

## Arbitrariness in the Position of Dominance as a Restrictive Practice of Competition under Algerian Law

التعسف في وضعية الهيمنة كممارسة مقيدة للمنافسة في ظل القانون الجزائري

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### Abstract

The Algerian legislator recognized the unlawfulness of arbitrariness in the position of hegemony and prevented it, as a protective method for competition in the market, but the study of Algerian legislative texts shows that the principle of prohibition and punishment of arbitrariness resulting from the position of domination on the market about some exceptions enshrined in the text of Article 09 of the Competition Law No. 03- 03.

### Keywords:

Arbitrariness, position of dominance, competition, Market, economic dealer

### المخلص

أقر المشرع الجزائري بعدم مشروعية التعسف في وضعية الهيمنة وقام بمنعه وذلك كأسلوب حمائي للمنافسة في السوق، لكن دراسة النصوص التشريعية الجزائرية تبين أن مبدأ الحظر ومعاقبة التعسف الناتج عن وضعية الهيمنة على السوق تحتل بعض الاستثناءات المكرسة في نص المادة 09 من قانون المنافسة رقم 03- 03.

### الكلمات المفتاحية

التعسف، وضعية الهيمنة، المنافسة، السوق، المتعامل الاقتصادي.

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## **Introduction**

The large corporation allows the acquisition of a position of economic power in the market, which may make it dominate and become the goal of every economic trader by increasing and improving production and developing marketing methods that are not prohibited, except those not relying on the restrictions and legal rules regulating competitive activity. It leads his owner to commit a violation represented in the arbitrariness of this hegemony, which necessitates the existence of a legal structure that protects the weak market from its strongest who may exploit their dominant position in the market arbitrarily, especially when the aim is to limit and prejudice the freedom of free competition, by excluding the competitors who exercise economic activity in the market.

The Algerian legislator was late in organizing this practice until Executive Decree No. 2000-314 was issued (dated 18 October 200 J.R n°61) Article 05 indicated that: "This situation occurs in the absence of an alternative solution." However, this restrictive practice of competition was not clearly regulated except by the issuance of ordinance No. 03-03 related to the abolition of the decree above, as Article 07 prohibited all arbitrariness of this situation, by stipulating its text. However: "Any abuse resulting from a position of domination or monopoly over the market or part of it ...". Therefore, the subject of the study raises the following problem: When does the position of hegemony transform from a legitimate goal for the economic dealer to a restricted practice of competition that calls for prohibition, in light of the Algerian legislation?

To answer the above problem, the descriptive and analytical method must be followed, depending on a plan divided into two topics, the first deals with the concept of the dominance position (first topic) while the second is devoted to studying arbitrariness in that situation (second topic).

### **The first topic: The concept of dominance**

The concept of hegemony status is among the most important concepts covered by modern competition legislation, including the Algerian legislator who touched on this concept within the order No. 03-03 related to competition (the first requirement), whose understanding depends on the determination of the relevant market and the standards that show that economic aid is in a position of domination (the second requirement).

### **The First Requirement: Definition of Dominance Position**

The first attempts to define the position of domination came from the doctrine of jurisprudence (firstly), and then it was covered by modern competition legislation, including the Algerian legislator, who touched on this concept within the order No. 03-03 related to competition (secondly).

### **Firstly: Juristic Definition of Domination**

Domination is the economic power that an institution possesses, whereby it can impede competition in the market (actual competition), while adopting a behavior that is sufficiently wary of exploitation in the face of its competitors as well as customers. Jurisprudence is also concerned with the issue of defining hegemony, as some have defined it as: “the economic power possessed by an institution, which enables it to impose obstacles that prevent the existence of actual competition, which enables it to take decisions independently and to practice activities that the rest of its competitors cannot overcome in the face of consumers ( Van siclen, 1996, p. 7- 8).

Some have come to regard it as the position in which an institution exists, in its relationship with another institution, and which gives it the authority to eliminate competition from other institutions present in the same market (R. Lee, 1985, p. 102).

It was also considered by some as: “a situation in which a person or group of people working together can control mainly over a 30% market share of the product of goods and services” (الغريب. 2004, p. 262).

Accordingly, the position of domination allows the institution concerned to avoid competitive pressures and its control over the market, which leads the economic agents dealing with it to submit to its conditions (لاكلي, 2018, p. 13).

It is noted that the definitions of the position of hegemony take into account the practices issued by the dominant institution and their effects on the position of its competitors as well as commercial dealers and consumers, a position that affected the Algerian legislator in the framework of the regulation issued by Order No. 03-03 related to competition.

### **Secondly: Legislative Definition of Domination**

The Algerian legislator defined the position of domination through the text of Article 3/3 of Order No. 03/03 as: “The position that enables an institution to obtain the status of economic power in the market concerned would hinder the establishment of actual competition in it and give it the possibility to carry out unilateral actions to such an extent considerable against its competitors, customers or suppliers.

It is clear from this paragraph that the position of dominance arises through the economic, financial, and administrative power owned by an institution or any economic project that enables it to outperform the rest of its competitors in the market in which its products or services are offered in a manner that leads to the absence of actual competition.

Also noted from the above definition that the legislator does not prevent an institution from reaching a dominant position in the market, given the dynamism and change characteristic of commercial practices, but what he attends is the abuse of it, which makes the institution impede the establishment of an actual competition in the relevant market compared to other institutions.

Thus it can be said that the dominant position is the one in which the institution is able to control and influence the activity of the market, without stipulating a complete absence of competition (بن عبد القادر, 2019, p.35).

## **The Second Requirement: Determine the Relevant Market and the Measures that Show that Economic Aid is in Dominance Position**

Understanding whether an economic institution or economic aid is in a dominant position requires first identifying this particular market, then measures that show that economic aid is in a dominant position.

### **Firstly: Determine the relevant market**

The market concerned means the space in which offers, requests or services are replaceable, which buyers or users consider as a substitute among them, without being replaceable with other offered goods or services (بن عزة, 2000, p.08).

Previously, Executive Decree No. 2000-314 defined it as: “The market or part of the reference market means to determine the dominance position, the goods and services offered by economic aid, and the alternative goods and services that can be obtained by dealers or competitors in the same geographical area”.

However, with the issuance of ordinance No. 03-03 that canceled the above decree, the market was defined in article 03 as: “Every market for goods and services concerned with practices restricting competition as well as which the consumer considers to be identical or compensatory, especially because of its advantages, prices, the use assigned to it and the geographical area that offers the institutions in which the goods or services are concerned”.

Through this definition, it is clear that to determine the dominant market, two elements are required: first, the market for goods and services, and second, the geographical boundaries thereof.

### **First: The market for goods and services**

The domination of an enterprise on the market stipulates that goods and services provided by other institutions present. The same market replaces the goods and services provided by the dominant institution from the consumer point of view, which is known as the market for alternative goods and services or the reference market (مقدم, 2011, p.11), so if there is a high price in the good or service that usually leads to customers leaving another similar commodity, they do the same purpose, and therefore it comes in this case to search for the availability of alternative offers, but the problem arises in the difficulty of saying the matching of the alternative (خمايمية, 2012, p.49).

## **Second: The geographic determination criterion**

The geographical location of the market is one of the important criteria for considering the market suitable for monopolization or not (لحراري, 2012, p.67), since the market commodity differs according to the economic activity practiced by the institution (Valentine Korah, 1994), so that the more broad-based activity the wider the market (Le loup, 2000, p.83). In this context, domination is not required to extend at the national level, rather, it is sufficient for it to be available at the local level (Decocq, 2003, p.138).

It is indicated that article 07 of ordinance no. 03-03 related to competition, as mentioned above, was general and did not specify the geographical scope of the market by which the position of domination is measured, nor the type of this market, whether it is domestic or national, as it says: “abuse resulting from a position of domination or monopoly on the market or part of it ...”. So, determining the limits of the market is extremely important by its direct impact on the completeness or failure of domination, given the location of competition that was constrained by it.

## **Secondly: Metrics that show that economic aid is in a dominant position**

The Competition Council opens the way for diligence to determine the standards that show that economic aid is in a dominant position, so that it is the result of field experience, and in this regard it is noted that there is no legal text defining these standards, after the executive decree No. 2000-314 mentioned above has been canceled, so it is possible to rely on the criteria previously included, which were divided into quantitative and qualitative standards, as it was dealt with in the second article thereof, which stipulated that: “The measures determining the status of economic aid domination over a market for goods or services or a part thereof are, in particular, the following:

- The market share held by economic aid compared to the share held by each of the other economic agents in the same market.
- Legal or technical privileges available to the economic aid in question.
- Financial, contractual or actual relationships that link economic aid to one or more economic agents and that give him multiple types of privileges.
- The privileges of the geographical proximity that the economic aid in question benefits from.

What can be observed in this article is that the legislator did not specify these criteria exclusively, as the phrase "in particular" was used in the content of this article.

Hence, it is the competence of the Competition Council to rely on other criteria or standards that determines the dominance position in which economic aid exists.

In order to analyze the text of the second article, we must address the quantitative criteria (first) and then exposure to the qualitative standards (second).

### **First: quantitative standards**

One of the things that show the extent of the domination status has been achieved is the amount of market share held by economic aid (A), in addition to the gathering of economic power (B).

#### **A- Market share**

Market share means that share held by economic aid compared to the share held by each of the other economic agents present in the same market ( بن اوهايبيية, 2019, p. 142), and the market share is the most indicative measure of the position of dominance and may be sufficient to establish it (مزيفغش, 2016, p.196), and the best example of this is the status of monopoly that enables the beneficiary to a certain market level of occupying a dominant position by acquiring all or a majority of the market shares, as it is not subject to any competition, thereby achieving concentration and gathering of economic power (تادرس, 2007, p.27), and it becomes the only customer in the same market (La Bard, Guy, & Chantal, 1994, p.73).

So, the market share is the standard or indicator that must be used first to judge whether the institution is in a dominant position or not (بوزيان, 2017, p.83), as for how it is determined by the relationship between the business number of the economic aid in question and the business number of all economic agents in the same market.

#### **B- The gathering of economic power**

When economic power rests in the hands of an institution or group of institutions, it occupies a position of domination and can be estimated through several elements, including:

- The number and importance of financial and economic agreements concluded with other groups.
- The ability to raise prices or make unjust discrimination between agents.
- Ease of obtaining funding sources.
- The characteristics of the institution considered, such as its excellence in management and technical innovation.

Thus, one of these criteria is the economic strength of an enterprise on the market level.

## **Second: qualitative standards**

In addition to the aforementioned criteria, there are other factors of a qualitative nature that can be taken into account in determining the extent of the dominance status, including:

### **A- Legal or technical privileges available to the concerned economic aid:**

In this case, the Competition Council must prove the availability of these concessions to the economic aid in question by searching for the technical means used, as well as the position on which it exists, such as good location and access to preference for some sources of funding.

### **B- Financial**

Contractual or actual relationships that link economic aid to one or several economic agents and that give it multiple types of privileges.

### **C- Fame or mark**

For the Samsung brand “Samsung”, for example, with respect to the electronic, in the eyes of consumers, it is a sign of great fame.

**D-** Concessions of the geographical proximity that the economic aid in question benefits from.

### **E- The competitive position**

In addition to the position of domination, an analysis of the competitive position at the level of a specific sector is required in order to ensure the ability of the economic customer to maintain his position despite the intense competition faced by other dealers in the market.

## **The second topic: Abusive dominance**

The position of monopoly may represent a position of domination on the market if the institution includes all market shares, which makes it not subject to any competition, and thus in this capacity has achieved a certain concentration of economic power. In this case, the prohibited act is not embodied in the simple domination of market, but rather is the exploitation of this control, and the abuse of its use, and therefore, to determine the concept of arbitrariness in the position of domination, it is necessary for us to search for the arbitrary exploitation of the dominant position prohibited (first requirement), and the exception provided to this urban which makes it permissible (second requirement).

## **The first requirement**

### **Arbitrary exploitation of the forbidden dominant position**

The concept of arbitrariness applies to the institution or economic aid that seeks to obtain unjustified commercial and economic privileges except for the domination of the market and the abuse of its exploitation. However, merely claiming the existence of these arbitrary practices is not enough; it is for the one who claimed this to prove if notification submitted to the Council Competition, is not supported by sufficient persuasive elements. Article 07 of the Competition Law mentioned some cases of abuse resulting from market dominance, as follows:

- Reducing market entry or engaging in commercial activities therein.
- Reducing or controlling production, marketing outlets, investments or technical development.
- Market sharing or supply sources.
- Obstructing the setting of prices according to market rules by artificially encouraging the rise and fall of prices.

Apply unequal conditions for the same services towards trading partners, which deprives them of the benefits of competition.

Subjecting the conclusion of contracts with partners to accept additional services that are not related to the subject matter of these contracts, whether by nature or according to commercial norms.

Here we point out that these images of arbitrariness in the position of dominating the market are the same as those related to the prohibited agreements that Executive Decree No. 2000-314 has already canceled. Other cases are represented in practices that respond specifically to the following standards:

- Maneuvers aimed at controlling market entry or its course.
- The expected or actual prejudice to competition, that is, it is not limited to the conclusive results of achieving arbitrariness in the position of dominance, but rather extends to the potential effects, and the possibility of the restriction must be reasonable; in other words, it is based on objective grounds and not only merely the possibility.
- The absence of an alternative solution due to an economic situation, and this case is considered before the issuance of ordinance No. 03-03 related to competition as a second aspect of the arbitrariness resulting from the domination of the market, but after the issuance of the aforementioned order, the legislator was allocated an article for it alone.

## **The second requirement**

### **Arbitrary exploitation of the permissible dominant position**

Restricted practices were attended to competition of any kind for the structural health of the market, but the constant movement and speed in changing market data as well as the complexity of the economic reality in a manner that is not consistent with the stability and limitations of legal texts, made the Algerian

legislator cite some necessary exceptions to the principles of competition law that are mentioned by law of Competition (firstly), as stated in the executive decree 05-175( dated 18 mai 2005, JR n° 35), and stipulated another restriction that was not stipulated in the competition law, which is the declaration of non-interference (secondly).

### **Firstly: exceptions mentioned in the competition law**

The legislator attached to the competition law, after listing the arbitrary actions of the position of domination with some exceptions, which was covered by Article (9) of the Algerian competition law, which states that

**" It is not subject to the provisions of Articles (06) and (07) above, the agreements and practices resulting from the application of a legislative or regulatory text that you find applied to.**

**Licensing agreements or practices whose owners can prove to lead to economic or technical development or contribute to improving employment, or that would allow small and medium enterprises to enhance their competitive position in the market, only the agreements or practices that were authorized by Competition board. "**

With the above article, exceptions can be listed as follows

### **First: Exceptions resulting from a legal, legislative / regulatory text**

Abuse is not considered arbitrariness if it results from the application of a legislative text or any decree or decision that exempts the perpetrator of arbitrary practice of domination status from follow-up, the perpetrator of an arbitrary practice is exempted from the situation of hegemony from follow-up (بن عبد القادر, 2018, p.50), and this case was provided for in Article 09 of the aforementioned Order No. 03-03.

It is noted that Article 09 did not clarify how to allow the prohibited agreements and the arbitrariness resulting from the state of domination resulting from the application of a legislative or regulatory text that was taken to implement it.

However, by referring to the text of Article 37/37 of the same matter, which states that: **"If investigations related to the conditions of application of legislative and regulatory texts related to competition prove that the application of these texts entails restrictions on competition, the Competition Council shall take every appropriate measure to establish an end to these restrictions"**.

According to this article, we find that there is a third condition that must be met is the condition of the authorization expressed by the Competition Council of the prohibited agreement or arbitrariness resulting from the position of domination (بن طاوس, and اوهايبيبة, 2019, p. 148).

Moreover, the French judiciary has set two rules for the application of this license represented in the conditions of the legislative text, and until the exemption from follow-up is achieved as a result of prohibited behaviors the issue of regulation raised as a justification for an illegal agreement or for arbitrariness in the position of control must be to restrict competition, but the entire economic sector must not escape from a regulation of a free economy.

As for administrative publications, the Technical Committee for Agreements and Dominance Positions has accepted that these publications are raised in a beneficial manner by the institutions, even though they do not constitute factual organizational texts, provided that the publication is issued by the Minister of Economy only and constitutes an interpretation of a valid regulation, where it permits clearly some restrictive practices of competition (غالية, 2007, p.68-69).

## **Second: The exception resulting from the arbitrary contribution to the dominance position in the economic and technical development**

According to article 09-02 of ordinance No. 03-03 related to competition, agreements or practices whose owners can prove to lead to economic or technical development are authorized. The reason behind the exclusion of some arbitrary practices in the position of hegemony is that they have a positive aspect consistent with the public interest, as they may contribute to economic progress, and erase the anti-competitive nature (Baker, 1983, p. 377- 378).

To determine the extent of economic progress, it is necessary to ascertain some of the factors and effects resulting from the arbitrary domination of the economy:

### **A- Improving productivity**

It is the most important factor for estimating the extent of economic progress due to the arbitrariness of control. This factor depends on analyzing the difference between the produced quantity and the work spent and the expenses. The lower the costs, the more the production and the better the terms of distribution, the lower the prices (Areeda & kaplo, 1990, p. 825).

### **B- Technical progress**

Innovations can justify abuse by domination if it is necessary for that for a reasonable period of time, provided that institutions do not seek to avoid others to benefit from the benefits of technological transition, and that economic progress can be considered justification for excluding arbitrariness in the predominance of the legal prohibition:

#### **1- Demonstrate the economic progress included in the practices**

The burden of proving the economic progress that is included in arbitrariness falls in the position of domination by arbitrary practitioners

(Article 02/09 of ordinance n° 03-03), and this proof varies according to the fact that the exception is public or private, includes economic benefits.

Through the foregoing, we can say that the exception stipulated by the Algerian legislator is a special exception, because the owners of abusive practices must prove the contribution of these abuses to economic progress and request a license from the Competition Council (كتو, 2010, p.148).

## **2- Economic progress has a tangible and positive impact**

Arbitrary practice must have a tangible effect which shows that the contribution to economic progress has reached a tangible degree and has achieved positive results in favor of the competitive market and sufficient to cover the disadvantages that the practice entails Arbitrary (Boutham & dowers, 1995, p. 6).

## **2- The existence of a causal relationship between economic progress and the committed practice**

That is, if they hinder and limit competition, they contribute directly to providing jobs or improving the competitive position of small and medium enterprises, so they can obtain a license.

## **Secondly: License not to interfere**

Arbitration resulting from the position of domination may be authorized by a license from the Competition Council. article (08) of Law 3/3 related to competition, which states that: “The Competition Council may note, at the request of the institutions concerned and based on the information provided to it, that an agreement or arrangement, or practice as defined in articles 06 and 07 above does not call for its intervention”.

The modalities for submitting an application to benefit from the provisions of the previous paragraph shall be determined by decree.

In implementation of the above, the Executive Decree No. 05-175 was issued specifying the methods for obtaining a permit to non-interference regarding the agreements and the position of dominance in the market, and in accordance with article 02 thereof and the declaration is received by the Competition Council at the request of the concerned institutions where the Competition Council does not have a reason to interfere with the practices provided for in articles 06 and 07 of the Competition Law (Article 02 of executive decree n° 05-175).

The file is required to obtain the permit from the institutions concerned or submitted by the representatives of these institutions according to a written authorization showing the capacity of representation they are entitled to.

- The concerned foreign institutions or their authorized representatives must show an address in Algeria (Article 03 of executive decree n° 05-175).

The documents that must be attached to the request for a non-interference permit regarding the agreements and the position of market dominance have been identified (Article 04 of executive decree n ° 05-175).

In this regard, between the first annex of the above decree, the application must be attached to a form that includes the required information, documents attached, and the file must be deposited in five copies with the Secretariat of the Competition Council in exchange for a receipt or sent to him via a guaranteed transmission and the application must specify the following:

- The identity of the other participants in the application.
- The subject of the request if it relates to an agreement or a hegemonic position.
- The signatories' declaration, whereby they declare that the information provided above, as well as the information provided in all documents and documents attached to the application are true and in conformity with reality and that the estimates, numbers and forecasts are indicated and presented in the way that is closest to the truth, and the place of editing the date and its date can be determined.

The Competition Council may pass a fine of no more than 800,000 dinars, based on the report of the decision, against institutions that adopt submitting false or incomplete information in relation to the required information or negligence in providing it (Article 59 of ordinance n ° 03-03).

The second annex of the Executive Decree No. 175-175, mentioned above, specifies what is required in the information form to obtain the non-interference permit stipulated in Article 04, which must contain the following data:

- Data related to the institution or institutions participating in the request.
- Determine the specific market.

The motives for the request by accurately indicating the subject of the request, with an indication of the benefits that the relevant institutions benefit from the request, as well as specifying the duration of the request and indicating the reasons that the subject of the request may violate the rules of competition, and a statement of the reasons that the behavior of the institution or institutions concerned does not aim to impede freedom of competition in the same market, limiting or disrupting it, in addition to stating the advantages of demand that may be reflected on the competition and the consumer.

Article 04 of the decree adds the article that the powers entrusted to the person or authorized persons who apply for permission to obtain a non-intervention permit, as well as copies of the financial results for the last three fiscal years marked and certified by the governor of the accounts or one copy of the outcome of the last year if the establishment of the institution or the concerned institutions do not exceed three (03) years, and if the application is joint, one file can be submitted.

As for the process of filing, the file shall be sent in (05) copies accompanied by authenticated documents if they are photocopies, the file of obtaining the non-interference permit shall be deposited with the Secretariat of

the Competition Council in exchange for a receipt, or by sending a letter of recommendation.

- The receipt carries the registration number of the submitted application according to what is stated in article (05).

By referring to Article (06) of the decree, for studying this file, the reporter can ask the designated institutions or their authorized representatives to view him with additional information or documents that he deems necessary.

- The concerned institutions or their authorized representatives can protect some information or some of the submitted documents due to the confidentiality required by the business. In this case, the information or documents must be sent separately and the phrase “business confidentiality” must be written on every page according to Article (07).

In case the application is rejected, the Competition Council issues a decision that includes the institution’s decision to limit its practice, otherwise it will be subject to the penalties stipulated in the competition law (غالية, 2007, p.79)

## **Conclusion**

Through this study, it became clear that the Algerian legislator recognized the illegality of domination in the position of control and prevented it, as a protective method for competition in the market, but the study of Algerian legislative texts shows that the principle of prohibition and punishment of abuse results from the position of domination on the market, some exceptions devoted to the text of the article 09 of the Algerian Competition Law of 2003:

- If the abuse results from the application of a legislative or regulatory text, implementation has been taken.
- If arbitrariness is to achieve the economic progress through which consumers receive a fair share of the expected benefit from it, provided that this does not result in granting the dominant institution the ability to eliminate competition in an essential part of a specific market.

And the dominance position that is considered a supposed corner for arbitrariness is linked to a specific market, which is towards globalization, especially after the desire to regulate the World Trade Organization, and large companies develop outside their home countries, and the impact of economic blocs cannot be ignored as a step to transcend the national geographical boundaries of the private in the competitive market, something that the Algerian authorities and agencies may encounter some problems, especially with regard to the extent of their competence to address the practices affecting its national territory.

The partial step envisaged by the Algerian legislator, in contrast to his French counterpart, is the procedure for authorizing non-interference, which is a

positive aspect of Ordinance No. 03-03 related to competition, which gives the owner of the activity more comfort and independence in practicing his activity for the duration of the permit in addition to the procedures for pardoning or mitigating the amounts of financial penalties prescribed for arbitrariness in accordance with the provisions of article 60 of the same order; in addition to all these procedures, make the present order of competition more flexible than its predecessor. At the same time, the new competition law is not without its negative aspects, especially those related to removing standards and criteria for determining the status of dominance devoted realistically and economically.

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