

Monopolistic Excess Situation : Between Judicial Non-Interference and Judicial Oversight

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Abstract

Excessive monopoly in any relevant market necessarily raises a competitive dispute regarding the extent of its restriction of competition and may turn into a conflict between the dominant monopolist and its competitors. This is reflected in administrative follow-up at the level of the Competition Council and/or the sectoral regulatory authority and, if necessary, in judicial proceedings before the courts.

Although achieving monopoly remains the aim of every economic operator, monopolistic abuse falls within practices that restrict competition under Algerian law and may be considered anti-competitive practices under comparative law.

On this basis, any affected party, if meeting the legal requirements, has the right to file a direct lawsuit before the judiciary, regardless of notifying the Competition Council or the regulatory authority. They can submit a notification to the competent independent administrative authorities and initiate judicial proceedings, whether sequentially, in parallel, or by prioritizing judicial action over administrative authorities. In principle, recourse by an institution harmed by the abuse of a dominant company to claim its rights before the judiciary is an inherent legal right and necessarily prompts judicial intervention.

Keywords: Monopoly, excess, judiciary, competition, relevant market, economic operator, judicial intervention, deterrence.

Introduction:

Monopolistic excess in any relevant market inevitably raises a competitive dispute regarding the extent to which competition is restricted, which may escalate into a conflict between the dominant party and its competitors. This is reflected through administrative (quasi-judicial)

follow-up conducted at the level of the Competition Council and/or the sectoral regulatory authority, and if necessary, through judicial follow-up at the level of the competent courts.

Considering that the abuse of a dominant position is central to anti-competitive practices as defined by Algerian law, and may be considered among anti-competitive practices in comparative law, any affected party, provided that they meet the legal requirements, has the right to file a direct lawsuit before the judiciary, regardless of whether they have notified the Competition Council or the regulatory authority. They may notify the competent independent administrative authorities and file a lawsuit at the judicial level, whether sequentially, concurrently, or by prioritizing judicial action over administrative procedures. As a general principle, the right of an institution harmed by the abuse of a dominant institution to claim its rights before the judiciary is an inherent right established under Article 48 of the amended and supplemented Order 03-03, which explicitly states this.

At the same time, one cannot speak of absolute freedom for the affected institutions to resort to either administrative or judicial follow-up or to prefer one over the other. Even when dealing with the same facts, the choice is necessarily relative, taking into account the requests of the affected institutions and the competencies of the Competition Council, regulatory authorities (such as the Postal and Telecommunications Regulatory Authority), and the competent courts to address and respond to these requests¹.

In general, it may logically be expected that the claimant (i.e., the affected institution) will initially approach the Competition Council or the Postal and Telecommunications Regulatory Authority to establish the presence of the prohibited violation (particularly the abuse by an institution of its dominant position to the detriment of other institutions), given the difficulty in detecting and proving such abusive practices. Assessing and characterizing these practices in light of substantive laws and regulations requires specialized expertise. This is followed by a second stage, where the affected party may turn to the competent judicial institutions to seek compensation for the damage caused by these abusive practices or to nullify the terms that demonstrate the extent of the abuse and harm to competition.

¹ Administrative deterrence involves issuing orders to cease the complained-of practices, with the possibility of threatening financial penalties in the form of fines if the practices continue, or directly imposing financial penalties as a result of condemning the implicated institutions. It may also include taking temporary measures until a final decision is made regarding the existence of anti-competitive abusive practices. This applies to the authority of postal and telecommunications regulation, which has jurisdiction over disputes related to interconnection and may propose to the relevant minister the issuance of sanctions such as permanent license revocation, temporary suspension, and other penalties.

Judicial deterrence, on the other hand, involves awarding compensation to those harmed by abusive practices if such practices are proven, or annulling contractual obligations if they contain clauses that are abusive or restrictive to competition.

Section 1: At the Level of Judicial Authorities (First Instance Courts)

Under this heading, we will address the jurisdictional boundaries of both the Competition Council and the sectoral regulatory authority, as the jurisdiction is exclusively vested in the relevant judiciary.

A distinction is made here between civil and criminal courts.

First: Civil or Commercial Courts

Two types of cases can be brought before civil courts, which are completely outside the jurisdiction of both the Competition Council and the Postal and Telecommunications Regulatory Authority.

- **The Claim for Nullification of Obligations Related to Anti-Competitive Practices, and the Claim for Compensation for Damages Resulting from Anti-Competitive Practices:**
- **The Claim for Nullification of Obligations Related to Abuse Resulting from a Dominant Position as an Anti-Competitive Practice²:** The Algerian legislator explicitly stated in Article 13 of the amended and supplemented Order 03-03 on competition that any obligation, agreement, or contractual condition related to prohibited anti-competitive practices³, including the abuse resulting from a dominant position, shall be nullified. This aligns with the stance of the French legislator⁴.

The examination of this type of claim remains solely within the jurisdiction of the judiciary and falls outside the competencies of independent administrative authorities responsible for competition, such as the Competition Council or the Postal and Telecommunications Regulatory Authority.

Therefore, parties or institutions that have suffered damages due to such illegal competition-restricting clauses, agreements, or obligations have the right to request their nullification before the competent judicial authorities pursuant to Article 48 of the amended and supplemented Ordinance 03-03. This is done in accordance with the provisions of the Civil

² Article 13 of Ordinance 03-03, as amended and supplemented

³ Taking into account the provisions of Articles 8 and 9 of the same ordinance, which pertain to the declaration of non-intervention, the application of a legislative or regulatory text adopted pursuant to it, and contributions to economic progress, as they fall within the exceptions to the principle of prohibition concerning anti-competitive practices.

⁴ Article L.420-3 of the French Commercial Code.

and Administrative Procedure Code, which represents the applicable legislation referred to by the last article and general rules⁵.

Hence, any party with standing and interest may file a claim for this purpose through a written, signed, and dated petition (submitted by them, their agent, or their lawyer, with copies matching the number of opposing parties). The petition must include all required information, especially the competent judicial authority, the names, and addresses of the plaintiff and defendant, the designation and nature of the legal entity, its registered office, and the identity of its legal or contractual representative. It must also provide a summary of facts and requests, along with supporting documents, under penalty of inadmissibility. After registration with the court clerk and scheduling, the initial claim is served to the opposing parties by a bailiff, who prepares a summons at the plaintiff's request. The legal deadlines between serving the summons and the first hearing, set at a minimum of 20 days, must be observed⁶.

The French legislator, similar to the Algerian counterpart, entrusted this type of claim to the judiciary, thus limiting the powers of administrative authorities, particularly the Competition Council and the Electronic Communications and Postal Regulatory Authority⁷.

Naturally, when a claim seeks the nullification of a specific contractual condition, the judge will assess whether the contract can remain valid without the disputed condition or if the condition can be amended or mitigated. The nullification has retroactive effect, meaning the transaction is treated as if it never occurred.

- **The Claim for Compensation for Damages Caused by Abuse Resulting from a Dominant Position as an Anti-Competitive Practice:** The Algerian legislator has adopted the recourse for any party harmed by abuse resulting from a dominant position to file a claim before the competent judicial authority under the legal procedures (Civil and Administrative Procedure Code)⁸.

⁵ Article 102 of the Algerian Civil Code: 'If a contract is absolutely null and void, any interested party may invoke this nullity, and the court may declare it on its own initiative. The nullity cannot be rectified by ratification. The action for nullity is time-barred after fifteen years from the date the contract was concluded.'

⁶ Law No. 08-09 dated 25/02/2008 concerning the Civil and Administrative Procedure Code, particularly Articles 13, 14, 15, 16, 17, and the subsequent articles.

⁷ Art. L420-7 of the French Commercial Code: 'Without prejudice to Articles L. 420-6, L. 462-8, L. 463-1 to L. 463-4, L. 463-6, L. 463-7, and L. 464-1 to L. 464-8, disputes related to the application of the rules contained in Articles L. 420-1 to L. 420-5, as well as in Articles 81 and 82 of the treaty establishing the European Community, and those in which these provisions are invoked, are assigned, as appropriate and subject to the rules governing the distribution of jurisdiction between court orders, to the courts of first instance or commercial courts, whose location and jurisdiction are set by decree of the Council of State. This decree also determines the location and jurisdiction of the court(s) of appeal responsible for reviewing decisions rendered by these courts.'

⁸ Article 48 of Ordinance 03-03, as amended and supplemented.

It is worth mentioning that the repealed Law 95-06 was more precise in this regard⁹.

This is a claim of tort liability, where the claimant must prove the wrongful act (i.e., the legally prohibited abuse), the damage suffered, and the causal relationship between the abusive act and the resulting damage¹⁰.

According to general rules, the assessment of compensation is at the discretion of the judge, based on the harm suffered and lost potential gains, in accordance with Article 182 of the Civil Code, which necessitates awarding compensation to redress the damage.

It is noteworthy that even if the claim becomes time-barred before the Competition Council (with a statute of limitations set at three years), the affected party can still pursue judicial recourse to claim compensation for damages affecting their interests due to these anti-competitive practices. This is because, under Article 133 of the Civil Code, the right to claim compensation only expires 15 years after the harmful act occurs.

It should be noted, in this context, that the same principles apply in administrative courts when the competition law is invoked in the context of a dispute involving an administrative contract or administrative act. Consequently, any administrative contract or act that violates legal regulations must be nullified¹¹.

Second: Criminal Judiciary The Algerian legislator, through Article 15 of the repealed Order 95-06, stipulated that "If the organization and implementation of anti-competitive practices or abuse resulting from dominance as stated in Articles 6, 7, 10, 11, and 12 of this Order is personally attributable to any natural person, the Competition Council shall refer the case to the competent Public Prosecutor for legal proceedings." It added that, without prejudice to the penalties stipulated in Articles 13 and 14 of this Order, the judge may sentence the involved natural persons to imprisonment for a period ranging from one month to one year if they caused or participated in such practices. The last paragraph of Article 24 of the same Order stated that the Competition Council could issue a decision to refer the case to the competent Public Prosecutor for prosecution when necessary.

From this, it can be seen that the Algerian legislator had previously established custodial penalties for any natural person who personally contributed, as either a principal or an

⁹ Article 27/1 of the repealed Ordinance 95-06: 'Any natural or legal person who considers themselves harmed by an anti-competitive practice, as defined by the provisions of this ordinance, may file a lawsuit before the competent judicial authorities in accordance with the Civil Procedure Code to seek compensation for the damage suffered.'

¹⁰ Article 124 of the Algerian Civil Code: 'Any act, regardless of its nature, committed by a person that causes harm to others obliges the person who caused it to provide compensation.'

¹¹ L.IDOT, Les limites et le contrôle de la concurrence dans la perspective d'une harmonisation internationale, in: Revue internationale de droit comparé. Vol.54.n°2,Avril-Juin2002. p.379.

accomplice, to planning anti-competitive practices (including abuse resulting from a dominant position) through fraud, with jurisdiction assigned to criminal courts.

However, the Algerian legislator revisited this stance in the amended and supplemented Order 03-03 by limiting the penalties to financial ones only, regarding any fraudulent contribution by a natural person to organizing or implementing the abuse resulting from a dominant position as an anti-competitive practice¹².

Furthermore, it assigned the power to impose this financial penalty to the Competition Council¹³, thus eliminating any criminal prosecution related to anti-competitive practices within the judicial system.

Conversely, the French legislator explicitly imposed custodial penalties (up to four years of imprisonment) in addition to financial penalties and full or partial publication as a complementary penalty. Naturally, jurisdiction was assigned to criminal courts, given that custodial sentences fall within the inherent competence of the judiciary¹⁴.

The Algerian Penal Code, specifically in the seventh section titled "Crimes Related to Industry, Commerce, and Public Auctions," notably Article 172, stipulates that anyone found guilty of illegal speculation shall be punished with imprisonment ranging from six months to five years and a fine between 5,000 to 100,000 Algerian dinars. This applies to those who, directly or through intermediaries, artificially raise or lower the prices of goods, commodities, or public or private securities, or attempt to do so using any of the following five methods: spreading false or deliberately misleading news to the public, offering proposals in the market to create price fluctuations, offering prices higher than those requested by sellers, engaging in solo or coordinated actions in the market to gain unearned profit, or by using other fraudulent means.

Thus, some anti-competitive practices, notably abuse resulting from a dominant position, may align with certain forms listed in the aforementioned article. Once the elements of the crime of illegal speculation are established, jurisdiction is assigned to criminal courts.

¹² Article 57 of Ordinance 03-03, as amended and supplemented: 'Any natural person who personally contributed fraudulently to organizing and implementing anti-competitive practices, as defined in this ordinance, shall be punished with a fine of two million dinars (2,000,000 DZD).'

¹³ Article 62 bis 1 of Law 08-12, as amended and supplemented to Ordinance 03-03: 'The penalties specified in the provisions of Articles 56 to 62 of this ordinance are decided by the Competition Council...'

¹⁴ Art. L420-6 of the French Commercial Code: 'Any natural person who fraudulently takes a personal and decisive part in the design, organization, or implementation of practices referred to in Articles L. 420-1 and L. 420-2 shall be punished by imprisonment for four years and a fine of 75,000 euros. The court may order that its decision be published in full or in excerpts in the newspapers it designates, at the expense of the convicted person. Interrupting actions under the competition authority in accordance with Article L. 462-7 shall also interrupt the prescription of criminal actions.'

As a general rule, public prosecution is initiated by the Public Prosecutor in accordance with the Criminal Procedure Code¹⁵.

Additionally, the role of the criminal judge extends to conducting extensive investigations, including visits and inspections, which he authorizes and oversees as stipulated by French law¹⁶. This also applies under Algerian law.

Section Two: At the Level of Judicial Authorities (Higher-Level Authorities)

Jurisdiction here is divided into two categories: consideration of appeals submitted against judgments initially issued by judicial bodies at the first level, which fall outside the jurisdiction of independent administrative authorities. This is subject to general rules, particularly the Civil and Administrative Procedure Code and the Criminal Procedure Code. It is sufficient to indicate that, according to general rules and following the effect of appeal transmission, the entire case is transferred to the judges of the competent appellate court as the second level of litigation, granting them full authority over it. They reassess the facts and apply the law to adjudicate it anew.

Additionally, consideration is given to appeals against acts of the competent independent administrative authorities (related to disputes involving anti-competitive practices, particularly those concerning abuse of dominance). This includes cases from the Competition Council, where jurisdiction is exclusively held by the Algiers Court of Justice, or from the Postal and Telecommunications Regulatory Authority, where jurisdiction is held by the State Council.

It is noteworthy that in the event of an appeal against a decision issued by the Competition Council, while the entire case is transferred to the judges of the commercial chamber of the Algiers Court of Justice, and their authority over it becomes comprehensive, reassessing the facts and applying the law to adjudicate it anew, this is not considered an appeal but rather a judicial review of a decision issued by the Competition Council. The latter (as an independent administrative authority) can, under no circumstances, be regarded as a judicial body, as the structure of the judiciary under the adopted judicial organization is legally specified in a limited manner¹⁷.

¹⁵ Ordinance 66-155 issued on 08/06/1966, as amended and supplemented, containing the Algerian Code of Criminal Procedure, Official Gazette No. 48, issued on 10/06/1966.

¹⁶ Article L.450-4 of the French Commercial Code.

¹⁷ The judicial system includes: the ordinary judicial system (which includes the Supreme Court, the courts of appeal, and the courts), the administrative judicial system (which includes the Council of State and administrative courts), and the Court of Conflicts. See Organic Law No. 05-11 dated 17/07/2005 concerning the judicial organization, Official Journal No. 51, issued on 20/07/2005.

Generally, after completing the procedures for notifying the appeal and verifying their correctness and compliance with all legal conditions, the president or one of his deputies proceeds to the investigation phase, studying the appeal and presenting observations.

During the sessions of the Algiers Court of Justice, all observations are reviewed, and each party has the right to present their oral observations publicly. However, due to the specific nature of disputes involving the decisions of the Competition Council, the sessions must adhere to certain provisions, primarily ensuring the right to defense. This pertains to the right to legal representation as understood from Article 64, which refers to the application of general rules and considering the principle of protecting professional confidentiality, especially since the appeal hearing is conducted publicly. There is a risk of disclosing confidential information during the investigation and hearing process, which could affect the economic operator's interests. If professional confidentiality is not protected before the Algiers Court of Justice, what then is the benefit of protecting it before the Competition Council?

The Algiers Court of Justice session for appeals against decisions of the Competition Council is characterized as the final phase in adjudicating the appeal. After reviewing all aspects of the case, it makes its decision. The commercial chamber of the Algiers Court of Justice has full authority to either uphold, annul, or amend the decision issued by the Competition Council.

It is essential to pause briefly to consider the jurisdiction of the commercial chamber of the Algiers Court of Justice concerning judicial review of the Competition Council's actions related to anti-competitive practices.

While it is logical for the Algerian legislator that the actions of the Postal and Telecommunications Regulatory Authority are subject to judicial review by the State Council, including decisions involving interconnection disputes between operators¹⁸, given that the Authority falls under the national public authorities as defined in Article 9 of Organic Law No. 98-01¹⁹, it becomes part of its exclusive jurisdiction. However, controversy arises over the jurisdiction of the Algiers Court of Justice (in appeals related to anti-competitive practices issued by the Competition Council), even though it is considered part of the national public authorities as defined in the aforementioned Article 9.

It seems that the Algerian legislator, in an effort to align with its French counterpart, has overlooked the principle of parallelism of forms. The rules of the Council of State were

¹⁸ Unlike the French legislator, who made disputes related to interconnection and all matters within its scope the jurisdiction of the Paris Court of Appeal under Article L.38-6 of the French Postal and Electronic Communications Law.

¹⁹ Organic Law 98-01 dated 30/05/1998 concerning the powers, organization, and functioning of the Council of State, Official Journal No. 37, issued on 01/06/1998.

established based on an organic law²⁰, specifically Organic Law No. 98-01, which explicitly defined, in Article 9, the exclusive jurisdiction of the Council of State to adjudicate, in first and final instance, on annulment appeals filed against decisions issued by national public bodies.

Meanwhile, Ordinance 03-03 on competition, as amended and supplemented (which exceptionally transferred jurisdiction to the Algiers Court of Justice to rule on appeals against the decisions of the Competition Council related to anti-competitive practices), is classified under ordinary laws²¹.

²⁰ The Algerian constitutional legislator introduced what are called organic laws, in accordance with Article 123 of the Constitution, which defines areas of legislation through this type of law. Paragraph 1 of Article 123 of the 1996 Constitution (the Algerian Constitutional Amendment of 1996, issued by Presidential Decree No. 96/438 dated 07/12/1996, Official Gazette No. 76 issued on 08/12/1996) states the following: 'In addition to the areas allocated to organic laws under the Constitution, Parliament legislates by organic laws in the following areas: organization and functioning of public authorities, electoral system, laws related to political parties, laws related to media, the judiciary's basic law and judicial organization, laws related to financial laws, and laws related to national security.' This is in addition to various other provisions of the Constitution.

Thus, the constitutional legislator introduced amendments to the hierarchy of legal acts, creating organic laws that rank higher than ordinary laws, although both originate from the same authority. This is due to the nature of the subjects assigned to organic laws, their special procedures, including the requirement of a 3/4 majority in the Council of the Nation, and the necessity of their compliance with the Constitution, which must be monitored by the Constitutional Council before their promulgation. In this regard, the Constitutional Council emphasized in one of its opinions the difference in the ratification procedures between ordinary laws and organic laws, confirming that: 'Organic laws are subject to ratification procedures that differ from those of ordinary laws, as a result of the principle of hierarchy of norms in the legal system, which requires that the organic law, by virtue of its position in this system, cannot be intervened in by the ordinary law except in the designated field and according to the procedures specified by the Constitution. Therefore, the National People's Assembly cannot subject a provision of the ordinary law to the same ratification procedures applied to the organic law,' (Constitutional Council Opinion No. 10, dated 13-05-2000, concerning the review of the conformity of the National People's Assembly's internal regulations with the Constitution).

²¹ The constitutional legislator has established a special legal system for decrees under Article 124 of the 1996 Constitution, which stipulates in its first paragraph that the President of the Republic can legislate by decree in the event of a vacancy in the National People's Assembly or between the parliamentary sessions (excluding exceptional cases as per Article 93 of the Constitution, which are not relevant to the study we are undertaking). Once the decree is issued by the President, it becomes law after being approved by Parliament in its first session following its issuance. However, before such approval, some legal scholars have argued that decrees are administrative acts that can be challenged before the Council of State for annulment. Others distinguish this view and consider them as regulations subject to the Constitutional Council's review under Article 165/1.

When we say that Parliament's approval in its first session turns these decrees into laws, this is similar to ordinary laws, which are lower in rank than organic laws and are subject to optional constitutional review by the Constitutional Council. The body of referral can exercise its powers to refer these decrees for optional review. The review by Parliament of these decrees is not effective, especially since the Constitution requires Parliament to either approve these decrees as they are or reject them without the right to amend or discuss them, and it votes on them in the nearest session and in general without debate. On the other hand, although the Constitution mandates the presentation of decrees to Parliament in its first session, the legal nature of decrees issued in exceptional circumstances differs from those issued due to a vacancy in the National People's Assembly or between parliamentary sessions. The latter must be presented to Parliament for approval to become laws,

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It is evident that the Algerian legislator did not pay attention to the principle of the hierarchy of laws when adopting a legal text derived from an ordinary law²² that transfers exclusive jurisdiction under a text based on an organic law²³. This inevitably raises the question of the constitutionality of the amended and supplemented Ordinance 03-03, particularly concerning its adoption of the jurisdiction of the Algiers Court of Justice over the review of decisions of the Competition Council regarding anti-competitive practices.

The Ordinance 03-03 might have bypassed constitutional compliance since, unlike organic laws²⁴, it is not subject to preventive and obligatory constitutional oversight by the Constitutional Council, which would prevent the issuance of laws that conflict with the constitution. Consequently, this avoids annulment or invalidation after legal positions are established and associated rights acquired. However, Ordinance 03-03 on competition can be subject to subsequent oversight if the Constitutional Council is notified, as it cannot act independently without being prompted by the qualified entities. The Council would then rule on its constitutionality by issuing a decision in this regard²⁵.

Compared to the French legislator, the circumstances are entirely different, especially considering the specificity, logical structure, and historical depth of French legal texts. Notably, when referring to French constitutional texts, it is evident that they exclude ex-post review, unlike the Algerian constitutional framework²⁶.

whereas decrees issued in exceptional cases do not require parliamentary approval or objection and are considered legislation as soon as they are issued.

²² Articles 63 and 64 of Ordinance 03-03, as amended and supplemented by Law 08-12 related to competition.

²³ Article 9 of Organic Law 98-01 dated 30/05/1998 concerning the jurisdiction, organization, and functioning of the Council of State.

²⁴ Article 165 of the Constitution, in its second paragraph, states: 'The Constitutional Council shall obligatorily give its opinion on the constitutionality of organic laws after they are passed by Parliament, once it is referred by the President of the Republic.' The last paragraph of the same article also adds the requirement for the internal regulations of each chamber of Parliament to be in conformity with the Constitution.

²⁵ Subsequent oversight is not restricted by a specific deadline for referral and only concerns treaties, ordinary laws, and regulations after they have come into force. The Constitutional Council issues a decision on these matters according to the provisions of Article 165 of the Constitution, in its first paragraph: 'The Constitutional Council, in addition to the powers explicitly granted to it by other provisions of the Constitution, rules on the constitutionality of treaties, laws, and regulations, either with an opinion before they become enforceable or with a decision in the opposite case.'

²⁶ The first paragraph of Article 61 of the 1958 French Constitution states: 'A provision declared unconstitutional cannot be promulgated or implemented.'

The French Constitutional Council has consistently refused to exercise subsequent review over the constitutionality of laws, considering Article 61 of the Constitution as a jurisdictional rule preventing it from reviewing enacted laws, whether through referral or through the 'exception of unconstitutionality.' This pertains to preventive (anticipatory) review, adopted by the French constitution-maker, which emphasizes not reconsidering laws that have already come into force.

The oversight of the actions of independent administrative authorities primarily falls under the jurisdiction of administrative courts. The issue of jurisdiction, which was later conferred to ordinary courts, was not introduced before 1986. The deregulation and disengagement policy adopted by the French state (*Le mouvement de déréglementation et de désengagement*) led the French legislator, after obtaining the Constitutional Council's approval, to transfer the jurisdiction over disputes regarding decisions made by the Competition Council to civil courts. This transfer was partial, as some actions remained within the competence of the administrative judiciary.

In the French Constitutional Council's decision dated 23/01/1987²⁷, concerning the jurisdictional system for the decisions of the Competition Council, it was considered that the principle of final jurisdiction residing with administrative courts for the annulment and modification of decisions taken in the exercise of public authority by administrative authorities, especially when these authorities are deemed "nationally competent bodies" (*Des organismes collégiaux à compétence nationale*), is one of the fundamental principles of the laws of the Republic.

Thus, the Council of State is initially and ultimately competent to review annulment claims. For full jurisdiction claims related to state liability (due to the lack of legal personality for these authorities), the jurisdiction lies with administrative courts at the first level. However, exceptions have been introduced by the French legislator, particularly regarding sanctions issued by the High Audiovisual Council and the Insurance Control Committee, where full jurisdiction is conferred to the Council of State²⁸.

The transfer of disputes involving the Competition Council to ordinary courts went through several stages. This transfer was not solely motivated by the aim of providing sufficient guarantees for litigants but also driven by ideological, political, and collective considerations. In 1986, when the Competition Committee was transformed into the Competition Council with the authority to issue its own decisions, the idea of transferring jurisdiction over related disputes to ordinary courts was initially considered. However, the Council of State raised objections and insisted on the administrative judiciary's jurisdiction in this matter. Later, a proposed law redirected this jurisdiction to ordinary courts.

The proposed law was submitted to the Constitutional Council, which outlined the conditions under which the jurisdiction transfer would occur. In its decision dated 23/01/1987, the

See: Jean-Pierre Camby, *Une loi promulguée frappée d'inconstitutionnalité*, R.D.P, no. 3, 1999, pp. 653-655; Ahmed Salem Oued Boubout, *L'apport du conseil constitutionnel au droit administratif*, Economica, 1987, p. 177.

²⁷ Decision no. 86-224, dated 01/23/1987, JO (Fr) of 01/25/1987, p. 924. Available at: <http://www.conseil-constitutionnel.fr>

²⁸ N.DECOOPMAN, "Le contrôle juridictionnel des autorités administratives indépendantes", in *Le droit administratif en mutation*, J.CHEVALLIER et al., PUF, 1993, p.213

Council considered the proposed law unconstitutional due to the ordinary judge's inability to issue a stay of execution, which is seen as a fundamental safeguard for the right to defense. The administrative judiciary, in contrast, ensures this guarantee, unlike ordinary courts, which do not suspend execution pending challenges to administrative acts.

Hence, if ordinary courts are granted jurisdiction, this safeguard must be ensured for litigants. Apart from this issue, the Constitutional Council did not oppose the jurisdiction transfer. After reaffirming the principle of administrative courts' jurisdiction, the Council implicitly referred to the "Theory of Competence Blocks" (La théorie des blocs de compétence), allowing for specific and limited amendments when justified by the needs of proper judicial administration.

This paved the way for the unification of practices within the judicial system concerned²⁹.

The law enacted on July 6, 1987 (amending the French Competition Law or the ordinance of December 1, 1986³⁰) granted jurisdiction to the Paris Court of Appeal for disputes involving the Competition Council, while including the possibility of issuing a stay of execution (Article 15 of the ordinance of December 1, 1986, which became Article L.464-8 of the French Commercial Code).

In its decision of 23/01/1987, the French Constitutional Council highlighted the reserved domain of the administrative judge (Le domaine réservé au juge administratif). However, the exclusive nature of this jurisdiction has somewhat diminished, considering that for the "proper administration of justice," the legislator may introduce necessary exceptions. The step taken by the French Constitutional Council reflects its pragmatic nature (Son pragmatisme) and also considers the future implications of such jurisdiction transfers.

From this perspective, it is observed that transferring jurisdiction to the Paris Court of Appeal, instead of the Council of State, provides litigants with the possibility of appeal in a two-tiered system, even though the Court of Cassation is primarily a court of law. This does not prevent litigants from benefiting from dual oversight. Additionally, this could lead to a unified judicial precedent with the Court of Cassation positioned at the top of the judicial hierarchy³¹.

References

²⁹ N.DECOOPMAN, op-cit, p.214

³⁰ Law No. 87-499 of July 6, 1987, transferring the litigation of decisions of the Competition Council to the judicial jurisdiction. JO (Fr) of July 7, 1987. Available at: <http://legifrance.gouv.fr>

³¹ N.DECOOPMAN, op-cit.p.215

¹ Administrative deterrence involves issuing orders to cease the complained-of practices, with the possibility of threatening financial penalties in the form of fines if the practices continue, or directly imposing financial penalties as a result of condemning the implicated institutions. It may also include taking temporary measures until a final decision is made regarding the existence of anti-competitive abusive practices. This applies to the authority of postal and telecommunications regulation, which has jurisdiction over disputes related to interconnection and may propose to the relevant minister the issuance of sanctions such as permanent license revocation, temporary suspension, and other penalties.

Judicial deterrence, on the other hand, involves awarding compensation to those harmed by abusive practices if such practices are proven, or annulling contractual obligations if they contain clauses that are abusive or restrictive to competition.

² Article 13 of Ordinance 03-03, concerning Algerian competition as amended and supplemented

³ Taking into account the provisions of Articles 8 and 9 of the same ordinance, which pertain to the declaration of non-intervention, the application of a legislative or regulatory text adopted pursuant to it, and contributions to economic progress, as they fall within the exceptions to the principle of prohibition concerning anti-competitive practices.

⁴ Article L.420-3 of the French Commercial Code.

⁵Article 102 of the Algerian Civil Code: 'If a contract is absolutely null and void, any interested party may invoke this nullity, and the court may declare it on its own initiative. The nullity cannot be rectified by ratification. The action for nullity is time-barred after fifteen years from the date the contract was concluded.'

⁶ Law No. 08-09 dated 25/02/2008 concerning the Civil and Administrative Procedure Code, particularly Articles 13, 14, 15, 16, 17, and the subsequent articles.

⁷ Art. L420-7 of the French Commercial Code: 'Without prejudice to Articles L. 420-6, L. 462-8, L. 463-1 to L. 463-4, L. 463-6, L. 463-7, and L. 464-1 to L. 464-8, disputes related to the application of the rules contained in Articles L. 420-1 to L. 420-5, as well as in Articles 81 and 82 of the treaty establishing the European Community, and those in which these provisions are invoked, are assigned, as appropriate and subject to the rules governing the distribution of jurisdiction between court orders, to the courts of first instance or commercial courts, whose location and jurisdiction are set by decree of the Council of State. This decree also determines the location and jurisdiction of the court(s) of appeal responsible for reviewing decisions rendered by these courts.'

⁸ Article 48 of Ordinance 03-03, as amended and supplemented.

⁹ Article 27/1 of the repealed Ordinance 95-06: 'Any natural or legal person who considers themselves harmed by an anti-competitive practice, as defined by the provisions of this ordinance, may file a lawsuit before the competent judicial authorities in accordance with the Civil Procedure Code to seek compensation for the damage suffered.'

¹⁰ Article 124 of the Algerian Civil Code: 'Any act, regardless of its nature, committed by a person that causes harm to others obliges the person who caused it to provide compensation.'

¹¹ L.IDOT, Les limites et le contrôle de la concurrence dans la perspective d'une harmonisation internationale, in: Revue internationale de droit comparé. Vol.54.n°2,Avril-Juin2002. p.379.

¹² Article 57 of Ordinance 03-03, as amended and supplemented: 'Any natural person who personally contributed fraudulently to organizing and implementing anti-competitive practices, as defined in this ordinance, shall be punished with a fine of two million dinars (2,000,000 DZD).'

¹³ Article 62 bis 1 of Law 08-12, as amended and supplemented to Ordinance 03-03: 'The penalties specified in the provisions of Articles 56 to 62 of this ordinance are decided by the Competition Council...'

¹⁴Art. L420-6 of the French Commercial Code: 'Any natural person who fraudulently takes a personal and decisive part in the design, organization, or implementation of practices referred to in Articles L. 420-1 and L. 420-2 shall be punished by imprisonment for four years and a fine of 75,000 euros. The court may order that its decision be published in full or in excerpts in the newspapers it designates, at the expense of the convicted person. Interrupting actions under the competition authority in accordance with Article L. 462-7 shall also interrupt the prescription of criminal actions.'

¹⁵Ordinance 66-155 issued on 08/06/1966, as amended and supplemented, containing the Algerian Code of Criminal Procedure, Official Gazette No. 48, issued on 10/06/1966.

¹⁶Article L.450-4 of the French Commercial Code.

¹⁷ The judicial system includes: the ordinary judicial system (which includes the Supreme Court, the courts of appeal, and the courts), the administrative judicial system (which includes the Council of State and administrative courts), and the Court of Conflicts. See Organic Law No. 05-11 dated 17/07/2005 concerning the judicial organization, Official Journal No. 51, issued on 20/07/2005.

¹⁸Unlike the French legislator, who made disputes related to interconnection and all matters within its scope the jurisdiction of the Paris Court of Appeal under Article L.38-6 of the French Postal and Electronic Communications Law.

¹⁹ Organic Law 98-01 dated 30/05/1998 concerning the powers, organization, and functioning of the Council of State, Official Journal No. 37, issued on 01/06/1998.

²⁰ The Algerian constitutional legislator introduced what are called organic laws, in accordance with Article 123 of the Constitution, which defines areas of legislation through this type of law. Paragraph 1 of Article 123 of the 1996 Constitution (the Algerian Constitutional Amendment of 1996, issued by Presidential Decree No. 96/438 dated 07/12/1996, Official Gazette No. 76 issued on 08/12/1996) states the following: 'In addition to the areas allocated to organic laws under the Constitution, Parliament legislates by organic laws in the following areas: organization and functioning of public authorities, electoral system, laws related to political parties, laws related to media, the judiciary's basic law and judicial organization, laws related to financial laws, and laws related to national security.' This is in addition to various other provisions of the Constitution.

Thus, the constitutional legislator introduced amendments to the hierarchy of legal acts, creating organic laws that rank higher than ordinary laws, although both originate from the same authority. This is due to the nature of the subjects assigned to organic laws, their special procedures, including the requirement of a 3/4 majority in the Council of the Nation, and the necessity of their compliance with the Constitution, which must be monitored by the Constitutional Council before their promulgation. In this regard, the Constitutional Council emphasized in one of its opinions the difference in the ratification procedures between ordinary laws and organic laws, confirming that: 'Organic laws are subject to ratification procedures that differ from those of ordinary laws, as a result of the principle of hierarchy of norms in the legal system, which requires that the organic law, by virtue of its position in this system, cannot be intervened in by the ordinary law except in the designated field and according to the procedures specified by the Constitution. Therefore, the National People's Assembly cannot subject a provision of the ordinary law to the same ratification procedures applied to the organic law,' (Constitutional Council Opinion No. 10, dated 13-05-2000, concerning the review of the conformity of the National People's Assembly's internal regulations with the Constitution).

²¹ The constitutional legislator has established a special legal system for decrees under Article 124 of the 1996 Constitution, which stipulates in its first paragraph that the President of the Republic can legislate by decree in the event of a vacancy in the National People's Assembly or between the parliamentary sessions (excluding exceptional cases as per Article 93 of the Constitution, which are not relevant to the study we are undertaking). Once the decree is issued by the President, it becomes law after being approved by Parliament in its first session following its issuance. However, before such approval, some legal scholars have argued that decrees are administrative acts that can be challenged before the Council of State for annulment. Others distinguish this view and consider them as regulations subject to the Constitutional Council's review under Article 165/1.

When we say that Parliament's approval in its first session turns these decrees into laws, this is similar to ordinary laws, which are lower in rank than organic laws and are subject to optional constitutional review by the Constitutional Council. The body of referral can exercise its powers to refer these decrees for optional review. The review by Parliament of these decrees is not effective, especially since the Constitution requires Parliament to either approve these decrees as they are or reject them without the right to amend or discuss them, and it votes on them in the nearest session and in general without debate. On the other hand, although the Constitution mandates the presentation of decrees to Parliament in its first session, the legal nature of decrees issued in exceptional circumstances differs from those issued due to a vacancy in the National People's Assembly or between parliamentary sessions. The latter must be presented to Parliament for approval to become laws, whereas decrees issued in exceptional cases do not require parliamentary approval or objection and are considered legislation as soon as they are issued.

²²Articles 63 and 64 of Ordinance 03-03, as amended and supplemented by Law 08-12 related to competition.

²³Article 9 of Organic Law 98-01 dated 30/05/1998 concerning the jurisdiction, organization, and functioning of the Council of State.

²⁴Article 165 of the Constitution, in its second paragraph, states: 'The Constitutional Council shall obligatorily give its opinion on the constitutionality of organic laws after they are passed by Parliament, once it is referred by the President of the Republic.' The last paragraph of the same article also adds the requirement for the internal regulations of each chamber of Parliament to be in conformity with the Constitution.

²⁵Subsequent oversight is not restricted by a specific deadline for referral and only concerns treaties, ordinary laws, and regulations after they have come into force. The Constitutional Council issues a decision on these matters according to the provisions of Article 165 of the Constitution, in its first paragraph: 'The Constitutional Council, in addition to the powers explicitly granted to it by other provisions of the Constitution, rules on the constitutionality of treaties, laws, and regulations, either with an opinion before they become enforceable or with a decision in the opposite case.'

²⁶ The first paragraph of Article 61 of the 1958 French Constitution states: 'A provision declared unconstitutional cannot be promulgated or implemented.'

The French Constitutional Council has consistently refused to exercise subsequent review over the constitutionality of laws, considering Article 61 of the Constitution as a jurisdictional rule preventing it from reviewing enacted laws, whether through referral or through the 'exception of unconstitutionality.' This pertains to preventive (anticipatory) review, adopted

by the French constitution-maker, which emphasizes not reconsidering laws that have already come into force.

See: Jean-Pierre Camby, *Une loi promulguée frappée d'inconstitutionnalité*, R.D.P, no. 3, 1999, pp. 653-655; Ahmed Salem Oueld Boubout, *L'apport du conseil constitutionnel au droit administratif*, Economica, 1987, p. 177.

²⁷ Decision no. 86-224, dated 01/23/1987, JO (Fr) of 01/25/1987, p. 924. Available at: <http://www.conseil-constitutionnel.fr>

²⁸ N.DECOOPMAN,"Le contrôle juridictionnel des autorités administratives indépendantes",in *Le droit administratif en mutation* ,J.CHEVALLIER et al.,PUF,1993, p.213

²⁹N.DECOOPMAN,op-cit, p.214

³⁰ Law No. 87-499 of July 6, 1987, transferring the litigation of decisions of the Competition Council to the judicial jurisdiction. JO (Fr) of July 7, 1987. Available at: <http://legifrance.gouv.fr>

³¹N.DECOOPMAN,op-cit.p.215