficiency in Legal Transplants: An Essay in Comparative Law and Economics' [1994] 14 International Review in Law and Economics 1, 3.

transplant should not consider the local environment as it is solely concerned with the transfer of laws from one jurisdiction to another. On the other hand, it is believed that legal transplant must consider the context in which these laws are implemented; otherwise, legal transplant is not viable.

Fifth, this chapter reviewed the different forms of legal transplants in the context of competition law. The literature has categorised them into three models. The cut and paste, wherein the law is directly transferred from the EU or US model. The contextualised model, which considers the value and concepts of foreign laws and apply them with respect to the environment of the borrowing country. The tailor made model which takes into account the national priorities of the receiving country. The main finding is that legal transplant is suitable for developing countries. However, the domestic conditions must be considered because competition law must evolve with the context in which it is placed. After reviewing the conditions, arguments and declinations of competition law. The next chapter aims to put them into context as it investigates competition law in Maghreb countries, the system of competition law chosen, the declination and goals applied.

Chapter Four: Competition Law in Maghreb Countries

1. Introduction

This chapter aims to analyse the state of competition law in Maghreb countries. As these countries have been trying to develop their national economies, they have entered into trade agreements in order to improve their economic and legal standards, including competition law. The most significant trade agreements have been the Arab Maghreb Union (AMU), which aims to create a common market among the signatory countries and the Euro-Med Association Agreements. Therefore, this chapter aims to examine the rationale for having trade agreements and reviews the AMU and Euro-Med agreements.

The legal system of Maghreb countries is inherited from diverse sources, including the French legal system, Islamic laws and customary rules. Consequently, this chapter explores the concept of mixed legal systems and its evolution in these countries. Moreover, since their independence, Maghreb countries have undertaken a number of reforms to meet the demands of their domestic economies. After the recent events that unfolded in the region, the number of reforms has become more significant as they aim to assist these countries in improving their economic and social conditions and enhancing market competition. Thus, this chapter aims to explore the latest significant reforms.

In terms of competition law, Maghreb countries have chosen to implement the EU competition law model, this was facilitated by their historical connection to the French Civil legal system, the economic connection via the Euro-Med Association Agreements and the fact that the EU model is regarded as more interventionist in controlling markets, which benefits the developing state of Maghreb economies. Consequently, this chapter aims to explore the legal, economic and historical justifications for implementing the EU model. Additionally, this chapter also reviews the implementation of competition law in Maghreb countries.

Finally, this chapter aims to explore the EU competition law model. As EU competition laws form part of a historical and institutional setting, it is of relevance to this research to investigate the background of EU competition law, the different forms of binding and non-binding provisions included in EU competition law and the institutions in charge of drafting, implementing and enforcing these rules.

2. The Maghreb Countries

In Arabic, the term Maghreb refers to the sunset, which is in opposition to the Mashreq or the Levant. The latter means sunrise and refers to the countries of the Middle East. The Maghreb comprises Morocco, Algeria and Tunisia. Libya, Mauritania and sometimes Egypt are added to the list to form the Greater Maghreb region. Geographically, The Maghreb region represents the North Eastern part of Africa and has a strategic position from Europe and the Middle East. The region extends over 6 million square kilometres and includes a variety of climates. Berber tribes were the first inhabitants of Maghreb countries; the region was later invaded by several Mediterranean, Islamic and Western empires. More recently, the population of the Maghreb was estimated at almost 84 million as of 2013.[186]

Morocco, Algeria and Tunisia constitute a strategic economic market. In addition to be united by their colonial past, these countries stand out as a potential and viable common market that can create a framework to exploit natural resources, augment economic activities and create a bridge between the two rimes of the Mediterranean.[187] Economically, the region produces one third of the African GDP. [188] In terms of commercial transactions and international business, the region is considered as falling behind. The recent political events that unfolded in some countries of the region have urged governments to adopt an economic approach, which would comprise structural changes as well as the implementation of investment friendly policies. However, economic growth has been slow because of a fall in oil prices and persistent instability in the region. In 2015, the African Development Bank estimated the growth rate in the North African region at 3, 2 per cent.[189]

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[186] Larousse, 'Encyclopaedia' (Larousse 2013) < http://www.larousse.fr/encyclopedie/autre-region/Maghreb/131068 > accessed 13 January 2017. The Phoenicians and the Romans were among the first empires to establish colonies in the Maghreb. Later, Islamic dynasties such as the Omayyad and the Abbasids colonised the region.

[187] Emanuele Santi, Saoussen Ben Romdhane and William Shaw, 'Unlocking North Africa's Potential through Regional Integration Challenges and Opportunities' (*African Development Bank*, 2012) 9.

[188] The World Bank 'World Bank Report 2015: Middle East and North Africa Prospects' (*The World Bank*, 2015) <http://www.worldbank.org/en/publication/global-economic-prospects/regional-outlooks/Global-Economic-Prospects-June-2015-Middle-East-and-North-Africa-analysis> accessed 10 November 2015.

[189] Frederic Dubessy, 'North African Economic Growth in 2015' Econostrum.info (3rd June 2018) <http://www.econostrum.info/L-Afrique-du-Nord-affiche-une-croissance-economique-moyenne-de-32-en-2015_a21898.html> accessed 13 February 2017.

From a national perspective, these three countries rely on different resources to generate their domestic income. Algeria obtains its revenues mainly from oil and gas.[190] Morocco and Tunisia rely mostly on the tourism industry and agriculture.[191] With the aim of bettering their economic and policy standards, these countries have entered into numerous trade agreements. The latter have become a significant tool to foster economic exchange among countries and have been at the forefront of regional and international commercial cooperation. However, trade agreements often suffer from a lack of coherence in terms of organising action plans and arranging commitments. Additionally, most of these agreements have not yet managed to coordinate standards or eliminate restraints on trade or services.[192] Regional trade agreements have numerous categories in accordance with the type of economic integration they aim to cover. Regional trade agreements can cover reciprocal bilateral free trade, customs areas as well as multilateral agreements.[193] As mentioned previously, Maghreb countries have signed a number of agreements; the most significant have been the Euro-Med Association Agreements with the European Union and the Maghreb Union Agreement (AMU) The Euro-Med Partnership will be explored further in this research in relation to its influence on competition law. The AMU is reviewed in a subsequent section. First, it is important to investigate the rationale of entering into trade agreements.

3. Rationale for Ratifying Trade Agreements in Maghreb Countries

Economists have acknowledged two main rationales for the existence of trade agreements, namely, the monitoring of governments' actions on trade policies and the protection against the influence of private interests and the private sector. In the first case, it is claimed that a country that does not have a trade agreement may have the temptation to influence the price of its exports relative to imports, which are also known as, terms of trade, so that it can augment its national income at the expense of its trading neighbours. In the second case, it is argued that governments face economic and political pressures because of interest groups and

[190] Ali Aissaoui, *Algeria, The Political Economy of Oil and Gas* (Oxford University Press 2001).

[191]The World Bank, 'Morocco: Overview' (*The World Bank: Countries*, 31 March 2016) < http://www.worldbank.org/en/country/morocco/overview> accessed 26 July 2016.

[192] Jamel Zarrouk and Franco Zallio 'Integrating Free Trade Agreements in the Middle East and North Africa' (2001) 2 (2) J World Investment 403, 404.

[193] The World Bank 'Regional Trade and Preferential Trading Agreements: A Global Perspective' Global Economic Prospects' (*The World Bank*, 2005).

the private sector, which may influence the government to depart from their free trade policies. As most governments aim to achieve economic efficiency by maximising national welfare, they would regard a departure from free trade as a counter-productive option. Consequently, unilateral trade policies that inefficiently restrain trade do not take place and trade agreements that aim to open trade flows occur.[194]

As mentioned above, the terms of trade approach means that countries that have the capacity to influence their terms of trade can be attracted to act in their own interest, as a result, the non-cooperative equilibrium is not efficient as the unilateral choices of countries cancel out one another because they create contraction of trade volumes and decrease overall welfare. This situation can be prevented by signing trade agreements as it allows cooperation instead of unilateral behaviours. Thus, cooperation through binding agreements reduces trade restrictions and avoids such inefficiencies. However, trade agreements ought to have punishment sanctions or be self-sanctioning, that is signatories will respect it so long as it is in their own interest because the short-term gains in case of breaching the agreement does not counter-balance the long-term losses.[195]

Moreover, trade agreements reduce inconsistencies of domestic policies. For instance, when choosing its trade policies, a government might not be capable of ensuring trustworthy economic commitments to the private sector or the parliament. This creates time inconsistency issues. In this case, the decision of the government to adopt a certain policy in the future does not occur when the future period arrives. Thus, the credibility of the trade policies becomes questionable. The use of inconsistent trade policies influences the actions of participants in the economy who will attempt to respond to it in order to decrease its impact on them, which entails that the government may not be able to use its discretion in trade policy and this leads to a trade policy that is socially inefficient.[196]

Additionally, credibility issues take place when a government is the subject of political pressure or pressures from private interest groups. For instance, a country that does not possess a considerable advantage would be influenced to restrict import, which would be more rewarding for domestic producers but would divert investment from different economic

[194] WTO, 'Flexibility in Trade Agreements' (WTO World Trade Report 2009) 21-22 < https://www.wto.org/english/res_e/booksp_e/anrep_e/wtr09-2b_e.pdf> accessed 13 September 2016.

[195] Ibid 22-23.

[196] Ibid 24.

activities. The costs created from these restrictions may be even more considerable in the long term. Therefore, it is more advantageous for governments to have free trade. In addition, trade agreements also decrease government powers in setting tariffs and improve the bargaining powers of each government in relation to its interests.[197]

Furthermore, trade agreements can have a broader perspective, which include issues that pertain to peace and regional security, control of migration flows, trafficking in persons, human rights and sustainable development issues. For example, during the Cold war, a number of trade agreements were concerned with military security concerns dominated by political thinking. These issues remain of concern, especially in the Mediterranean region.[198]

In addition to the economic and political rationales for ratifying trade agreements, Maghreb countries signed its two most important agreements in order to create regional integration and align their competition policies with those of economically established countries. In the case of the Arab Maghreb Union, the spill over effect of regional integration models, which included the relatively successful EU model, started to constitute a viable reasoning for implementing the concept of regionalism in Maghreb. Additionally, economic deals, which may impose some constraints on weaker parties, would be better negotiated if these countries formed a regional block.[199] In the case of the Euro-Med and its Association Agreements, one can deduct that the rationale has been to reduce harmful practices by foreign private undertakings and find a valid reason to open market against over-protectionist state practices. Additionally, having free trade agreements that include competition rules, means that Maghreb countries would have a harmonised competition system by way of soft or hard harmonisation, which in the long term would facilitate trade with not only the EU but also other countries that decided to embrace the EU model.

3.2. The Arab Maghreb Union (AMU)

The Arab Maghreb Union (AMU) is formed of five countries: Mauritania, Morocco, Algeria, Tunisia and Libya. The first consultative committee of the Maghreb was the first institution formed which aimed to implement a harmonised system of trade and industrial policies.

[197] Ibid.

[198] Habib Ben Yahia, 'Security and Stability in the Mediterranean: Regional and International Changes' (1993) 4(1) Mediterranean Quarterly 1, 3.

[199] Melanie Cammett, 'Defensive Integration and Late Developers: The Gulf Cooperation Council and the Arab Maghreb Union' (1999) 5 Global Governance 379, 380-381.

However, this attempt failed to provide the expected results and led to dissolving the committee. The second attempt took place in 1987, when the Algerian and Moroccan governments decided to come together.[200]

The Treaty aims to create a supranational governmental structure with the presidential Council in command. The main objective of the agreement is to reinforce the commercial relations among member states and establish a common policy at different levels. The Treaty also works towards allowing the free movement of people, goods, capital and services among member states. In addition, AMU aims to achieve the industrial, agricultural, social and commercial progress of its members. All parties agreed to adopt coordinated tariffs on imports without stepping on national sovereignty. The Union was at the time of its formation considered as a counterpart of the European Union.[201]

Although the Treaty has not yield the results expected, according to the former secretary general of the AMU, Habib Boulares, the different organs of the AMU work. He claims that 'it must not be argued that the AMU is blocked, it would be unfair for all the ones who work actively in all sectors for the achievement of this goal'.[202] Concretely, numerous projects have been coordinated under the AMU, these include, the national sections of the North African motorways, the fibre optic extension of telecom networks and cooperation on environmental issues such as the fight against desertification.[203]

3.3. The Euro Mediterranean Partnership (Euro-Med) and Association Agreements

Due to its geographical proximity with North Africa and the Middle East (MENA), the EU has always expressed a great interest in the region. The relationship between the EU and the MENA region dates back to the early 1960's. During this period, the cooperation was regarded as an equal partnership. Since then, the role of the EU market in the MENA in general and North Africa in particular has significantly increased whereas the significance of

[200] Robert W McKeon Jr, 'The Arab Maghreb Union: Possibilities of Maghreb Political and Economic Unity and Enhanced Trade in the World Community' (1991) 10(2) Dick Journal of International Law 263.

[201] Carole Murray, 'Treaty Creating the Arab Union of the Maghreb' (1993) 7 Arab Law Quarterly 205, 205-208.

[202] Luis Martinez, 'Algeria, the Arab Union and Regional Integration' [2006] EuroMeso Papers 1, 6. < http://www.euromesco.net/euromesco/images/59_eng.pdf> accessed 7 February 2017.

[203] Ibid note 203.

MENA countries towards the EU decreased, as an illustration, most of the trade coming from the South Mediterranean markets consists mainly of oil imports.

The Euro Mediterranean Partnership represents collaboration between the European Union and Southern Mediterranean countries. The Euro Med partnership ultimately aims to set a free trade area among countries, which signed the Barcelona Declaration.[204] The Euro Med is viewed as an upgrade of the cooperation agreements signed in the 1970's; it is based on the principles of solidarity, reciprocity and co-development.[205]Article 127 states that, 'The Union may conclude with one or more member third countries or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure'.[206]

As a result of negotiations, the EU and the neighbouring countries decided to sign bilateral Association agreements. Each Association Agreement aims to work towards the implementation of EU technical rules for trade, investment and sustainable development standards as well as the harmonisation of competition policies. Each agreement also includes a number of provisions on dialogue regarding political and security issues in addition to social and culture collaboration on educational concerns. Moreover, the Euro-Med agreement aspires to foster cooperation among Southern Mediterranean countries.[207]

Consequently, the EU took the decision to deepen its relationship with its neighbouring countries and established the European Neighbourhood policy (ENP) in 2003. The latter aims to reinforce the governance of EU neighbours and set an action plan in order to develop trade relations. In 2007, the ENP was revised in order to emphasis on some reforms such as competition policies.[208] The developments gave birth to the Union of the Mediterranean (UfM), this agreement aims to further strengthen the trade, cultural and political relationships

[204] Jamel Zarrouk and Franco Zallio 'Integrating Free Trade Agreements in the Middle East and North Africa' (2001) 2(2) J World Investment 403, 405. The Barcelona process represents multilateral cooperation with the countries of the Mediterranean basin. The EU and 12 Mediterranean non-member countries adopted this agreement; these were Algeria, Cyprus, Egypt, Israel, Jordan, Lebanon, Malta, Morocco, the Palestinian Authority, Syria, Tunisia and Turkey.

[205] Mohammed El Said, *The Development of Intellectual Property Protection in the Arab World* (The Edwin Mellen Press 2010).

[206] Art 27, Treaty on the Functioning of the European Union [2007] OJ C306/1.

[207] Ibid 407.

[208] ENP action plans are not legally binding.

with Southern Mediterranean countries and help the concretisation of the Barcelona process.[209]

4. Legal Systems in Maghreb Countries: The Concept of Mixed Legal Systems

The general meaning of a legal system refers to the rules, procedures and legal institutions that characterises a country. It also denotes the practices, procedures and legal philosophy that some nations have in common. The latter description refers to the notion of parent legal family. Whilst ancient civilisations such as the Greeks' acknowledged that legal, multiplicity is an unavoidable phenomenon. Experts argue that legal families are divided into two major parent groups, namely, the Common and Civil systems.[210]

Although most legal systems in the world are assimilated to one of the major existing parent legal families. This view faces criticism as it focuses on Western law models, in addition, legal systems which share similar features with a legal family, do not necessarily belongs to it. As an alternative, certain legal systems deserve to be regarded as a family in their own rights; therefore, a new 'family tree' comes into existence. This form is known as the hybrid system; it encompasses a mix of legal traditions, or incorporates elements of religion or local customary rules in its legal system. In line with this view, Plessis argues that, 'legal systems generally are mixed in the sense that they have been influenced by a variety of other systems'. Thus, legal systems can be reorganised according to the supremacy of the 'ingredient sources'. [211]

Legal experts differ regarding the concept of mixed legal systems. They consider that because the features of a mixed legal system cannot be classified under one family, therefore, they continue to be a dividing line. However, they acknowledge the fact that certain mixed legal system contain an advanced legal work, thus, they may achieve a balance that could in that sense, contest their connexion to classical systems. Moreover, the extent of this new

[209] European Union, 'European Union: External Action Plan' (European Union, 30 June 2017) < https://eeas.europa.eu/topics/european-neighbourhood-policy-enp_en?page=2> accessed 12 February 2016. Both ENP action plans and UfM are considered as operational and institutional plans for the Association Agreements.

[210] Rene David and John E C Brierley, *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law* (2nd edn, The Free Press 1978).

[211] Esin Orucu, 'Family Trees for Legal Systems: Towards a Contemporary Approach' in Mark Van Hoecke (ed), *Epistemology and Methodology of Comparative Law* (Bloomsbury Publishing 2004) 362-363.

classification would be proportionate to the strictness of the standards for admission to other families from which the mix systems derive.[212]

Even if the abovementioned viewpoints are consistent regarding their categorisation, however, they appear to overlook the necessity of historical progress and specific methods of 'adjudication and legal doctrines' of the legal system involved. Due to their colonial past, legal systems in the Maghreb region are based on the civil legal system, however, these countries are also categorised as mixed. Plessis includes countries from this region such as Algeria under the grouping of mixed systems of Islamic and civil laws.[213]

4.1. The Evolution of Mixed Legal Systems in Maghreb Countries

During colonial times, the Arab world was divided between the French and British empires. North African countries including, Morocco, Algeria and Tunisia fell under French colonial powers. Thus, up until their independence, these countries applied the French legal system. Additionally, Islamic law, which was considered as tribal, was also applied in special circumstances such as marriages and inheritance.[214]

After gaining their independence, Maghreb countries established their own national legal systems. The colonial heritage together with the Islamic tradition and customary laws had a significant impact in shaping the constitutions and diverse codes.[215] Maghreb countries kept the Napoleonic civil code. In addition, the Islamic law, which represents opinions and interpretations of legal scholars, became one of the sources of law in Maghreb countries.[216]

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[212] Ibid.

[213] Roger Cotterrell, 'Is It So Bad to Be Different? Comparative Law and the Appreciation of Diversity' in Esin Orucu and David Nelken (eds), *Comparative Law: A Handbook* (2nd edn, Routledge 2010) 133-154.

[214] Amar Mohand Amer and Belkacem Benzenine, *The Maghreb and the Algerian Independence* (CRASC, 2012).

[215] Interpretation of Sharia law follows four main schools of thought, namely, Malaki, Hanafi, Shafii and Hanbali. The constitutions of Morocco, Algeria and Tunisia state that Islam is the religion of the state. Art 03, Decree 29 July 2011 regarding the promulgation of texts on the Constitution of the Kingdom of Morocco. Art 2, Law n° 08-19 of 15 November 2008 amending the 1996 Constitution of the People's Democratic Republic of Algeria. Art 01, Constitution of the Tunisian Republic of 27th January 2014.

[216] Napoleonic code refers to the first code drafted and established under Napoleon I. it was the first French civil code. Among the academics who helped draft Arab legal systems was the famous Egyptian Jurist Abdel Razzak Al Sanhuri.

The customary laws were used as a source of the law; however, there is rarely any recourse to them.

Moreover, at that time, legal experts, mainly based in other Arab countries started codifying laws for the Arab world. It is interesting to note that while translating laws for the Maghreb countries, legal experts included laws from the Egyptian legislature in place at the time, this is because, Egypt was among the first countries to codify its legal system, which was also based on the Napoleonic civil code.[217] Therefore, the borrowing process facilitated the establishment of a new legal system for Maghreb countries.

5. Overview of Reforms in Maghreb Countries

Similarities in languages, religion and culture, reflected a certain consistency and legal order in these countries. In the mid-fifties and sixties, an industrialisation process was put in place to fill the void left by the French colonist and meet the social and economic expectations. Algeria adopted a socialist economic system based on the nationalisation of private assets, state ownership and centralisation of powers. Morocco and Tunisia implemented a more liberal economic approach. Although, state ownership in both markets remained significant, private ownerships were not restricted and foreign investments were authorised and encouraged.[218]

Throughout the last three decades, Maghreb countries have undertaken a wave of reforms to meet the requirements of their domestic economies. At the end of the eighties, these countries suffered multiple economic setbacks, which were linked to socio-political and economic changes that were taking place at an international level. These included the oil shock of 1986 and the subsequent decrease in oil prices, the decline of the dollar, the fall of Communism and bi-polar forces and the consolidation of the European Community as an important trading block. Consequently, Maghreb countries attempted to redirect their economies towards a liberal approach in order to prevent an increase in the external debts. These reforms continued during the nineties, although one of these countries, namely, Algeria was plagued by a bloody civil war, which had a minor effect on its neighbours, the liberalisation process continued and included important sectors such as telecommunications and banking. In 2011,

[217] Mohamad A M Ismail, *International Investment Arbitration: Lessons from Developments in the MENA Region* (2nd edn, Routhledge 2013) 2-6.

[218] Ibid.

civil unrest spread across the region because of unemployment, social injustice and corruption. This led to the dissolution of the national government of Tunisia, the movement had a spill over effect in both Morocco and Algeria and a third vague of reforms took place in all Maghreb countries. The next sections aim to review the latest reforms that are concerned with reinvigorating investment and competition at national levels.

5.1. Morocco

The Moroccan legal system is built on a constitutional monarchy, as mentioned in this chapter, legal systems in Maghreb countries have components of French law and Islamic tradition. Since its independence in 1956, the kingdom witnessed six constitutional reforms, in 1970, 1972, 1992 and 1996. Reforms during this period included the creation of commercial courts and liberalisation of important sectors.[219]

Before 2011, the King enjoyed a supreme reign on executive powers. For example, the King was given the power to dissolve the parliament. The new constitution comprised a number of reforms to meet the socio-economic requirements of the country, which included, reforming public administrations and regionalisation, developing infrastructure via reforming sectoral regulations. Implementing strategic projects vital for economic revival and the diversification of the economy, putting national plan to improve youth training and employment.[220] In terms of power, the king has to appoint a Prime Minister from the party that wins the majority of seats in parliamentary elections.[221]

Morocco considers investments as an essential factor to ensure sustainable economic growth. The Kingdom took the decision to reform the economy by adopting new laws that aim at facilitating investment procedures for companies wishing to establish a business in the country. These latest changes aim to offer an enhanced protection for private national and foreign operators. The latest amendments comprise:

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[219] African Development Bank, 'Morocco Documents Country Strategy 2012-2016' (*AfDB*, 2012) 2-10 < http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/MAROC%20-%20DSP%202012-2016.pdf> accessed 06 October 2016.

[220] Ibid.

[221] European Bank for Reconstruction and Development, 'Commercial Laws of Morocco: An Assessment by EBRD' (*EBRD*, 2015) < http://www.ebrd.com/downloads/sector/legal/morocco.pdf > accessed 06 October 2015. Additional reforms included the recognition of freedom of religion even if Islamic law remains the law of the kingdom. The new constitution also protects fundamental human rights and recognises the supremacy of international treaties as ratified by the Kingdom.

5.1.1. Supporting Investment in Morocco

The kingdom created an investment framework, which aims to initiate a strategic phase that focuses on private investments as a vehicle for long-term growth. The Framework includes three main categories, namely, common core offers to all sectors, sectoral offers developed to support special sectors of the economy and regional offers, which aim to promote the creation of new regional hubs. These measures include the creation of a free tax system for the a duration of five years, the creation of free zones in each region, the granting of free zone status for large industries which are outside the free zone and the implementation of support mechanisms for least developed regions. At an institutional level, the Moroccan government established the Agency for the Development of Investment and Exports. The new structure aims to support investment at different levels.[222]

Moreover, the Kingdom established further measures to promote investment such as financial state contribution to certain forms of investments under the Investment and Industrial Development Fund, the state takes charge of 20% of expenses related to the acquisition of land and offers import duty exemption for any business that invests above 100 million Dirham.[223] Moreover, Morocco established a strategy to improve commerce by modernising traditional distribution routes, offering gradual financial support, and created an agency in charge of the digital economy that aims to foster the presence of administrative services online.[224]

Additionally, in terms of international trade, the country was the signatory of an Association Agreement with the European Union, which aims to establish a free industrial exchange, deepen the liberalisation of commerce, specifically agricultural products, liberalise exchange of services and reinforce commercial integration.[225]

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[222] Fahd Iraqi, 'Tens of Projects Announced to Reform Investment Plans' (Jeune Afrique, Casablanca, 05 July 2016) <http://www.jeuneafrique.com/339028/economie/maroc-plusieurs-dizaines-de-projets-annonces-nouveau-plan-industriel/> accessed 14 January 2017.

[223] The Dirham is the national currency of the Kingdom of Morocco.

[224] Ibid n 222.

[225] Association Agreements (Morocco-European Union) (adopted 26 February 1996, entered into force 1 March 2000). Other main trade agreements include, the United States and Turkey.

5.1.2. Protection of Industrial Properties and Personal Data

This legal framework aims to reinforce the protection of trademark, putting in place measures at national borders in order to control counterfeit goods, protection of audio brands and to the submission of electronic forms of trademark.[226] In addition to modernising submission procedures, putting a national system of data and regulating the profession of industrial property consultant.[227]

The kingdom was also the signatory of international Treaties in relation to industrial property strengthening its legal framework, protecting national and international investors, and aligning with international standards.[228] Moreover, the Moroccan Office of Industrial and Commercial Property monitor the application of such laws.[229]

Moreover, the amendment introduced legal dispositions which aim to protect identities, rights, individual and collective freedom and to protect matters related to the private life of individuals. In addition, the law defines the right to access databases, which contain personal data, oppose certain behaviours, provide the right to seek the rectification of certain erroneous data, deleing certain outdated information. In this case, the National Commission in charge of controlling personal data is responsible for verifying the treatment of personal data and guarantee their legality and that they do not represent a risk or threat to fundamental human rights.[230]

5.2. Algeria

The Algerian economy has revolved around the oil and gas industry, which led a number of experts to analyse its economic and legal framework under the Dutch disease.[231] After

[226] Law n° 31-05 modifying and completing Law 17-97 in relation to the protection of industrial property.

[227] Law n° 23-13 modifying and completing Law n 17-97 in relation to the protection of industrial property.

[228] Among the Treaties signed by Morocco is the Trademark Law Treaty, Trademark Law Treaty (adopted 27 October 1994, entered into force 1 August 1996) 001 TRT 1.

[229] Moroccan Office of Industrial and Commercial Property 'Missions' (*OMPIC,* 2014) <http://www.ompic.org.ma/en/content/missions > accessed 08 October 2015.

[230] Law n° 08-09, Art 01-24 protection of physical persons regarding the treatment of personal data.

[231] The Dutch disease refers to the reliance of an economy on one particular sector, The Economist, 'What is Dutch Disease, and why It Is Bad? (*The Economist*, 5th November 2014) <

Algeria gained its independence in 1962, the government in place established a socialist system and a state planned economy. After the 1986 oil crash and political turmoil, the country undertook a number of reforms: The first one, covered the period of 1988 to 1991, which included the beginning of the liberalisation process. The second one encompassed the period between 1993 to 1999 and witnessed a structural adjustment. The last period extended from 1999 and forwards with an opening of the economy then a return to a more protectionist approach. The most significant changes are reviewed in the following section.

5.2.1. Prioritisation of National Investments

The liberalisation process included restructuring public companies, privatisation and opening certain sectors to competition. Investments are regulated by ordinance n° 01-03,[232] which states that any investments are subject to fiscal advantages.[233] The new amendments introduced in 2014 encourage foreign investments that help transfer Know-How and technology to national firms. However, the law imposed some restrictions. For example, foreign investors are now required to set up a partnership with nationals. Such provision aims to protect investments and reinforce the presence of local businesses in the market.[234]

Moreover, Algeria created a special fund to support the export of national goods or services abroad. Assistance is provided to any firm residing within the country and any businessperson registered at the national register of commerce. The Ministry of commerce fixes the amount of financial assistance according to percentages determined in advance. The financial assistance includes studies regarding the foreign markets. Some expenditure for international exhibitions held abroad, the transportation costs of goods at harbour. Any

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http://www.economist.com/blogs/economist-explains/2014/11/economist-explains-21> accessed 25 November 2016.

[232] This law is concerned with developing investments. It was modified and completed by ordonnance 06-08 of 15th July 2006, the financial laws of 2009, 2010, 2011, 2012, 2013, 2014 and 2016.

[233] Art 4, Law n° 01-03. Investors must register with the National Agency for Development and Investments before starting any investment.

[234] Association Agreement (Algeria-European Union) (adopted April 2002, entered into force December 2005) OJ L265 1. KPMG, 'Guide to Investing in Algeria 2016' (*KPMG*, 2016) 51-51 < https://www.kpmg.com/DZ/fr/IssuesAndInsights/Publications/Documents/Guide%20Investir%20en%20Alg%C3%A9rie%202016.pdf> accessed 12 October 2016.

expenditures related to adapting the products to the demands and standards of the foreign market.[235]

At an international level, Algeria started the negotiation process to become a full member of the World Trade Organisation (WTO). Additionally, Algeria was the signatory of a declaration of cooperation agreement with the European Free Trade Association (EFTA), which has as ultimate objective, the creation of a free trade area.[236]

5.3. Tunisia

Tunisia drafted its first constitution in 1959, since then, the country encountered major economic changes. First, under President Habib Bourguiba, the country commenced a modernisation process of its educational, industrial and cultural infrastructures. Tunisia adopted a presidential republic regime; the President enjoyed numerous powers such as heading the Supreme Court and directing the state policy and proclaimed laws. In 1987, after an economic crisis due to unbalanced payments, Tunisia commenced a series of economic adjustments and stabilisation programmes; these included a progressive liberalisation of prices, a removal of barriers to entry into its domestic market and decrease the presence of public companies in different sectors.[237]

After the process of democratic transition started in 2011, Tunisia has embarked in a number of economic and political reforms. The legislative system was changed to two-tier houses of parliament. The upper house is represented by the Chamber of Councillors and the lower House embodied by the Chamber of Deputies. The Constitutional Council investigates draft laws proposed to the President to guarantee their compliance with the constitution. Additionally, the Council has been given the power to review Treaties and questions of institutional organisation.

[235] Law n° 96-31 relating to the creation and functioning of the fund, modified and complemented by Law n° 05-16.

[236] Declaration on Cooperation (Algeria-EFTA States) (adopted 12 December 2002) It should be noted that the negotiations are currently on hold.

[237] These reforms were put in place by the subsequent governments under President Ben Ali who was removed after the 2011 uprising.

5.3.1. Prioritisation of Export

The country has also established a programme to develop exports, the programme aims to diversify exports and improve access to external markets for small and medium sized firms. Guarantee the pre-financing of exports to firms, simplify, and facilitate export procedures. The programme was launched in 2000, the plan was divided into three stages, the launch and development that took place between 2000-2005, the consolidation phase occurred between 2005-2010 and the last part which entered into phase in 2011 and will last until the end of 2016. The strategic programme has provided positive results, more than 1700 enterprises developed their exportations, and more than 50 companies managed to gain access to foreign markets.[238]

Moreover, Tunisia has set up a number of international economic agreements. First, the country signed the General Agreement on Tariffs and Trade (GATT). It has been a member of the WTO since 1995. More recently, Tunisia has reinforced its trade ties with the EU by launching negotiations for a Deep and Comprehensive Free Trade Area (DCFTA).[239] The objective of such negotiations is to establish further investment opportunities between both markets. The Agreements aim to assist the economic reforms in the country and align the Tunisian legislation close to the EU in trade-associated areas.[240]

6. Justification for implementing the EU Competition Law Model in Maghreb Countries

As mentioned in this chapter, the EU and US competition law models represent the most transplanted models, Maghreb countries have been among the developing countries that implemented competition provisions based on the EU competition law system. Therefore, it is essential to identify the rationale behind implementing the EU competition law and the derived model transplanted. Before a developing country embarks in transplanting foreign

[238] Ministry of Commerce, 'Exports Development Programme' (*Tunisian Republic*) <http://www.commerce.gov.tn/Fr/programme-de-developpement-des-exportations-pde_11_76 > accessed 17 October 2015.

[239] European Commission, 'Trade, Countries and Regions: Tunisia' (*Europa: Trade*, 29 July 2016) <http://ec.europa.eu/trade/policy/countries-and-regions/countries/tunisia/> accessed 17 October 2015.

[240] The EU is the largest Trade partner of Tunisia, which represents 62.8% of the country's total trade. The majority of imports from Tunisia are machinery and transport equipment.

rules, it usually analyses which competition law model is compatible with the characteristics and needs of its domestic market.

Although the US and EU models have matured over time, they both have specific historical, economic and cultural attributes. In this race, the US model, which gives priority to the principle of consumer welfare, has been perceived by a number of developing countries including Maghreb as not capable of tackling the challenges that these economies have to overcome. For example, the US tradition acknowledges the view that markets should be more self-correcting and give reverence to profit maximisation. Additionally, the US Supreme Court often shies away from monopolisation offences, predatory pricing and price squeeze.[241] On the contrary, the EU model is more apt to accommodate the specificities and the different level of economic development of Maghreb jurisdictions. This is because the EU competition law is founded on the economic and political approach of the ordo-liberalists of the Freiburg School, which regard efficiency, especially allocative as a positive outcome of competition. EU competition law aims to safeguard competition and a competitive process based on merits instead of relying on markets to self-correct. As Fox claims 'A model consistent with developing economies is not one where the role of the state is very much a residual one confined to regulating instances of market failure'.[242]

6.1. Legal Perspective

EU competition law is considered more suitable for keeping the fragile balance of newly liberalised markets because it has a more interventionist approach on markets. The EU competition law is not considered as shying away from sanctioning state enterprises if they abuse their dominant position. Moreover, the EU competition law is known to have drastic measures to fight international cartels. The rules, which detect predatory pricing, price-fixing and abuse, are considered as offering a better protection, especially for small and medium sized firms. Additionally, EU competition law is considered a trusted harbour because it utilises market shares to measure dominance and authorise special statutory exclusions. In

[241] *Verizon Communications Inc V Law Offices of Curtis V Trinko LLP* 540 US 398 (2004).

[242] Kathryn McMahon, 'Competition Law and Developing Economies: Between Informed Divergence and International Convergence' 225 note 57. Contrary to EU competition law, US antitrust law has departed from market definition to using direct assessments of market power, it has also moved away from the per se offence for resale price maintenance and have instead adopted the rule of reason analysis.

contrast to EU competition law, the US model is considered more appropriate for markets with a few entry barriers and for market players, who are able to gain access to an active and operative capital market.[243]

It should be noted that adjusting paradigms of competition law to the situation of the country in which it is implemented could require utilising more discretion, which may sometimes be perceived as triggering capture and broad immunities for entrusted interests. In this case, EU competition law is believed to prevent these problems by building up more transparency of per se rules.[244] Furthermore, selecting the EU system is based on acknowledging that an effective institutional framework is equally critical to legislative actions. US competition law is complemented by criminalising offences and private actions. The EU model is built on public remedies and administrative bodies and discretion, which offers an adaptable and flexible option than applying general standards decided mainly by courts.[245]

6.2. Economic Perspective

As observed in this chapter, the EU promoted its competition law through trade policies by inviting other countries to implement a competition law, which is in compliance with its rules. In this context, EU Association Agreements oblige less strong partner to accept EU substantive competition law rules. This technique has been utilised for all EU candidate countries and countries hoping to establish trade links with the EU market. For equally strong trading partners, emphasis has been put on the benefit of having convergent laws that facilitate exchange of information and mutual assistance.[246]

The above-mentioned trend is recognised as ‘conditionality; whereby the importing jurisdiction establishes its laws as conditions that the other party has to follow in order to have access to the reward. One can observe that Maghreb countries followed a similar path, Morocco, Algeria and Tunisia were all signatories of EU Association Agreements, which comprised provisions concerned with convergence of their domestic laws to EU standards. It should be noted that competition provisions for Maghreb countries were concerned with

[243] Ibid 223-224.

[244] Louis Kaplow, ‘Why Ever Define Markets?’ (2010) 124 Harvard Law Review 437.

[245] Ibid.

[246] Ibid note 147.

substantive laws rather than institutions. The EU-Morocco Association Agreement aimed to reinforce trade between the two markets. This agreement enclosed competition provisions in articles 36 to 38, which prohibit any agreements, decisions and concerted practices that aim to restrict, prevent or distort competition in addition to any abuse of dominant position and aid which distorts or threatens to distort competition.[247]

Algeria signed the trade agreement with the EU, which also aimed at facilitating economic exchange and modernise its competition law, article 41-43 of the agreement deals with similar provisions related to competition matters.[248] Furthermore, Tunisia was the first Southern-Mediterranean country to sign an Association Agreement with the European Internal Market. The Agreement contains competition provisions embodied in articles 36-39 which also prevent concerted practices, abuse of dominant positions and state aid that distorts competition. [249]

6.3. Historical Perspective

As mentioned in this chapter, Maghreb countries have been receptive of the French civil code and civil law system, although at the beginning; legal transplant was forced up on these countries, after gaining their independence, the situation changed to become a voluntary transplantation of rules. Therefore, the historical link provided a natural incline towards EU competition law model. In this context, the contextualised version of the EU competition law was applied. This is because trade-agreements permitted a transplant of the principles and provisions of EU competition law.[250]

Moreover, Maghreb countries implemented a derived version of the French ordinance n° 86-1243 in relation to competition and freedom of prices. The provisions of this ordinance gave the government the freedom to intervene to regulate high or low prices, put temporary measures in sectors where an unexpected situation took place. This comforted the idea of

[247] Association Agreement (European Union-Morocco) (adopted 26 February 1996, entered into force 1 March 2000) OJ L70/2.

[248] Association Agreement (European Union- Algeria) (adopted 22 April 2002, entered into force 1 May 2005) OJ L 265/2.

[249] Association Agreement (European Union-Tunisia) (adopted 17 July 1995, entered into force 1 March 1998) OJ L 97/98.

[250] See chapter three section 6.1.2.

choosing a regime that allows more room for discretion and intervention in the market, which was regarded as suitable for the state of Maghreb countries.

Regarding the aim of competition law, Maghreb countries followed the French model and chose to encourage economic efficiency and enhance consumer welfare. However, it is interesting to note that Tunisia added an additional goal in its recent amendment, which guarantees market balance; this may imply that Tunisia is considering the principle of public interest, especially, in the transitioning context of the country.[251]

6.4. Implementation of Competition Law in Maghreb Countries

The full implementation of competition law in Maghreb did not start until the nineties when reforms were established to open some sectors to competition. In Morocco, competition law was officially adopted in 1999 with the implementation of law 06-99.[252] This law established the foundation on free pricing and competition. In addition, it created the Competition Council. The law aimed to provide the government with a mechanism to supervise markets that began to depart from monopoly and simplify cooperation between public administration and private firms. Moreover, competition law in Morocco was given a constitutional strength, that is, any infringement of competition law has been considered an offence against the fundamental rights and freedom of citizens.[253]

In Algeria, the first law created was concerned mainly with pricing. However, this piece of legislation was not regarded as an effective representation of competition law neither did it cover the needs of the market which started to receive foreign investment.[254] The pervious law was abrogated and replaced with a new law, which entered into force in 1995.[255] The new law aimed at organising and encouraging competition and emphasised the importance of transparency in commercial transactions. However, this law was also regarded as ineffective; because it suffered from weak drafting and did not differentiate between the varieties of anti-

[251] Law n 06-99 Preamble; Ordinance nº 03- 03, Art 01; Law n° 2015-36, Art 01.

[252] Law n 06-99 regarding freedom of pricing and competition, amended and completed by Law n° 104-12 relating to Freedom of Price and Competition and Law n° 20-13, Art 01 in relation to the Competition Council.

[253] Maher Dabbah, *Competition Law and Policy in the Middle East* (Cambridge University Press 2007) 135.

[254] Law n° 89-12 of the 5 July 1989 in relation to prices.

[255] Ordinance n° 95-06 of the 25 January 1995 concerning competition.

competitive practices. After signing the Association Agreement with the EU, the law was modified to facilitate business relationship and global integration.[256] The 2003 ordinance and its consecutive amendments gave further consideration to competition law, they aimed to control economic concentration, prevent anti-competitive practices including cartels and abuse of dominant positions in more details.[257]

Tunisia is considered a pioneer is terms of competition law in North Africa; as mentioned, its engagement with the European Union was among the first ones signed in the region. The first legislative enactment in relation to competition law took place in 1991. It created the Competition Council, which enjoyed a consultative role and later became the Competition Council. This piece of legislation embodied the liberalisation process the country had started to undertake. Competition law has been dealing with prohibition of anticompetitive behaviours and discriminatory practices. In addition, the law contains provisions that aim to enhance consumers' protection.[258]

As we have seen, the Maghreb countries have selected the EU model mainly due to the legal straightforwardness of the EU model in combatting anti-competitive practices. Therefore, it is worth investigating the EU model in more details. The next sections aim to provide a review of the historical implementation of EU competition law, its general provisions and the institutions in charge of applying it.

7. Background on the Creation of the EU Competition Law Model

The European internal market emerges from the Treaty of Rome later renamed the Treaty on the Functioning of the European Union (TFEU).[259] As the European economies were conventionally managed by the state and the majority of sectors were subject to monopoly, each country's economy was separated from the other at national borders. Consequently, the underlying objective of the Treaty was to dismantle national borders and establish an

[256] Ordinance n° 03-03 of 19 July 2003 relating to competition modified and completed by Law n° 08-12 in Arts 06 and 10 regarding practices which restrict competition.

[257] The Council must be notified of any merger operation that represents more than 40% of market activities.

[258] Law n° 64-91 in relation to competition and prices.

[259] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C306/01. The basis of the Treaty was set in the European Coal and Steel Community Treaty of 1951, which was signed between France and Germany.

integrated market. Throughout the years, the European Union have progressed from the idea of creating political stability to establishing common economic and social standards.[260]

The internal market of the European Union aims to achieve a dynamic, knowledge based economy that is able to compete at an international level.[261] The idea of establishing a homogenous common market was consolidated in 1985 after the European Council reached an agreement to accelerate the integration process. The enactment of the single European act (SEA) was the stepping-stone that allowed establishing the freedom of movement for people, money, goods, and services.[262]

The free movement of persons entailed that legal residents of the Union would be able to work or live in any other member state and have their professional qualifications recognised. Cross-border flow of capital and currency ought to be allowed. Consequently, any type of service would be made available in any member state irrespective of the location of the provider's headquarters and residents would have the freedom to use such services.[263] Moreover, the fundamental purpose was to remove all non-tariff barriers, which hampered the progress of the common market, or led to price distortion, these included the following:

- Physical barriers, such as customs and border checks;
- Technical barriers which comprised the variety of standards and regulations;
- Fiscal barriers, which were caused by the high level of indirect taxation.[264]

The Treaty of Lisbon brought a number of changes into effect. First, it amended the numbering of the Treaty articles and changed the name of some institutions. Consequently, the Treaty on the Functioning of the European Union is now constituted of 358 articles. Additionally, the amendments made to the former treaties gave birth to substantial jurisprudence. Thirdly, the Treaty has been seeking to develop important initiatives that

[260] Daniel A Crane, *The Institutional Structure of Antitrust Enforcement* (Oxford University Press 2011) 192.

[261] As a market, the EU signed a variety of commercial agreements, such as the Treaty Establishing the European Economic Area with Norway, Liechtenstein and Iceland, European Economic Area Agreement (EU-EFTA) (entered into force 1 January 1994).

[262] The Single European Act [1987] OJ L169.

[263] John McCormick, *Understanding the European Union, A Concise Introduction* (4th edn, Palgrave Macmillan 2008).

[264] Neill Nugent, *The Government and Politics of the European Union* (7th edn, Palgrave Macmillan, 2010).

would eventually contribute to the sustainable growth of the European economy. Among which, the Treaty urged EU governments to embrace liberalisation in a variety of markets including telecommunication, electricity and gas, air traffic, encourage research and development in addition to assisting the EU to move towards a well-integrated digital knowledge community.[265]

The first attempt to liberalise the different sectors was first introduced with a green paper, which assessed the situation of the telecommunication market, energy and postal sectors. This resulted in the introduction of liberalisation reforms as well as implementing competition law enforcement mechanisms. The first attempt took place via directives and decisions which were reflected in national legislations. After that, the EU encouraged the setting up of national regulatory authorities, which would work with EU institutions to facilitate the process.[266] Although coordination between EU and national institutions was incited, there were no standard norms. Therefore, a transnational network of regulators was put in place to ease the process of synchronisation.[267] The empowerment of national competition agencies was supported by the creation of a system of mutual recognition and cooperation among Member States and the Commission, this system is recognised as the European Competition Network (ECN) which has for main objective to enhance collaboration and safeguard the application of competition rules under the supervision of the EU Commission.[268] In addition, the EU Commission and national regulatory authorities established forums at community level such as the European Regulators for Electronic Communications (BEREC) that aimed at improving dialogue between national regulatory authorities and the EU Commission. The main role was to ensure compliance with the main objectives of the internal market.

[265] John McCormick, *Understanding the European Union, A Concise Introduction* (4th edn, Palgrave Macmillan 2008).

[266] Ariel Ezrachi, *EU Competition Law: An Analytical Guide to the Leading Cases* (4th edn, Hart Publishing 2014).

[267] Javier Tapia and Despoina Mantzari, 'The Regulation Competition Interaction' in Ioannis Lianos and Damien Geradin (eds), *Handbook on European Competition Law: Substantive* Aspects (Edward Elgar 2013).

[268] The Commission Notice on Cooperation within the Network of Competition Authorities [2004] OJ C 101/43 para 1.

7.1. The Provisions of EU Competition Law

As mentioned, competition is at the heart of the EU internal market; Competition law provisions represent a significant component of the Treaty on the Functioning of the European Union (TFEU). These conditions are compulsory upon all European Member States. EU competition law is covered from article 101 to article 109; it complies with the principles of the Treaty, which aim to create a competitive economic market for the European Union.[269]

Articles 101 deals with the main competition rules that are applicable to undertakings. Article 101 of the Treaty on the Functioning of the European Union (TFEU) prohibits agreements that have as their object or effect the restriction, prevention or distortion of competition within the EU and which have an effect on trade between EU member states. [270]

Article 102 stipulates that any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in: (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.[271]

Articles 103 states that the appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102 shall be laid down by the Council, on a proposal from the Commission and after consulting the European Parliament. Article 104 states that until the entry into force of the provisions adopted in pursuance of Article 103, the authorities in Member States shall rule on the admissibility of agreements, decisions and concerted practices and on abuse of a dominant position in the internal market in accordance with the

[269] Alison Jones, Brenda Sufrin, *EU Competition law* (Oxford University Press 2011).

[270] Treaty of Lisbon amending the Treaty on European Union and the Treaty Establishing the European Community [2007] OJ C306/01. Art 101 replaces art 81 note 259.

[271] Ibid art 102.

law of their country and with the provisions of Article 101, in particular paragraph 3, and of Article 102.

Finally, European Union Merger Regulation (EUMR)[272] complements competition law with rules applicable to concentration between undertakings that may affect the EU community.[273]

Since the enactment of the first version of the Treaty, EU competition law has been at the heart of the EU discussions. The preamble that introduced the Treaty of the European Economic Community (EEC) mentioned the necessity to establish a business environment, which guarantees fair competition.[274] The most recent version of the Treaty referenced the need to set out a framework that aims to guarantee undistorted competition.[275]

In addition to the main laws, EU legislation includes a number of complementary regulations such as directives, decisions, recommendations and opinions. Directives are intended to be implemented by Member States in their national legislations; they are binding by the nature of their results. Legislators at national levels are in charge of applying them regardless of the form or procedures chosen.[276] Decisions also have a binding nature; they only concern market players against which these decisions have been directed. In the case of anticompetitive practices, the EU Commission uses decisions as a tool to apply its competition rules on undertakings, in this instance, the Commission can either oblige the party to stop a behaviour considered as anticompetitive or order the payment of a fine. [277]

Opinions and recommendations are not binding; they stand as soft laws to voice the view point of European Commission on competition matters.[278] Moreover, notices also represent a

[272] Regulation (EU) No 139/2004 on the Control of Concentrations between Undertakings [2004**]** OJ L24/1.

[273] Richard Wish, David Bailey, *Competition Law* (7th edn, Oxford University Press 2012). Article 4(3) of the Treaty on the European Union is applied with Article 3(1) (b) and Articles 101 or 102 TFEU in order to prevent Member States from enacting or maintaining measures to reduce the effectiveness of competition law.

[274] Treaty Establishing the European Economic Community and Related Instruments [1957].

[275] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C306/01. Note 259.

[276] E.g, Directive (EU) No 104/2014 of the European Parliament and of the Council on Certain Rules Governing Actions for Damages Under National Law for Infringements of the Competition Law Provisions of the Member States and of the European Union Text with EEA relevance [2014] OJ L 349/1.

[277] Eg, Decision (EU) 764/2008 on Fixing the Definitive Amount of the Periodic Penalty Payment Imposed on Microsoft Corporation **[**2008] OJ C 166/20.

[278] E.g, Notice (EU) on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 101 and 102 TFEU [2016] OJ C 127/13; Recommendation (EU) on Common

form of non-binding regulation. For example, the leniency notice which sets out the minimum requirements to impose or reduce a fine on cartels.[279] The Commission has published guidelines on Block exemptions, which generally serve as a clarification on their content.[280]

The legislations related to EU Competition law have developed throughout several stages. The first stage established the role and legal powers of the European Commission and the European Courts. The second phase dealt with the block exemptions related to vertical agreements. The third period witnessed the birth of the liberalisation process whereby the Commission's work focussed on generating rules regarding state aid. The final stage handled the decentralisation procedures, which consisted of determining the relationship between the Commission and national competition agencies in addition to ensuring compliance with competition law principles at national levels. EU competition law is unequivocally a critical tool to ensure the effective functioning of the internal market in the EU. It is considered as an innovative concept because all Member States regardless of their legal tradition must comply with its rules. For that reason, a system has been put in place wherein the European Commission together with the rest of the EU institutions work to ensure that it is applied as effectively as possible.[281]

Another point that has been mentioned in regards to competition law in developing economies and Maghreb countries and is also of debate in the EU, is the definition of the ultimate goal of competition law. Although this question has been a long lasting discussion in the EU and it is out of scope of this research to investigate the goal of competition law in the EU, it is worth mentioning that a number of experts point out the importance of agreeing on the ultimate goals of EU competition law. That is, whether EU competition law should focus on economic efficiency and consumer welfare or the public interest or attempt to strike a balance, and if those objectives strengthen or weaken market integration.[282]

Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States Concerning Violations of Rights Granted Under Union Law [2013] OJ L 201/60.

[279] Notice on Immunity from Fines and Reduction of Fines in Cartel Cases [2006] OJ C298/17.

[280] Guidelines (EU) on Vertical Agreements [2010] OJ C 130/1.

[281] Imedla Maher, 'Competition Law Modernisation: An Evolutionary Tale' in Paul Craig and Grainne De Burca (eds), *Evolution of EU Law* (2nd edn, Oxford University Press 2011).

[282] Richard Wish, David Bailey, *Competition Law* (7th edn, Oxford University Press 2012).

7.2. The Institutional Structure of EU Competition Law

First, the European Commission is at the centre stage of competition law. It is in charge of creating and controlling regulation on cartels, state aid, mergers and block exemptions. In addition, it is responsible for fact-finding and enforcement of penalties. It also cooperates on cross border issues with competition agencies from jurisdictions inside and outside of the EU. It should be noted that the body in charge of competition matters within the European Commission is the Directorate General of the Competition Commission, which is constituted of the Commissioner, the Director, the Chief Economist and the Hearing Officers. [283]

Second, the General Court. Competition cases are in the first instance heard before the General Court, which must evaluate the extent to which a decision is in accordance with the conditions of the TFEU. The Court deals with cases presented by persons, entities and countries against the decisions of the Commission or the Council. Any decision from the General Court can be subject of appeal before the Court of Justice.[284]

Third, the Court of Justice handles references regarding primary decisions from national courts related to interpreting EU law. Moreover, it deals with infringement actions in addition to annulment of measures adopted by an EU institution as well as actions against EU bodies, which fail to act. Finally, the Court of Justice is in charge of reviewing appeals against judgements of the General Court.[285]

Fourth, the European Parliament: This institution has the power to influence the Commission to take actions related to specific issues such as competition law. Fifth, the Council of the European Union: This organ represents the legislative arm of the European Union; the Council is concerned with legislations at the Union level. It consists of head of States of each Member State and the constituency can change in line with the subject matter at hand. The power delegated to the Council has been cited in articles 103 and 352 of the Treaty on the Functioning of the European Union (TFEU). However, the Council does not deal with

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[283] The European Commission, 'Directorate General for Competition' (*Europa:* 20 February 2014) < http://ec.europa.eu/competition/index_en.html> accessed on 10 November 2015.

[284] In addition, the Court manages cases in relation to Community Trademark and appeals related to decisions by the EU Civil Service Tribunal.

[285] European Union, 'Eur-Lex: Access to the European Union Law' *(Europa*) <http://eurlex.europa.eu/summary/glossary/court_of_justice.html> accessed 10 November 2015.

competition matters and has granted power to the Commission to deal with competition matters and agreeing to block exemptions.[286]

The special nature of EU competition law gives rise to questions pertaining to its connection with national competition laws. On this occasion, EU member states have reshaped their domestic law to comply with articles 101 and 102. The issue arises as to the priority in terms of application. As a principle, sovereignty goes to EU laws over national laws. The application of competition law is split between the Commission and national competition authorities and courts, it is compulsory for national competition authorities and courts, which enforce national competition law to apply EU competition law.[287]

8. Conclusion

This chapter aimed to investigate Maghreb countries and the state of their competition law regimes. First, this chapter offered an overview of Maghreb countries, it demonstrated that Maghreb countries are in the developing state and therefore, there was a requirement to develop their economies by entering trade agreements. Therefore, this chapter reviewed the rationale for entering trade agreements; the main findings were that countries sign trade agreements to protect their national economies from private interests and to control the behaviour of governments in terms of policy promises. Additionally, trade agreements open the idea of regional integration and allow the harmonisation of legal standards.

Second, this chapter evaluated the concept of mixed legal systems and its evolution in Maghreb countries. The main findings were that the concept of legal systems evolved over time to include a third category that is mixed legal systems. The latter includes aspects such as religion and customs, Maghreb countries were categorised as mixed legal systems because of the different influences they experienced. Third, this chapter examined the reforms in Maghreb countries, these reforms aim to enhance the competitiveness of national markets and thus, the application of competition law. The main findings were that each country decided to apply a different strategy. Morocco chose to support investment and protect data. Algeria

[286] European Union, 'Institutions and Bodies' (*Europa*, 18 February 2015) < http://europa.eu/about-eu/institutions-bodies/european-parliament/index_en.htm > accessed 16 November 2015.

[287] European Union, 'Cooperation with National Courts: Application of Antitrust Laws by National Courts' (*Europa*, 11 February 2015) <http://ec.europa.eu/competition/court/antitrust.html > accessed 16 November 2015.

decided to put national investments forward whereas Tunisia prioritised its exportation programme.

Fourth, this chapter explored the justification of Maghreb countries for choosing the EU competition law model. In terms of legal rationale, the EU competition law model is regarded as more adapted to developing countries because the state has more discretion to intervene in the market. Economically, the Euro-Med Associations Agreements facilitated the convergence towards EU competition law. Historically, the influence of the French competition law simplified the implementation of the EU model. Fifth, this chapter reviewed the historical and institutional settings of the EU competition law. The latter is enshrined in the Treaty on the Functioning of the European Union; the implementation of EU competition law has evolved because of a will to further integration within the internal market. Moreover, this chapter demonstrated that a number of institutions work towards the implementation and enforcement of competition law, this system is complemented by an application of EU competition rules at a national level. This multi-tiered system of governance aims to ensure transparency, independence and enhance governance.

Chapter Five: Assessing the Institutional Design and Governance of Competition Agencies

1. Introduction

This chapter represents the practical part of this research, where the institution design and governance of competition agencies are tested. Its main objective is to explore the criteria used to assess the performance of competition agencies in general. Additionally, this chapter aims to evaluate the effectiveness of competition agencies in Maghreb countries. Consequently, this assessment will determine whether competition agencies in these countries are complying with international standards or require improvement.

Although it is acknowledged that passing competition law without having an agency that works adequately would be meaningless. However, it should also be recognised that other factors which are out of the reach of a competition agency also influence the impact on enforcement. These are economic structures, degree of market liberalisation, political interference.

This chapter is organised as follows: section two explores the concept of institutional design which comprises the forms of leadership structure available to competition agencies as well as the forms of regulatory and enforcement powers that an agency can select. This section also investigates the institutional design of competition authorities in Maghreb Countries. Section three explores the meaning of governance and the criteria that constitute good governance for a competition agency in addition to examining the governance of competition agencies in Maghreb countries. The last section represents the conclusion.

2. Institutional Design

The institutional design represents the method by which a competition agency is organised. It encompasses how the leadership, regulatory and enforcement powers are arranged. First, the leadership structure indicates whether an agency has decided to base its executive on a single person, a multiple board or a combination of both models. Second, regulatory powers denote the responsibilities of a competition agency, that is, whether a competition authority is only in charge of competition issues or also monitors other areas of the law such as consumer's

protection. Third, enforcement powers refer to the institutions, which were assigned the task of applying competition law.

It is important to acknowledge that there is no optimal institutional design that would be suitable for all countries. In that, each jurisdiction selects a model according to factors such as budgeting, policy agenda and political influence. A jurisdiction should adopt a design, which guarantees that a competition agency effectively delivers its commitments in compliance with the objectives for which competition law was implemented.[288] In this regard, it is important to determine the extent to which the institutional designs selected for competition agencies in Morocco, Algeria and Tunisia represent a suitable choice in terms of meeting their competition obligations.

2.1. Forms of Leadership Structure: Single Executive, Multiple Board Members or Hybrid Model

The leadership structure of a competition agency can take three different forms. The multi-members model, the single executive approach or the hybrid model. The multi-members approach comprises a board formed of two or more members. In this model, the outcome of any decision is determined in a collegial way. The multi-members approach is claimed to bring different degrees of expertise and experience because of the diversity of the board members who belong to various professional and educational backgrounds. This in turn, is believed to render the agency less prone to capture. Nevertheless, critics of this model suggest that having a number of people in a board creates difficulties in terms of communication as each member may have a different perspective.[289]

In the context of the single executive approach, one person is in charge of taking decisions. Supporters of this model believe that it is more responsive because the decision-making duty relies on one person only. In addition, it is believed that if a particular person has been appointed to this position, it is because she is already equipped with the required level of experience and expertise to meet the requirements of this position.[290] Opponents of this view

[288] Eleanor Fox and Michael J Trebilock, *The Design of Competition Law Institutions: Global Norms, Local Choices* (Oxford University Press 2013) 9.

[289] William E Kovacic and David A Hyman, 'Competition Agency Design: What's on the Menu' [2012] 13 Illinois Public Law and Legal Theory Research Papers Series 2, 7. <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2179279> accessed 25 July 2015.

[290] Ibid.

argue that giving away control to one-person risks creating a credibility issue because the executive may be inclined to offer a preferential treatment to certain groups without having to be accountable for his actions. Regarding the hybrid model, some competition authorities may choose to adopt this approach, because it combines having a Chairman and a board to guide the decisions. The Chairman is used to decide on case in the event that the board does not reach a decision by majority voices. This model offers advantages in terms of prevention of capture by interest groups and provides more accountability, which in turn improves the trustworthiness of the agency. However, the role of the board can sometimes be limited to guidance purposes only. In this case, the advice provided may not be of a binding nature.[291]

Regardless of the structure selected, one can observe that leadership structures encounter a number of issues, which have a tendency to occur more often in developing countries. For example, the executive or board members may hold a position at the competition authority secondary to their primary line of work. Consequently, cases, which require special attention, may be prone to mistakes. Moreover, in some cases, the government reserves the right to remove board members or the single executive without a valid justification. As a result, the agency may not enjoy the stability required to make adequate decisions. Furthermore, it is worth to note that some countries lack participation from consumers' groups and associations. This is because these associations are absent, inactive or not consulted or they shy away from bringing cases before the competition authority even when they have the right to do so. Thus, competition authorities should encourage these associations and consumers' protection groups to become more involved by allowing them to have a consultancy role and supporting them in introducing more cases before the concerned authorities.

2.1.1. Leadership Structure in Maghreb Countries

In terms of leadership structure, Maghreb countries adopted the hybrid model. All decisions are voted at a majority and the President has a decisional role in case of equal votes. This approach is considered suitable for Maghreb countries because, as mentioned above, it allows combining different expertise and experiences, which is advantageous for Maghreb countries due to the scarcity of experts in competition law matters. Additionally, combined expertise allows the board to seek the best option available in terms of decision-making.

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[291] Ibid. Guidance can include the creation of programs and initiatives or for administrative related issues.

In Morocco, the Council is formed of thirteen members. The President and twelve other members. These members comprise four vice presidents and eight advisory members. Two magistrates who form part of the vice presidency, four members chosen for their economic or competition law experience, one of which is also a Vice-President. Two members chosen for their legal experience, one of which is the Vice President. Three members who have worked in the industry, distribution or services. One member chosen due to his competence in matters of consumers' protection.[292] The president is appointed for five years renewable once by decree. Other members of the Council are also nominated for five years renewable once after proposal from the competent governmental agency.[293] However, the law is not clear as to whether they can be removed during their terms and the procedures to follow for their removal. It is worth noting that in order to prevent any conflict of interest and external pressure, the President and Vice Presidents, apart from the magistrates must suspend any commercial or professional activity in the private sector or any public administration or public company. The rest of the Members must inform the President of any interest they detain and the functions they hold in a private commercial activity.[294]

In Algeria, the Council is composed of twelve members, six members must be experts with a University degree or an equivalent work experience of eight years minimum in the legal and or economic field and must also have competences in competition related matters, distribution, consumer protection or intellectual property. Four members are chosen among qualified professionals who hold a post-secondary qualification, or have worked in key positions and have a professional experience equivalent to five years minimum in the production, distribution sectors, artisanal, services and liberal professions. Additionally, two qualified members, who represent consumer protection associations, are also appointed and all members are nominated by Presidential decree. [295]

[292] Art 9, Law n 20-13 in relation to the Competition Council and its Competences.

[293] Art 10, Ibid. Members who have not taken the oath will have to do so before the Court of Appeal of Rabat.

[294] Art 11, Ibid. Magistrates are still subject to the law forming the status of magistrate, Law n° 1-74-467 of the 11 November 1974. The president of the Council is chosen from the first category of experts cited above; the two vice presidents are selected from the second and third categories mentioned in article 24.

[295] Art 24, Law n 08-12 in relation to the Competition Council.

Moreover, in order to avoid any disturbance in the functioning of the Council, the Algerian legislator imposed that members of the Council are recruited on a full time basis. Similar to Morocco, members of the Council have to stop any professional activity once they have been appointed. It is worth noting that the Council is putting a strong emphasis on University education and long professional work experience which aim to consolidate the Council's expertise and assist in the decision making process. The mandate of each Council member including the President is renewed once every four years.[296] Besides, the Council meetings cannot be validated unless eight of its members are present. The decisions are considered when the simple majority has voted. In the event of equal voices, the vote of the President will determine the outcome.[297]

In Tunisia, the Council comprises fifteen members; the President exercises his functions on a full time basis. He is selected from members of the magistrates, or any other persons who has expertise in economics, competition or consumers' protection matters. The President must have at least twenty years of work experience. The President is appointed by decree from the Minister of Commerce for a period of five years non-renewable. In addition, the Council is formed of two Vice Presidents, a counsellor before the administrative tribunal who has ten years work experience and a counsellor before the court of accounts who also enjoys ten years of work experience. The Counsellors are appointed for five years non-renewable. The Council also comprises four magistrates appointed for a period of four years not renewable. Additionally, the board has four members chosen because of their competences in the fields of economics, law, competition or consumer's protection. Four personalities who have worked or are currently working in the sectors of industry and commerce, services, agriculture, protection of consumers. All of these members are appointed for four years non-renewable. [298] Any decision must have the majority vote and the decisions are pronounced in a public session.[299]

Similar to the Moroccan and Algerian Councils, one can observe that the Tunisian Competition Council has been well equipped in terms of having representatives from

[296] Ibid note 321. Additionally, the Council has a general secretary and a rapporteur appointed by presidential decree.

[297] Art 28 Ibid.

[298] Art 13, Law n 2015-36 in relation to competition and pricing.

[299] Art 20 Ibid note 324.

different areas of expertise. Additionally, one can note a strong judiciary presence with the appointment of four magistrates and one expert from the administrative tribunal, which is likely to facilitate the interaction with Courts. However, there are issues in terms of whether the board members can hold a second position. The law states the President and the Vice-presidents must occupy this position on a full time basis.[300] The law is not clear regarding the rest of the board members, the only precision provided is that they must inform the President of the Council of any conflict of interest. Furthermore, the law does not stipulate the mode by which board members can be removed. Regarding the presence of representatives from consumers' associations, only Algeria seems to have included the participation of representatives from consumers' protection organisations. However, Morocco and Tunisia Councils comprise a person with expertise in consumers' protection.

2.2. Forms of Regulatory Powers: Separate vs Combined

Some jurisdictions have established a competition authority with the purpose of enforcing competition rules only. Others have chosen the multi-function model wherein the agency is in charge of two or more areas of the law. The multi-purpose agency can take three forms: In the first one, the competition and consumer protection authorities are combined in one agency. In the second form, the competition authority is joined with sector regulators. In the last one, the competition, consumer protection and sector regulators are gathered under one roof.[301]

Recently, a number of jurisdictions have decided to adopt this trend, combine regulatory, and competition law in one agency. The United Kingdom has recently restructured its competition authority. The Office of Fair Trading (OFT) and the Competition Commission (CC) were dismantled to create one agency, that is, the Competition and Market Authority (CMA). Ireland joined its competition and consumer agencies to set up the Competition and Consumer Protection Commission. The Netherlands have also merged its consumer, telecommunication and competition agencies to establish the Authority for Consumers and Markets (ACM). In the developing world, fewer countries have adopted this trend, for example, Ecuador has merged three authorities into one to create the superintendent for the

[300] Ibid.

[301] Annetje T Ottow, 'Erosion or Innovation? The Institutional Design of Competition Agencies-a Dutch Case Study' (2014) 2(1) Journal of Antitrust Enforcement 25, 28-31.

Control of Market Power. Other countries such as Gambia, Mongolia and Tanzania have also decided to merge their respective competition and consumers authorities into one agency.[302]

Views differ among experts as to whether having a competition and other agencies under one scope would favour coordination or create confusion. Some experts argue that combining powers enhances outcomes. This is because, a multiple purpose agency merges different areas of expertise in one office, each party brings a different perspective to the attention of the decision makers, this in turn, helps advance regulatory and enforcement decisions. In addition, coordination of the work and synergies facilitates the sharing of information and lowers transaction costs which in turn improve the institution's efficiency.[303]

Additionally, a multipurpose competition authority is more complicated to capture as it is assigned to monitor different sectors and areas of the law. However, sceptical of this model claim that having an agency with different functions may lead to a scattering of its priorities and a lack of focus. This is because each side of the agency would be fighting over the power to implement its own vision and strategies. Moreover, the nature of the intervention of both competition law and sector regulation may add another layer of difficulties for this regulator as one institution will have to intervene twice on the same case causing a blur in the internal work of the authority, which may legitimate certain conducts.[304]

Besides, the advantages mentioned previously can be deceptive if the agency cannot ensure the appropriate use of its resources, if the management of the combined institution is not well organised. The spread between administrating competition law cases and sector regulation renders the task of assessing the quality of the work delivered by the management more difficult because its accountability becomes too broad.[305]

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[302] The newly emerged agencies were named as follows: Gambia, the Competition and Consumer Commission; Mongolia, the Authority for Fair Competition and Consumer Protection; Tanzania, the Fair Competition Commission.

[303] William E Kovacic, 'The Quality of Appointments and the Capability of the Federal Trade Commission' [1997] Administrative Law Review 915.

[304] Allan Fels and Henry Ergas, 'Institutional Design of Competition Authorities' (OECD, 122 Meeting 17-18 December 2014) 17-20 <http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD(2014)85&docLanguage=En> accessed 24 October 2016.

[305] Rachel E Barkow, 'Insulating Agencies: Avoid Capture through Institutional Design' (2010) Texas Law Review 15, 35-39.

Therefore, it is believed that a competition agency with a single purpose is more adequate. This is because having a single purpose helps establish clearer priorities and a defined institutional image. That is, a specialised institution would have a determined framework for intervention and specific assignments. Additionally, a single purpose agency have people with specialised skills who focus on one expertise which results in a narrower but potentially more responsive form of monitoring the markets.[306]

Consequently, it is less problematic for a single purpose agency to convince the judiciary and the general public of its expertise and ability to provide sound decisions in the areas allocated to it. Moreover, single purpose competition authorities are built to govern over matters in diverse industries; therefore, they are equipped with the experience to deter private interests. However, it is also important to note that a single purpose agency presents some flows. For example, specialised expertise may lead to increased costs because it inhibits economies of scale from being achieved as transaction costs can be incurred for using expert contractors on periodic basis for matters, which are outside of the agency's own expertise.[307] Besides, if the competition agency has to cooperate with a different authority over a case, it may face conflicts in the way the case is assessed. In addition, exchange of information may also be more complicated, which can create an overlap and a duplication of work.[308]

2.2.1. Regulatory Powers in Maghreb Countries

In terms of regulatory expertise, the choice has been to implement competition agencies with a single expertise; the researcher believes that this is because Maghreb countries are still incorporating competition law in their legal culture. Therefore, having an agency with multiple areas of specialisation is not necessary because the legal environment is not mature enough. Additionally, the cases presented before the agency usually deal with competition matters solely, which do not necessitate the action of the sector regulator. Additionally, Maghreb countries transplanted their institutional model from the French competition agency, which up until very recently chose to focus solely on competition matters. However, it will be interesting to see whether Maghreb competition agencies will decide to implement this model in the near future.

[306] Ibid.

[307] Ibid note 298.

[308] William E Kovacic and David A Hyman, 'Competition Agency Design: What's on the Menu' 8 note 292.

2.3. Forms of Enforcement Powers: Single vs Multiple Bodies

Enforcement is considered as an essential element for an effective functioning of a competition authority. It entails that the institution responsible guarantees a proper application of the law and ensures that market operators comply with their legal obligations.[309] Consequently, the legislation defines the main functions and powers of a competition authority and to whom the responsibility of enforcing the law is conferred and the sanctions the agency can impose.[310]

Enforcement can take two forms. First, the single model, wherein enforcement is confined in the hands of the competent competition authority. Second, the combined system which entails that two or more authorities are in charge of enforcing the law. For example, enforcement powers are distributed between the competition agency and sector regulator or shared within the different level of government authorities, which is the case in the United States where the Federal Trade Commission (FTC) and the Department of Justice (DOJ) have joint authority.[311]

Each system brings its benefits and disadvantages. Concerning the single model mentioned above, the advantage seems to reside in the level of expertise of its staff members, this is because, members of the personnel participate to managing different aspects of competition law including indirect participation in drafting regulations and offering in-depth opinions. However, this model can be perceived as biased because one agency is in charge of the entire process. Thus, the assessment process may be flawed. Besides, what the agency gains in expertise may be diminished by not respecting the notion of due process, which refers to the fact that a competition agency acts expeditiously in investigating the cases presented before it. Consequently, these factors cast doubt on the legitimacy of the competition authority.[312]

Therefore, it is argued that having different enforcement agencies to deal with competition issues represent a better option. Among the arguments put forward is the idea that the combined model means that these institutions would be less prone to capture. In addition, the

[309] Marc Winerman and William Kovacic, 'Outpost Years for A Start Up: the FTC from 1921-1925' [2010] 77 Antitrust Law Journal 145, 150-152.

[310] Imelda Maher, 'The Institutional Structure of Competition Law' 73 note 4.

[311] William E Kovacic and David A Hyman, 'Competition Agency Design: What's on the Menu' 8 note 292.

[312] Ibid 9.

combined model indicates that there is an implied rivalry among these agencies, which forces each authority to offer the best performance. It also means that these agencies coordinate their work to improve outcomes. For example, by establishing a database system to exchange information.[313]

However, having more than one agency in charge of enforcement present some challenges. Among the issues facing multiple enforcement institutions is the fact that having more than one public authority in charge of enforcing competition law may create a clash as each side may attempt to dominate the rest of the institutions. Thus, making it increasingly difficult for the enforcement agencies to agree on one solution. Consequently, this can shift the objective of enforcement from achieving the wellbeing of the society to emphasising on the negative rivalry among enforcement bodies and hurt the legitimacy of the enforcement system as a whole. Moreover, having multiple enforcement institutions may damage the consistency of a case because of the number of staff members involved in each agency; it may become difficult to prioritise cases in terms of their importance and the timing that should be dedicated to each of them.[314] For instance, if one agent makes a mistake on the cases to give priority to, it can have an adverse effect on the work of the rest of the agents. However, a few remedies exist to offset such situations from taking place. For example, by imposing a strict hierarchical system wherein one institution would have the authority to make the final decision; it can also be possible to have recourse to soft laws in order to guide each institution to follow the right trajectory.[315]

It should be noted that the enforcement style of competition law ought to follow the general enforcement and legal culture of the country. Nevertheless, exceptions exist and the enforcement style of the competition institution can be divergent from the general cultural standard.[316] Furthermore, it is also important for the image of a competition agency that its enforcement system must guarantee coherence and predictability. The former means equal treatment of cases, the latter refers to facilitating compliance procedures for firms.[317]

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[313] Ibid.

[314] Ibid 464.

[315] Ibid.

[316] Imedla Maher, 'The Institutional Structure of Competition Law' 76.

[317] The competition authority should prioritise potentially harmful conducts and precedent setting cases.

It is worth noting that in some cases, a competition agency may face a lack of power, whether operational or procedural. Operational refers to the power of a competition agency to investigate a case and be able to gather the required information. It can also expand to inspections and receiving merger notifications.[318] Procedural signifies that a competition agency has the power to stop certain behaviours in order to re-establish competition, impose sanctions or prosecute in court to restrain a certain conduct or enforce sanctions. Some jurisdictions do not give their competition agencies any operational power or restrict it to certain activities such as receiving notifications. For instance, among the countries, which suffered from the above-mentioned issues, is Peru, where the national competition authority did not have the ability to exercise its powers to control anti-competitive mergers and predatory behaviours.[319]

Other countries permit such action; however, they do not allow a competition authority to sanction anti-competitive behaviours or impose fines. For example, the Egyptian Competition Authority has been granted the right to conduct investigations and publish decisions; however, these decisions are not binding. The Minister for Trade is in charge of decision related to cases and decides whether a case should be put before the Court of First Instance.[320] Consequently, the competition agency is unable to offer an effective and continuous enforcement of the law.[321]

A further controversial point is the relationship between competition authorities and the judiciary. Often, competition agencies regard recourse to courts as obstructive. This is especially the case in developing countries. The main challenge is that judges lack knowledge and trainings on competition law and economic related issues and therefore, have difficulties understanding competition law. Thus, it is claimed that judges prefer to redirect their

[318] Opening an investigation can come from external requests or from the agency's own initiative.

[319] National Institute for the Defence of Competition and Intellectual Property Protection (INDECOPI), 'Legislation' (INDECOPI) <https://www.indecopi.gob.pe/web/indecopi_ingles/legislacion> accessed 13 July 2016.

[320] Art 21 of the Egyptian Competition Act.

[321] UNCTAD, 'Foundations of an Effective Competition Agency' (Intergovernmental Group of Experts on Competition Law and Policy, Geneva, 19-21 July 2011) UN Doc TD/B/C.I/CLP/89 < http://unctad.org/en/Docs/ciclpd8_en.pdf> accessed 19 July 2016.

attention on the administrative and procedural issues instead of focussing on substantive matters.[322]

One of the solutions put forward is to have specialist courts to deal with competition related cases. For example, in Turkey, the judicial review process is passed to administrative courts. The South African Competition Act incorporated this structure into its legal system; the competition agency is in charge of investigating competition infringements. It is also in charge of controlling mergers that fall under a pre-established threshold. Any appeal regarding competition matters goes before the competition tribunal. [323]

Furthermore, any country that chooses to open its national market to competition should introduce judicial reforms to accompany such changes. These reforms should include the fight against corruption, enhanced judicial independence and reduction of procedural delays.

2.3.1 Enforcement Powers in Maghreb Countries

In terms of enforcement, Maghreb countries adopted the single model, which gives investigative and sanctioning powers to the competition agencies. Moreover, appeals are presented before the competent judicial authority. The rationale for adopting this model is that similar to other developing countries, Morocco, Algeria and Tunisia suffer from lengthy bureaucratic procedures. Consequently, if powers were divided between numerous agencies, it would create issues in terms of due process. Additionally, the legal culture of Maghreb countries has relied on the idea of centralising duties in the hand of one institution. Consequently, the multiple enforcement system would have been difficult to implement because it would have contradicted this legacy. Moreover, as mentioned previously, the lack of competition expertise in these countries means that the Competition Councils represent the most experienced and skilled authorities to investigating and penalise anti-competitive behaviours.

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[322] ICN, 'Capacity Building and Technical Assistance: Building Credible Competition Authorities in Developing and Transition Economies' (ICN 2nd Annual Conference, Mexico, 23-25 September 2003) 26-30 <http://www.internationalcompetitionnetwork.org/uploads/library/doc364.pdf> accessed 06 June 2016.

[323] In South Africa, larger mergers are investigated by the competition tribunal; ICN, 'Capacity Building and Technical Assistance: Building Credible Competition Authorities in Developing and Transition Economies' (ICN 2nd Annual Conference, Mexico, 23-25 September 2003) 39-40 <http://www.internationalcompetitionnetwork.org/uploads/library/doc364.pdf>
Accessed 06 June 2016.

In terms of operational and procedural powers, some of these agencies were limited in terms of their actions up until recently. For example, in Morocco, the Competition Council did not have any authoritative power, the agency could only be seized to assist a complaint presented before it or offer opinions if it were consulted by the Minister of Commerce. This situation changed in 2014 to provide the agency real powers. The Council is now able to take the decision to intervene from its own initiative, concerning any competition related issues, after a proposal from its general rapporteur.[324]

Similarly in Tunisia, the Competition authority claimed that many firms did not have the will to inform against an infringement from other market players due to the market being small and companies being run by a certain group.[325] As the Council could not initiate a case by its own initiative, it rendered the task more difficult. However, the situation was remedied and the authority was given powers to instigate against firms suspected of infringing competition provisions.[326] Additionally, these authorities enjoy investigative and sanctioning powers for referrals made in terms of controlling anti-competitive practices which deal with concerted practices, collusions and understandings (expressed or tacit) that aim to restrict or distort competition or any exploitative or abuse of a dominant position in addition to practices related to predatory pricing or any economic concentrations that would be detrimental to the economy.[327]

In Algeria, the Competition Council has had investigative, decisional and consultative powers that it exercises at its own initiative or after a request is submitted from the Minister of Commerce or any other interested parties. The Council can undertake any actions to stop anti-competitive behaviours and all decisions are legally binding.[328] Additionally, the Council can offer opinions and recommendations from its own initiative regarding any competition

[324] Art 4, Law n° 20-13.

[325] ICN, 'Lessons To Be Learnt from the Experience of Young Competition Agencies' (ICN, Cape Town, 3-5 May 2006) 10 < http://www.internationalcompetitionnetwork.org/uploads/library/doc369.pdf> accessed 15 August 2016.

[326] Law n° 2005-60, modifying and completing n° 91-64 du 29 July 1991 relative to competition and pricing.

[327] Art 2, Law n 20-13 Morocco. Art 11, Law n 2015-36 Tunisia.

[328] Art 37, Law n 08-12 Algeria.

question. For instance, the Council can recommend the administration to apply the necessary measures to improve competition in markets.[329]

In terms of the relationship with the judiciary, the problem of expertise seems to exist in Morocco and Algeria as anti-competitive matters are still referred to generalist courts. In Morocco, the Court of appeal is in charge of matters related to anti-competitive practices. However, Morocco established the administrative Chamber of the Court of Cassation to deal with economic concentration appeals.[330] In Algeria, the Court of Algiers is the higher instance regarding any competition matters.[331] In Tunisia, it is interesting to note that any decision made by the Council can be appealed before the administrative tribunal in compliance with the law n° 72- 40 that regulate tribunals. However, in relation to decisions that cannot be appealed, the President or in his absence the Vice President of the Council has the authority to review such decisions in compliance with the procedural and commercial codes.[332] Although administrative tribunals may not have full expertise in terms of economic and competition matters, they represent a first step towards more specialised institutions.

3. Governance

In the context of public authorities, governance refers to the process by which an institution manages its activities. The evaluation of governance in performance assessment studies is significant because governance influences enforcement actions, budget, prospective projects and policy implementation. In addition, assessing the governance of competition agencies represent an important criterion for stakeholders, the legislators, academics and the public as it testifies of the state of affairs of a competition agency, and its effectiveness as a public institution.[333]

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[329] Art 4, Ibid note 327.

[330] Competition Commission, 'The Council: Presentation' (Competition Council Morocco) < <http://www.conseil-concurrence.ma/pageFr.aspx?id=10> accessed 09 November 2016.

[331] Art 34, Law n 08-12.

[332] Art 28, Law n 2015-36.

[333] United Nations Department of Social Affairs, 'Public Governance Indicators: A Literature Review' (UN, New York, 2007) UN Doc ST/ESA/PAD/SER.E/100, 4-6 <https://publicadministration.un.org/publications/content/PDFs/E-Library%20Archives/2007%20Public%20Governance%20Indicators_a%20Literature%20Review.pdf> accessed 14 January 2017.

According to the United Nations Model Law for competition, the most effective form of competition agencies ought to be 'independent or quasi -independent from government control.'[334] In addition to independence, other essential features have a critical role in assessing the governance of competition agencies. These are transparency, accountability, resources, strategic planning, the promotion of competition culture and advocacy and case management. As mentioned in this work, these criteria have been utilised by international organisations to evaluate the performance of competition agencies in developed and developing countries. However, it should be noted that the use of these indicators by international organisations including the World Bank have been criticised by some countries because they are perceived as meddling in the internal affairs of governments and public agencies because these indicators impose standards without truly interfering. Nevertheless, having good governance in a jurisdiction is no longer considered a procedure to achieve international standards; it has become an end in itself that every country aims to attain.[335]

3.1. Independence

Independence represents an essential factor in performance assessment because it refers to the aptitude of an agency to take decisions without external influence from political or private parties and within the limits of its mandate. In this regard, an independent agency ought to implement impartiality, integrity and expertise as core values in order to guarantee fair enforcement and demonstrate its credibility.[336] The principle of impartiality requires that an independent agency considers the different interests at stake and has the ability to evaluate and understand the information available in a case in order to make its judgement.[337] Integrity denotes that the staff members of this independent authority achieve the goals for which the agency was created, without being influenced by their self-interest or those of private groups.

[334] UNCTAD, 'Model Law on Competition: Substantive Possible Elements for a Competition Law, Commentaries and Alternative Approaches in Existing Legislations' *(UNCTAD*, 2007) UN Doc TD/RBP/CONF.5/7/Rev.3 66 < http://unctad.org/en/docs/c2clpd67_en.pdf> accessed 11 July 2016.

[335]Gwenaëlle Otando, 'Institutions, Governance and Economic Development: Problems, Reforms and Orientation of the Gabonese Economy' (2011) 14(2) Markets and Organisations Revue 129, 141.

[336] Martino Maggetti, *Regulation in Practice: The de Facto Independence of Regulatory Agencies* (ECPR Press 2012) 34.

[337] Annejte Ottow, *Market and Competition Authorities: Good Agency Principles* (Oxford University Press 2015) 74.

Expertise refers to the technical capacity of an agency to investigate a case that is presented before it.[338]

Nonetheless, independence cannot be unconditional. This is because unrestricted independence does not guarantee decisive or curative actions; the best illustration was during the financial crisis in which regulatory agencies were unable to correct market failure. For that reason, independence interlinks with accountability, any decision taken by an independent authority must include external monitoring and participation through remarks and comments. Although some commentators argue that there is a trade-off between these two mechanisms, accountability enhances independence because a fair system would not work adequately if there were no checks to prove that an agency is trustworthy. [339]

In addition, an independent agency represents a means to ensure that quality regulation is provided because a degree of regulatory and political power has been transferred to this authority. Consequently, an independent agency is considered an asset to governments as it helps balance the powers of politicians and enhance public confidence in their work. That is why; governments are increasingly choosing to delegate powers to these agencies. This characteristic is believed to symbolise a major institutional trend in regulatory governance. Therefore, independence represents a positive attribute for competition authorities, even though the government is responsible for the legislative implementation of competition rules, their application and adjustments are left in the hands of the agency.[340]

Moreover, having an independent competition agency brings certain advantages. For example, it attracts foreign investment, because firms believe that independent authorities value the concept of fairness while enforcing rules and regulations. Additionally and as mentioned previously, decisions taken by this type of agencies are subject to outsiders' scrutiny and can be reviewed by external bodies such as courts.[341] Furthermore, establishing an independent competition agency also helps enshrine this concept into the legal culture of a

[338] Frederic Jenny, 'Competition Authorities: Independence and Advocacy' in Ioannis Lianos and Daniel D Sokol, *The Global Limits of Competition Law* (Stanford University Press 2012) 126.

[339] Adam Jasser, Independence and Accountability' (2015) 6(2) Journal of European Competition Law and Practice 71. 71-72. Accountability is explained in details in a subsequent section of this chapter.

[340] Imelda Maher, 'The Institutional Structure of Competition Law' 63 note 4.

[341] Stephen Wilks and I Bartle, 'The Unanticipated Consequences of Creating Independent Competition Agencies' [2002] 25 Western European Politics 148, 152.

jurisdiction, which over time, gives the agency more influence to promote competition-oriented regulation.

However, the notion of independence is often challenging to implement for the following reasons: First, an inadequate legal and constitutional environment can limit the level of powers that ministries can transfer to arm's length bodies including competition authorities, that is, if a government suffers from hierarchical rigidity, powers are only enforced by the executive branch of the central government. Second, independence is also restrained by the fact that a competition agency must consider other political, social and market players to carry out its functions.[342] Third, experts disagree on the level of independence that should be applied. They argue that independence is linked to the objectives that a competition agency aims to achieve.[343]

3.1.1. Forms of Independence

It is important to acknowledge that *de jure and de facto* indicators aim to measure the independence of a competition agency. The former refers to the formal form of independence wherein the laws in place encompass legal measures to uphold the independence of an authority. The latter indicates independence in the behaviour and decision making process of the agency during its day-to-day activities.[344] *De facto and de jure* independence bring into question, the notion of symbolic or factual independence, that is, whether governments and politicians use competition agencies as figurative defence mechanisms or they fully support the role of these institutions.[345] Because *de facto* independence reflects the real standing of a competition agency in society as it takes into account real performance.[346] This form of assessment is also used in this research to the extent of information available on the work of

[342] Pradeep S Mehta, Siddhartha Mitra and Others, 'How Vital Is Regulatory Independence? The Telecom Sector in Developing Countries' in Vivek Ghosal (ed), *Reforming Rules and Regulations: Laws, Institutions and Implementation* (MIT Press 2011) 162.

[343] William E Kovacic, 'Competition Agencies, Independence and Political Process' in Joseph Drexl, Wolfgang Kerber and Ruppert Podszun, *Competition Policy and the Economic Approach* (Edward Elgar 2011) 292.

[344] Imelda Maher, 'The Institutional Structure of Competition Law' 62.

[345] Stephen Bartle and Ian Bartle,' The Unanticipated Consequences of Creating Independent Competition Agencies' (2002) 25(1) Western European Politics 148, 152.

[346] Karin Ingold, Frederic Vrone and Frans Stokman, 'A Social Network-Based Approach to assess de Facto Independence of Regulatory Agencies' (2013) 20(10) Journal of European Public Policy 1464.

competition agencies in Maghreb countries. In this context, *de jure* is represented by the structural independence and *de facto* is reflected in its functional independence.

3.1.1.1. Structural Independence

John Vickers suggests that the justification for an independent competition authority from government is similar to the rationale for the independence of central banks; this is because they both comprise a commitment element.[347]Commitment refers to the idea that an independent competition authority represents an entity that does not form part of a ministry and concentrates on competition goals.[348] This concept is referred to as structural independence; it also comprises the fact that an agency is responsible for its actions before an external body such as the parliament or the legislator. [349] However, structural independence does not signify that an agency, which is not fully independent from a ministry, cannot be entrusted with the application of competition law. The level of independence differs among jurisdictions according to the structure chosen for the agency and its relationship with other government organisations.[350]

3.1.1.2. Functional Independence

A further form of independence is represented under functional independence. It refers to the powers given to a competition authority. For example, whether an agency has the power to investigate cases and take the decisions that it considers suitable for each case, if it can establish its own procedural rules or it uses its own means to investigate a case and the kind of sanctions it is allowed to enforce. It can also include the freedom that an agency has to

[347] John Vickers, 'Central Banks and Competition Authorities: Institutional Comparisons and New Concerns' [2010] 331 BIS Working Paper 1, 1-32.

[348] For example, when a competition agency decides on a merger case, other issues such as employment or environment are not always taken into consideration. The issues are left to those who have the expertise to deal with that policy area. However, if the competition agency has to take its decisions based on those underlying issues, then, information sharing becomes essential.

[349] John Clark, 'Competition Advocacy: Challenges for Developing Countries' (2005) 6(4) OECD Journal of Competition Law and Policy 69, 70. Frederic Jenny, 'Competition Authorities: Independence and Advocacy' in Ioannis Lianos and Daniel D Sokol, *The Global Limits of Competition Law* (Stanford University Press 2012) 159.

[350] For example, governments can provide policy guidelines without interfering in the work of the agency. Annejte Ottow, *Market and Competition Authorities: Good Agency Principles* (Oxford University Press 2015) 77.

participate into the drafting of legislations, comment on regulatory issues and offer views that may differ from those of the government or private sectors.[351]

Functional independence also includes matters such as who funds the authority and who is responsible for its internal organisation. For example, who is responsible for appointing staff members including the head of the entity and other board members? The extent of the appointment, that is, fixed terms, renewable or not. The status of the board, whether they are allowed to occupy a position in the government or private sector while being part of the competition agency and if there is a conflict of interest between the responsibility of the board members in the agency and their obligations in their permanent functions or political affiliation.[352]

Other forms of independence include policy independence, which represents the extent to which an agency can take a decision in relation to policy implementation, and interventional independence, which is linked to the degree by which an agency is accountable; this includes audit, assessment of performance, impact evaluation and whether a sanction can be prescribed by external intervention.[353]

It should be noted that a number of mechanisms exists in order to enhance the independence of competition authorities. For instance, independence can be improved by clarifying the mandates of regulators and augmenting the participation of consumers in regulatory decisions. In addition, board members should be selected on their professional background instead of political connection, they should also be protected from been removed by arbitrary decisions during their terms.[354]

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[351] John Clark, 'Competition Advocacy: Challenges for Developing Countries' 71 note 352.

[352] Frederic Jenny, 'Competition Authorities: Independence and Advocacy' 164-165. Giorgio Monti, 'Independence, Interdependence and Legitimacy: the EU Commission, National Competition Authorities and the European Network' [2014] European University Institutes Working Papers 1, 2-3.

[353] Koen Verhoest, Guy Peters and others, 'The Study of Organisation Autonomy: A Conceptual Review' (2004) 24(2) Public Administration and Development 101. Accountability is discussed further in this chapter.

[354] Antonio Estache, 'Designing Regulatory Institutions for Infrastructure: Lessons from Argentina' (World Bank, 1997) <http://documents.worldbank.org/curated/en/841781468741671303/Designing-regulatory-institutions-for-infrastructure-lessons-from-Argentina > accessed 03 October 2016.

3.1.2. Independence in Maghreb Countries

In terms of the independence of competition agencies, Maghreb countries have cited this concept in the laws regulating the function of these authorities. In Morocco, article one of the law relative to the competences and organisation of the competition authority states that the Competition Council is an independent agency that is in charge of organising a free and fair competition, the Council is also responsible for ensuring transparency in markets and equality in terms of its economic relations.[355] In Algeria, the legislator regards the competition authority as an autonomous administrative agency, which enjoys an independent legal personality and financial freedom. Similarly, in Tunisia, the competition council has been given a moral entity and financial autonomy. However, these agencies are placed under the tutelage of their Ministries of Commerce in matters related to finances.[356] Nonetheless, its budget is still attached to that of the Ministry of Commerce.

Additionally, competition agencies in Maghreb countries have been given structural independence. Although their budgets are still dependent of ministries, they are not involved in the function of those ministries and are committed to concentrating on competition matters only. In addition, these agencies are responsible for their own actions and decisions and have to produce an annual report in which decisions and inquiries are justified and presented to the competent institution. In Morocco, the report is presented before the Chambers of Parliament. In Algeria, the annual report and the decisions are communicated to the Minister of Commerce and the Chief of government.[357] In Tunisia, the annual report which includes all the decisions is presented before the President of the Assembly and the Chief of government.[358]

In terms of functional independence, as mentioned in this work, the Competition Councils in these countries have been granted functional independence. In Morocco, the Council has the power to conduct the necessary investigation into practices which it has been seized for or has decided to investigate from its own initiative. The Council has the authority to require information, investigate and seize any necessary document in any matter related to freedom

[355] Art 01, n 20-13.

[356] Art 23, Law n 08-12. Art 11, Law n 2015-36.

[357] Art 47, Law n 08-12.

[358] Art 14, Law n 2015-36.

of prices, anti-competitive behaviours or control of operations related to economic concentration. In addition, the recent amendments added additional functions to the Council, which acquired a decisional authority. For example, the Council can impose sanctions that represent around 10% of the total turnover of national or worldwide activities of a firm that infringed the law.[359] Moreover, the new amendments granted the Council the ability to publish market and sectoral studies.[360] The Council is still authorised to offer advice, opinions and recommendations regarding competition related matters or recommend to the administration to put in place any measures necessary to open monopolistic markets or increase competition.[361]

In Algeria, the Council is empowered by the state to undertake any action which is relevant to its jurisdiction, notably, investigations, sanctions, studies opinions and expertise services.[362] The Council can intervene from its own initiative or at the request of the Minster of Commerce, a firm, or any local government, economic and financial institutions, enterprises, professional associations, unions and consumers' protection associations.[363]It is also worth noting that the Council possesses the power to undertake any measure to cancel its actions. These measures and any decision are published in the official bulletin for competition.[364] Additionally, the Council can seek assistance from the Ministry of Commerce, or any experts to help its investigative purposes.[365]

In Tunisia, the Council gives consultative opinions at the request of the Minister of Commerce regarding legislative texts and any other question in relation to competition. Additionally, the opinion of the Council must be solicited in matters regarding draft

[359] Arts 39-40, Law n° 104-12 Relating to Freedom of Price and Competition; Marc Veuillot and Nadia Benzakour, 'Morocco: What Know about the Competition Law Reform CMS Francis Lefebvre Office' (Usinenouvelle, 28 April 2015) http://www.usinenouvelle.com/article/maroc-ce-qu-il-faut-savoir-de-la-reforme-du-droit-de-la-concurrence-selon-cms-bureau-francis-lefebvre.N325325> accessed 10 November 2016.

[360] Art 2, Law n° 20-13.

[361] Art 4, Ibid.

[362] Art 37, Law n° 08-12. One can notice a contradiction between article 34, which provides the Council with the power to give its opinion from its own initiative regarding any question related to competition and article 35 which stipulates that the Council gives its opinion regarding competition matters at the request of the government.

[363] Art 44, Ordinance n° 03-03.

[364] Art 34, Law n° 08-12.

[365] Ibid.

legislations that may restrict competition on markets. In terms of its additional missions, the Council has investigative and decisional powers regarding any anti-competitive practices, abuse of dominant position and abuses of economic dependence. In terms of economic concentrations, the Minister of Commerce introduces a draft of the project to the Council which has sixty days to decide on the case.[366]

3.2. Transparency

Transparency refers to the mechanisms that an agency utilises to disclose its performance. It offers an overview of its workings and unveils the activities and procedures by which it takes its decisions. Therefore, transparency represents an important indicator to assess the functioning of markets and regulatory authorities. Transparency is divided into *ex ante* and *ex post*. The first form defines the method by which an institution explains its rules and policies. For example, the process used to select board members or the procedures utilised to conduct investigations. In other words, *ex ante* represents a continuing clarification of the rules and regulations from the agency's viewpoint.[367] The second form is linked to understanding the reason behind the agency's decisions such as choosing to enforce, settle or not challenge a case. It also serves to clarify certain issues after the investigation process ended and offer a better understanding of the way the agency is expected to handle similar cases.[368]

Transparency aims to augment the visibility of an agency and demonstrate that it is achieving the objectives for which it was created. It signifies that the agency is open and accessible to be checked by stakeholders and external actors including members of the public. Therefore, this concept implies that an institution is committed to respecting the rule of law; apply fairness, comprehensive reasoning and due process in order to achieve better coherence in its decisions.[369]

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[366] Art 15, Law n 2015-36.

[367] Other forms of ex ante transparency are, advisory opinions and business review letters, which aim to advise the business community on the application of competition rules to certain behaviours, it should be noted that neither advisory opinions nor business review letters are binding documents.

[368] Harry First, Eleanor Fox and Danile E Hemli, 'Procedural and Institutional Norms in Antitrust Enforcement' [2012] 12 NYU Law and Economics Research Papers 49, 46.

[369] William E Kovacic, 'Using Ex Post Evaluations to Improve the Performance of Competition Policy Authorities' [2006] 31 Journal of Corporation Law 503, 510.

Although transparency represents an efficient indicator to assess the performance of a competition agency, there are several arguments against its implementation. First, it is claimed that transparency clashes with the element of confidentiality, which represents an important factor, especially in the investigative stage when there is a requirement to protect certain information and private interests. For instance, during the application of leniency programmes. Second, it is argued that instead of implementing transparency, an agency should evaluate whether its resources cannot be used to improve its enforcement process rather than explain the rationale behind its decisions. Additionally, certain methods used to reflect on the transparency of an agency are disputed. For example, the use of guidelines, which are supposed to reflect on the policy choices of an agency, may not always be echoing the perspective of its current thinking neither that of its staff members. In addition, it can be difficult for an agency to keep updating its guidelines on a regular basis. Moreover, it is feared that guidelines can be utilised against the agency during a litigation process.[370]

Because of the aforementioned reasons, some competition authorities prefer not to commit to transparency, the perception is that if they comply with such norm, it is feared that outsiders will misunderstand or misrepresent their work. Furthermore, competition authorities may be sceptical to demonstrate that the manner by which their work is handled is in fact precarious and does not meet the expectations of stakeholders.[371]

Nonetheless, opponents of such views believe that transparency should remain a priority for any competition agency because it improves the outcome of its activities. It also increases the confidence of stakeholders and other parties in the efficiency of the agency and therefore reinforces its legitimacy as a public enforcement institution. Regarding the element of confidentiality, a limit should be imposed to the degree of information that can be disclosed, any information that may potentially be harmful needs to be protected. However, any rules, regulations, policies, principles for making regulations or agreements and decisions should be disclosed. Concerning the idea of guidelines, they are a form of soft laws, represent an

[370] Harry First, Eleanor Fox and Danile E Hemli, 'Procedural and Institutional Norms in Antitrust Enforcement' [2012] 12 NYU Law and Economics Research Papers 49, 47.

[371] William E Kovacic,'Achieving Better Practices in the Design of Competition Policy Institutions' (Seoul Competition Forum 20 April 2004) 6.

explanation of the rules from the viewpoint of a competition agency, and are not meant to be binding.[372]

Moreover, transparency reduces the likelihood that the parties affected by a decision of the competition agency claim that the decision is discriminatory or biased as the evidence and justification for such decision appears clearly. Furthermore, providing public records on decisions and the reasoning thereafter and having public hearings provides a degree of immunity to the agency from claims that decisions were taken in secrecy and arbitrarily. However, this does not mean that the agency should not also invest in enhancing its enforcement procedures.[373]

3.2.1. Transparency in Maghreb Countries

In terms of transparency, *ex ante* transparency is applied to a certain extent. For example, Maghreb competition authorities do not explain the justification for selecting a particular board member. However, the procedures by which they are appointed are provided. In Morocco, the President is nominated by decree from the King. The rest of the members are selected from the competent institution that nominated them, which include the High Council for the judiciary powers for members of the magistrates and the competent governmental authority for the rest of the members.[374] In Algeria, the President and vice Presidents and all other members are nominated by presidential decree.[375] In Tunisia, all members are nominated by governmental decree after being suggested by the Minister of Commerce.[376] Furthermore, concerning *ex post* transparency, each of these competition agencies must publish its decisions with justifications in its annual report and the official bulletin.[377] However, in some instances, such is the case in Algeria; a decision can be ordered to be

[372] Ibid.

[373]Frederic Jenny, 'Competition Authorities: Independence and Advocacy' in Ioannis Lianos and Daniel D Sokol, *The Global Limits of Competition Law* (Stanford University Press 2012) 165. UNCTAD, 'Foundations of an Effective Competition Agency' (Intergovernmental Group of Experts on Competition Law and Policy, Geneva, 19-21 July 2011) UN Doc TD/B/C.I/CLP/8, 8 < http://unctad.org/en/Docs/ciclpd8_en.pdf> accessed 16 December 2016.

[374] Art 10, Law n 20-13.

[375] Art 25, Law n 08-12.

[376] Art 14, Law n 2015-36.

[377] Art 23, Ibid note 377.

partially published if there were any confidential information that the Council prefers to restrain from issuing publicly.[378]

3.3. Accountability

Accountability aims to assess the way regulators use their power. It helps keep stakeholders, government, market operators and the general public informed regarding the activities of a competition agency. Accountability aims to enhance the integrity of a competition authority as a public institution.[379] Accountability bears the following forms: Financial, procedural, substantive, political and judicial. A competition agency is not required to employ all of these categories. However, it must have some form of accountability and work towards implementing the others.

3.3.1. Financial Accountability, Procedural and Substantive Accountability

Financial accountability refers to the disclosure of the cost of the agency's activities. A competition agency must justify any expenses made and should keep costs to a minimum. In order to ensure that a competition authority is complying with its financial obligations, a jurisdiction can chose to put the annual budget of this authority under the supervision of an executive branch of the government. However, it should be noted that financial means may also be obtained from sources, which do not necessarily require ministerial approval.[380]

Procedural accountability deals with the practices that an agency follows to monitor the market, investigate infringement and impose fines. In this case, a competition agency can be subject to external participation and consultations from consumers' associations, market operators, academics, lawyers or the public in order to defend its choices, and prove that its methods are fair, neutral and respect the public interest.[381]

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[378] Art 45, n 03-03.

[379] UNCTAD, 'Foundations of an Effective Competition Agency'(Intergovernmental Group of Experts on Competition Law and Policy, Geneva, 19-21 July 2011) UN Doc TD/B/C.I/CLP/8, 7< http://unctad.org/en/Docs/ciclpd8_en.pdf> accessed 16 December 2016.

[380] Anthony I Ogus, *Regulation: Legal Form and Economic Theory* (Clarendon Law Series 1994) 111.

[381] Ibid. It should be noted that an agency can also chose to voluntarily disclose its information in order to enhance its legitimacy.

Substantive accountability relates to the decisions of an agency in relation to its role as an enforcement authority.[382] This form of accountability aims to prove that decisions are proportionate and aim to provide legal certainty. For example, a competition agency can publish data regarding its enforcement decisions. Some competition agencies publish an online competition enforcement database, which comprises a description of their actions, and the documents related to it. Other agencies developed newsletters and statistics regarding their criminal and civil enforcement actions. However, such information maybe too complex to analyse for outsiders, therefore, it is argued that competition agencies should facilitate this process by providing simplified information, which would demonstrate whether a competition agency reached its intended objectives.[383]

3.3.2. Political and Judicial Accountability

Political accountability relates to having an oversight from a government body such as ministries or parliaments.[384] These executive bodies have the power to request investigative hearings or inquire about particular actions. In addition, rules should be set up to allow them to remove members of the board if they are found guilty of misconduct or incompetence. A competition agency can be required by law to publish an annual report detailing information on its operations and present it before the government. In addition, the legislator has the power to pass laws to refocus the regulatory authority of an agency or narrow its jurisdiction. Therefore, political accountability helps disclose information that would have not been available otherwise.

However, political accountability does not always represent a satisfactory form of accountability because the relationship between government and a competition agency is similar to that of the principal-agent. The agent, that is the competition authority has a deeper knowledge of competition issues, the principal, which is in this case the government, assigns certain responsibilities to the competition agency but allows it to use discretion. The agent may use this discretionary power for its own benefit. The government does not always have

[382] Anthony I Ogus, *Regulation: Legal Form and Economic Theory* 111.

[383] Harry First, Eleanor Fox and Danile E Hemli, 'Procedural and Institutional Norms in Antitrust Enforcement' [2012] 12 NYU Law and Economics Research Papers 49, 56-57.

[384] András G Inotai and Stephen Ryan, 'Improving the Effectiveness of Competition Agencies around the World: A Summary of Recent Developments in the Context of the Internal Competition Network' [2009] Competition Policy Newsletter 1, 4.

the required knowledge to understand the issues presented before, additionally, there are more than one identified principal in charge of controlling the actions of the competition agency. Consequently, it becomes more difficult to apply the principle of accountability.[385] Therefore, in some jurisdictions, judicial control of competition agencies was put in place. Accountability to the judiciary is applied by allowing courts to assess the actions of regulatory authorities because; judges are believed to have a more profound knowledge of the law than politicians do. As the judiciary is an independent body, it is less prone to political pressure and thus more capable of monitoring the agency's actions.[386]

It should also be noted that political accountability cannot be absolute. The executive should not have the power to cancel or invalidate the agency's decision without proper justifications. Moreover, political accountability can be enhanced if a competition agency has representatives from both sides sitting on the board and participating in the decision making process.[387]

3.3.3. Accountability in Maghreb Countries

In the context of Maghreb countries, there are a few disparities regarding the publication of information related to finances. As it will be demonstrated in the section on financial resources, Morocco and Tunisia have been attempting to implement financial accountability by publishing and justifying expenses in their annual reports. For instance, In Morocco, the Council's budget comprises a share from the government's budget, revenues from its tangible and intangible assets and other diverse revenues and donations which do not affect its independence. The budget is under the supervision of the president who decides the method by which expenditures are made. In addition, an accountant, who is attached to the government, is in charge of monitoring the expenses. Moreover, the Court of accounts controls the execution of the Council's budget.[388] In Tunisia, the law states that the budget is

[385] Anthony I Ogus, *Regulation: Legal Form and Economic Theory* 112-117.

[386] UNCTAD, 'Prioritization and Resource Allocation As a Tool for Agency Effectiveness' (Inter-Governmental Group of Experts on Competition Law and Policy, Geneva 12-13 July 2013) UN Doc TD/B/C.I/CLP/20, 14 < http://unctad.org/meetings/en/SessionalDocuments/ciclpd20_en.pdf> accessed 11 January 2017.

[387] William E Kovacic, 'Competition Agencies, Independence and Political Process' in Joseph Drexl, Wolfgang Kerber and Ruppert Podszun, *Competition Policy and the Economic Approach* (Edward Elgar 2011) 292.

[388] Art 15, Law n° 20-13. One can deduct that the Moroccan government has put legal provisions to ensure accountability in terms of budgeting. It is also worth noting that the legislator is attempting to prevent capture by

attached to that of the Ministry of Commerce which comprises the external and internal expenses.[389]

In Algeria, budget management resides within the law. Article 33 states that the Council's budget is under the responsibility of the ministry of commerce and is subject to the rules and regulations applicable to any state budget.[390] However, The Prime Minister requested to amend the law in order to provide more financial independence to the agency and offer more clarity on expenses.[391] It is not clear whether the draft law will implement more safeguard regarding the disclosure of financial resources.

In terms of procedural accountability, external consultations and participations from market operators, consumers and the wider public are still not the norm in Maghreb countries. To the researcher's knowledge and according to the data available on the subject matter, none of these agencies has publicly been approached by an external source to justify its practices. Regarding political accountability, as Maghreb competition authorities are under the supervision of the Ministries of Commerce. Therefore, it is assumed that there are internal rules of checks and balances. Nonetheless, these rules have not all been made available to the public. The only example that was found is on Morocco, whereby a commissioner has been assigned to the Council in order to monitor its sessions and represent the government, although the latter holds an advisory role, he can seek clarification and submit questions or seek to have a particular matter officially discussed during the Councils' meetings.[392] Furthermore, as mentioned previously, each of these agencies has to publish an annual report which is presented to their respective governments.

In regards to judicial accountability, Maghreb countries have included recourse to the judiciary in order to ensure fairness of treatment. In Morocco, as previously mentioned, the general courts of appeal are responsible over issues related to anti-competitive practices.

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putting a provision regarding donations. However, such provision should not be left to the discretion of the Council; it should contain more details to determine what constitutes an objectionable donation.

[389] Ordinance n 2006-477.

[390] Art 33, Law n 08-12.

[391] Competition Council, 'Competition Council Annual Report 2015' (*Competition Council Algeria*, 2015) 18 < http://www.conseil-concurrence.dz/?p=3144> accessed 02 February 2016.

[392] Art 13, Law n 20-13.

Additionally, the administrative Chamber of Cassation deals with appeals on economic concentration.[393] In Algeria, only the Court of Algiers is in charge of competition matters. [394] In Tunisia, the administrative tribunal represents the judiciary body that deals with competition matters.[395] It should be noted that as a general rule in Maghreb countries, decisions from the Council cannot be suspended. However, a decision can be made by the judicial in a shorter period if required.

3.4. Financial Resources

Financial resources critically influence the performance of a competition authority. This is because; an agency that lacks funding has fewer chances at effectively implementing and enforcing competition rules. The size of an agency's budget often depends on the size of the national economy of a country. Consequently, large economies tend to have budgets that are more significant.[396]

Availability of financial resources offers several advantages. First, adequate budgeting enhances the ability of a competition agency to conduct investigations and have recourse to judiciary actions when necessary.[397] Second, it allows the agency to reside in descent premises and have access to information technology facilities in order to conduct its activities. Third, it gives a competition agency the ability to enhance its reputation by organising and participating to national and international conferences, adhering to international networks and institutions that promote competition law. Fourth, financial resources allow conducting upstream studies and sectoral inquiries. Fifth, financial resources affect the ability of an agency to recruit experts and qualified staff members, this element is considered of upmost importance, because competent staff members including lawyers, cases handlers, rapporteurs and other qualified staff are crucial to the success of legal procedures. If a competition agency lacks qualified staff or is, unable to retain them because the salaries

[393] Competition Council, 'The Council: Presentation' (Competition Council Morocco) < <http://www.conseil-concurrence.ma/pageFr.aspx?id=10> accessed 09 November 2016.

[394] Art 34, Law n 08-12.

[395] Art 28, Law n° 2015-36.

[396] Michael W Williamson, 'An Antitrust Law Index For Empirical Analysis of International Competition Policy' (2008) 4(4) Journal of Competition Law and Economics, 1009, 1016.

[397] Imelda Maher, 'The Institutional Structure of Competition Law' 72 note 4.

offered are less attractive if compared to the private sector. This means that an agency will be unable to handle cases effectively, which creates delays in procedures, generate mistakes, inaccurate decisions and leads the competition authority to lose its credibility.[398]

It is often claimed that the lack of monetary resources originates from insufficient backing from national governments, which often prefer to allocate resources to priority areas.[399] Besides, competition agencies are often not allowed to find alternative methods to increase their budgets such as applying filing and service fees.[400] Although these methods can prevent unnecessary actions and improve the financial health of an agency, they are perceived as unfair because a competition agency can use unfounded reasons to impose them.[401] Moreover, lack of accountability, control measures, fraud and corruption that take place in some countries put further constraints on financial resources. Therefore, some competition agencies have no other choice but to select the priority issues to address, abandon smaller cases and prioritise larger ones as they have a deeper impact on jurisprudence.[402]

Furthermore, to remedy the lack of financial resources, some competition agencies, especially in developing economies have accepted technical assistance packages offered by international organisations and well-established competition agencies. These programmes offer exchange, trainings, and secondment programmes for capacity building purposes.[403] Other agencies

[398] William E Kovacic,'The Competition Policy Entrepreneur and Law Reform in Formerly Communist and Socialist Countries' (1996) 11(3) American University International Law Review 437, 441-443.

[399] Competition agencies must follow heavy bureaucratic procedures to have budgets allocated from their ministries; these procedures are not cost effective.

[400] The Jamaican competition agency raised a request to apply fees for its services; however, the government did not allow such demand; Ignacio de Leon, *An Institutional Assessment of Antitrust Policy: The Latin American Experience* (Kluwer Law International 2009) 545.

[401] Ratnakar Adhikari,'Prerequisite for Development Orientated Competition Policy for Implementation: Case Study of Nepal' (*UNCTAD*, 2002) 53 <http://unctad.org/en/Docs/ditcclp20041_en.pdf > accessed 11 July 2016.

[402] Because of budgetary problems, the Competition authority of Israel established a yearly agenda, which selects the issues to be addressed as priorities in the following year; ICN, 'Competition Policy Implementation: Lessons to Be Learnt from the Experience of Young Competition Agencies' (ICN, Cape Town 3-5 May 2006) 22 < http://www.internationalcompetitionnetwork.org/uploads/library/doc369.pdf> accessed 18 November 2016.

[403] UNCTAD, OECD and the Wold Bank are among the international organisations that offer technical assistance and capacity building programmes. The EU and the US competition authorities represent the most established institutions that provide such programmes.

sought financial assistance from stakeholders and institutional donors, while others have recourse to subcontractors and external consultants.[404]

3.4.1. Financial Resources in Maghreb Countries

Some of the governments of these countries are engaged in improving the financial health of their competition agencies. In Morocco, the budget dedicated to the Council's activities in 2013 was 14, 250,000 Dirham, which represents a descent budget for a small economy. The majority of the budget was dedicated to paying the staff travel expenses. The second largest expenditure came from the organisation of meetings and conferences. For example, in 2013, The Council prepared for its participation at the International Competition Network (ICN) annual conference, which demonstrates the commitment of the Council to exchange experiences with other competition agencies, reinforce, and enhance its presence at an international level. Finally, the last share of the budget has been utilised to conduct sector upstream studies. Between 2012 and 2013, eight studies were achieved which comprised an investigation of the cement industry, the banking sector and audio-visual activity.

Additionally, the Moroccan Competition Council has also been attempting to improve its human capital. Before the 20-13 amendments, the Council launched a secondment recruitment campaign for rapporteurs from different ministries. However, because of the conditions, which require employees to have held a public service position, only one rapporteur has been recruited. Although the new modifications annulled such condition in order to facilitate recruitment. A few observations can be made. For example, positions that are advertised should have a more concise description of their duties Moreover, in order to attract experts; temporary contracts should evolve into permanent positions. Furthermore, in 2013, the Council had 27 staff members spread between the general secretariat and other departments. It is interesting to note that the number of staff has increased since the revival of the Council. An analysis conducted in 2012 showed that 19% of the staff younger than 45 years of age and 12% of its employees held a post-graduate University degree.[405]

As mentioned in this work, training of staff members represents an important factor for a competition authority. The Moroccan Competition Council has improved its trainings.

[404] Damien Geradin, 'Competition Law and Regional Economic Integration: An Analysis of the Southern Mediterranean Countries' 62 note 126.

[405] Competition Council, 'Annual Report 2013' (*Competition Council Morocco*, 2013) 24-26 < http://www.conseil-concurrence.ma/publications/RapportAnnuel2013-Fr.pdf> accessed 10 October 2015.

According to its 2013 annual report, three members of the Council went on to undertake a training with the Austrian and Polish Competition Councils in order to further their knowledge in abuse of dominant position, leniency programme and state aid, this programme falls under the cooperation agreement signed with competition agencies of both countries. Moreover, employees benefited from training in the English language, which should facilitate access to information available online, in addition to enhancing communication skills, especially during international conferences. Moreover, a workshop was organised under the EU technical assistance programme[406] wherein an expert from the French competition authority provided three-days training on monitoring economic concentrations.[407]

In Algeria, the budget allocated to the competition agency is not disclosed. As mentioned, the inclusion of the agency's budget in the diverse expenses of the Ministry of Commerce has been perceived as inadequate, because it does not allow the agency the freedom to guide its budget according to its needs.[408] In the researcher's view, having an oversight from the government constitutes a positive point, because the Council's activities can be monitored. Regarding staff retention, the Algerian Competition Council suffers from a lack of staff, because the agency does not a fixed premise to operate its activities from. The agency has a total vacancy of 43 positions. The gap remains because of the lack of experts in competition issues. Additionally, only four interns who specialise in competition matters were promoted to permanent staff in the period of 204-2015. Regarding training, in 2015, only two rapporteurs were sent on ten days training with the French competition authority.[409] However, Algeria signed a memorandum of cooperation with the Austrian competition authority on the 25 January 2016, the memorandum include training of experts and attendance of conferences organised by the other party.

In Tunisia, expenses were mostly divided between the renting of premises and the use of necessary materials. For instance, in 2011, the renting of premises was estimated at 84% of its budget, the rest was allocated to the purchase of books related to competition, the

[406] The Technical Assistance and Information Exchange Instrument of the European Commission (TAIEX) aims to assist public administration and application of EU legislation and facilitate sharing best EU practices.

[407] Ibid note 421.

[408] Chapter 73-02 ordinance 03-03.

[409] Competition Council, 'Competition Council Annual Report 2015' 18 note 394 < http://www.conseil-concurrence.dz/?p=3144> accessed 02 February 2016.

participation to conferences and buying of computers and printers. In terms of staff members, the retention ration has attained 66.6%. However, the agency suffers from a lack of experts. Consequently, one graduate from the School of National Administration was recruited.[410] In terms of trainings, the Tunisian competition agency has been investing in furthering the knowledge of its members of staff. For instance, in 2009, one of the vice presidents was sent to attend a conference regarding the functioning of public administrations.[411] In 2011, one of the vice presidents was sent to attend training on competition at Fordham University.

3.5. Strategic Planning and Prioritisation

Competition agencies should implement a plan to achieve their strategies. This plan should comprise a work programme to set deliverables over a period of time. The plan should include enforcement activities, advocacy actions and prospective studies that a competition agency aims to pursue. In addition, it should demonstrate how resources are allocated between the main projects; resources encompass financial means, human capital and expertise. Moreover, strategic planning should allow a margin of manoeuvre in order for the agency to face unexpected challenges or changes in the economic situation of the country or any unforeseen activities such as certain merger notifications, complaints or investigations, which require dedicating more time and resources.[412]

Prioritisation means that an agency should put some projects or sectors that have a significant impact (whether the impact is on consumers, the economy or the legal doctrine) at the top of its list. However, this does not signify that an agency should abandon or neglect projects that have less impact.[413]

There are short and long terms aims behind strategic planning and priority setting. In the short term, a competition agency aims to maximise time and resources, coordinate its actions, provide better services and enhance its productivity. In the long term, strategic planning and

[410] Competition Council, 'Competition Council Annual Report 2011' (Competition Council, Tunisia 2011) 228-229.

[411] Competition Council, 'Competition Council Annual Report 2009' (Competition Council, Tunisia 2009) 283.

[412] András G Inotai and Stephen Ryan, 'Improving the Effectiveness of Competition Agencies around the World: A Summary of Recent Developments in the Context of the Internal Competition Network' [2009] Competition Policy Newsletter 1, 4.

[413] Ibid.

priority setting aim to provide high impact results on consumer welfare, offer better services and demonstrate the position of the competition agency in the overall economy.[414]

It should be noted that the capacity of a competition agency to achieve strategic planning and prioritisation interlinks with the degree of independence and the mandatory functions that an agency has been assigned to carry out. In many cases, an agency that forms part of a government has to comply with the government strategies and priorities. In addition, in some countries, some sectors are given priorities because of their impact on the economy or their recent liberalisation, which obliges the agency to prioritise them.[415]

3.5.1. Strategic Planning and Prioritisation in Maghreb Countries

In terms of strategic planning and prioritising, the laws regulating Maghreb competition agencies do not offer any form of strategies or prioritisation. However, in their annual reports, most of these agencies use their missions as a reminder of their main activities which comprise the sanctioning of anti-competitive practices, control of market structure, issuing of opinions and market studies.

3.6. Promotion of Competition Culture and Advocacy

The lack of awareness regarding competition law, especially in developing countries drives businesses to regard it as a form of meddling from the government. Certain interest groups claim that the existence of competition law hinders business possibilities. Others tend to confuse competition law with unfair competition, often, market operators who file against competitors who are believed to be in breach of competition rules, do not fully understand the role of competition authorities. Therefore, the role of a competition agency in the framework of an effective performance is to inform and educate the business community, private firms, public institutions and the public about the basic principles of competition law, the benefits of complying with such rules and the outcome in case of non-conformity.[416]

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[414] UNCTAD, 'Prioritization and Resource Allocation as a Tool for Agency Effectiveness' (Intergovernmental Group of Experts on Competition Law and Policy, Geneva, 8-12 July 2013) UN Doc TD/B/C.I/CLP 20, 4-5 < http://unctad.org/meetings/en/SessionalDocuments/ciclpd20_en.pdf> accessed 14 January 2017.

[415] András G Inotai and Stephen Ryan, 'Improving the Effectiveness of Competition Agencies around the World: A Summary of Recent Developments in the Context of the Internal Competition Network' 2 note 383.

[416] Imelda Maher, 'The Institutional Structure of Competition Law' 77.

A competition agency builds a competition culture by organising conferences, seminars, workshops, and invites experts from academia, law firms, and competition authorities from other jurisdictions to debate around issues of concerns. Moreover, awareness can be enhanced by creating media campaigns and using online platforms to publish guidelines and informal opinions.[417]

The main goal of advocacy is to encourage the creation of a competitive market without the need of having the competition authority constantly intervening. Advocacy can greatly influence government policies, a competition agency can recommend solutions that would enhance economic efficiency and consumer welfare and prevent rent seeking and lobbying of interest groups. Advocacy can be explicit or implied; this is because, in some jurisdictions, the law provides the competition agency with a mandate to offer its advice to ministries or other regulatory agencies. In other jurisdictions, the law may not explicitly state such role. Unless forbidden by the law, a competition agency should be active in promoting the role of competition in the public arena; this is especially the case for developing markets. A competition agency should be active in different arenas including the following areas, promotion of trade liberalisation, establishing friendly regulation, advocacy of equal treatment of market players.[418]

3.6.1. Promotion of Competition Culture and Advocacy in Maghreb Countries

As regards to advocacy, the Moroccan Council organised a number of events at national level. Between 2009 and 2012, twelve workshops were organised with the help of chambers of commerce and local authorities in order to initiate the concepts of competition law and analyse the structure of major markets. Participants ranged from private enterprises, professional associations and the general public. Different approaches were taken during these events such as presenting the outcome of studies conducted by the competition agency.

[417] OECD, 'Competition Advocacy: Challenges for Developing Countries' (OECD, 2002) 4-6 < http://www.oecd.org/daf/competition/prosecutionandlawenforcement/32033710.pdf> accessed 19 December 2016.

[418] Alan Fells and Wend Ng, 'Rethinking Competition Advocacy in Developing Countries' in Daniel D Sokol, Thomas K Cheng and Ioannis Lianos (eds), *Competition Law and Development* (Stanford University Press 2013) 193.

Moreover, the media was involved by publishing summaries of recent studies and recent development in the area of competition law. [419]

In Algeria, at a national level, the Council organised workshops, seminars and conferences regarding abuse of dominant positions, the positive impacts of competition law and the institutional environment of Competition law. At an international level, the Council participated to international conferences on competition law organised in Berlin, Tunis, Geneva and Morocco. Additionally, the Competition Council launched its website in 2015, the website aims to spread competition culture and educate the general public regarding the missions of the Council. Moreover, the website provides additional information regarding legislations, investigations, decisions and studies.[420]

In Tunisia, 2010 marked the most active year where conferences were organised around the subject of modernisation and privatisation of infrastructures. Moreover, the Council frequently publishes columns in national newspapers regarding the evolution of its activities. Furthermore, the Council participates to radio programmes in order to spread awareness on the role of competition law.[421]

3.7. Case Management

Measuring the success of a competition authority by the number of cases it has handled has been one of the standards for performance evaluation of an institution. The majority of competition agencies have numerous cases in their pipeline whether at an early investigation stage or about to reach a decision. It is important for an agency to assess at an early stage whether a case should go to the next level or be terminated. Therefore, a competition agency should have an internal assessment procedure to determine the next action. It is also helpful for an agency to set internal deadline and targets in order to refocus its resources according to

[419] For example, on the 24th of January 2012, an event was organised to celebrate the third anniversary of the revival of the Competition Council and the presentation of its annual results and prospective plans. On the 04th June 2012, a workshop was held to present the results of an internal study regarding government subsidised products. Competition Council, 'Annual Report 2012' (*Competition Council Morocco*, 2012) 28 < http://www.conseil-concurrence.ma/publications/RapportAnnuel2012-Fr.pdf> accessed 10 October 2015.

[420] Competition Council, 'Competition Council Annual Report 2015' (*Competition Council Algeria*, 2015) 18 < http://www.conseil-concurrence.dz/?p=3144> accessed 02 February 2016.

[421] Competition Council, 'Competition Council Annual Report 2009' (Competition Council, Tunisia 2009) 281.

the requirement of a case.[422] However, it is important to note that measuring the success of an agency by the number of cases managed encounters limitations. This number oriented indicator may lead the agency to concentrate only on big cases or cases that leave a meaningful impact and may bring fundamental doctrinal changes or development to the way competition law is used or provide economic benefits to consumers. Therefore, similar to strategic planning and priority settings, a competition agency should not diminish of the value added of less significant cases. [423]

3.7.1. Case Management in Maghreb Countries

In terms of case management, In Morocco, the Competition Council started publishing its opinions in 2009. The first year, the Council published four opinions in its capacity as an advisory authority.[424] In 2010, the Council published three consultative opinions, one of which dealt with an economic concentration regarding Kraft Food Inc. In 2011, the Council offered five opinions.[425] In 2012, the Council published opinions on eleven cases including one economic concentration regarding Danone-Gervais. In terms of decision, since the Competition Council was authorised to make decisions on cases, four decisions were taken and ten opinions were proposed.[426] In this case, one can observe that the Council has been fairly active if compared with the small economy of the country.

In Algeria, the Council handled eleven decisions and fourteen opinions since 2003. However, most of the consultative actions were in terms of reorienting market operators regarding practices allowed on the market.[427] In this case, one observes that despite its efforts, the Algerian Competition Council has been slow in terms of performance.

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[422] András G Inotai and Stephen Ryan, 'Improving the Effectiveness of Competition Agencies around the World: A Summary of Recent Developments in the Context of the Internal Competition Network' [2009] Competition Policy Newsletter 1, 3.

[423] William E Kovacic, 'Rating the Competition Agencies: What Constitutes Good Performance' 907-913 note 15.

[424] Competition Council, Annual Report 2009.

[425] Annual Report 2010.

[426] Annual Reports 2012, 2013.

[427] Competition Council, ' decisions, opinions and recommendations' (Competition Council, 2015) <http://www.conseil-concurrence.dz/?page_id=23 >

In Tunisia, the Competition Council published twenty decisions in 2006, twenty two in 2007, twenty one in 2008, twenty five in 2009, twenty seven in 2010 and thirty one in 2011. The number of opinions ranged from twenty to twenty one between the periods of 2006 to 2008 and twenty five to thirty one from 2009 to 2011. Consequently, one concludes that the number of cases and opinions handled by the Tunisian Competition Council were in constant and steady rise. Therefore, the Tunisian Competition Council has been the most productive in terms of performance.

4. Conclusion

This chapter evaluated the institutional designs and governance of the competition agencies of Maghreb countries. One concludes that the Councils of these countries are fairly performant in responding to the needs of their markets. In terms of institutional designs, this chapter demonstrated that competition agencies have a number of options available. As each model brings its benefits and drawbacks, countries should seek for a model that meets the demands of their market in terms of competition enforcement.

Moreover, concerning governance practices, the main findings were that applying good governance criteria on competition agencies allows testing the effectiveness of these public authorities from the inside out. Concerning their input, Maghreb competition countries invested in enhancing the performance of their Councils by complying with a number of these criteria. In terms of output, further points needs to be addressed regarding financial resources, transparency of procedure and investment in training expert staff members. Overall, one concludes that the enforcement results have been fairly positive for Morocco, Algeria and Tunisia.

Chapter Six: Assessment of the Relationship between Competition Authorities and Sector Regulators

1. Introduction

The creation of a market entails an affirmative act of policy design, that is, with any decision to regulate or deregulate, policymakers must inevitably make a host of additional choices about how to configure and direct the newly shaped market. Thus, the choice of regulation represents a crucial step. In recent years, there have been significant changes in the regulatory processes. First, state controlled markets have been liberalised. Second, the number of sector regulators has increased. Third, competition law was introduced to further control market operators. Consequently, both sector regulation and competition law are utilised as means to monitor markets.

As these forms of regulation exist within an institutional framework. Therefore, it is essential to investigate the interplay between both forms of regulations as well as the institutional relationship between the agencies in charge of applying these rules. In a number of jurisdictions, these agencies function in isolation and are not aware of the extent to which they affect one another. Competition authorities must understand the role of competition law from the point of view of sector regulator whereas sector regulators must encourage the implementation of competition friendly regulations. Therefore, this chapter aims to analyse the interaction between competition law and sector regulations as legal means that ensure the efficient functioning of markets. In doing so, this chapter endeavours to demonstrate that competition law and sector regulators are two mechanisms that can be utilised together to ensure that markets remain competitive.

In order to understand this link, this chapter first defines the notions of market regulation. The latter can take the form of self-regulation or state regulation. Second, this chapter explores the notion of economic theories of regulation, which are mainly divided between pursuing the wider public interest and the achievement of private interests. Third, this chapter reviews the relationship between competition law and sector regulator and identifies their differences in terms of scope and forms of interventions. Moreover, this chapter explores the interplay between both mechanisms. On the other hand, there is the standpoint that both legal mechanisms are complementary. On the other hand, there is the view that these instruments fundamentally oppose. Moreover, this chapter investigates the role of competition law as the

sole regulatory instrument. This perspective is worth investigating, especially, for markets where sector regulation is not developed. Furthermore, this chapter examines the intersection between sector regulation and competition law at an institutional level. As both regulators are converging in order to ensure competitive markets, this chapter explores the different forms of cooperation. Finally, this chapter investigates the forms of cooperation at the level of Maghreb countries, because of its importance; the telecommunication sector is used as an example.

2. Market Regulation

The broad meaning of the word regulation describes a set of rules, which aims to control behaviours in accordance with certain values and standards. In the context of market regulation, it refers to the intervention of an authoritative body in an activity either by using explicit legal supervision or informal and indirect peer group monitoring. Regulation is also regarded as a social and politico-economic concept. A legal framework, which is put in place in order to protect the economic organisation of societies and markets.[428] It is 'a sustained and focused control exercised by a public agency over activities that are valued by the community'.[429] Regulation is also perceived as an attempt by the state to monitor and guide the economy and society.[430]

Regulation can take different forms including social regulation. The latter aims to prevent risks or harms that economic regulation did not have the capacity to restrict. Social regulation focuses on health, safety and other considerations that can affect the society. Economic regulation refers to market behaviour, prices charged and costs.[431] Economic regulation also aims to promote competition. Because of the intent of this research, the focus is on the

[428] Anthony Ogus, *Regulation: Legal Form and Economic Theory* (2nd edn, Hart Publishing 2004) 15.

[429] Philip Selznick, 'Focusing Organizational Research on Regulation' in RG Noll (ed), *Regulatory Policy and the Social Sciences* (University of California Press 1985).

[430] David Levi-Faur, *Handbook of the Politics of Regulation* (Edward Elgar Publishing 2012). E.g., soft laws represent a form of market regulation.

[431] Social solidarity refers to the notion in which the state intervenes to ensure access to public services in order to protect the disadvantaged. According to Prosser, 'social objectives are met when regulation is used to overrule the requests of market players'. As regulation sets out a framework of rights and practices to allow the market to function efficiently. Thus, regulation can also be regarded as a tool to organise social relations before being used to control markets. Pertaining to the protection of human rights, Prosser points to the use of distributive justice as an illustration of regulation employed to enhance human rights.

economic form of regulation.[432] Regulation is employed to monitor behaviours in a distinctive sector; it deals with information intensive rules, which are applied, to the content of business rather than its form.[433]

There are two systems of economic organisation, namely, the market model and the collectivist behaviour. The former offers a set of agreements, which carry rights and obligations, in this case, regulation, is used to impose obligations, protect rights and overrule private agreements when necessary.[434] Whereas collectivism implies that a superior authority i.e. the state or its agents imposes sanctions on individuals who behave in ways which are not compliant with the public interest. It is argued that the objective of all regulatory processes is to obey a code of conduct regardless of the nature of the rules agreed on, they nurse various consequences for each interest group, and this leads to question the different stages of the regulatory process ranging from the proposal to the approval.[435]

Within these two models, experts distinguish between two types of regulations: State regulation and self-regulation. The former, that is, state regulation refers to rules, which have the purpose to enforce a code of conduct on market players and request penalties in case of non-conformity. The latter, self-regulation, relates to the ability of the market to correct itself without using any form of state intervention.[436]

2.1. State Regulation

The use of state regulation entails recourse to agents or government bodies to apply the law on the market, in the event of non-compliance with the rules, these agents seek clarification or enforcement of those laws via court decisions. State regulation is utilised in areas whereby externalities can deeply affect the very nature of market activities. The intervention of a third

[432] Stephen G Breyer and Sheila Jasanoff, *Breaking the Vicious Circle: Toward Effective Risk Regulation* (Harvard University Press 1993).

[433] Adi Ayal, 'Anti-anti Regulation: the Supplanting of Industry Regulators with Competition Agencies and How Antitrust Suffers as a Result' in Josef Drexel and Fabiana Di Porto (eds), *Competition Law as Regulation* (Edward Elgar Publishing 2015) 42.

[434] Anthony Ogus, *Regulation: Legal Form and Economic Theory* (2nd edn, Hart Publishing 2004)1-2.

[435] Chibuike Ugochukwu, 'The theory of regulation' (2000) 9 (1) Journal of Financial Regulation and Compliance 67, 68-69.

[436] Edward J. Balleisen and David A Moss, *Government and Markets: Toward a New Theory of Regulation* (Cambridge University Press 2010).

party such as a state organism, aims at preventing conflict of interest as it provides a mechanism that separates between the regulated industry and the bodies in charge of adjudicating or enforcing the law.[437]

State regulation is also employed to prevent any conduct that could harm the market or consumers.[438] The term 'state regulation' also refers to the traditional interpretation of regulation also known as 'classic regulation' which consist of hard laws, rules and directives applied by regulatory bodies. Soft laws or meta regulation such as guidelines are also considered as a form of state regulation.[439]

Although the main objective of governmental intervention is to prevent markets from failing, concerns arise over the adaptability of state regulation to markets' conditions. In other words, state regulation may not always provide a flexible solution to adjust to the continuous changing requirements of markets. One example is the use of statutory laws. The nature and process by which these laws operate do not allow the necessary changes to take place rapidly enough, which in the long-term affects the functioning of markets. In addition, statutory laws accentuate a one-size fits all solution that can lead market participants to follow those standards without debating the cost-benefit on their industry.[440] Moreover, regulatory bodies are perceived as exercising a certain degree of dominance in the way they monitor markets, which invalidates the justification of their existence. Some experts also argue that state regulation may facilitate corruption of government representatives which results in a lack of confidence and in turns may affect the stability of markets.[441] Because of the above-mentioned reasons, some commentators argue in favour of self-regulation.

[437] Chibuike Ugochukwu, 'The theory of regulation' 69.

[438] Edward L Glaeser and Andrei Shleifer, 'The Rise of the Regulatory State' [2003] Journal of Economic Literature 404, 407.

[439] Douglas w Arner and Michael w Taylor, 'the Global Financial Crisis and the Financial Stability Board: Hardening the Soft Law of International Financial Regulation?'(2009) 32(2) 488, 490.

[440] Chibuike Ugochukwu, 'The theory of regulation' 70.

[441] Glaeser and Shleifer, 'The Rise of the Regulatory State' 410.

2.2. Self-Regulation

Self-regulation comprises a mechanism wherein a group of firms or individuals establish rules to control the behaviour of market players. A self-regulatory regime implies an agreement among market participants to utilise experts from the industry to develop an efficient framework, which has as purpose to achieve the interest of the industry. The two main justifications for self-regulation to take place are. Firstly, the elimination of any form of recourse to government controlled regulation. Secondly, the protection of the reputation of the industry from some business operators whose behaviour would lead to putting the industry's standards at risk.[442] A number of organisations can perform self-regulation, professional bodies, trade associations and business collaborates to name but a few.[443]

Advocates of this type of regulation claim that the structure of self-regulation provides a number of advantages to the market. Among them, field expertise, that is, in a self-regulatory regime, regulatory bodies possess a thorough and practical knowledge of the industry; this is due to the interconnection between the profession and the regulating authority. The latter is usually formed of experts from the industry, which allows an easier flow of information regarding market trends and demands. Expertise in a self-regulatory scheme also implies a better applicability of the rules. As expertise comes from the profession, market operators tend to regard the conditions imposed by self-regulators as being reasonable to apply; this can lead to a higher level of voluntary compliance from business players.[444]

In addition, proponents of self-regulation also highlight the cost-benefit of such a system. They argue that under this process, information is easier to access for the regulatory body, which creates lower costs in formulating and setting standards. Moreover, reduced information costs also means a decrease in enforcing and monitoring the regulated groups. Besides, as industry experts set this kind of regulation, this means that there is an established trust between the market supervisor that is the regulator and the supervisee, which overall, gives self-regulation a more flexible approach to adjust to market demands. Furthermore, a

[442] Ibid.

[443] Robert Baldwin, Martin Cave and Martin Lodge, *Understanding regulation: Theory, Strategy and Practice* (2nd edn, Oxford University Press 2012) 20-29.

[444] Edward J Balleisen and David A Moss, *Government and Markets: Toward a New Theory of Regulation* (Cambridge University Press 2010) 125.

self-regulatory mechanism assumes that market players and revenues from trade activities sustain all costs, which removes the burden from taxpayers' shoulders.[445]

However, self-regulation raises the issue of trustworthiness. The rationale behind a self-regulatory mandate is that regulation must support legitimate purposes. Besides, members of the regulatory body must be independent and protect the public interest. Self-regulation relies on private non-elected parties to pursue its objectives and rules, which implies that these regulations and principles can be perverted from their initial aim to fulfil the interest of private groups, thus, raising the issue of the capture theory and casting doubt on the claim that the wider public interest is achievable under self-regulation. This is especially the case when self-regulators are in charge of updating, formulating and adjudicating rules. Moreover, sceptical views over self-regulation allege that this system has a poor record in terms of enforcement against its members, in addition to behaving in a non-competitive way by increasing entry barriers and setting unattainable standards.[446]

Detractors of self-regulation also put forward the argument that as this system relies on a group of individuals or firms from the industry who hold power over self-regulatory systems, the principle of accountability cannot be achieved. Others assert that the principle of accountability can be complied with, however, they point out that the key issue is to establish whether accountability in self-regulatory regimes should be dealt with via governmental intervention or through market players. This they say will help define the appropriate form of accountability. On the one hand, if one views self-regulatory systems as a private matter, this means that market professionals and the self-regulatory body in charge must tackle any arising problem. On the other hand, if self-regulation is perceived as a governmental matter, the most effective solution would be to have recourse to judicial and other forms of governmental intervention, especially when the public interest is at stake. Furthermore, it is asserted that self-regulatory bodies have no obligation to refer to non-industry members prior to shaping their policies and decisions; they are not required to explain any action they undertake and allow a limited access to non-members reviews even when the outcome of the decision goes beyond the industry circle to affect outsiders.[447]

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[445] Baldwin, Cave and Lodge, *Understanding regulation: Theory, Strategy and Practice* 30.

[446] Ibid.

[447] Ibid.

Although self-regulation can be beneficial to markets in terms of expertise. However, the wave of deregulation that gave rise to the recent financial crisis of 2007-2008 reveals that some form of government intervention is required to safeguard the good functioning of markets. Therefore, one agrees with the view that state regulation provides a more reliable form of market monitoring to the extent that the principles of accountability and transparency are respected to achieve the wider interest. Additionally, some forms of collaboration with industry experts would offer a practical expertise in order to create laws that respond to markets' needs. Concerning Maghreb countries, state regulation were put in place in order to help markets transition. Additionally, markets in Maghreb countries are not mature enough to self-regulate. Furthermore, the influence of the EU model and the interventionist approach led to the creation of regulatory bodies in different sectors.

3. Theories of Regulation

Market regulation aims to prevent market failure. The latter arises when market transactions give rise to a spill over effect or externalities on third parties or when information inefficiencies take place.[448] Market failure also applies when competition is deficient or there is a monopoly over a market. Monopoly takes place when one producer supplies the whole market. Baldwin argues that monopoly arises when there is a single supplier for the entire market, the product sold is unique in the sense that there is no substitute sufficiently close for consumers to turn to and substantial barriers restrict entry by other firms into the industry and exit is difficult. The unique supplier sets prices above marginal costs in addition to restricting outputs which leads to higher prices and a transfer of costs from consumers to producers.[449]

Consequently, competition law is utilised to correct these potential monopolies and enhance the business environment. However, it should be noted that in case of natural monopolies, market failure is accepted. The standard definition of natural monopoly indicates that the entire demand within the relevant market is satisfied at the lowest cost by one single firm. In other words, a natural monopoly takes place when existing economies of scale are present in a substantial amount that a single firm is able to provide the relevant market at the lowest cost for consumers and the society as long as other areas such as access to network or process are regulated. Ogus suggests that, 'economies of scale may affect one part of a given process; the

[448] Clifford Winston, *Government Failure versus Market Failure Macroeconomics: Policy Research and Government Performance* (Brookings Institution Press 2006).

[449] Baldwin, Cave and Lodge, *Understanding regulation: Theory, Strategy and Practice* 10.

task of many governments and regulators is to identify those parts of a process that are naturally monopolistic so that these can be regulated while other aspects are left to the influence of competitive forces'.[450]

Although regulation aims to remedy market failure, it is also categorised according to its effectiveness. Thus, there are three recurrent aspects of regulations, which take place whether directed at internalities, externalities or barriers to entry. At the outset, there is the welfare effect. The latter is analysed within the framework of market transactions, the decision of both firms and consumers confronted to regulatory restrictions will define the terms and conditions on which resources will be allocated.[451]

Secondly, participation of consumers as well as firms' interest groups in the regulatory process, which will shape the prospects of the regulated market. In other words, the type of regulation chosen will echo the market concerns of both consumers and firms. Thirdly, imperfect information; this concept has a pivotal role within the regulatory process. Market regulators must take into consideration the lack of information on market participants while putting regulation in place, this is because the intervention of governments in the market is closely linked to the degree of regulation used to ease or worsen access to information in the market. In some cases, markets also fail to support consumers in the decision process by not providing the necessary information for the following reasons:

- The cost of producing the information is high;
- Other producers use the information without compensating the initial producer;
- Consumers would be at disadvantage;
- Consumers do not have the expertise to investigate the product in more depth;
- Collusion among producers may reduce information on products.[452]

[450] Antony I Ogus, Regulation: Legal Form and Economic Theory (Bloomsbury Publishing 2004) 31. Others argue that economies of scale are not as significant as long lasting, and fixed investments while setting the barrier to entry in natural monopoly. For instance, environmental regulations for the air and water pollution or natural resource depletion are aimed at externalities where transactions lead to costs to be borne by third parties. Regulation of product quality, workplace safety or contract terms is directed at internalities that is costs or benefits of market transactions that are not reflected in the terms of exchange.

[451] Ibid.

[452]Robert Baldwin and Martin Cave and Martin Lodge, *Understanding regulation: Theory, Strategy and Practice* 18-19.

It is important to note that the use of regulation also finds justification in the fact that it prevents moral hazard provides social solidarity and protects human rights. Moral hazard refers to the instance where a third party rather than the consumer bears the service costs. For example, the cost of medication is paid by the state or a private insurer, in this case, regulation is used to avoid overconsumption.[453] Therefore, in order to explain the origins, practices and significance of regulation, a number of theories have emerged over time. However, for the purpose of this research, only the main concepts have been analysed. These are the public interest and the capture theories.[454]

3.1. The Public Interest Theory

The public interest theory also known as the public good theory embraces the idea that regulation is supplied in response to the demand of the public for the correction of inefficient or inequitable market practices.[455] It regards market regulators as knowledgeable and best able to detect and correct market failure. The public interest concept relies on the idea that some forms of activities being business or industrial can work in the interest of the public provided they are controlled and supervised. If the main objective of regulation is to protect the public, it should also provide the relevant information to facilitate the decision making process. From a historical perspective, regulation has always been subject to some forms of crisis. For example, the creation of the Security and Exchange Commission (SEC) in the United States was the result of the 1929 financial crisis. It is argued that regulation, which is designed for the public ought to safeguard the market from monopolies in industries, which generate significant amounts of costs or benefits; although it is not always the case, [456]as seeing before, some experts disagree with the view that governmental bodies are trustworthy tools to intervene in markets when necessary.[457]

Opponents of the public interest theory raised their concerns regarding its theoretical concept and the extent to which it can accommodate any political understanding. In other words, the

[453] Ibid 20.

[454] The terms interest group and capture theory are used interchangeably to refer to the same theory.

[455] Sam Peltzman, 'Toward a More General Theory of Regulation' (1976) 19(2) Journal of Law and Economics 211.

[456] Richard A Posner, 'Theories of Economic Regulation' (1974) 2(2) The Bell Journal of Economic Regulation and Management Science 335.

[457] George Stigler, 'The Theory of Economic Regulation' (1971) 2(1) Bell Journal of Economics 3.

public good concept has neither a defined notion nor a proper comprehension of the socio-political environment that determines the very nature of the regulatory process. Others claim that regulation creates constraints on companies in terms of creativity and management style; instead of keeping up with the fast-paced business environment, management may be more concerned with meeting the various regulatory demands. As a result, business and consumers needs are neglected.[458]Consequently, if the public interest theory demonstrates that regulation is no longer implemented for the benefit of the public, it is therefore reasonable to enquire about the effectiveness of such theory. Because of the above-mentioned reasons, critics of the public interest theory favour a different approach to regulation, that is, the interest group theory.

3.2. The Interest Group Theory

The fundamental reasoning of the interest group theory is that the regulatory process works to achieve the interest of certain groups rather than the public. Industries capture the regulatory agencies that are supposed to regulate the market. This concept is also identified as the capture theory.[459] Some commentators claim that the interest group theory works together with the economic theory of regulation; that is to say, regulation is under the influence of the industry to serve certain organised groups and producers at the expense of consumers.[460] Commentators who agree with the interest group theory point out that self-interest triggers political behaviour; people put their own objectives above those of others, to achieve that, they make use of all available resources. The choice between market and political action is primarily economic; it will be subject to the costs involved and the chances of success in each case.[461] According to Peltzman 'the regulatory process will to some extent reflect wider social interests but will still be dominated by the regulated interest'.[462] Gary Becker holds the view that 'once an industry has successfully captured the monopoly rents from any particular

[458] Edward P M Gardener, *United Kingdom Banking Supervision: Evolution Practice and Issues* (HarperCollins Publishers 1986).

[459] Kenneth J Meier, *The Political Economy of Regulation: The Case of Insurance* (State University of New York Press 1988).

[460] Baldwin, Cave and Lodge, *Understanding regulation: Theory, Strategy and Practice* 43-44.

[461] John M Cobin, *A Primer on Free Market Economics and Policy* (2nd edn, Universal Publishers 2009).

[462] Sam Peltzman, 'Toward a More General Theory of Regulation'.

regulatory intervention, it will generate countervailing interests to mobilise and contest the acquired rents'.[463]

Other critics raise an important question regarding the role that institutional arrangements play in shaping the regulatory landscape.[464] Some observers draw attention to the fact that regulation put in place to achieve public interest can also serve the interest of certain groups. For instance, the ban over tobacco advertising is said to have benefited the industry more than consumers. As the ban helped saving advertising costs to the industry, it also made it more complicated for new comers to enter the market.[465]

Nevertheless, public and private interests are said to be interrelated, some observers suggest that the most efficient means to achieve public interest is by putting private interest first. Regulation serves different purposes for different interest groups, they also claim that because regulation changes rapidly, neither the public interest theory nor the interest group have managed to explain the rationale for regulation.[466] As regulation exists in both instances, it is important to differentiate between the different actions of regulation. As we have seen, regulation can be economic or technical; in this case, it is conferred to a specific industry. Regulation can also be wider and aims to prohibit certain forms of market behaviours. In that case, competition law is used. Therefore, the next sections aim to investigate this interplay.

4. Sector Regulation and Competition Law as Legal Means to Regulate Markets

As noted in the section on the general forms of market supervision, one possible outcome of market monopoly is market failure. An excessive pricing or limitation of output can trigger a monopolistic behaviour. Thus, it is necessary to intervene in markets.[467] In other words, if

[463] Baldwin, Cave and Lodge, *Understanding regulation: Theory, Strategy and Practice* 44.

[464] Ibid.

[465] Ibid.

[466] Michael E Levine and Jennifer L Forrence, 'Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis' (1990) Journal of Law Economics and Organization 167.

[467] The notions of efficiency and distributive justice constitute additional reasons for governments to interfere in markets. These two concepts hold different functions in defining the role and executions of competition law and regulation. Sector regulation aims to achieve efficiency while competition is concerned with ensuring that resources are allocated so that market performance is not distorted. See Katalin Judith Cseres, *Competition Law and Consumer Protection* (Kluwer Law International 2005).

markets fail to self-correct, the state must get involved. In this instance, the state can use two different methods. The first available option is price incentive, which mainly revolves around taxation. The second mechanism is the regulatory route, which is the subject matter of this chapter.[468]

The main role of regulation is to watch over the extent to which the conduct of firms can affect market outcomes and correct any economic shortcomings. Regulation becomes sectoral when it is limited to a particular industry and requires sector specific rules.[469] The use of sector specific regulation primarily brings in administrative supervision over markets and the degree of intervention varies depending on the nature of the sector. [470] If sector regulation cannot prevent market failure, another form of regulatory intervention is used, namely, competition law. As a legal instrument, competition works toward avoiding that the market falls in the hands of a minority of economic operators who would manipulate it to their advantage. Additionally, competition law supports competitiveness and promotes the values of the free market.[471]

Consequently, the concepts of competition law and sector regulation coexist within the notion of the free market. As both instruments aim to monitor the behaviour of market participants, the major viewpoints, which consider the interplay between sector regulation and competition law, focus on the approaches that both instruments use to monitor economic activities and prevent market failure. Sector regulation is said to exist outside the market system whereas competition law operates within the market.[472] Therefore, the subsequent sections aim to unveil the basic features that shape each of these two mechanisms.[473]

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[468] Niamh Dunne, *Competition Law and Economic Regulation*: *Making and Managing Markets* (Cambridge University Press 2015) 33-35.

[469] Kenneth J Meier, *The Political Economy of Regulation: The Case of Insurance* (State University of New York Press 1988) As noted previously in this work, another form of regulation known as social regulation is also used to regulate some aspects of the market. Social regulation comprises standards such as environmental and safety norms. Nevertheless, this type of regulation and its impact fall outside the scope of this research.

[470] Adi Ayal, 'Anti-anti Regulation: the Supplanting of Industry Regulators with Competition Agencies and How Antitrust Suffers as a Result' in Josef Drexel and Fabiana Di Porto (eds), *Competition Law as Regulation* (Edward Elgar Publishing 2015) 31.

[471] Ibid.

[472] Martin Hellwig, *Competition Policy and Sector Specific Regulation for Network Industries* (Max Planck Institute for Research on Collective Goods 2008).

[473] For the purpose of this section, the terms economic regulation and sector regulation are used interchangeably.

4.1. Scope of Intervention: *Ex ante* versus *ex post*

The scope of intervention constitutes the major difference between both tools. As we have seen, industry regulations deal with specific rules of conduct, which restrict the type of behaviours that operators are allowed to adopt. It requires market participants to carry out some actions in order to comply with such rules, which creates a substantive legal structure so that market failure does not take place. Consequently, sector regulation is applied *ex ante*.

In opposition to sector regulation, competition law is used retrospectively or *ex post* in order to prohibit actions, which are deemed non-competitive in nature (retrospection is not used in case of merger control). Therefore, competition law imposes punishments on firms after they perform their behaviour.[474] In this regard, the rationale behind *ex ante* and *ex post* gives rise to a debate on the regulatory expertise of both competition law and sector regulation.

One the one hand, it is argued that competition law has a general scope of application, as it is obligatory for all industries to comply with such rules on condition that there is no stated exemption. On the other hand, sector regulation is said to be tailored to fit a particular industry as it involves more detailed obligations on operators. In other words, sector regulation comes into force if there is a shortcoming in the market whereas competition law is put in place to tackle problems that might take place in the future. Consequently, the sector specific regulator has at its disposition a technical expertise to monitor markets whereas competition authorities deliver solutions based exclusively on a competition outlook. [475]

The lack of expertise of competition law and the subsequent authorities in charge of enforcing it can be problematic, especially, in cases where competition law serves as the sole regulatory mechanism, that is, sector regulation is either minimal or absent because the market is going through a deregulation phase. However, as competition law deals with issues

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[474] Nikos Nikolinakos, *EU Competition Law in the Converging Telecommunications Media and IT sectors* (Kluwer Law International 2006).

[475] Suzanne Rab, 'Financial Services: Is Competition and Regulation Working' (Lincoln's Inn, Competition Law Series, London, 19 November 2015).

related to the competitive behaviour of firms in the market. Thus, specific knowledge of the industry is not a necessity.[476]

4.2. Forms of Intervention: Dynamic versus Static

Competition law is regarded as a dynamic tool whereas sector regulation is perceived as a static legal instrument. This is because the nature of the obligations imposed by competition law renders it more prone to adapt to market requirements, whilst sector specific regulation is regarded as stationary because it provides solutions to well-defined actions that already took place. Niamh Dunne suggests that 'in theory, competition law is an indirect or facilitating mechanism, which assists the market process to arrive at the most efficient outcome, whereas regulation directly imposes its solutions within the market, bypassing the market processes'.[477] By contrast, Kimmelman and Cooper argue that sector regulation implement rules which aim to support markets more dynamically than competition law because it provides protections to consumers that 'antitrust cannot reach or is not likely to reach in a timely manner'.[478]

These differences shed light on the nuances regarding the issues that are tackled by each of those two mechanisms. In this regard, one observes that sector regulation offers traditional and detailed solutions to markets that cannot correct themselves, while competition law is viewed as having an innovative perspective on regulating markets. Moreover, competition law entails a judicial procedure, which aims to be more independent from the state. In contrast, regulation often follows political agendas and is therefore considered as more dependent on government choices.[479] After reviewing the regulatory expertise and the forms of intervention, the next two sections aim to analyse competition law and sector regulation from two perspectives, namely, complementarity and opposition.

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[476] Mario Siragusa and Fausto Caronna, 'Reassessment of the Relationship Between Competition Law and Sector Specific Regulation' in Jose Drexel and Fabiana Di Porto, *Competition as Regulation* (Edward Elgar Publishing 2015) 161.

[477] Niamh Dunne, *Competition Law and Economic Regulation*: *Making and Managing Markets* 48.

[478] Gene Kimmelman and Mark Cooper, 'Antitrust and Economic Regulation: Essential and Complementary Tools to Maximize Consumer Welfare and Freedom of Expression in the Digital Age' [2015] 9 Harvard Law & Policy Review 403.

[479] Tony Prosser, *The Regulatory Enterprise: Government Regulation and Legitimacy* (Oxford University Press 2010).

5. Complementarity of Sector Regulation and Competition Law

This viewpoint denotes that competition law and sector regulation aim to achieve a similar goal, that is, supervision of markets and prevention of market failure. Although the method of intervention differs, the end results remain the same. This view also suggests that market intervention constitutes a perquisite. However, the level at which intervention is necessary varies from one market to another. It adjusts to market conditions, which are influenced by social, cultural, historic and political factors in addition to the economic and legal state of development of the market.[480]

As experts fundamentally disagree on the extent of market intervention, it led to the creation of schools, which provided different opinions on the subject matter. For example, the Chicago School supports a minimal market intervention from the state; it encourages the use of competition law as the main source of regulation. In this perspective, experts such as Hayek support the application of competition as the key process under which economic activity should be established and the state should only get involved to maintain or improve competitiveness.[481]

Other experts such as Clark suggest that freedom of behaviour within a market is favoured over economic regulation. Nevertheless, competition law is an essential part of the competitive process so that to ensure that the economic choices of market players do not influence the economic activity of the entire market. Therefore, the behaviour of market players can be managed from a sector specific perspective or from a competition law angle.[482] Consequently, complementarity between competition law and sector regulation is possible in instances where it is difficult to determine what activity falls under the scope of which regulation.

An example that illustrates the convergence of these two legal mechanisms is the granting of exclusive rights and imposition of some economic activities such as licensing. It is deemed obligatory to adopt certain rules in order to ensure that these rights and obligations are respected and to guarantee that resources are allocated in compliance with the principles of

[480] Ibid 58.

[481] Friedrich A Hayek, *The Road to Serfdom (*The University of Chicago Press 1944).

[482] Sam Peltzman, 'Towards a More General Theory of Regulation' (1976) 12(2) Journal of Law and Economics 211.

free competition and non-discrimination[483]in addition to assigning market players some universal service obligation to protect the general interest. In this case, sector regulation and competition law are applied as complementary tools to ensure the good functioning of the market.[484]

Another instance where both mechanisms are combined is when; sector regulation requires firms to follow specific rules in order to ensure market transparency. However, there would be no mechanism in place to monitor price control. In this case, competition law is used to avoid that firms put in place higher and abusive prices that would be detrimental to consumers and other competitors.[485]

In convergence, the main differentiation in terms of regulatory intervention, *ex ante* and *ex post* seem to become almost absent. Competition law can be utilised *ex ante* which is the case for merger control whereas sector regulation may intervene *ex post* in cases where the sector regulatory authority has discretionary powers to assess the behaviour of competitors in the market. Consequently, they can be applied simultaneously even if they have different objectives.[486]

Moreover, the application of both sets of rules as complementary means that further consideration is given to the obligation of market operators regarding compliance rules. That is, if competition law and sector regulation converge, this would reduce the duplication of administrative procedures, offer legal certainty in decision making which in turn facilitates compliance with both sets of laws.[487] However, because of the scope of their regulatory nature, some experts believe that competition law and sector regulation profoundly differ. Consequently, the next section aims to investigate this perspective.

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[483] ICN, 'Antitrust Enforcement in Regulated Sectors Working Group' (ICN Annual Conference, Bonn, 2004) <http://www.internationalcompetitionnetwork.org/uploads/library/doc381.pdf> accessed 10 December 2015.

[484] Damien Geradin and Michel Kerf, *Controlling Market Power in Telecommunications: Antitrust vs Sector Specific Regulation* (Oxford University Press 2003).

[485] Jose Carlos Laguna de Paz, 'Regulation and Competition Law: In Regulated Industries' (2012) 33(2) European Competition Law Review 77.

[486] Eg, Case 13/77 GB-Inno-BM v. ATAB [1997] ECR 185.

[487] Pier Luigi Parcu, 'The Surprising Convergence of Competition Law and Regulation in Europe' (2011) 35 EUI Working Papers 1.

6. Competition Law and Sector Regulation in Divergence

This view perceives sector regulation and competition law as contradictory; this is because competition law is regarded as delimiting the options of firms in the market by imposing restraints on the type of behaviours that can be held. It represents an extra set of laws, which are added on top of sector regulation. By contrast, sector regulation is believed to outmanoeuvre it by allowing market operators to undertake a certain set of actions. Experts such as Kahn claim that competition law and sector regulation are alternative systems of control that are 'essentially competitive rather than complementary'.[488] Therefore, from this viewpoint, competition law is considered as having a penalising role for market players whereas sector regulation holds a preventive role. Consequently, both regulatory mechanisms are regarded as having opposing roles. On the one hand, competition law enforces the law only when external boundaries are breached, it penalises actions that have already taken place. On the other hand, sector regulation predicts market development and reprimands certain practices accordingly.[489]

Moreover, this view considers that each of sector regulation and competition law are built to provide different responses to specific issues. Because sector regulation intervenes only if there is a need for technical expertise. Therefore, it focuses on contextual analysis of the sector under scrutiny. For instance, it preserves the concept of universal access to services, which holds that previous monopolists regardless of the competitive nature of the market must not abandon some obligations. It also intervenes when *ex post* rules imply a degree of legal uncertainty and the case requires fast intervention, or when the socially desired outcome is difficult to meet by competition law standards. However, competition law is deemed more appropriate if sector regulation does not have the ability to anticipate the behaviour of some market players who may influence the market to their advantage and distort it. Additionally, competition law is more efficient if sector regulation exposes the market to a risk of manipulation, or if some anti-competitive practices restrain access and add additional costs that could be passed over to the consumer.[490]

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[488] Alfred E Kahn, The Economics of Regulation: Principles and Institutions (MIT Press 1988) 1.

[489] Jose Carlos Laguna de Paz, 'Regulation and Competition Law: In Regulated Industries Behaviour Can Often Be Approached from Sector-Specific Regulation and from Competition Law' (2012) 33(2) European Competition Law Review 77.

[490] Marek Szydło,'Sector-Specific Regulation and Competition Law: Between Convergence and Divergence'

Nevertheless, the use of competition law and sector regulation as counterparts raises challenges in terms of legal outcomes. This is because, in some cases, sector regulation prevails over competition law when there is a deliberate policy to allow national laws to create a legal framework that restricts competition. In other circumstances, market operators are subject to competition rules only if national laws encourage, make it easier or leave room for anti-competitive behaviours.[491]

Therefore, in many jurisdictions, the law states that sector regulation cannot restrain the application of competition law. For instance, within the EU legal framework, the existence of sector regulation cannot limit the application of competition law in regulated markets. Article 102 TFEU prohibits any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it, as far as it may affect trade between the Member States.[492] However, competition provisions should be understood in the context of sector regulation.

As an illustration, the case of Deutsche Telekom AG *vs* Commission reflects the importance of competition rules. Before the full liberalisation of the telecommunications market in Germany, Deutsche Telekom enjoyed a legal monopoly in the retail provision of fixed-line telecommunications services. This case dealt with the necessity to review the condition to let competitors provide competing services. The German telecommunication regulator allowed the wholesale. However, the wholesale and retail access to the loop were both subject to regulation. The Commission came to the conclusion that Deutsche Telekom abused its dominant position because it used the margin of discretion allowed by the regulator to squeeze its market competitors out of the market by charging abusive prices to allow access to its local network. In this case, competition law prevailed because the sector specific regulation does not prevent firms from undertaking behaviours, which distort, restrict or prevent competition.[493]

European Public Law (2009) 15(2) 257, 260-265.

[491] Lorenzo Federico Pace, *European Competition Law: The Impact of the Commission's Guidance on Article 102* (Edward Elgar 2011).

[492] Consolidated Version of the Treaty on European Union Part Three Union Policies and Internal Actions Title vii Common Rules on Competition Taxation and Approximation of Laws Chapter 1 Rules on Competition Section 1 Rules Applying to Undertakings Article 102 ex Article 82 TEC [2008] OJ C115/89.

[493] Case C-280/08 P - *Deutsche Telekom v Commission* [2010] ECR I09555.

In the United States, the relationship between competition law and sector regulation is reliant on Courts interpretations whereby the principle of specialty is applied. The Court acknowledges the idea that enforcing competition provisions is not necessary if special remedies have been put in place in the sector regulation. Moreover, in this case, antitrust enforcement would create additional costs.[494]

Furthermore, parallel decisions by sector regulation and competition law would amount to a double punishment for the same offence, and overrule the principle of proportionality. However, according to the *ne bis in idem* principle, legal action cannot be brought repeatedly against the defendant for the same offence. Consequently, having separate decisions tend to create a jurisdictional overlap for the authorities in charge. While the sector regulator may grant permission, the competition authority may limit this right.[495]

7. Competition Law as Sole Regulatory Measure

The concept of competition law as regulation holds two meanings. The first one, descriptive, whereby competition law has a functional position to substitute for sector specific regulation. The second definition relates to the doctrinal use of competition law. [496] The implementation of competition law as regulation in a sector considers that if sector regulation is either inexistent, weak in nature, failed to be applied or does not cover all areas of a sector. Competition law would be the first regulatory response. Because competition law holds a general scope of application, its rules can be applied to all sectors without the need of changing its core content. [497]

As previously mentioned, the nature of competition law renders it adaptable within any sector. Competition law can provide a quick fix, in instances where sector specific regulation has not been implemented because there was a will to let the market correct itself or to bring state intervention to the minimum. It can also be the case that, the specific sector never faced

[494] Verizon Communications Inc Petitioner *v* Law Offices Of Curtis v Trinko, Llp.

[495] Jill Hunter, 'Development of the Rule against Double Jeopardy' [1984] Journal of Legal History 3; Ioannis Kokkoris, *The Reform of EC Competition Law: New Challenges* (Kluwer Law International 2010).

[496] Stephen G Breyer, *Regulation and Its Reform* (Harvard University Press 1982) 158-161.

[497] Ibid.

any issue before and thus; there was no need to regulate. As Stephen Breyer claims 'Antitrust is another form of regulation. Antitrust is an alternative to regulation, and where feasible, a better alternative'.[498]

Competition law becomes regulation when it incorporates elements of sectoral regulation, which are pursuant of *ex ante* type of results instead of *ex post* as illustrated in the compliance guidelines provided by competition authorities. Although administrative in nature and function, these instructions have as objective to build a reasonable *ex ante* framework for firms within the boundaries of competition law, in addition to providing a practical interpretation of competition requirements.[499] Although the majority of competition rules are regarded as prohibitive in nature, some such as the essential facility doctrine provide a prescription i.e., an obligation rather than a punishment. This concept aims to authorise access to other competitors at an affordable price.[500] In this case, competition law adopts a sector regulatory like behaviour by setting a requirement on firms.

The third model of competition law used in the form of economic regulation is the application of settlements. A settlement revolves around the fact that the public enforcer and the firm accused of breaching the law agree on changes of the firms' behaviour or organisation. However, settlements may not provide any recognition of infringement or liability from the defendant.[501]

8. The Intersection between Competition Agencies and Sector Regulators

As we have observed, the main role of regulatory agencies is to set standards, rights and obligations, which are made compulsory on market operators. In case market players do not comply with such rules, regulatory institutions follow specific procedures in order to enforce

[498] Stephen G Breyer, 'Antitrust, 'Deregulation and the Newly Liberated Marketplace' (1987) 75 California Law Review 1005, 1007.

[499] Håkon A Cosma and Richard Whish, 'Soft Law in the Field of EU Competition Policy' (2003) 14(1) European Business Law Review 25.

[500] Keith N Hylton, *Antitrust Law and Economics* (2nd edn, Edward Elgar 2010).

[501] E.g, The EU Commission uses settlement in cartel cases, the Commission denotes that a settlement does not amount to recognising an infringement of the law and from the involved parties to admit guilt. European Commission, 'Cartel Case Settlement' (*Europa: Competition Cartels*) <http://ec.europa.eu/competition/cartels/legislation/cartels_settlements/settlements_en.html> accessed on 09 December 2015.

these rules.[502] Because of the liberalisation process in most industries, there has been an increase in the creation of regulatory agencies including sector specific regulators. A number of these regulators have been given sanctioning powers by way of either imposing fines or revoking licences, in cases where market operators do not comply with the rules and guidelines or fail to implement the regulator's decision. Additionally, competition agencies have been established to monitor the behaviour of market operators regarding competition issues.[503]

Although tension exists due to differences in regulatory approaches, that is, market regulators tackle the issue in a direct manner whereas competition authorities use indirect ways to impose prohibition. The relationship between sector regulators and competition authorities has become relevant, especially, regarding the extent to which each authority considers the interest of the other one and the contribution each of them brings to the other institution.[504] Additionally, it has become evident that sector specific regulation is becoming closer to competition law. Consequently, there has been a certain degree of convergence between the instruments used by both institutions in order to pursue the creation of pro-competitive markets. Moreover, convergence means that sector regulator can be in charge of economic and technical regulation in addition to having powers on some or all competition issues. Meanwhile, competition authorities are given economic or sectoral enforcement functions. Convergence can also be in terms of institutional design, where, as we have seen, sector regulators and the competition agency are combined under one agency.[505]

For instance, in the EU, it is also noticeable that competition authorities have evolved towards having enforcement powers that are quasi regulatory. In addition, sector regulators have been given powers, which resemble the power held by competition authorities. For instance, access regulation, which requires that the incumbent operators provide access to their networks. Directive 2002/19 named the Access Directive provides transparency, non-

[502] Adam Jasser, Independence and Accountability' (2015) 6(2) Journal of European Competition Law and Practice 71.

[503] Nicolas Petit, 'The Proliferation of National Regulatory Authorities Alongside Competition Authorities: A Source of Jurisdictional Confusion' [2004] The Global Competition Law Centre Working Papers Series 02.

[504] Niamh Dunne, *Competition Law and Economic Regulation: Making and Managing Markets* 264-265.

[505] Maher Dabbah, 'The Relationship between Competition Authorities and Sector Regulators' (2011) 70 The Cambridge Law Journal 113, 116-117.

discrimination and pricing requirements over undertakings that hold a significant market power. [506] In addition, in the EU, the concepts of dominance under competition law bears resembles with the significant market power in sector regulation.

Convergence also denotes that national sector regulators and competition authorities can be qualified as interchangeable in nature. For example, competition authorities take over the role of sector specific regulator in order to settle disputes. In the case of *Marathon vs Thyssengas GmbH*, the latter denied access to its gas, Marathon, the company complained before the Commission under the rationale of Article 102 TFEU. The two undertakings finally came to a settlement.[507] However, because of convergence, it has often become difficult to distinguish between the jurisdictional and enforcement powers of competition authorities and national sector regulators, which can lead to regulatory inconsistencies, forum shopping and an increase in administrative costs that can affect consumer's welfare. Therefore, there is a need to set strong coordination systems between the different regulators in order to avoid conflict, delimit the degree of exclusivity in a jurisdiction or monitor market intervention.

8.1. Forms of Coordination between Competition Authorities and Sector Regulators

It is worth noting that the deregulation of a static market and the creation of a competitive one differ from the protection of competition on a market that is already competitive. This is because opening up a market that was previously subject to monopoly necessitates a number of *ex ante* decisions of an industrial policy nature in order to set up the possibility of having competition and establishing the number of entrants that should be permitted to enter the specific market.[508] Therefore, early and regular cooperation between competition and sector authorities is recommended. Cooperation can be compulsory or voluntary. For example, in the United States, the Federal Antitrust agencies give advice to industry specific regulators on matters related to mergers, whether the advice is compulsory or voluntary, However, there is no specific method as to which the agency will instigate the first contact. According to the

[506] ICN, 'Antitrust Enforcement in Regulated Sectors Working Group 2004: Interrelations between Antitrust and Regulatory Enforcement' (International Competition Network, Annual Conference, June 2004) < http://www.internationalcompetitionnetwork.org/uploads/library/doc381.pdf> accessed 31 December 2015.

[507] European Commission, 'Commission Settles Marathon Case with Gas de France and Ruhrgas' (European Commission, 30 April 2004) < http://europa.eu/rapid/press-release_IP-04-573_en.htm?locale=en> accessed 02 August 2016.

[508] Frederic Jenny, 'The Institutional Design of Competition Authorities: Debates and Trends' 10.

Federal Communications Commission (FCC) rules,[509] when the cooperation is compulsory, the information regarding any proceeding must be disclosed which allows the public and other interested parties to review the level of cooperation between these two agencies. Nevertheless, there are exceptions, which include cases of voluntary cooperation; in this case, the Department of Justice does not have the capacity to provide information unless a waiver is applied.

Cooperation helps ascertain the idea of having a network among regulators to address market challenges.[510] Cooperation can be pre-determined by joint agreements that establish the specific level of collaboration including at investigative and decisional levels. Therefore, it is important to explore examples on the types of compulsory and voluntary cooperation agreements that can be put in place between competition and sector agencies.[511]

8.1.1. Compulsory Cooperation

Compulsory cooperation can take the form of an agreement that determines which agency is given priority over a case. For instance, if a case is detrimental to competition and the law does not give priority to one agency over the other. The agreement would stipulate that the competition agency would have pre-determined priority. However, if the case includes a particular threshold that requires economic or technical intervention, the case would be automatically assigned to the sector regulator. Additionally, a compulsory agreement can request that if a case requires both competencies, a joint inquiry and decision could be published. This approach provides each institution the ability to fulfil its role and have the output of the other agency without incurring the costs, duplication of work and bureaucratic obstacles involved if these agencies were to be working separately.

Moreover, compulsory cooperation can include an automatic exchange of information and data regarding the case subject matter of investigation. Because of the advancement of technology, a database can be put in place whereby information regarding a case would be shared as soon as an inquiry begins. In this context, UNCTAD has formulated the idea of

[509] Federal Communication Commission (FCC), 'Proceedings and Actions' < https://www.fcc.gov/proceedings-actions/ex-parte > accessed on 02 August 2016.

[510] Cornelius Dube, 'Competition Authorities and Sector Regulators: What is the Best Operational Framework' (*CUTS International*, October 2008) 1-2.

[511] This list is non-exhaustive.

establishing an online database for member countries whereby competition agencies and sector regulators can exchange non-confidential information.

Besides, having two independent agencies can also create a mutual monitoring in terms of governance. For instance, an accountability system can be established between sector regulators and competition agencies, wherein, each agency can have the right to moderate or audit the cases handled by the other agency, [512] or the competition agency can have board members from different sectoral agencies who would have the task to monitor cases that require specific sectoral expertise.

8.1.2. Voluntary Cooperation

Voluntary cooperation can include an option wherein each agency publishes opinions regarding decisions emanating from the other agency. Although opinions are not of a binding nature, each decision would be justified if it were to be different from the opinion formulated by the other institution. In addition, an opinion can be requested during the investigative stage. This is the case in France, where the Competition Council offers opinions to sector regulators regarding the definition of the relevant market as well as opinions regarding access to networks.[513]

Furthermore, as we have observed, cooperation between agencies may take place in the form of advocacy. For instance, competition authorities can organise conferences, seminars or private meetings with sector regulators to promote competition rules in regulated industries. By contrast, sector regulators can organise training sessions directed to the competition agency staff members regarding technical aspects of their sector. This is the case of the Austrian Competition agency, whereby, trainings are organised for a period of three months yearly.[514]

However, in some cases, it remains difficult to coordinate the relationship between sector regulators and competition authorities through cooperation agreements, because of the fast pace by which markets operate. Therefore, a number of jurisdictions have decided to have recourse to an institutional merger of sector and competition expertise. As mentioned

[512] Ibid.

[513] Euro-Mediterranean Forum on Competition Law (FEMC), 'Relationship between Competition agencies and Sector Regulator (Workshop, Tunis 28-29 November 2013) 3.

[514] Ibid 4.

previously, in the UK, the CMA provides an example of combining two agencies, which aim to reinforce cooperation between enforcing competition law and sector regulation, protecting consumers and ensuring the public interest at large. In addition, merged institutions aim to enhance information-sharing, investigations and offer a more responsive action to business malpractices and market failure. Moreover, this form of cooperation also attempts to provide more transparency on the agency's work and demonstrate the importance of communication with other agencies and the government; it also shows that independent institutions must stay in touch with commercial and business events.[515]

In a similar context, in Australia, the competition authority was entrusted with supervising some industries with some exceptions and exclusions. Therefore, the merged authority has a larger number of legal instruments at its disposition to find the appropriate tool to resolve an issue as in some instances, decision-making requires analysing the competitive and economic impact on the market; an integrated institution may have an easier access to investigating such option.[516]

8.2. Relationship between Sector Regulators and Competition Authorities in Maghreb Countries

In Maghreb countries, the trend towards convergence has also been observed. As the Telecommunication sector represents the most dynamic industry in the region. Therefore, this sector is used as an illustration to demonstrate the jurisdictional overlap that exists in these countries. One can observe that the lack of expertise and political vision in these countries led to a confusion between the will to privatise this sector and the need to create competition. However, in recent years, Maghreb countries have started to establish cooperation agreements with the Telecommunication sector in order to enhance collaboration and avoid duplication of work. However, this cooperation remains at a voluntary level. Additionally, the national legislators are also attempting to give further powers to the Competition Council even if the powers remain consultative.

[515] Niamh Dunne, *Competition Law and Economic Regulation: Making and Managing Markets* 270.

[516] Allan Fels and Henry Ergas, 'Institutional Design of Competition Authorities' (OECD, 122nd Meeting 17-18 December 2014) 17-20 < http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD(2014)85&docLanguage=En> accessed 24 October 2016.

In Morocco, the National Agency for the Regulation of Telecommunications (NART) is responsible for regulating the Telecommunication and Postal services. Law n 24-96 gave the regulator competencies in matters of economic and technical regulation. Additionally, decree n 2-16-347, which modifies decree n 2-05-772 in relation to pricing and competition, incorporates the principle of competition and the restriction of anti-competitive practices and economic concentrations for network providers and users which is regulated by the sector regulator. In this case, the legislator provided the full powers to investigate and enforce competition issues to the sector regulator instead of the Competition Council.[517]Thus, the NART enjoys *ex ante* and *ex post* powers.[518] Additionally, the Moroccan competition law states that, apart from cases where the interactions between sector regulators and the Competition Council have been regulated by the institutional texts of both authorities, the Competition Council is the competent organ.[519] However, it is believed that this confusion is due to the fact that the Telecom regulator has been given full powers because the activities of the Competition Council were frozen up until 2008. Nevertheless, because of the new 2011 Constitution, which gives general competences to the Competition authority over all sectors, this overlap must be addressed.

In this instance, the Telecommunication sector could follow the example of the agreement to be established between the Moroccan Central Bank (Bank Al Maghrib) and the Competition Council. The new draft legislation intends to provide a cooperation mechanism between the Competition Council and the Central Bank. In this case, the draft provides that, on the one hand, when the Competition Council is asked to intervene in relation to competition, it must obtain the Central Banks' opinion prior to making any decision. On the other hand, the Central Bank is in charge of analysing accreditations to enter the market or merger requests, if it is concerned with the fact that one of the above activities may infringe competition provisions, it must also acquire the Council's opinion prior to authorising any action.[520] In this way, both agencies would be aware of the cases that the other agency intervenes in.

[517] Arts, 6, 7 and 8, Law n 104-12 in relation to freedom of prices and competition. Decision ANRT/DG/ N° 08/11 from the referral introduced by WANA CORPORATE V MEDI TELECOM regarding anti-competitive practices.

[518] Art 3, Law n 55-01 in relation to telecommunications and Postal Services.

[519] Art 109, Law n 104-12 in relation to freedom of prices and competition.

[520] Competition Council, 'Annual Report 2013' 72 note 421 < http://www.conseil-concurrence.ma/publications/Etude_BQ_Avr2013_TEF.pdf> accessed 15 October 2015.

Therefore, preventing the repetition of investigations, and limiting the option of forum shopping.

In Algeria, the Telecommunication sector is monitored by the Agency for the Regulation of Postal and Telecommunication services (ARPT) which aims to ensure effective and fair competition on the market by taking all the necessary measures to promote or re-establish competition.[521] As for the Competition Council, the ARPT is assigned the role of investigator and enforcer in the market. In this context, ARPT issued a decision in relation to competition against the economic operator Orascom Telecom Algeria (OTA) which represents the largest Telecom operator in the country. The agency stated that the operator is obliged to submit before its application, any new price offer (including basic offers, promotional offers of products or services) which must include adequate information regarding amendments of traffic. This aims to enable the agency to verify if the offer complies with the non-discrimination on-net/of net, which verifies the difference of prices and that OTA did not artificially increase the club effect to the detriment of other competitors.[522]

Although the Telecom regulator is also fully responsible for applying *ex ante* and *ex post* laws, there has been no overlap so far between the Competition Council and the Post and Telecom services regulator, this is because the law has established some dispositions. For instance, if a case is presented before the Competition Council and requires the competences of a sector regulator, a copy of the case is transferred to the sector regulator in order to provide its opinion within 30 days. However, the opinion is not legally binding. This provision permitted the reassignment of the case to the Telecom sector because it was judged to have the required technical and economic abilities in addition to having the possibility to have recourse to the Competition Council when needed.

Additionally, the law states that the Competition Council must develop further cooperation and exchange of information with sector regulators.[523] In this context, there have been discussions to establish an agreement to transfer information to sector regulators and foreign Competition Councils under the principle of reciprocity and in respect of confidential

[521] Law, n 02-03 in relation to the regulation of Post and Telecommunications.

[522] Decision n 14/SP/PC/ARPT of the 22/04/2007 regarding the regulation of prices Orascom Telecom Algeria.

[523] Art 39, Law n 08-12.

information.[524]The Council can also conduct an investigation in relation to restrictive practices at the request of the foreign Competition Council.[525]

In Tunisia, the National Instance for the Telecommunication sector (NIT) was established in 2001 after the creation of the code for the regulation of Telecommunications, which allowed the opening of the market to private operators.[526] As a result, competition law started to be enforced. The Telecommunication sector also reveals conflicts in terms of exclusivity of jurisdiction. Neither the Telecommunication regulator (NIT) nor the Competition Council determines which agency has priority. The only precision that was given by the legal texts referred to the principle of mutual consultation as an option.[527] Therefore, a recent memorandum of understanding has been signed in 2012 between both regulators in order to consolidate the relationship and determine the competences in instances where two decisions are published on a similar case.[528] Additionally, the amended law n 2015-36 now requires the Competition Council to request the technical expertise of sector regulators for each case, which is referred to it.[529]

9. Conclusion

The chapter explored the relationship between competition agencies and sector regulators. First, this chapter analysed the concept of market regulation. The aim of this analysis was to understand the rationale for regulating markets. Although some experts advocate for self-regulation, the concept of market failure has proven that there is a need to establish regulatory oversight monitored by government bodies. State regulation can take two forms, economic regulation, or competition law. The differences reside in the expertise and domain of intervention. Sector regulation provides economic and technical expertise whereas competition law as its name indicates focuses on anti-competitive practices. In addition,

[524] Art 40, Ordinance n 03-03. . Information exchange or any investigation must not pose a threat to the sovereignty of the country, its economic interest or its public order.

[525] Art 41, n 03-03.

[526] Law n 2001-1.

[527] Arts 09 and 11.

[528] Euro-Mediterranean Forum on Competition Law (FEMC), 'Relationship between Competition agencies and Sector Regulator (Workshop, Tunis 28-29 November 2013) 6.

[529] Art 15.

economic regulation aims to regulate markets ex ante whereas competition law intervenes ex post. Second, this chapter explored two approaches whereby competition law and sector regulation can be complementary or in opposition. The main finding was that sector regulation is converging towards competition law in order promote competitive markets. This chapter also explored the option of competition as sole regulation; this option was applied in New Zeeland in the early 2000's. However, it was not deemed efficient enough for the requirement of the national market at that time.

Moreover, this chapter demonstrated that convergence can be facilitated by creating cooperation agreements between both agencies. These agreements can be voluntary or compulsory. The former would deal with the presentation of non-binding opinions and the use of advocacy to promote convergence. The latter would clearly define which agency holds priority over a case. Furthermore, compulsory agreements can be utilised to monitor the method by which cases are handled and whether expertise from the other agency is needed. Therefore, one concludes that compulsory agreements would represent a better option. However, some countries preferred to institutionalise their cooperation by creating a new institution to deal with sectoral and competition matters. Nonetheless, it is too early to decide whether this option constitutes a viable choice. Finally, this chapter examined the state of collaboration between competition authorities and market regulators in Maghreb countries. The telecommunication market was utilised as an example. The main finding was that these countries are starting to strengthen their cooperation. However, the option chosen by Algeria and Tunisia has been voluntary cooperation. This is mainly due to the fact that these markets are still a work in progress. In Morocco, the choice has yet to be established. Nonetheless, these regulatory agencies should establish their cooperation in stages.

Chapter Seven: Regional Competition Regime for Maghreb Countries

1. Introduction

The idea of implementing a regional competition regime began with the adoption of regional trade agreements between Maghreb countries. However, because of economic, political and social obstacles, it has not been possible to achieve a regional competition regime. However, recently, Maghreb competition agencies have agreed to reconsider this idea. Therefore, this chapter aims to investigate the different consideration that should be taken into account before a concrete implementation of a regional competition regime. Moreover, the EU institution in charge of monitoring and enforcing competition rules represents a viable model that could be implemented by Maghreb countries as a supranational authority. Consequently, this chapter aims to investigate the institutional design and governance of this institution.

This chapter is divided as follows: section two aims to review the concept of regional integration. Section three reviews the effects of regional competition agreements. Section four investigates the institutional design and some governance aspects of the Directorate General of the European Commission, these elements have been selected because there has been a greater debate regarding their implementation at an EU level. Section five represents the conclusion.

2. Regional Integration

As demonstrated in this research, Maghreb countries have entered into regional trade agreements in order to improve their economies and enhance their laws and regulation. Therefore, the idea of having regional integration among Maghreb countries through the creation of trade agreements has been explored in the Arab Maghreb Union and the Euro-Med Partnership. Regional integration entails that governments decrease border and regulatory requirements along with consenting to recognise the regulatory standards and enforcement mechanisms of their counterparts.[530] From an economic viewpoint, regional integration intends to create welfare gains and liberalisation of trade. From a human capital perspective, it aims to establish a common framework of values, which incorporate,

[530] Jamel Zarrouk and Franco Zallio 'Integrating Free Trade Agreements in the Middle East and North Africa' (2001) 2 (2) J World Investment 403, 410.

knowledge transfer, freedom of movement and good governance.[531]According to the United Nations Development Programme (UNDP), the setting up of specialised experts hubs and knowledge-based economies symbolises the ultimate sources of regional integration.[532]

Therefore, having a regional coordinated legal framework in general, and in Maghreb countries in particular would create an integrated market by diminishing legal constraints, which would in turn have a positive impact on investments. It would also help the reputation of these developing countries on the global trade scene, as it would demonstrate their willingness to reach international standards.[533] Furthermore, regional integration that aims to create an open market must comprise a competition policy that offsets anti-competitive behaviours, works towards fostering innovation, protecting small businesses and promoting consumers' welfare. As the implementation of competition law facilitates trade among countries at a regional level, it will thus permit a better economic performance of these countries at a global level. The rationale for having a regional competition law agreement is to consolidate cooperation among countries and enhance the enforcement of competition rules at national and regional levels. As with Maghreb countries, jurisdictions that decide to create or join these types of agreements share regional proximity with one another.[534]

However, a number of elements, including, economic and political, have hindered the creation of a regional integration in Maghreb countries. Regarding political elements, the region has suffered from an ongoing diplomatic crisis between Morocco and Algeria, which is due to the support of the Algerian government to the creation of a sub-Saharan state in a region that Morocco considered as part of the Greater Moroccan state. Additionally, the existence of a high volume of customs documentation, permits, licenses and authorisation significantly penalises exporters and prevents the expansion of the private sector. Consequently, a number of important sectors, which could contribute to improving the economy of the region, are not able to do so because of the rigid restrictions established.

[531] Michael Fakhri 'Images of the Arab World and Middle East: Debates about Development and Regional Integration' (2010) 28 (3) Wisconsin International Law Journal 390, 391-393.

[532] Ibid.

[533] Anthony J Venables, 'Winners and Losers from Regional Integration Agreements' (2003) 113 (490) Economic Journal 747.

[534] Michal S Gal and Inbal Faibish Wassmer, 'Regional Agreements of Developing jurisdictions: Unleashing the Potential' in Josef Drexl and Others (eds), *Competition Policy and Regional Integration in Developing Countries* (Edward Elgar Publishing 2012) 292-297.

Furthermore, other issues such as corruption, the non-respect of the rule of law, which affects a number of public institutions, constitute further constraints.

In terms of regional competition law, Maghreb countries have yet to decide on the form of regime to adopt at a regional level. In 2015, the project for the implementation of a regional competition law was proposed by the Algerian Competition Council and has received a positive echo from Tunisia and Morocco, which have both agreed to the project. However, the format has not yet been agreed upon. Therefore, it is worth investigating the effects that emanate from the creation of a regional competition law agreement.

3. Regional Cooperation in Competition Law

One of the most common formats in terms of competition law agreements concentrates on enforcement programmes, which aim to create a common competition authority at regional levels. The remaining models focus on the creation of awareness of competition culture or cooperation among national competition authorities regarding the sharing of information and enforcement methods and procedures. Regional competition agreements should aim to create a pareto situation for Member States. That is, member countries must be better off with than without the agreement. As countries choose to join a regional agreement willingly, any provisions are agreed on before signing the agreement. That is, members should be able to comply with the fact that they must hand over some of their powers in order to improve the national and regional application of competition rules.[535]

One of the potential benefits of a joint competition law agreement is the decrease of costs concerning the enforcement of competition provisions. For example, a common competition framework would provide the funding to train employees of national competition authorities. In addition, developing countries are said to benefit from establishing regional competition law agreements because they would increase the possibility of enforcing multijurisdictional cases. In most cross-border cases where firms are suspected of infringing competition provisions, authorities encounter challenges in gathering information related to the case. Given their size and the state of development of their legal systems, some developing markets do not have the required competences to monitor the behaviour of multinational companies as

[535] Michal S Gal and Inbal Faibish Wassmer, 'Regional Agreements of Developing jurisdictions: Unleashing the Potential' 292-297 note 341.

the weight that these companies have can considerably affect local economies.[536] Moreover, developing jurisdictions face the burden of enforcing fines on international firms if they are incorporated in a different location. The existence of a supranational entity backed by a regional competition law agreement has the capacity to create a more effective enforcement of competition rules as this agency would have the ability to act on behalf of member states if asked. Moreover, it is worth considering the influence of interest groups, which can include both public and private firms. This is because, the use of a competition authority at a supranational level would considerably lower the decision making impact of interest groups as the obligation to comply would come from a higher authority. Moreover, a regional competition agreement would assist in limiting negative welfare effects especially in merger cases. It would also limit the impact of some decisions on other jurisdictions i.e., externalities, this is because, having a joint competition framework would take into account the welfare of neighbouring countries.[537]

A question that often arises in the case of developing countries is whether countries without an existing competition culture should join a regional competition agreement. Interestingly, most countries that are signatory of such agreements do not have a strong competition culture. In such case, countries can join their powers to spread awareness on competition issues at a regional level. Additionally, variations in competition cultures among these countries can bring an added value as countries can learn from their different domestic experiences and methods to raise awareness on competition issues.[538]

Nonetheless, one of the critical issues faced by developing economies during the process of establishing a regional competition agreement is the issue of having a hierarchy in the system. This is because, joining a regional competition law agreement poses a substantial question regarding harm to sovereignty and domestic interest as such agreement may restrain the ability of national competition authorities to judge on infringement of competition laws at a national level, because powers may only be concentrated in the hands of the supranational authority.[539]Consequently, it is important to achieve institutional coherence by dividing

[536] Ibid.

[537] Ibid.

[538] Ibid.

[539] Michal S Gal and Inbal Faibish Wassmer, 'Regional Agreements of Developing jurisdictions: Unleashing the Potential' 298-299 note 341.

competences among these organisations. Each institution would be vested with a specific legal expertise and cooperation among the different institutions becomes mandatory.[540] In terms of coordination between the local competition authorities and the regional competition body, cooperation in enforcing competition law should be the key issue. [541] As an illustration, Latin American agreements such as MERCOSUR require that enforcement should be introduced at the national level by the local competition authority in charge. In the EU, community laws supersede national laws. The EU model permits the national competition bodies to treat cases that have an impact on its national market. The supremacy of EU laws and institutions guarantee that all national decisions are in compliance with competition rules, and therefore allow the Commission to tackle cases that have a regional effect. Therefore, allocation of cases and institutional cooperation remains a key in the effective application of regional competition law.

Besides, the creation of a new supranational body at a regional level entails the existence of additional expenses. Hence, countries must undertake a cost benefit analysis before adhering so that they can weigh the benefits of such commitment. Such steps are usually divided into pre and post expenditures. The former relates to the costs of altering a rule, the later deals with compliance, monitoring and enforcement of the rules. Furthermore, numerous developing countries suffer from financial and political instability, which puts a further restraint on their actual ability to be fully devoted to achieving the rationale behind joining a regional competition agreement.[542]

Cooperation agreements may not always be beneficial for all participating parties. For instance, effects on consumers vary from one jurisdiction to another. Therefore, it is important to note that any common criteria and if based on consumer welfare and harm will be more beneficial to some jurisdictions over others. In other words, convergence standards among countries member of a joint agreement is a prerequisite. However, they should be agreed on. Additionally, during the early stages of the cooperation agreement and if a

[540] Mbissane Ngom, 'Regional Integration and Competition Policy in the Economic Community of West African States ECOWAS' in in Josef Drexl and Others (eds), *Competition Policy and Regional Integration in Developing Countries* (Edward Elgar Publishing 2012) 127-132.

[541] Michal S Gal and Inbal Faibish Wassmer, 'Regional Agreements of Developing jurisdictions: Unleashing the Potential' 304-308 note 341.

[542] It is worth noting that being part of a regional competition agreement may be part of a greater deal in order to allow joining an international organisation. Michal S Gal and Inbal Faibish Wassmer, 'Regional Agreements of Developing jurisdictions: Unleashing the Potential' 299-301 note 341.

supranational entity is established, it is suggested that only cross border cases should be put in front of the joint authority. That is to say, only cases wherein joint interest is at stake would be tackled by the supranational organisation. In the case of a merger that would be beneficial for some economies but harm others, one solution would be to compensate the economies harmed by the merger.[543]

Because of the reasons mentioned above, it is important that regional competition agreements set a common goal to pursue whether it is the elimination of barriers to enter the markets, or reinforcing regional trade and investment or the creation of cohesive regional policy that would pave the way to the creation of a common market. It is also important to implement flexible procedures and structures that would accommodate the necessary changes when required and balance power among the institutions in charge.[544] Furthermore, a two-tier membership can be suggested as a possible alternative to a full membership for countries, which do not have the capacity to comply with the conditions of a regional competition agreement.

4. Supranational Authority: Does the EU DG Competition Commission Constitute a Viable Model for Maghreb Countries? Investigation of its Institutional Design and Governance Features

4.1. Institutional Design

The Directorate General for the Competition Commission undertook structural changes in 2003 and 2007 respectively. The first change incorporated merger and antitrust units into directorates that were devoted to enforcement actions in major sectors of the economy such as energy, telecoms, transport and the financial services. The second change saw the merger of state aids units with antitrust and merger teams in five market and cases directorates. The aim of these reorganisations were to gather sector expertise under one roof, in order to render the investigative process faster and more effective and allow for a better spread of best practices and facilitate the organisation of sector enquiries and enhance cooperation with

[543] Josef Drexl, 'Economic Integration and Competition Law in Developing Countries' in Josef Drexl et al (eds), *Competition Policy and Regional Integration in Developing Countries* (Edward Elgar, 2012) 302.

[544] Michal S Gal and Inbal Faibish Wassmer, 'Regional Agreements of Developing jurisdictions: Unleashing the Potential' 317-319.

sector regulators. The cartel directorate was established in 2005, which strengthened the expertise of the Commission in terms of cartels.[545]

Moreover, the DG Competition Commission undertook an additional change regarding the allocation of assignments. As the structure of the Commission is constituted of Directorates which are composed of units; this has been regarded as less flexible. Therefore, an initiative was introduced in which staff members can be assigned with a case manager to a project regarded as being of priority, they report directly to a director who can also come from a different unit. Case teams with the required expertise can be brought together from different Directorates. The last financial crisis witnessed the application of this method when there was a requirement for a fast response to the crisis by creating teams for state aid notifications.[546]

4.2. Governance

4.2.1. Accountability

It is believed that the more agencies are used, the more essential the governance system of agencies becomes important, especially in terms accountability. Therefore, agencies must have an effective mechanism to control and monitor their performance. As mentioned previously in this work, the controversy with independent regulatory agencies has been whether independence goes along with accountability and external monitoring. Nonetheless, in the EU, independence is seeing as strength because an independent administrative structure simplifies supervision and visibility. Agencies have the possibility to promote policy implementation and enforcement. In addition, within the EU, agencies actions can be recognised. The issue may be with the European Commission as to whom the agency is accountable to.[547]

Accountability can be divided into political accountability and procedural accountability. At an EU level, the European Parliament has different supervisory mechanisms such as

[545] Philip Lowe, 'The Design of Competition Policy Institutions for the 21st Century: The Experience of the European Commission and the Directorate General for Competition' in Xavier Vives (ed), *Competition Policy in the EU: Fifty Years on from the Treaty of Rome* (Oxford University Press 2009) 34-35.

[546] Ibid 36.

[547] Ellen Vos, 'Independence, Accountability and Transparency of European Regulatory Agencies' in Damien Geradin, Rodlphe Munoz and Nicolas Petit (eds), *Regulation Through Agencies in the EU: A New Paradigm of European Governance* (Edward Elgar 2005) 125.

budgetary powers or appointing a member of the parliament to take part in the supervisory or administrative board. The increase in the different types of accountability to the general public and other institutions reflects the importance given to this principle in the EU. Back in the early 2000's. A number of regulatory authorities embraced the idea of having a charter on public responsibility, which was implemented upon a demand from the European Ombudsman. Regulatory institutions put in place a 'code of practice' that obliges all agencies at any level to be under the monitoring of the European Ombudsman.[548]

Throughout its different studies on the subject of accountability, enhancing public participation has been confirmed to establish more confidence in the work of public bodies in delivering and implementing the appropriate policies. The majority of institutions also created a network in order to organise their collaboration with peer organisations. These networks aim to promote cooperation among the concerned agencies, and often involve collaboration with governments, consumer associations and the wider public.[549]

4.2.2. Transparency

The principle of transparency in the EU has been ascertained as high priority on the political agenda. This is because transparency is regarded as indispensable to monitor the way Community institutions are using the powers conferred to them. Transparency is also important in order to reinforce the democratic element that characterises these institutions and the expectations that the public has in their administrations. As discussed previously in this work, transparency is connected to the accountability process, that is, if the modus operandi of agencies is opaque, the public cannot keep these institutions accountable.[550] In addition, providing access to documents has been incorporated explicitly in the procedures that different agencies and departments must follow. Therefore, documents are made available to all parties concerned based on the Commission's rules regarding access to documents.[551]

[548] Supervision under the Ombudsman is consolidated by a Constitutional Treaty.

[549] Ellen Vos, 'Independence, Accountability and Transparency of European Regulatory Agencies' 129 note 554.

[550] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C306/01.

[551] Ellen Vos, 'Independence, Accountability and Transparency of European Regulatory Agencies' 130 note 554.

In 2005, the rules concerning access to the Commission's files by parties concerned were revisited and the previous notice was updated.[552] Access was facilitated as the Commission enabled both electronic and paper access. In addition, the 2004 Regulation also put in place a referral method that aimed at establishing a more rational allocation of cases between the Commission and Member States, this mechanism intended to enable the appropriate authority to handle the merger investigation.[553]

The Commission has also worked to enhance its transparency; the Commission has put this principle at the forefront of its governance. Therefore, the publication of Notices and Guidelines are intended to increase knowledge on the subject of Competition and the work of the DG Commission. They also demonstrate the consistency of EU competition rules, the elements and processes that Commission utilises in determining its decisions, this would also aim to enhance compliance of firms with Competition rules.[554]

The transparency and legitimacy of the Commission have been supported by the increase in the number of consultations concerning aspects of competition law and enforcement. The publication of block exemptions for firms also supports the context of providing clearer idea of the thresholds and the conditions for exemptions; it also decreases the margin of discretion of the Commission in taking decisions. General Block Exemption Regulation was implemented to explain state aid for SMEs, research and development (R&D) as well as aid for employment, training and regional aid in addition to new regulation regarding environmental aid, risk capital and R&D aid for larger enterprises.[555]

Additionally, a set of best practices on the conduct of merger investigations were implemented to guide interested parties on the merger control proceedings so that to make the investigation and decision making process more transparent. Guidelines on the assessment of

[552] Commission Notice (EU) on the rules for Access to the Commission File in cases Pursuant to Articles 81 and 82 of the EC Treaty [2005] OJ C 325/7.

[553] Regulation (EC) No 139/2004 on the control of concentrations between undertakings [2004] OJ L24/1.

[554] H M Gilliams, 'Modernisation: From Policy to Practice' (2003) 28(4) European Competition Law Review 451. The Commission published its first Notice in 1996 regarding the setting of fines, prior to that, the Commission was criticised for the lack of transparency regarding its decision-making assessment process.

[555] Commission Regulation (EU) No 651/2014 on declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty Text with EEA relevance [2014] OJ L187/ 1.

horizontal mergers complemented the 2004 Merger Regulation.[556] The aim was to explain the analytical approach the Commission takes when reviewing the competitive impact of mergers and demonstrate which type of mergers may be challenged.[557] Additional guidelines such as the assessment of mergers between companies, which are in vertical or conglomerate relationship, were added in 2007. The guidelines intend to offer examples of how the merger could significantly inhibit competition.[558]

At the level of the European Parliament, two Committees are in charge of monitoring the actions of the DG Competition Commission. The Committee on Internal Market and Consumer Protection and the Committee on Economic and Monetary Affairs. The Parliament also offers opinions on the Commission's annual report and comments on competition related matters proposed by the EU Commission. Moreover, The European Ombudsman has the power to collect complaints concerning alleged cases of mismanagement; it can open an investigation when the complainant has provided satisfactory indication on facts that have not been subordinated to legal proceedings.[559] Besides, the Committee of Permanent Representatives at the Council of the European Union is also responsible for monitoring the actions of the European Commission. It assesses sector and horizontal competitiveness in the EU in order to guarantee that Competitiveness is respected in all areas and legislations.[560]

Furthermore, the Economic and Social Committee, which offer advice on to different groups and associations such as, trade unions, consumers, and undertakings, also provides opinions on issues related to the single market, consumption and production among which competition law. The different bodies of the EU including the Commission, the Council and the European

[556] The explanation provided included different areas such as economic indicators or rights of defence. For example, the latest Best Practices on the disclosure of information in data rooms in proceedings under Articles 101 and 102 TFEU and under the EU Merger Regulation < http://ec.europa.eu/competition/mergers/legislation/disclosure_information_data_rooms_en.pdf> accessed 17th October 2016.

[557] Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations Between Undertakings [2004] OJ C31/1.

[558] Commission Notice Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2008] C265/1.

[559] Article 228 of the TFEU provides such powers to the European Ombudsman. Nikkiforos Diamandouros, 'Improving EU Competition Law Procedures by Applying Principles of Good Administration: The Role of the Ombudsman' (2010) 1(5) Journal of European Competition Law & Practice 379.

[560] The Committee is also known as the Competiveness Council, it is formed of European Affairs Ministers, Research Ministers and Industry Ministers.

Parliament can refer to this Committee. The Economic and Social Committee also has the capacity to issue opinions from its own initiative. For instance, the publication of its yearly opinion on the Commission's annual report regarding its competition policy activities.[561]

4.2.3. Independence

The Commission stipulates that independence is one of the pillars of European public administration. The Commission stated that

[i]t is particularly important that they should have genuine autonomy in their internal organisation and functioning if their contribution is to be effective and credible. The independence of their technical and/or scientific assessments is, in fact, their real raison d'etre. The main advantage of using the agencies is that their decisions are based on purely technical evaluations of very high quality and are not influenced by political or contingent considerations.[562]

Regarding the independence of the Competition Commission, there were calls to change the structure from Directorate to an independent agency, it was argued that this process would enhance legal certainty as well as detach competition from a political context. This reasoning also revolves around the fact that enforcement should be done in an essentially judicial environment.[563]

However, others disputed the argument of an independent European Competition Commission, this is because they claim that an independent institution would not resist the pressures around it; they further claim that the current structure of EU institutions enhance the Commission to preserve its high standards, principles and improving the application of competition law within Member States. In addition, the Court of First Instance agreed on the current structure. Although it is important that the Directorate only commit to competition issues, separating competition from other directorates maybe detrimental as it is important to connect competition law with the larger EU system, because separation would render some

[561] European Economic and Social Committee, 'European Economic and Social Committee: Competition Policies' (*EESC: Europa European Union*) <http://www.eesc.europa.eu/?=portal.en.int-section > accessed 13 October 2016.

[562] White Paper on European Governance, COM (2001) 428 final, 24.

[563] Eleanor Fox, 'Antitrust and Institutions: Design and Change' (2010) 41(3) Loyola University Chicago Law 474, 480-483.

tasks such as state aids, antitrust and merger less correlated.[564] Consequently, the current structure of the Directorate is considered distinctive and appropriate for the multi-functional purpose of the European Union.

Nonetheless, flaws in the system have been recognised. For example, delays and long procedures. Therefore, some changes have been introduced. Before these changes, the hearings were managed by the case handler which constituted a conflict of interest as the case handler represents the prosecutor and the judge, after that, the post of Hearing Officer was created wherein the Hearing officer is separated from the Competition Directorate and is directly linked to the Commissioner in terms of reporting the case. There were also a basis for factual interferences; the Court of First instance issued a decision to reverse merger decisions.[565] Moreover, a position of chief economist was added to the Directorate, they are all involved in all cases. The basis of facts and the law are analysed to test the decisions.

However, at some levels, the Commission is said to have more chances to be influenced by external lobbying. For example, when a case is put under the scrutiny of the DG Comp by ways of notification, complaints from third parties, investigation started from the will of the DG Comp or if the case has been reassigned because the Commission is best placed to deal with it. Complainants may urge for their case to be prioritised or from parties asking for a favourable treatment. Inappropriate pressure may take place because the system by which the cases are settled are not reviewed by the judiciary, this can result in risks of insistent or insufficient enforcement. Second, the DG is regarded as possessing a certain degree of discretion in selecting the cases that should be investigated. This DG comp competition has responded to this concern by requiring that all commitments asked from the parties are market tested.[566] Furthermore, the Commission has established numerous soft laws notices to explain the work of the DG competition, these soft laws somehow create a commitment on the methods the DG competition utilises. If they are not properly followed, then they can be

[564] Neelie Kroes, 'Antitrust and State Aid Control, Lessons Learned' (36th Annual Conference on International Antitrust Law and Policy, Fordham University, 24th September 2009).

[565] Case T-5/02 *Tetra Laval v Commission* [2002] ECR 4381. Case T-342/99 *Airtours v Commission* [2002] ECR 2585.

[566] Regulation (EU) No 1/2003 on the Implementation of the Rules on Competition Laid down in Articles 81 and 82 of the Treaty [2002] OJ L 001/1.

challenged in Court. Such Commitments to prove its dependence also gives the Commission more legitimacy as an enforcement institution.[567]

Therefore, the European Commission has a significant different standpoint if compared to national competition authorities, it is backed by the EU Treaties which ensure its independence from political interest. In addition, it independence aims to support the 'Common Interest' of the entire European Union. It is still worth emphasising that the Commission as an agency and not only the DG Competition holds the function of Europe's competition institution.[568]

[567] Giorgio Monti, 'Independence, Interdependence and Legitimacy: The EU Commission, National Competition Authorities and the European Competition Network' [2014) European University Institute Working Papers 1, 10.

[568] Philip Lowe, 'The Design of Competition Policy Institutions for the 21st Century: the Experience of the European Commission and the DG Competition' [2008] 3 Competition Policy Newsletter 1, 2. <http://ec.europa.eu/competition/publications/cpn/2008_3_1.pdf> accessed 17 October 2017.

5. Conclusion

This chapter investigated the notion of regional integration in relation to Maghreb countries. The main finding is that regional integration has been hindered by domestic elements such as political instability and bureaucracy. However, these countries have been attempting to establish a common market through the creation of a common competition law framework. Having a regional competition regime would bring major benefits in terms of fighting international cartels and cross-border cases. Nevertheless, in terms of implementing a regional competition regime, Maghreb countries have to consider two significant elements regarding the pre and post implementation.

First, in terms of pre-implementation, Maghreb countries should run costs benefits analysis in order to calculate the effects of adopting a regional regime on their national economies and legal framework. Second. Maghreb countries should consider the repartition of powers. If a supranational entity is established, the issue of sovereignty must be tackled. However, there have been different successful models from which the Maghreb countries can learn. The most successful one has been the EU model. Therefore, this chapter analysed the institutional design of its supranational institution, which is responsible for competition issues. As transparency, accountability and independence were controversial in the context of this agency. Thus, this chapter investigated these elements to demonstrate the changes occurred and what the Maghreb can learn for their regional competition institution.

Chapter Eight: Main Findings

1. Developing Countries

The aim of this research was to assess the performance of competition agencies in terms of their institutional designs and governance practices in Maghreb countries. The analysis on developing countries demonstrated that the implementation of competition law faces deeply rooted legal issues. Therefore, it is important to consider such issues before drafting a competition law for a developing country. Additionally, developing countries should adopt simple competition rules that can be backed by the judicial structure in place. Moreover, competition rules incorporate a level of universality. Thus, the main provision regarding cartels, abuse of dominance and merger control should be included in the drafting of competition rules.

Moreover, the objectives of competition laws may differ among countries. Nonetheless, developing countries have to find a balance between the two main objectives of efficiency and respecting the public interest. Besides, competition law constitutes an evolving field. Therefore, the goals of such laws should develop according to the progress of the domestic market. Additionally, this research demonstrated that the benefits of a competition regime offset its disadvantages. One of the options for developing countries is to transplant laws that have already proven their effectiveness and implement them according to the context of their markets.

2. Maghreb Countries

The analysis of Maghreb countries revealed that they are in the developing stage. Among the vehicles utilised to promote their economies towards better standards are trade agreements. Trade agreements allow monitoring the behaviour of governments in terms of policy implementation. Additionally, they protect from the influence of private groups. Moreover, trade agreements pave the way to regional integration. Furthermore, this research evaluated the concept of mixed legal systems and the different influences that led to the creation of mixed legal systems in Maghreb countries, which comprise religious and customary aspects. Regarding the legal and economic state of Maghreb countries, one observes that a number of reforms were introduced to improve market competition. However, each country concentrated on a particular path. Morocco supported investment. Algeria focused on

national investments and Tunisia preferred to concentrate on exportation programmes. In terms of competition law, Maghreb countries decided to implement the EU model. The main justifications were linked to the historical relations of the legal systems in Maghreb to the Franco-German legal tradition. Economically, the Euro-Med trade agreements facilitated convergence towards this model. Consequently, this research reviewed the setting and main laws of the EU model.

3. Performance of Competition Agencies in Maghreb Countries

3.1. Institutional Design

In terms of institutional design, the main findings were that each country chooses to adopt an option that is best suited to the requirements of its markets. In terms of leadership, a competition agency can select a board with numerous members, a single executive or a hybrid version which encompasses a Chairman with more decisional powers. Regarding the leadership of Maghreb competition agencies, a hybrid model was implemented; this model offers a reasonable option for these countries because it combines expertise. Concerning regulatory powers, competition agencies can incorporate additional expertise in their design or decide to emphasise on competition matters. Each of these models brings a different perspective. However, economies that do not have an evolved market, which is the case in Maghreb, should implement one purpose and focus their efforts to enforce it. In regards to enforcement powers, a single model offers the advantage of having predictable procedures; the combined model on the other hand, offers more fairness in terms of application. Additionally, special attention is given to the relationship with the judiciary. In terms of their enforcement, Maghreb countries have chosen to implement the single model. Additionally, the judiciary plays an important role in monitoring the decisions of these agencies. Overall, Maghreb countries have made a suitable choice regarding their institutional design.

3.2. Governance

Regarding governance, the main findings were that independence, transparency and accountability represent the main criteria to assess the performance of public institutions. Additional criteria were added in the context of competition agencies. Therefore, a competition agency that complies with these indicators has managed to implement good practices which, in turn enhance its enforcement performance. In the context of Maghreb

countries, one can observe that competition agencies are performing fairly well, although some actions could be taken to improve the state of independence, financial budgeting, transparency in procedures and human capital. In terms of outcome, the number of cases handled by the Tunisian competition authority demonstrates that it has been effective in enforcing its competition law; Morocco has become more active since decisional powers have been assigned to its agency. However, Algeria remains behind in terms of performance. If good governance criteria were not to be respected, the performance of these agencies would be minimal.

3.3. Relationship with Sector Regulator

This research investigated the relationship between competition agencies and sector regulator. In order to put this relationship in perspective, it was important to explore the concept of market regulation so that to comprehend the rationale behind the existence of regulations. In the case of market regulation, views differ regarding the method by which the market should be monitored. On the one hand, self-regulation puts the emphasis on the capacity of markets to auto-regulate and prevent market failure. On the other hand, state regulation represents a safer option against market failure because regulatory authorities are invested with the mission of controlling market behaviour.

Additionally, state regulation offers two distinct ways of regulating the market. First, sector regulation, which comprises economic, and technical expertise. Second, competition law which aims at preventing anti-competitive actions. Moreover, economic regulation has an ex ante application whereas competition law is utilised ex post. However, views oppose as to whether these two areas of the law are complementary or in opposition. This research found that sector regulation is converging towards competition law. Therefore, it is important that competition agencies and sector regulators work together to coordinate their intervention. Among the methods created to facilitate collaboration are partnership agreements. These agreements can be voluntary or compulsory. Voluntary agreements can be utilised by competition agencies and sector regulators at an early stage of the collaboration. Compulsory agreements can be used to provide expertise. A third option is the creation of institutional cooperation, which regroups different regulatory expertise under one umbrella. This method has recently been adopted by a number of countries. However, the experience is recent and lessons cannot yet be learnt. Furthermore, regarding Maghreb countries, this research

examined the relationship between competition agencies and sector regulators. The main finding was that these countries are a work in progress. Cooperation is still at an early stage. Therefore, collaboration should start with voluntary agreements and progress towards compulsory cooperation.

4. Regional Integration

Third, in relation to improving their enforcement, competition agencies, including the ones in developing markets join regional competition agreements. Maghreb countries have been contemplating this idea within a larger context of creating a regional integration and a common market. Competition law agreements can include a supranational entity or be used to exchange information. A regional competition regime would offer some benefits such as fighting international cartels. Nonetheless, developing countries including Maghreb countries have to take certain aspects into consideration before agreeing to a regional competition agreement. Maghreb countries should undertake cost benefits analysis so that to evaluate the impact of the new laws on their national economies and legal frameworks. Additionally, these countries should consider the repartition of powers in case a supranational authority is set up. Among the models from which Maghreb countries can learn, is the EU model, Therefore, an analysis of this supranational entity was undertaken in terms of institutional designs and governance. The most significant elements of the institutional design were analysed, these were transparency, accountability and independence in order to demonstrate that even a supranational entity evolves in order to improve its performance.

5. Recommendations for Good Practices for Competition agencies

1. Competition agencies should participate in performance assessment in order to improve their performance.
2. Performance criteria should evaluate governance and institutional design. Additionally, relationship with sector regulators should be incorporated as additional evaluation criteria.
3. Competition agencies should communicate with other regulators as coordination of activities aims to enhance enforcement.
4. Competition authorities should have their budgets increased in order recruit experts who can provide advice on efficient ways to enhance competition.

5. Regional competition agreements represent a viable option for market integration and enhancement of enforcement, especially when domestic markets do not have the means to face significant cases. However, cost analysis is important and distribution of powers between agencies must be clear.

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