The Lebanese University
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The Evolution of International Cooperation in Competition Law

(Comparative Study)

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by

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Introduction:

Competition law (anti-trust law) is a body of legal rules and standards that stimulate and maintain market competition by way of prohibiting and controlling anti-competitive conducts that would significantly impede competition in the relevant market, thus creating more competitive environment[1].

The main policies behind competition law are protecting consumers' welfare, maintaining entrepreneurs' opportunities to enter into the market, and protecting competitors[2].

Competition law has undergone considerable debate among countries. Yet it has acquired huge geographical expansion in a short period of time contrary to any other branch of law[3].

Competition law enforcement has been, to a certain extent, an approachable target in developed countries and a serious dilemma in certain developing countries. One hand cannot clap alone, and so is the case when it comes to competition law. Mere adoption and enactment of competition law do not suffice unless accompanied by effective enforcement.

Back to history, laws governing competition law can be traced back to over two millennia. The concept of this law appeared by the Roman Emperors and Mediaeval monarchs who used tariffs to stabilise prices, promote and protect local production. Traders at that time were subjected to severe sanctions whenever they had been held in default.

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[1] Dabbah, Maher: **The Internationalisation of Antitrust Policy**, published by Cambridge University Press, UK 2003, chapter 3, pp. 46 and 47. The definition mentioned above also corresponds to other definitions adopted by other writers such as Sokol, Daniel and Cheng, Thomas and Lianos, Ionnis in **Competition Law and Development**, first edition, published by Stanford University Press, California, 2013, p. 1.

[2] Whish, Richard and Bailey, David: **Competition Law**, eighth edition, published by Oxford University Press, UK 2015, chapter 1 pp. 19-23.

[3] Dabbah, Maher: **International and Comparative Competition Law**, published by Cambridge University Press, UK 2010, Chapter 1, p. 1.

A historic example of competition law can be referred to "The Lex Julia de Annona" that was passed during the Roman Republic around 50 BC. This law aimed at protecting trade of grains by imposing weighty fines against any person who commences whether alone, or in association with others, any act which has the effect of increasing the price of corn.

However, this law failed due to the phenomenon of monopoly that had been growing to cover other types of food. This led to the issuance of successive imperial decrees imposing criminal sanctions over infringers who monopolize any sorts of goods. Sanctions included, among others, deprivation of the infringers' rights to trade and their deportation out of the country[4].

In the era of Diocletian[5] and in particular in 301 AD, an order was passed imposing capital punishment sanction against any person who infringes a tariff system such as behaviors which might lead to the deficiency of daily goods from the market[6].

The Constitution of Zeno of 483 AD also witnessed the enactment of further legislations which can be traced into Florentine Municipal laws of 1322 and 1325. These laws prohibited any mergers leading to monopolization whether they had been conducted by a private sector or even by the Emperor. Also, these laws imposed the penalty of abandoning all infringers previously acquired exclusive rights[7].

The Constitution of Zeno had been followed by Justinian I[8] who enacted the legislation of appointing paid officials to maintain state monopolies[9].

Furthermore, Adam Smith, the famous Scottish economist, had been the first economist who initiated the study of competition. He was named "The Father of Modern Economics" and he was a prime follower and motivator of laissez-faire

[4] Wikipedia: Competition Law
https://en.wikipedia.org/wiki/Competition_law#cite_ref-12

[5] Diocletian was a Roman Emperor (284-305 AD) and his full name was Gaius Aurelius Valerius Diocletianus.

[6] Wilberforce, Campbell Alan and Elles Neil: **The Law of Restrictive Practices and Monopolies**, second edition, published by Sweet and Maxwell, London, 1966, p. 20.

[7] Ibid., p. 22.

[8] Justinian I was a Byzantine Emperor (527 to 565 AD), and he was known as Justinian the Great.

[9] Wilberforce, Campbell and Elles, op. cit., p. 21.

economic policies recognized by his first published book in 1759; "The Theory of Moral Sentiments[10]".

Laissez-faire is a doctrine that calls for liberalisation of economic affairs from governmental intervention; whereby transactions between private parties shall be concluded and implemented without any governmental intervention or taxation.

In 1776, Adam Smith adopted the philosophy of the “invisible hand” which means that free markets shall regulate themselves through three factors; competition, supply and demand and self-interest. For example, if trader B of a particular product reduced its price compared to a similar product of trader A, consumers would switch to buying this product from trader B instead of trader A. Accordingly, trader A would either reduce his product’s price or enhance his product’s quality.

In 1977, Smith published “The Wealth of Nations” book where he had argued that the distribution of tasks among labors on the basis of their specialization produces prosperity. For instance, if one man has to manufacture a pin, it would take him a week to manufacture two pins[11]. However, with the assistance of ten additional men, production would increase to tenths of pins per week. This example clarifies how cooperation between several specialised labors would attain greater productivity.

Traders who sell their products seek their own interests of making profit. On the other side, consumers who purchase these products also meet their needs. Smith believed that this cycle would induce each market player to enhance his productivity to meet consumers’ satisfaction and consequently get financially awarded. This briefs Smith’s popular quote: "*It is not from the benevolence of the butcher, the brewer, or the baker, that we can expect our dinner, but from their regard to their own interest*”[12].

“The Wealth of Nations” also introduced the concept of gross domestic product GDP which has been a measuring tool of country’s prosperity rather than the old

[10] Blenman, Joy: **Adam Smith: The Father of Economics**, Investopedia, 19th of April, 2017. https://www.investopedia.com/updates/adam-smith-economics/
[11] Smith, Adam: **An Inquiry into the Nature and Causes of the Wealth of Nations**, Volume I, published by Fame Authors, 1977, Chapter 2, p. 6.
[12] Ibid., p. 17.

measuring tool that depends on the value of gold and silver deposits. He further supported free exchange which would lead to an increase in imports and exports.

In short, Adam Smith had been the first proponent of capitalism who called for private ownership and free market self-regulation. The study of competition law was initiated by Smith since the eighteenth century. He influenced the development of "laissez-faire" doctrine in Great Britain, and he impressed governments and businessmen by his "invisible hand" philosophy which founded the doctrine of Laissez-faire.

During the era of Adam Smith, the 19th century witnessed the opening of markets, development of internal trade and the evolution of international trade.

Since 1947, countries around the world have begun adopting competition laws that revolve around similar goals and perspectives; regulating market competition and attaining consumers' welfare.

It is worth mentioning that most of competition law systems around the world share several similar features and principles of protecting the market from the practices of horizontal agreements such as cartels, vertical restraints and other illicit practices which might impede competition in the relevant market[13].

The ultimate purpose of competition laws is to safeguard consumers' welfare and achieve economic growth and enhancement. Also, many of these systems have a special procedure for merger control.

On the contrary, several differences exist between competition law systems around the world. At first, countries have not yet agreed on a uniform definition for competition, a uniform classification for what is considered an anti-competitive practice, and a common measure and criterion for examining illicit practices. Also, countries have not yet agreed on the goals of this law even though some countries transplanted most of their competition law provisions from other countries' competition laws such as the case with the European competition law which has been a reference and guidance to many legislators around the world, mainly European countries.

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[13] Dabbah, **The Internationalisation of Antitrust Policy**, op. cit., p. 2.

Furthermore, there has been no consensus among countries as to which institutions shall be in charge of implementing the law. Some countries designate local judicial courts to take this action; others designate administrative agencies whilst in some other countries, special commissions have been established for this purpose. These commissions comprise of economic and legal specialists capable of understanding and applying the law professionally such as the Federal Trade Commission of the United States of America, the European Commission of the European Union and the promising competition authority of Lebanon.

In addition to that, some countries regulate competition in the market without having a comprehensive competition law and a specialized authority for this regulation. They rather refer to generic laws such as laws against unfair competition.

For instance, competition in Lebanon has been regulated mainly by some provisions of Resolution number 2385 of 1924 on Commercial and Industrial Property Rights, Code of Obligations and Contracts, Criminal Law and other Miscellaneous Laws.

In addition to that, the lack of competition laws or the unwilling desire to enforce existing competition laws creates uncertainty and leads to antitrust havens whose harmful effects might also extend beyond national boundaries.

Countries also differ in they way they deal with transnational competition law related transactions. For example, some countries adopt a unilateralist approach, some others adopt a bilateral approach, while some others adopt a multilateral approach[14].

It is also important to mention that transnational transactions with extraterritorial effects have been the most important stimulator for countries' cooperation among each other in order to eliminate and/or minimize anti-competitive effects originating from beyond the boundaries.

Based on the abovementioned input, this thesis tries to address the following problematic:

1- The effectiveness of local and international efforts in the framework of adoption and implementation of competition law.

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[14] Ibid., pp. 2-4.

2- Lebanese position in this regard and the major challenges Lebanon has been encountering in the absence of competition law.

Within the framework of addressing the above-mentioned problematic, it has been a must to provide a general overview on competition law in respect of its definition, goals, and anticompetitive practices it targets, in addition to the definition of the relevant market; within which competition law policies shall be applied.

Furthermore, in the context of addressing the problematic, this thesis have also tried to represent a comparative analysis of competition laws' enactment and enforcement of several developed and developing countries around the world.

Antitrust law of United States of America and competition law of the European Union have been chosen as examples because they represent the largest and strongest competition law systems around the world despite that anti-trust law of the USA has been subjected to certain criticism.

On the contrary, competition laws of the People's Republic of China and the Republic of South Africa have been chosen for this study due to the following reasons:

- People's Republic of China is considered the world's second largest economy by nominal GDP, yet it has recently enacted a competition law; knowingly that this law suffers from certain deficiencies.

- Republic of South Africa, despite being a country of great inequality and high crime, it has since long enacted and implemented a decent competition law taking into account social considerations.

In addition to that, this thesis has tried to outline the pros and cons of particular forms of countries' cooperation in this field as a response to globalisation and open markets. It also sheds light on some of the efforts and drawbacks of two of the most important international bodies; The General Agreement on Tariffs and Trade (GATT) System and World Trade Organisation towards developing countries in this field. A brief reference to the interesting EU – Canada CETA Agreement has also been introduced.

Finally, a full section has been devoted to the situation of Lebanon trying to illustrate the effectiveness of the existing provisions governing competition in

Lebanese markets, trying also to answer the basic question of what main challenges have been opposing the enactment of the 2007 competition draft of law.

Part One: Competition Law: From National to International Perspective

The central concern of all competition laws around the world is attaining consumers' welfare and economic prosperity. Competition law is a complex system that requires a case by case analysis of both legal and economic concerns.

Examination of every competition law case commences by the determination of the concerned parties, their nationalities, their market power and their geographical scope of work, the determination of the relevant market in accordance to the transaction in question, the identification of the type of transaction, and an analysis of the latter's anti-competitive effects. These tasks are fulfilled by conducting appropriate tests and by referring to useful guidelines.

Due to the increasing tendency of many businesses to control the market and to attain higher rates of profits, regulating competition in the market has witnessed a remarkable increase in significance during the last two decades or so.

In the late 1980s, only few competition laws were enacted around the world[15]. Less than 30 years later, there has been a tremendous change in the number of countries introducing competition laws into their legislation. Currently, there have been more than 130 jurisdictions adopting their own local competition laws[16].

Furthermore, international cooperation has existed between countries in order to enhance market competition protection especially in regards to transactions of extraterritorial effects. International cooperation is of several types where each type has its own characteristics, pros and cons.

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[15] Kovacic, William and Lopez-Galdoz, Marianela: **Lifecycles of Competition Systems: Explaining Variation in the Implementation of New Regimes**, Vol. 79: 85, April 2016. Available at: https://scholarship.law.duke.edu/lcp/vol79/iss4/4

[16] Whish and Bailey, op. cit., p. 1.

Chapter I: Competition Law Framework

It is important for all competition authorities, courts, lawyers, economics, businessmen and all other concerned parties to know how competition law cases are assessed in order to know which transactions do and do not comply with competition law policies.

Accordingly, setting the goals of competition law, defining the relevant market and determining which acts are considered anti-competitive behaviors shall constitute, in all jurisdictions, the framework for every competition law case.

Section 1: Competition Law concept and Market Definition

Competition law studies require, like any other branch of law, identification of its definition, goals, and framework.

1.1 Definition and Goals of Competition Law

1.1.1 Definition of competition law:

Competition is the process by which each market player tries to acquire what other players are seeking at the same time: sales, profit, and market share. They do so by offering the best prices, qualities, and services[17]. Competition exists between companies, enterprises, entrepreneurs and other businessmen whose aim is to market and sell their products and/or services within the same market in order to gain a profit.

Due to the fact that competition plays an important role in promoting economy's welfare in the country, protection of competition is a prerequisite. Accordingly, competition law has existed.

[17] Dabbah, **International and Comparative Competition Law**, op. cit., pp. 20-21.

It is unlikely to find a unique definition of competition law among competition laws around the world. However, it can be defined as the law that stimulates and maintains a competitive market through the prohibition or the control of anti-competitive practices that would significantly lesson or impede competition in the relevant market.

Nominations of this law differ among countries. For example, it is called competition law in the European Union (EU), anti-trust law in the United States of America (USA), and anti-monopoly law in China and Russia[18]. It is also called restrictive business practices law or law against unfair competition, etc...

The policy behind the introduction of competition law is to regulate, restrict or prevent practices of anti-competitive effects which would prejudice consumers, entrepreneurs, small and medium sized entities, producers, traders, businessmen, or the community as a whole. This law targets all transactions of potential anti-competitive effects conducted by private or public entities.

Fair and lawful Competition raises levels of efficiencies and innovation in markets. This would eventually lead to economic flourishment. Therefore, proper regulation of competition, including the imposition of barriers, restrictions and sanctions against infringers by governments or by specially established authorities, is indeed a prerequisite.

1.1.2 Goals of Competition Law

The fundamental goals of competition law may be divided into several categories; mainly economic and social goals. Competition law mainly aims at attaining economic efficiency within different markets through what's-so-called allocative and productive efficiencies[19].

Allocative efficiency is concerned with the demand side of the market that entails providing consumers with products and/or services of low prices and good quality among multiple alternative choices. However, productive efficiency is

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[18] Wikipedia: Competition Law.
https://en.wikipedia.org/wiki/Competition_law

[19] Dabbah, **International and Comparative Competition Law**, op. cit., p. 24.

concerned with the production side of the market that motivates companies to enhance their products' and services' efficiencies. Productive efficiencies occur when companies manufacture products and/or provide services at the lowest possible cost.

As long as companies could not set prices that exceed marginal cost, they would be motivated to provide products and/or services of better quality in order to attract more customers, and accordingly increase their marginal revenues.

Social goals are mainly concerned with consumers' welfare protection from the domination of big companies within the relevant market. The aim of Competition law is to lessen the entry constraints for small and medium-sized businesses to enter into the market and sell their products and/or services effectively. This would ensure certain degrees of equity and fairness satisfying consumers' welfare and ultimately attaining public interest.

Strictly speaking, a perfectly-competitive market does not exist in real world because it requires an infinite number of companies with perfect substitution and zero influence. The conditions required for attaining perfect competition is unlikely to happen in practice[20].

However, some industries have considerable number of companies selling similar products and/or services at very small profit margins. Those industries are fairly close to perfect competition.

For instance, in the farming sector, numerous farmers exist with no one being able to control prices for the simple reason that consumers would eventually revert to other farmers to obtain the same product at a lower price.

Another example is gold mining and trade businesses due to the excessive number of companies that sell gold and due to the fact that gold markets are closely linked to financial markets that frequently determine gold prices.

On the other hand, there exist many sectors controlled by big companies that dominate local and international markets due to their financial capabilities in monopolizing particular products of limited resources such as oil and gas. They

[20] Whish and Bailey, **Competition Law**, op. cit., p. 8.

mainly acquire this capability as a result of their political power, or as a result of their complicity with certain governments. For example, governments would impose restrictions, huge market entry burdens, or high taxes over small and medium-sized companies and entrepreneurs.

An example of dominating companies is the top four brand name tech companies such as Apple, Google, Amazon, and Microsoft.

The first and fundamental matter that arises when it comes to the application of competition law is the determination of the relevant market; i.e. the framework within which completion law policies shall be imposed and the benchmark for the determination of whether a particular behavior is likely to result in anti-competitive effects in the market.

The importance of this phase derives from the fact that each jurisdiction has its own concerns and guidelines when defining the relevant market.

Therefore, defining the relevant market is one of the major tasks that competition authorities shall undertake properly since market power does not exist in abstract but only in relation to a relevant market[21].

1.2 Relevant market definition

Defining the relevant market constitutes the first phase in detecting commercial practices that would give rise to competition concerns. It is essential for the determination of the actual and potential competitors in the concerned market, and for the calculation of their market shares and powers. Accordingly, competition authorities would be able to decide whether the concerned transaction carries potential anti-competitive effects into the market.

Within the European Community (EC) for example, defining the relevant market has always been a necessary step in the application of the EC antitrust law and in particular Articles 81 and 82 EC Treaty[22] (Articles 101 and 102 of the Treaty of the Functioning of the European Union).

[21] Dabbah, Maher: **EC and UK Competition Law: Commentary, Cases and Materials**, published by Cambridge University Press, UK 2004, chapter 2, p. 17.
[22] Dabbah, **The Internationalisation of Antitrust Policy**, chapter 2, p. 36.

Since market definition is a significant tool in examining market power, those who have to deal with competition law or those whom this law affects should familiarize themselves with the task of defining the relevant market.

Competition authorities have taken the responsibility of defining the relevant market. Antitrust authorities of the United States of America and the European Commission of the European Union are among the first authorities who have taken this initiative and who have provided sets of non-binding guidelines for defining the relevant market.

On the 9th of December 1997, the European Commission adopted its Notice[23] on the definition of the relevant market. It consists of a set of guidelines. Publishing these guidelines enhances the efficient application of competition provisions, provides companies and other market players with a costless self-evaluation compliance with competition provisions, and eventually contributes in the modernization of competition laws.

Under the European Community system of competition law, as an example, the importance of the definition of the relevant market can be extracted from the well-known early merger case, **Continental Can v Commission (1973) ECR 215**.

Continental Can, an American producer of metal containers and packaging, used Schmalbach-Lubeca-Werke AG, the biggest European packaging company in Europe, to supply light metal cans and lids for glass cans used for food packaging. Continental Can also used its subsidiary Europemballage Corporation, a company that was established in Wilmington, to purchase the majority of shares and to take over control through a takeover bid of a competing company Thomassen & Drijver-Verblifa N.V.; TDV-Dutch Undertaking.

At that time, there was no merger control regime in the EC. Nevertheless, the Commission considered that this type of behavior breaches Article 86[24] of the European Economic Treaty (ECC Treaty) by creating an abuse of dominant position

[23] Commission Notice on the definition of relevant market for the purposes of Community competition law (97/C 372/03), Official Journal of the European Communities 09/12/1997. Available at: EUR-Lex Access to the European Union Law.

[24] Article 86 of the ECC Treaty prohibits the abuse of a dominant position. It then became Article 82 of the EC Treaty.

in the market and therefore altering the supply and demand structure in the relevant market.

It found that Continental Can by virtue of the concerned undertaking held a dominant position over a substantial part of the common market of light packaging for preserved meat, fish, and crustaceans in addition to metal caps for glass jars. It also found that Continental Can abused this dominant position by the purchase of approximately 80 % of the shares and convertible debentures of the TDV.

The European Court of Justice, upon examining the legitimacy of the Commission's decision, held that this decision shall be annulled on the basis that the Commission had not sufficiently defined the relevant market to then prove the existence of a dominant position. It held that[25]:

> " *.... the definition of the relevant market is of essential significance, for the possibilities of competition can only be judged in relation to those characteristics of the products in question by virtue of which those products are particularly apt to satisfy an inelastic need and are only to a limited extent interchangeable with other products".*

As a consequence of the aforementioned significant case, the European Commission imposed intensive efforts in defining the relevant market until 1997 where it published the aforementioned Commission Notice dealing with this sophisticated task. This Notice provides guidelines on how the Commission defines the relevant market in relation to anti-competitive practices[26].

The importance of market definition has also been assured by another similar case: United Brands Company and United Brands Continental BV v Commission of the European Communities (1978) 27/76 ECR 207[27] where the applicant argued that bananas were in the same market among other fresh fruits. The Court of Justice held that this depends on whether the banana could be:

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[25] Dabbah, **EC and UK Competition Law: Commentary, Cases and Materials**, p. 18.

[26] Ibid., p. 20.

[27] United Brands Company and United Brands Continental BV v Commission of the European Communities (1978) 27/76 ECR 207.
Available at: EUR-Lex Access to the European Union Law.

"Singled out by such special features distinguishing it from other fruits that it is only to a limited extent interchangeable with them, and is only exposed to their competition in a way that is hardly perceptible..."

Market definition has three dimensions; relevant product market, relevant geographical market and in some cases relevant temporal market.

1.2.1 Relevant product market

The universal test which has been adopted by competition authorities and courts to define the relevant product market is the interchangeability or substitutability test. The European Court of Justice adopted this test in the aforementioned Continental Can case[28].

Substitutability is considered from the demand-side of the market and in certain situations from the supply-side of the market as well.

i. **Demand substitutability[29]**: Demand substitutability refers to the identification of a series of products or services (A, B, C and D) available in a geographical area or in an alternative area where consumers can revert to any of these products or services whenever the price of any of them increases or when it changes characteristics or intended use.

Therefore, the process of market definition commences from the identification of good(s) or service(s) supplied by the merging firms and after wards the identification of the good(s) or service(s) that may still be considered by the consumer substitutable as a result of the merger.

ii. **Supply substitutability[30]:** Supply substitutability, which is sometimes considered after the demand substitutability, refers to the identification of companies who are capable of switching production to alternative products or services whenever their price increases. This should only be considered when the switch in production

[28] Dabbah, **EC and UK Competition Law: Commentary, Cases and Materials**, op. cit., p.18.
[29] Dabbah, **The Internationalisation of Antitrust Policy**, op. cit., p.37.
[30] Ibid., p. 38.

occurs within a short period of time without a substantial amendment in the company's assets.

Assessing substitutability involves taking certain factors into consideration; physical characteristics, intended use and price.

Physical Characteristics are concerned with products that are similar in shape and sometimes in size when compared with the product under consideration.

Intended Use is concerned with available products or services that have a similar use as the product or service under consideration.

Price is a factor that is considered using a well-known substantial test called SSNIP test (Small but Significant Non-transitory Increase in Price).

In competition law cases consisting of abuse of dominance or merging matters, the SSNIP test is of crucial importance.

The SSNIP test was first introduced by the United States Department of Justice Merger Guidelines in 1982. It has been a recognised method for defining markets and for measuring market power directly. Ten years later, the SSNIP test was used for the first time within the European Union in the well-known **Nestle vs Perrier case** that will be discussed below, and it has been recognized by the European Commission in its 1997 Notice for the Definition of Relevant Market.

The aim of the SSNIP test is to identify the relevant market within which hypothetical monopolist or cartel could enforce a profitable substantial rise in price. The question asked is whether a small (5-10%) but significant, non-transitory (permanent) increase in the price of product A (under consideration) would enable consumers purchasing this product to switch to purchasing product B? If sufficient numbers of buyers are able to switch from product A to product B, A and B are considered to be in the same relevant product market[31].

For example, a producer of widgets sells each widget by 10$. Suppose that the producer applied a small but significant non-transitory increase in the price of widgets. After applying the SSNIP test, and in response to the test, it appeared that enough customers switched to buying blodgets instead of widgets. In such situation,

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[31] Dabbah, **The Internationalisation of Antitrust Policy**, op. cit., p. 38.

we can say that widgets and blodgets are substitutes for one another and form products of the same relevant product market[32].

In order to know whether Sprockets are included in the same market as well, suppose that the price of widgets and blodgets increased by 10%. If no significant switch by customers to buy Sprockets occurred, then Sprocket would not be included in the same market of widgets and blodgets.

We therefore conclude that if producers of Widgets and blodgets decided to merge, their behavior would significantly impede competition in the market because there becomes no other option for customers to switch to in order to obtain a similar product of lower price.

One of the most important cases in this respect is the case of the two internationally big companies that have significant market shares in the nutrition market; Nestle (Swiss Company) and Source Perrier SA (French Company).

In **Nestle-Perrier case**[33], the two companies decided to merge. For the European Commission to render its final decision, it had to define the relevant product market in order to measure substitutability of products and to decide accordingly whether the merged companies would create a dominant position and impede competition in the French market for bottled still and sparkling water.

In this respect, the Commission had to refer to articles 81 and 82 of the EC Treaty[34] dealing with competition. It recognized several factors for the identification of a distinct market for bottled source water; demand substitutability and supply substitutability.

The Commission found that the proposed merger between the two companies would eventually create duopolistic dominance and a dominant position which would

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[32] Whish and Bailey, **Competition Law**, op. cit., pp. 31-32.
[33] Nestle/Perrier v European Commission (1992) IV/M. 190.
Available at: EUR-Lex Access to the European Union Law.
[34] Articles 81 and 82 of the EC Treaty were replaced by Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). The TFEU was then replaced by Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

significantly impede competition in a substantial part of the relevant market. Some of the reasons for this finding are illustrated below:

a. The three national producers Nestle, Perrier and BSN own considerable market shares (82.3%) in the French market. Approving this merger would enhance their strength and power in this market.

b. The acquisition of Perrier would significantly increase the global capacity of Nestle and BSN[35] production. The proposed acquisition would therefore lead to joint dominance of the market by allowing the two main producers and sellers of bottled water (Nestle and BSN) to have high market shares and powers under the absence of other competitors in the relevant market.

Nestle proposed several commitments. One of the commitments is that Nestle sells the Vichy, Thonon, Pierval and Saint-Yorre in addition to other smaller water brands, formerly owned by Perrier to a new buyer who can promote the brands into competition with Nestle and BSN under a condition that Nestle should not re-purchase these brands back before at least ten years.

This commitment lead by the Commission to review its decision and to approve the acquisition of control over Source Perrier SA by Nestle subject to full compliance with all conditions and obligations included in Nestlé's commitment.

This case emphasizes the importance of market definition, as a preliminary step towards the assessment of a proposed anti-competitive transaction.

1.2.2 Relevant Geographical Market

The geographical boundaries of the relevant market may be similarly defined. The relevant geographical market involves the geographical area within which competition takes place and conditions of competition are homogeneous. Also, it is the geographic area which can be distinguished from other neighboring geographical areas with different competition conditions[36].

[35] BSN is a major supplier on the French source water market.

[36] Dabbah, **The Internationalisation of Antitrust Policy**, op. cit., pp. 39-40.

Relevant geographic markets could be local, international or sometimes global, depending on the circumstances of each case.

In identifying this market, SSNIP test may be used. Accordingly, the following question is asked: would customers of a particular product/service switch to other products/services located in another area in response to a small but significant (5-10%) increase of price of the product/service under consideration?

If the answer is positive, then both products/services are within the same relevant geographical market.

It is worth noting that it is not always sufficient to rely on the SSNIP test independently. Other factors shall be considered when identifying the relevant geographical market; some of which are:

a. Past evidence of diversion of orders to other areas: the competition authority compares prices where there have been for example exchange rate movements or taxation level differentiations. What were the customers' reactions to such changes?

b. Customers' preferences of national products and/or services.

c. Barriers and switching costs associated with the diversion of orders to companies located in other areas: sometimes there might be tough transportation costs and/or restrictions imposed by national laws.

The geographical market is defined based on the consumers' views of the substitutability of products/services sold at different locations. If customers of product A sold in France switch, in response to a small but significant (5-10%) and non-transitory increase in its price, to product B sold in Germany making the increase of price unprofitable, then the relevant geographical market in regards to that product is as wide as France and Germany. If not, then the two products are regarded to be in different geographic markets.

It is worth mentioning that a geographical market of a specific product/service would be worldwide. This has been proven in case law and specifically in **MCI WorldCom/Sprint v European Commission case[37].**

Both MCI WorldCom[38] and Sprint Corporation[39] are global telecommunication companies. On the 4th of October 1999, MCI WorldCom and Sprint signed an Agreement and Plan of Merger under which Sprint will be merged into MCI WorldCom.

The proposed concentration is therefore a full legal merger within the meaning of Article 3(1) (a)[40] of Council Regulation (EEC) No 4064/89 as amended; knowingly that this Regulation is no longer in force and it has been replaced by Regulation number 139/2004 of the EC Merger Regulations. The Commission found in WorldCom/MCI decision to merge that the relevant geographical market for top-level connectivity was global.

It concluded that the proposed merger would lead to either the creation of a dominant position in the market for the delivery of top-level or universal connectivity as a result of which competition would be significantly impeded in the common market within the meaning of Article 2(3)[41] of the EC Merger Regulation No 139/2004.

The notified concentration was therefore declared incompatible with the common market and with the functioning of the European Economic Area Agreement.

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[37] MCI WorldCom/Spirit v European Commission (2000) COMP/M. 1741
Available at: http://ec.europa.eu/competition/mergers/cases/decisions/m1741_en.pdf
[38] MCI WorldCom was an American Telecommunication corporation, and it is current a subsidiary of Verizon Communications.
[39] Sprint Corporation is an American telecommunication corporation that provides wireless services.
[40] Article 3(1): "A concentration shall be deemed to arise where: (a) two or more previously independent undertakings merge, or (b) one or more persons already controlling at least one undertaking, or one or more undertakings acquire, whether by purchase of securities or assets, by contract or by any other means, direct or indirect control of the whole or parts of one or more other undertakings".
[41] Article 2(3): "A concentration which would not significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared compatible with the common market".

1.2.3 Relevant Temporal Market

It is also beneficial in some cases to study the relevant temporal market that is mainly related to markets where the demand and supply variations occur as a result of the variation of the time of day or year[42]. Relevant temporal market has been well illustrated in the UK Guideline on Market Definition[43]. In electricity supply for example, consumers may change their consumption of electricity depending on the time of the day since the charges for electricity consumption during the day may be much higher than charges for electricity consumption during the night.

Other examples are those products or services whose purchase varies seasonally such ice cream and Halloween and Christmas decorations and clothing.

Furthermore, the relevant market could have a temporal dimension in the case of innovation. Due to technological progress, consumers may delay the purchase of certain products such as smart phones for their belief that an innovative version will be launched soon. This is currently the case of Samsung and Apple products.

However, only the first two dimensions (product and geographical) are more assessed in practice. In fact, the temporal dimension is usually considered an element in the relevant product market dimension and it is not an independent dimension by itself. The relevant temporal market is not cited in the EU's Commission Notice. Nonetheless, it has been discussed in little cases.

For example, in United Brands Company and United Brands Continental BV v Commission of the European Communities[44], it was alleged that the demand for bananas was prominent during the summer season where other fresh fruits were available in the market.

This raised the question about whether the banana market should be considered a distinct market from other fresh fruit markets throughout the whole year or it should be observed at least in the summer season available along with other fresh fruits[45].

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[42] Lorenz, Moritz: **An Introduction to EU Competition Law**, published by Cambridge University Press, New York 2013, p.274
[43] The UK's Office of Fair Trading Guidelines, Market Definition, Part Five
[44] Refer to page 18.
[45] Whish and Bailey, **Competition Law**, op. cit., page 42.

The European Court of Justice (ECJ) adopted the first view and defined the banana market as a single temporal market.

To sum it up, the concept of market definition is of economic nature where lawyers and economics should cooperate in order to reach a proper definition. It is the preliminary action of every competition law case where competition authorities conduct intensive and comprehensive investigations and analysis prior to approving a particular competition law related practice.

Guidance is of crucial importance for all parties concerned; competition authorities, courts, concerned parties, lawyers, experts, economists, in addition to all market players.

Section 2: Anti-competitive Practices

The presence of competition laws and competition authorities across the world aims at prohibiting anti-competitive practices which might have adverse effects on competition in the relevant market, and at imposing civil and/or criminal sanctions over infringers and indirect participants.

Anti-competitive practices may be categorized into three categories; anti-competitive agreements, abusive behaviors and mergers.

2.1 Anti-competitive agreements (Cartels)

Anti-competitive agreements are agreements that have an effect of impeding competition in the relevant market. There are two types of these agreements; horizontal and vertical[46].

A **cartel** is an example of a horizontal anti-competitive agreement in which a group of competing companies, whose collective market shares are high, acts together and agrees to fix prices, limit supply or restrict outputs for the purpose of increasing their collective profits while keeping production at the minimum.

[46] Ibid., p. 3.

This makes it difficult for any other company to enter into the market and charge lower prices, thus creating barriers to entry. In most cases, cartels do not benefit consumers. They impose high prices that do not change until the consumers find an alternative product and/or service.

Cartels usually occur in an oligopolistic market; a market that is controlled by a small number of sellers such as markets of cable television services, airline industry, pharmaceuticals, computer & software industry, aluminum and steel, oil and gas, auto-industry, mass media, smart phones…

A cartel is a very old dilemma recognised and prevented since days of the Eastern Roman Empire (Byzantium). Companies practicing this type of behavior are fully aware of the illegalness of their activities, and they try to conceal any documents or practices that might reveal their intentions and purposes.

Competition authorities may find it difficult to gather sufficient evidence to prove before courts the concerned cartel. In the Goldman Sachs Group v Commission Case[47], the European Commission made use of forensic information technology to reveal thousands of documents that had been deleted by one of the offending companies.

It is important to mention that the Commission holds liable all participants to the infringement of competition provisions regardless of their direct or indirect, minor or major role in the concerned illicit practice.

For example, in AC-Treuhand AG v European Commission case[48], the European Commission held in December 2003 that there is a cartel in the organic peroxide production industry and imposed fines on entities participating in this cartel. The Commission also imposed fines on AC-Treuhand AG, being the consultancy company who assisted in the illicit practices by organizing meetings to the cartel's members.

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[47] Goldman Sachs Group v Commission Case (2014) T-419/14
Available at: EUR-Lex Access to the European Union Law.

[48] AC-Treuhand AG v European Commission, decision 2005/439/EC
Available at: European Commission official website.

AC-Treuhand AG brought an action before the Court of First Instance[49] to set aside the decision taken against it alleging that it was neither a member to the cartel nor a contracting party, and therefore it did not breach Article 81 of the EC Treaty.

However, the Court of First Instance in 2008 upheld the Commission's decision considering that any entity which participates in a cartel forbidden within Article 81 of the EC Treaty, irrespective of being a minor participation, is responsible for the breach.

An old example of a cartel is the Anglo-American oil companies that had formed the "Consortium for Iran" cartel. "**Seven Sisters**" was a common term for the seven multinational oil companies which controlled the global petroleum industry since the mid-1940s until the mid-1970s.

Since then, industry dominance has moved to the OPEC cartel[50] which is the World's largest cartel and state-owned oil and gas group of companies in emerging-market economies, such as Saudi Aramco, Gazprom (Russia), China National Petroleum Corporation, National Iranian Oil Company, PDVSA (Venezuela), Petrobras (Brazil), and Petronas (Malaysia). In 2007, the *Financial Times* called these "the new Seven Sisters".

Cartels have several serious impacts on the market and the economy in a whole in which cartelised industrial sectors would eventually lack competitiveness and innovation. These agreements are severely punishable by fines and in certain legal systems by imprisonment.

Widespread forms of cartel practices are: price fixing, market sharing, bid rigging and output control.

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[49] AC – Treuhand AG v European Commission (2008) T-99/04
Available at: EUR-Lex Access to the European Union Law.

[50] Organization of the Petroleum Exporting Countries is an intergovernmental organization consisting of 14 nations as of May 2017. It was founded in 1960 in Baghdad by the initial five members (Iran, Iraq, Kuwait, Saudi Arabia and Venezuela) in order to coordinate the petroleum policies of its members, and to provide member states with technical and economic aid.

2.1.1 Price fixing:

Price fixing occurs when competing companies forming a cartel conclude an agreement that has the effect of fixing, controlling or maintaining the price of goods or services in the relevant market[51].

A clear example of price fixing can be found in a recent English decision[52] issued on the 21st of June 2017 regarding anti-competitive agreements concluded between National Lighting Company Limited, a supplier of light fittings and its resellers under Chapter I of the Competition Act 1998 and/or Article 101 TFEU.

After investigation, the Competition and Market Authority (CMA) in the United Kingdom fined National Lighting Company Limited an amount of £2.7 million for breaching competition law by preventing its resellers from selling its Endon and Saxby brands below a minimum price to customers at the retail level.

The CMA considered that this practice has the purpose of preventing, restricting or distorting competition within the UK market and/or between countries of the EU. This would accordingly affect trade within UK and/or between countries of the EU.

Also, the CMA sent warning notices to other suppliers within the same sector suspected of being engaged in resale price maintenance (RPM).

2.1.2 Market sharing

Market sharing occurs when competing companies or other types of businesses distribute markets among themselves. They conclude agreements whereby they distribute consumers among themselves by geographic areas agreeing not to compete and sell each other's products or services.

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[51] Business Europe: **Making Sense of Competition Law Compliance, a practical guide for SMES**, 2017, p. 11.
Available at:
https://www.businesseurope.eu/sites/buseur/files/media/reports_and_studies/2017_making_sense_of_competition_law_compliance.pdf

[52] National Lighting Company v Competition and Market Authority (2017) 50343
Available at: Official website of the government of the United Kingdom

A clear example of a market sharing agreement can be found in Celesio and Hamsard Groups v Office of Fair Trading UK case[53] engaging the following parties: Lloyds Pharmacy Limited 'Lloyds' and its parent Celesio AG 'Celesio', forming together the "Celesio Group" referred to as first party, and Total Medication Management Services Limited, trading as Tomms Pharmac ('Tomms'), its parent Quantum Pharmaceutical Limited 'Quantum' and its parent Hamsard 3149 Limited 'Hamsard', forming together the "Hamsard Group" referred to as second party.

These parties entered into a market sharing agreement in relation to the supply of prescription medicine to care homes in England. Since the 31st of May 2011 until the 10th of November 2011, Lloyds and Quantum agreed that Tomms would not market care homes' medicine already supplied with prescription medicines by Lloyds.

Also, since the 3rd of November 2011 until the 10th of November 2011, Lloyds and Quantum agreed that Lloyds would not market care homes' medicine already supplied with prescription medicines by Tomms.

The Office of Fair Trading concluded that both parties have breached the prohibition imposed by section 2(1) of the Competition Act 1998. It imposed against them financial penalties stipulated under Section 36 of the Act.

2.1.3 Bid rigging

Bid rigging is a form of fraudulent behavior whereby a commercial contract is promised to one party nevertheless appearing that the contract is open for other parties to present a bid[54].

It is a form of price fixing and market sharing, and it is often exercised in cases where contracts are concluded by a call for bids. Government construction contracts are the most type of contracts vulnerable to attempts of bid rigging.

The purpose of bid rigging is to eliminate competition in the procurement process, thus depriving the public a fair price.

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[53] Celesio and Hamsard Groups v Office of Fair Trading (2014) CE/9627/12
Available at: Official website of the government of the United Kingdom

[54] Business Europe, op. cit., p. 11.

Bid rigging occurs in all types of businesses and in all countries around the world. Bid rigging carries severe outcomes into the market and the economy especially when it targets public procurement causing severe harm to taxpayers.

Bidders can eliminate competition in public procurement in many ways. For instance, a bidder submits a non-competitive bid that is too high and is unlikely to be accepted, it includes conditions that are unacceptable to the buyer, a bidder agrees not to bid or to withdraw a bid from deliberation, or a bidder agrees to submit bids only in certain geographic areas or only to certain public establishments.

A clear example of bid rigging can be found in the Decision of the Office of Fair Trading number CA98/02/2009[55]. The OFT concluded that the firms had been engaged in illegal anti-competitive bid-rigging activities on 199 tenders from 2000 to 2006. Most of these activities were in the form of what's-so-called 'cover pricing'.

The Office of Fair Trading imposed fines totalling 129.2 million pounds against 103 construction firms in England such as A.H. Willis and Sons Limited, A.R.G (Mansfield) Limited, and Achroyd and Abott Limited, etc..

Cover pricing occurs when one of the firms invited to a tender for a construction contract (Firm A) is unwilling to win the contract, but it does not want to reveal its inability to acquire the client's interest.

Firm A seeks a cover price from another firm which is also tendering for the same contract (Firm B). Firm B aims at winning the contract and have known its own tender price and submitted to the client. The cover price which it offers to Firm A will be considerably high and inflated in order to ensure that Firm A does not win the tender. Cover pricing therefore requires co-operation between two of the firms being asked to tender; one asks for a cover price, and another must be willing to give it.

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[55] Bid rigging in the construction industry in England 21 September 2009 (Case CE/4327-04). Available at: Official website of the government of the United Kingdom.

Under the English Competition Act 1998 and under Article 81 of the EC Treaty, bid rigging is forbidden. Businesses found to have been involved in bid rigging can be fined up to 10 percent of their worldwide turnover.

On the 17th of July 2012, the Organisation for Economic Co-operation and Development (OECD) Council adopted a Recommendation on Fighting Bid Rigging in Public Procurement[56] requesting governments to evaluate their public procurement laws and practices at all levels of governments in order to ensure more efficient procurements and reduce the risk of bid rigging in public bids.

2.1.4 Output controls:

Output controls involve agreements concluded between companies in order to limit the supply of particular products in the relevant market, and accordingly to inflate prices[57].

Output restrictions occur when participants in an industry agree to prevent, restrict or limit supply. The purpose is to create scarcity in order to increase prices (or counter falling prices), while also protecting inefficient suppliers.

2.2 Abusive Behaviors

Abusive behaviors refer to particular activities conducted by a company having substantial market power that enables it to act independently of any other competitors in the market[58].

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[56] OECD: **Recommendation of the OECD Council on Fighting Bid Rigging in Public Procurement**, 2012.
Available at:
http://www.oecd.org/daf/competition/RecommendationOnFightingBidRigging2012.pdf

[57] Business Europe, op. cit., p. 11.

[58] Whish and Bailey: **Competition Law**, p. 3.

An example of abusive behavior is predatory pricing whereby a dominant company reduces its prices to below cost in order to drive a competitor out of the market and after wards charge higher prices[59].

In France Télécom SA v European Commission Case[60], the Commission held on the 16th of July 2003 that Wanadoo Interactive SA ('WIN'), an active company in France in the internet access services sector including ADSL (that was part of the France Télécom group), had infringed Article 82 of the EC Treaty by charging predatory prices from the end of 1999 to October 2002 for its ADSL services, known as Wanadoo ADSL and eXtense. The Commission thus fined the company EUR 10.35 million.

As a result of this practice, WIN sacrificed profits up to the end of 2002. The practice coincided with a company plan to pre-empt the strategic market for high speed internet access. While WIN suffered large scale losses on the Wanadoo service, France Télécom (which at that time held almost 100 % of the market for wholesale ADSL services for internet service providers (including WIN) was anticipating considerable profits on its wholesale ADSL products.

Upon Appeal by France Télécom, the ECJ[61] upheld the Commission's decision confirming that the abusive practices of France Télécom restricted market entry by competing internet providers, and thus abused consumers.

2.3 Mergers

A merger or a concentration is a result of an agreement concluded between two separate entities whereby the two entities merge into a new entity and therefore lose their individual entities, or when one entity acquires whole or part of another entity without the formation of a new entity, or when two entities decide together to establish an independent full functioned joint venture[62].

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[59] Ibid., pp. 781-782.
[60] France Télécom SA v European Commission (2003) COMP/38.233
Available at: EUR-Lex Access to the European Union Law
[61] France Télécom SA v European Commission (2007) T-340/03
Available at: EUR-Lex Access to the European Union Law
[62] Dabbah, **Introduction to Merger Control,** published by The University of London, UK 2007, Chapter 2, page 6.

A famous example of merger was the merger of Ciba-Geigy AG and Sandoz AG to form the major pharmaceutical and chemical company called Novartis[63] whereby Sandoz shareholders will receive 55% of the shares in Novartis and Ciba shareholders will receive the remaining 45% of the shares.

The European Commission[64] found that the notified merger between Ciba-Geigy AG and Sandoz AG is compatible with the common market and with the EAA Agreement.

Merger operations are divided into three different types; vertical, horizontal and conglomerate.

2.3.1 Vertical Mergers

A vertical merger (also known as vertical integration) is a merger that occurs between two undertakings that operate at different but complementary levels of the same market for the same finished product[65], such as a supplier acquiring a distributor. Mergers between entities occur for the purpose of reducing production costs, increasing efficiency, and seeking higher profits.

An example of a vertical merger is a car manufacturer purchasing a tire company. This vertical merger benefits the purchaser by reducing the cost of tires and the merging company (car manufacturer) by expanding its business by selling tires to competing car manufactures[66].

This type of merger enhances the economic efficiency. However, it sometimes carries anti-trust outcomes which might harm consumers and impede competition in the market. For instance, a vertical merger can make it difficult for competitors to

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[63] Whish and Bailey, **Competition Law**, op. cit., p. 853.

[64] Commission decision of 17 July 1996 in a proceeding pursuant to Council Regulation (EEC) No 4064/89 Ciba-Geigy/Sandoz v European Commission (1996) IV/M.737
Available at: EUR-Lex Access to the European Union Law

[65] Whish and Bailey: **Competition Law**, op. cit., p. 854.

[66] Peavler, Rosemary: **What are Horizontal and Vertical Mergers?** The Balance small business https://www.thebalancesmb.com/horizontal-and-vertical-mergers-explained-392846

gain access to an important component product or to an important network of distribution.

In Diageo PLC and Pernod Ricard S.A. vs Federal Trade Commission (FTC) case[67], the US FTC on the 4th of February 2002 challenged the proposed acquisition of Vivendi Universal S.A.'s (a French Societe Anonyme) Seagrum Wine and Spirits business by Diageo (a British public limited company) and Pernod Ricard S.A. (a French Societe Anonyme). The three companies operate also in the USA through different corporations.

The FTC considered that the acquisition would combine the second and third largest rum producers in the United States of America. This would accordingly eliminate actual competition between the firms leading to an increase in prices. Accordingly, the FTC considered that the proposed transaction carries anti-competitive effects and violates Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act.

In order to clear the transaction, Diageo PLC had to divest its Malibu Rum business worldwide to an acquirer approved by the FTC. Diageo has to do so within six months as of date of acquisition.

Later on, Diageo PLC submitted to the FTC a divestiture application requesting it to accept Diageo's sale of Malibu Rum Assets to Allied Domecq PLC. The FTC on the 8th of May, 2000 approved the proposed divestiture[68].

2.3.2 Horizontal Mergers

A horizontal merger is a merger that occurs between two undertakings operating at the same level of the production or distribution cycle such as competitor A acquires competitor B[69]. This type of merger occurs between large companies trying to form more efficient economies of scale such as the merger of Daimler-Benz and Chrysler;

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[67] Diageo PLC/Pernod Ricard S.A. v Federal Trade Commission (2002) 110057 Docket number C-4032
Available at: Official website of the Federal Trade Commission of the USA.

[68] Letter Approving Divestiture of Malibu Rum Assets to Allied Domecq Plc.
Available at: Official website of the Federal Trade Commission of the USA.

[69] Dabbah, **Introduction to Merger Control**, published by The University of London, UK 2007, Chapter 2, page 6.

world's two leading car manufactures. On the 7th of May 1998, Daimler-Benz Aktiengesellschaft in Germany and Chrysler Corporation in the United States of America signed a merger contract.

The merger resulted in a huge automobile company ranked third in the world in terms of revenues, market capitalization and incomes. However, this famous international merger ended in failure. This failure was a result of differences in corporate cultures, discoordination, and severe deficiency of trust between employees[70].

It is worth noting that this type of merger, whose anti-competitive effects are the most dangerous effects among other mergers' types, is treated more firmly by competition authorities[71]. Horizontal merges may eliminate sellers and reshape market structure unlike vertical and conglomerate mergers that may result in anti-competitive effects with no direct impact on the market structure.

For example, in Valero L.P. and Valero Energy Corporation vs FTC[72], the latter challenged the combination of an ethanol terminal operator and a gasoline refiner that needs ethanol to create blending gasoline.

Prior to the merger, an independent firm with no gasoline sales, controlled access to the ethanol supply terminal.

After the merger, the acquiring refiner could detriment its competitors in the gasoline market by restricting access to the ethanol terminal or by raising the price of ethanol sold to them. This would eventually lessen competition for sales of gasoline containing ethanol and would raise prices towards consumers.

In the 22nd of July, 2015, the FTC permitted Valero L.P. to purchase Kaneb Services LLC and Kaneb Pipe Line Partners under a condition of disposal of assets in

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[70] The Commisco Global Blog: Cultural Difference in International Merger and Acquisitions, 19th of April 2016.
Available at: https://www.commisceo-global.com/blog/cultural-differences-in-international-merger-and-acquisitions

[71] Dabbah, **Introduction to Merger Control**, p. 6.

[72] Valero L.P./Valero Energy Corporation v Federal Trade Commission (2005) Docket number C-4141.
Available at: Official website of the Federal Trade Commission of the USA.

order to preserve competition for petroleum transportation and terminating in Northern California, Pennsylvania, and Colorado, and to avoid any increase in the prices of gasoline and diesel, in addition to other conditions.

Later on, Valero submitted a divestiture application requesting it to accept Valero's divestiture of West Pipeline System, Philadelphia Area Terminals and San Francisco Bay Terminals to Pacific Energy Partners, LP. The FTC, on the 13th of September, 2005, approved the proposed divestiture[73].

2.3.4 Conglomerate Mergers:

A conglomerate merger is the third type of mergers that takes places between two or more companies whose businesses are unrelated[74]. Conglomerate mergers are of two types: pure and mixed. Pure conglomerate mergers involve companies with nothing in common, while mixed conglomerate mergers involve companies that are seeking product or market extensions[75].

Conglomerate mergers were common in the United States during the late 1960s and early 1970s. However, many conglomerate mergers were divested shortly after they had been completed. Nowadays, conglomerate mergers are quite rare.

The appraisal of conglomerate mergers is addressed in the EU regime, but it is not addressed in the US regime. Conglomerate mergers in the US are recognized as mergers that does not give rise to competition issues. This could be illustrated in the popular **General Electric and Honeywell EU and US cases** that will be discussed below in Chapter II, Section 1 of this Part.

Practically speaking, competition law pitfalls might exist in every trade agreement and it is worth mentioning that anti-competitive practices cannot be limited to the above-mentioned practices. Transactions might frequently give rise to new anti-

[73] Letter Approving Proposed Divestiture by Valero of the West Pipeline System, the Philadelphia Area Terminals, and the San Francisco Bay Terminals to Pacific Energy Partners, L.P. Available at: Official website of the Federal Trade Commission of the USA.
[74] Whish and Bailey, **Competition Law**, op. cit., p. 855.
[75] Dabbah, **Introduction to Merger Control**, op. cit., p. 6.

competitive effects especially with the rise of digital trading and cross-border transactions.

Furthermore, some transactions such as selective distribution agreements might be considered legal or illegal depending on the country of execution and on the surrounding circumstances and environment, while others known as hard-core violations such as bid-rigging and price fixing are considered illegal despite of all other factors. Hard core violations are subject to very strict civil and criminal punishments depending on the applicable law which might reach extradition from the country, exclusion from public procurement and state aid, and compensation for damages[76].

Apart from civil and criminal sanctions, anti-competitive transactions are considered by law null and void and the concerned entities, irrespective if they are proven guilty or not, may lose their reputation and shareholder value. Investigations incur concerned entities severe costs and time loss especially for defending competition law cases filed against them.

[76] Business Europe, op. cit., p. 10.

Chapter II: Development of Competition Law

Competition law has seen a remarkable increase in significance and geographical spread during the last two decades. In the late 1980s, few systems of competition law were enacted in the world. Afterwards, countries began and within less than thirty years later to recognise competition law in their domestic systems until we currently have more than 130 jurisdictions adopting competition laws[77] while others are in process of introducing this law into their legislation.

With this extraordinary increase in significance and in geographical expansion of competition law along with its globalisation, countries have been witnessing economic flourishment and market competition efficiency supported by wide cooperation satisfying accordingly customers' welfare.

Section 1: Competition Laws around the World

Countries were induced to insert their own competition law into their national legislation as an outcome to their economic reform, development and political liberalisation. Countries' shift from state control to liberal market has contributed in the gradual growth of competition laws' recognition among countries[78].

1.1 In Developed Countries

Competition laws of the European Union and Anti-trust laws of the United States of America have been chosen in this study because they represent the largest and strongest competition systems around the world.

1.1.1 European Union:

Many European countries observed considerable growth rates and economic development after altering their systems from mercantilism to liberalism. The European competition law regime is considered one of the largest competition regimes around the world. European countries began to enact competition laws harmonised by the European Union competition law model.

[77] Whish and Bailey, **Competition Law**, p. 1.

[78] Dabbah, **The Internationalisation of Antitrust Policy**, op. cit., p. 1.

For example, in 1983, Portugal enacted its first competition law in an attempt to reduce state intervention in the economy, and, in 1986, France switched from price controls to competition law. The European Commission was the efficient tool behind the adoption of competition law throughout Europe. Access to the European market was conditioned by the adoption of an EU harmonious competition law. The Italian competition law (1990) has been interpreted in accordance to the European Community Competition law and so competition law of Belgium (1991), Spain (1989), Portugal (1983) and other European countries.

European Union has influenced neighboring countries, desiring to get access into the European market and to enact laws harmonised by the European Competition law. Sweden and Finland, who were not yet members of the European Union, enacted new competition laws in harmonisation with the European competition law. Furthermore, the Czech Republic, Hungary, the Slovak Republic and Poland agreed, within their cooperation agreements with the European Union, to enact competition laws similar to those of the European law[79].

In brief, a considerable number of developed and developing countries have adopted national competition regimes influenced by the principles of the EU competition law and mainly Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU)[80]. This law has also been a reference to any recent developments in this field in addition to the huge number of writings and jurisprudence published on EU competition law.

Competition rules of the European Union can be initially found in the "Treaty of Rome"; officially "Treaty of the Functioning of the European Union" (TFEU)[81]. The treaty's main purpose was to unite the Europeans and to create a single market by which products, services and persons would be capable of moving freely[82]. These

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[79] Palim, Mark: **The Worldwide Growth of Competition Law: An Emperical Analysis**, 1999. Available at: https://heinonline.org/HOL/LandingPage?handle=hein.journals/antibull43&div=12&id=&page=

[80] Dabbah, **International and Comparative Competition Law**, op. cit., p. 161.

[81] Treaty of the Functioning of the European Union was called the EC Treaty, and it was signed on 25th of March 1957 which led to the creation of the European Communities (EC).

[82] Treaty of the Functioning of the European Union was called the EC Treaty, Preamble. Available at: EUR-Lex Access to the European Union Law.

goals can only be achieved through a compatible, transparent and fairly consistent regulatory structure for competition law.

Regulation N° 17 of the Council of February 6,1962[83] was the first regulation implementing Articles 81[84] and 82[85] of the EC Treaty (now Articles 101 and 102 of the above mentioned TFEU), and it was then replaced by Regulation N° 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the EC Treaty[86] which has developed and simplified cooperation between countries.

As a consequence of this Regulation, any transactions conducted between parties, which are considered a breach of Articles 81 and 82 of the EC Treaty, are prohibited.

The fundamental principle of Regulation N° 1/2003 is the application of a single set of rules by all decision-making bodies whenever encountered by a transaction affecting trade between Member States. Cooperating companies shall deal solely with the European Law rather than with 28 legislative systems when it comes to examining competition behaviors. This leads to a homogeneous, equitable and consistent application of the rules.

The first main decision under Article 101 of the TFEU concerning vertical anti-competitive agreements was held by the European Commission in Consten SARL and Grundig GmbH v European Commission case concerning vertical anti-competitive agreements. The Commission found that Grundig, a Turkish manufacturer of household appliances, acted illicitly in granting exclusive license rights to Grundig GmbH; its French subsidiary ensuring that no other wholesalers would be allowed to sell in France.

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[83] Regulation N° 17 of the Council of February 6,1962; First Regulation implementing Articles 85 and 86 of the Treaty.
Available at the official website of the World Trade Organization.

[84] Article 81 of the EC Treaty generally prohibits concerted market behavior that restricts or prohibits competition within the relevant market.

[85] Article 82 of the EC Treaty generally prohibits abuse of dominant position within the relevant market.

[86] COUNCIL REGULATION (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.
Available at: EUR-Lex Access to the European Union Law.

On the 13th of July 1966, The European Court of Justice (ECJ) upheld the Commission's decision, observing that[87]:

"8. [...] An agreement between producer and distributor which might tend to restore the national divisions in trade between Member States might be such as to frustrate the most fundamental objectives of the Community. The Treaty, whose preamble and content aim at abolishing the barriers between States, and which in several provisions gives evidence of a stern attitude with regard to their reappearance, could not allow undertakings to reconstruct such barriers".

The ECJ rejected the view that exclusive distributorships protect distributors' interests as long as competitors would not be able to sell the same products in the market in lower prices.

On the 22nd of March 2017, the European Commission published a proposal for a new Directive whose aim is to provide national competition authorities with minimum mechanisms to detect any EU competition law infringements and to impose effective sanctions over infringers.

The proposed Directive aims at ensuring that national competition authorities have the required human, financial and technical resources in order to be able to enforce EU competition law impartially and independently from any political and other external impacts. Furthermore, it ensures that national competition authorities are supported with sufficient investigation and decision-making powers such as remedial and commitment decisions, interim measures and imposing fines.

The proposed Directive has been forwarded to the European Parliament and Council for adoption. Once adopted, European Member States will have to include the provisions of the Directive into their national laws[88].

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[87] Consten SaRL and Grundig GmbH vs European Commission (1964) case number 56.
Available at: EUR-Lex Access to the European Union Law.

[88] European Commission: Empowering National Competition Authorities.
Available at: The official website of the European Commission.

1.1.2 United States of America: *most violently enforced antitrust law*

In regards to the United States of America which has the strongest competition system along with the European Union's, the concept of adopting an anti-trust law began during the late 19th century, and it has been developed in a common law style.

The nineteenth century witnessed detrimental anti-competitive practices known as "trusts" in several US sectors and mainly in sectors of transportation of goods, oil, steel and sugar. These sectors were controlled by a number of giant businesses who had imposed excessive and disproportionate charges[89].

Businessmen sought to formulate trusts influenced by famous characters such as John D. Rockeffeller who was American's first billionaire.

In 1870, Rockeffeller established Standard Oil which, by the early 1880s, controlled ninety percent of U.S. refineries and pipelines. He was accused by undergoing unethical activities, such as predatory pricing and colluding with railroads to abolish his competitors from the market in order to monopolize the oil industry.

As a result of Rockeffeller's practices and the practices of those who followed his policy, competition was eliminated from the market, access barriers were imposed against small and new entrepreneurs, and customers had no choices as from whom to purchase.

This situation demanded governmental action in order to limit the creation of anti-competitive trusts. President Theodore Roosevelt smashed several trusts by the adoption of antitrust laws in order to enhance competition in the common market and protect consumers' welfare.

The US Congress passed several anti-competitive laws in order to outlaw all sorts of activities which might have the effect of impeding or lessening competition in the relevant market. The Sherman Act was therefore passed in 1890 which represents the first and oldest anti-trust law in the United States of America[90].

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[89] Dabbah, **International and Comparative Competition Law**, op. cit., p. 228.
[90] Dabbah, **The Internationalisation of Antitrust Policy**, op. cit., p. 33.

One of the most well-known cases in the USA was **Standard Oil Co. of New Jersey v United States of America case**[91], in which the Supreme Court of the United States held that Standard Oil Co. of New Jersey, owned by John D. Rockefeller, had been caught guilty of monopolizing the petroleum industry through several anti-competitive behaviors and accordingly ordered it to dissolve.

The Court's remedy was to divide Standard Oil into several geographically separate and accordingly competing firms; Standard Oil of New Jersey (later known as Exxon and now ExxonMobil), Standard Oil of Indiana (Amoco), Standard Oil of New York (Mobil, again, later merged with Exxon to form ExxonMobil), Standard Oil of California (Chevron), and others.

Another case was American Tobacco Company v United States of America[92]. In 1907, the Department of Justice sued American Tobacco Company and other sixty-five companies and twenty-nine individuals.

In 1911, The Supreme Court of the United States of America held that the transaction in question has the effect of restraining trade and creating a monopoly over the business of tobacco in interstate commerce which infringes the Sherman Antitrust Act of 1890. It therefore ordered American Tobacco Company to dissolve; knowingly that the Court ordered in the same year Standard Oil to split into several separate entities.

Accordingly, American Tobacco Company was split into four companies; American Tobacco Company, R.J. Reynolds, Ligget & Myers, and Lorillard.

It is worth mentioning that later on three of the above four mentioned companies were found guilty of engaging together in monopolistic practices.

Indeed, the Sherman Act of 1890 makes it unlawful for businesses to conduct agreements which would limit competition in the common market by, for example,

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[91] Standard Oil Co. of New Jersey v United States of America, (1911) 221 U.S. 1
Available at: https://supreme.justia.com/cases/federal/us/221/1/

[92] American Tobacco Company v United States of America, (1911) 221 U.S. 106
Available at: https://en.wikipedia.org/wiki/United_States_v._American_Tobacco_Co.

price fixing or monopolisation[93]. Infringers would be held liable, ordered to pay huge fees and/or imprisoned.

However, the Sherman Act was quite effective in controlling anti-competitive practices. It did not clearly classify prohibited practices, and it did not clarify what was considered an illegal behaviour.

Therefore, the 1890 Sherman Act has been followed by the 1914 Clayton Act which has specified prohibited behaviors that would substantially restrict competition in the relevant market. Over and above that, it recognises and regulates mergers and acquisitions; being companies' alternative ways in controlling the market[94]. Along with the Sherman Act, business activities in the US were changed.

The US Congress created, through the Federal Trade Commission Act (FTCA) 1914, the Federal Trade Commission representing the federal agency for controlling anti-competitive practices[95].

The uniqueness of the USA anti-trust law is its dual implementation at the federal level by two separate authorities; the Antitrust Division of the Department of Justice (Antitrust Division) and the Federal Trade Commission (FTC)[96].

Furthermore, courts have also a substantial role to play in the implementation of the competition law regime in the USA. Other players are also efficient players in the field such as private litigants, state attorneys for practices conducted wholly within a particular state and sectoral regulators such as the Federal Communications Commission (FCC) in the field of merger control.

Unlike the Sherman Act that criminalized the infringement of its provisions, the Clayton Act is of civil type which imposes civil sanctions over infringers[97]. The

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[93] Rubenfeld, Daniel: Antitrust Policy, Intl encyclopedia, pp. 553-554.
Available at: https://www.law.berkeley.edu/files/antitrust_intl.encyclopedia.pdf

[94] Ibid., p. 554.

[95] Dabbah, **International and Comparative Competition Law**, op. cit., p. 245.

[96] Dabbah and Lasok: **Merger Control Worldwide**, published by Cambridge University Press, UK 2005, p.1295.

[97] Abott, Alden: **A Brief Overview of American Anti-trust Law**, University of Oxford, Center for Competition law and Policy, 2005, p. 2.
Available at: Official website of Oxford Law School.

procedures adopted under the Clayton Act of 1914 differ according to the concerned authority; the Antitrust Division or the Federal Trade Commission.

Sections 7 and 7A[98] of the Clayton Act deal with merger control. Section 7 forbids mergers or acquisitions that substantially lessen competition or tend to create a monopoly, while Section 7A introduces a mandatory requirement of pre-merger notification whenever the concerned merger meets the thresholds stipulated in the section.

Also, the Clayton Act, by its amendment by the Robinson-Patman Act of 1936, prohibits price discrimination which has the effect of lessening competition in the relevant market[99].

On the other hand, the Federal Trade Commission Act (FTCA), which is also a civil law imposing civil sanctions only, is empowered to implement the provisions of the Sherman Antitrust Act of 1890 and the Clayton Antitrust Act of 1914.

FTCA prohibits unfair means of competition and unfair or deceptive acts or practices which affect trade. In practice, Courts have widely interpreted the term 'unfair' to encompass any conduct which infringes public interest and even if it does not violate the provisions of the Sherman and Clayton Acts[100].

For example, in Sperry & Hutchinson Co. v FTC case[101], the FTC issued a cease and desist order against Sperry & Hutchinson Co. (S&H), being the largest and oldest US trading stamp company, on the basis that it had unfairly attempted to defeat the trading stamp exchanges and other free and open redemption of stamps.

S&H alleged before the Court of Appeal that its conduct did not fall within the scope of section 5 of the FTCA. The Court of Appeal reversed the FTC's decision, holding that the FTC had not proved that S&H's conduct violates antitrust laws or is deceptive or opposing to public morals.

[98] The Clayton Act 1914 was amended in 1976 adding section 7A relating to the pre-notification requirement (mergers).
[99] Dabbah, **International and Comparative Competition Law**, op. cit., p. 245.
[100] Abott, op. cit., p. 3.
[101] Sperry & Hutchinson Co. v Federal Trade Commission (1972) 405 U.S. 233
Available at: https://en.wikipedia.org/wiki/FTC_v._Sperry_%26_Hutchinson_Trading_Stamp_Co.

However, the US Supreme Court held that the Court of Appeal went wrong in its construction of section 5. The FTC has the powers to protect consumers, competitors, and has the authority to determine whether challenged conducts, though posing no threat to competition under antitrust laws, are nonetheless either unfair means of competition or unfair or deceptive acts or practices. The legal theory is termed "unfairness doctrine[102]." This entitles the FTC full discretion to challenge all sorts of practices which would carry anti-competitive effects even if they do not fall within the scope of the provisions of competition Acts.

1.1.3 Overlap between USA and EU Competition Laws:

Another important case in the USA was **United States v. Microsoft Corp, 2001**[103]. In 1999 a union of nineteen states along with the Federal Justice Department sued Microsoft Corporation. The trial held that Microsoft had threatened many companies in an attempt to prevent competition from the Netscape browser.

In 2000, the trial court ordered Microsoft to split into two as a means of punishment. However, the Court of Appeal reversed the trial court's decision. Microsoft and the government reached a settlement in which the government drops the case in response of Microsoft ceases many of the practices the government challenged. In his defense, CEO Bill Gates argued that Microsoft has always worked for the consumers' interests and that splitting the company would lessen efficiency and would slow down the development of software[104].

Microsoft was also sued by the European Commission in Microsoft Corporation v European Commission (2007)[105] finding that Microsoft Corporation abused its

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[102] The unfairness doctrine is a doctrine in the United States trade regulation law under which the Federal Trade Commission (FTC) can announce a business practice "unfair" because it is detrimental to consumers nonetheless the practice is not an antitrust violation.

[103] Microsoft Corporation v United States of America (2001) 253 F. 3d 34
Available at: Official website of the University of Berkley.

[104] Jennings, John: Comparing the US and EU Microsoft Antitrust Prosecutions: How Level is the Playing Field? Erasmus Law and Economics Review 2, no. 1 (March 2006): pp. 77-72.
Available at: www.eler.org/include/getdoc.php?id=70&article=16&mode=pdf

[105] Microsoft Corporation v European Commission (2007) case number T-201/04
Available at: EUR-Lex Access to the European Union Law.

dominant position in the European market. The EU reached a preliminary decision in the case in 2003 and ordered the company to offer both a version of Windows without Windows Media Player and the information necessary for competing networking software to interact fully with Windows desktops and servers.

In March 2004, the EU ordered Microsoft to pay an amount of € 497.2 million which had been the largest fine ever ordered by the EU at that time. The penalties also included 120 days disclosure of the server information and ninety days to produce a version of Windows without Windows Media Player[106].

Given the similarities existing between the USA and EU competition laws and the harmonization between Articles 81 and 82 of the EC Treaty and Sections 1 and 2 of the Sherman Act, it is debatable why these two regimes responded differently against Microsoft Corporation.

Some commentaries considered that the EU competition law aims at protecting competitors while the US Anti-trust law aims at promoting competition. Accordingly, if Microsoft's practices were considered to ease the operation of Windows for inexperienced users without harming consumers, the settlement of the US Government with Microsoft Corporation would be justified. On the other hand, if Microsoft was seen to defeat competition in the relevant market where the experience of Sun Microsystems, Netscape and RealPlayer had shown how Microsoft can squeeze its competitors, the harsh EC findings would be justified.

Furthermore, political considerations also played a role in the findings of both authorities. Political considerations in the EU might have driven authorities to seek harsher sanctions for the purpose of enhancing innovation and attaining consumers' welfare. However, when George Bush US administration had taken over the case in 2001, it was argued that the Government uses a total welfare test instead of a consumer welfare one. It focuses on increasing profit margins to domestic firms disregarding the negative impacts on consumers outside the jurisdiction. This might have played a role in the above-mentioned US settlement with Microsoft[107].

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[106] Jennings, op. cit., pp. 77-80.
[107] Ibid., pp. 81-84.

This also justifies the EU and US competition authorities' findings in the popular **General Electric (GE) and Honeywell case**. On October 22, 2000, GE and Honeywell announced their intention to merge. The United States Department of Justice[108] informally showed that it would allow the proposed merger to proceed, subject to certain remedies, holding that no evidence exists which would justify blocking the merger on the basis of portfolio power doctrine[109]. It found that the proposed merger would not strengthen GE's dominant position even if it was to be accepted that it would be dominant.

The parties also filed their notification with the European Commission[110]. The latter, however, found the proposed remedies insufficient, and it accordingly blocked the merger on the grounds that it would strengthen GE's dominant position in the common market; knowingly that the portfolio power played a key role in the Commission's finding[111].

The parties therefore filed an application for annulment of the Commission's decision. The European Court of First Instance (CFI) upheld the Commission's decision holding that the latter went right in blocking the merger despite the fact that it disagreed with the commission's assessment of the conglomerate effects of the merger[112].

While the theory of anti-competitive conglomerate effects formed the basis of the Commission's decision, it was unnecessary to the decision, since the merger's horizontal effects were sufficient enough to consider the concentration incompatible with the common market.

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[108] General Electric/Honeywell v United States' Department of Justice (2001)
Available at: Official website of the United States Department of Justice.

[109] Portfolio power enables the post-merger entity to use market power in relation to one product in order to gain advantage on another market.

[110] General Electric/Honeywell v European Commission (2001) COMP/M.2220
Available at: Official web portal of the European Union.

[111] Dabbah and Lasok: op. cit., p. 417.

[112] Press Release No° 109/05, 14 December 2005, Judgment of the Court of First Instance in Honeywell v Commission and General Electric v Commission Cases T-209/01 and T-210/01.
Available at: Official web portal of the European Union.

It is widely known that the United States of America has the strictest antitrust law all over the world. At a first glance, the advanced US antitrust law reflects the strength of the country's economy, the effective powers of the competent authorities, transparency in the trade transactions, free competition in the market place, political and economic stability, market fair competition and the like.

However, it is noticed that we coexist within a series of monopolies, oligopolies and other anti-competitive behaviors originating from the prominent advocate of antitrust law; United States of America.

The old experience with Standard Oil which was the basic engine for adopting competition law is now being refurbished with the dominancy of big technology companies such as Google, Amazon, Facebook and Apple (GAFA), Microsoft, etc.

In 2018, Google has over 90 percent market share in search advertising, Microsoft has 36 percent of the worldwide operating system market, and Amazon has around 50 percent share in the e-book market[113]. In common economic terms, all three corporations are monopolies.

Facebook Inc. and Google LLC, being American corporations, are now platforms monopolists gobbling up vast majority of internet advertising due to their remarkable influence and control over internet users and their ability to crush other productive businesses.

Like any monopoly, it is time for the government to regulate these types of acts serving the public interest, lifting access barriers to the market of internet services and products, providing consumers with several search and advertising options, etc.

Google holds around ninety percent of the market share for internet search services in most European Economic Area (EEA) countries creating market

[113] Andriole, Steve: **Apple, Google, Microsoft, Amazon and Facebook Own Huge Market Shares = Technology Oligarchy**, Forbes, 26 September, 2018.
Available at: https://www.forbes.com/sites/steveandriole/2018/09/26/apple-google-microsoft-amazon-and-facebook-own-huge-market-shares-technology-oligarchy/#50b8556c2318

dominance which resulted in a number of complaints submitted by competing companies before the European and the US authorities[114].

In April 2015, the EU Commission addressed Google a Statement of Objections[115]. The investigation focused on whether Google conducted any anti-competitive agreement or abused its dominant position within the EEA markets breaching Articles 101 and 102 of the TFEU. The Commission has conducted investigations against Google based on the latter's following conducts[116]:

a. Google's comparison shopping: whereby Google promotes its own services. Investigations had been launched since November 2010 until Google agreed on February 2014 to give importance to competing websites by presenting results from three competitors whenever it promotes its specialised search services, in addition to other commitments.

b. Google's handling of applications installed on mobile devices using the Android operating system. Investigations were launched in April 2015 on the basis that the majority of smartphone and tablet manufacturers use Android software, joined with Google's applications and services.
These manufacturers sign contracts with Google to acquire the right to install Google's applications on their devices. The Commission's preliminary view is that Google infringes EU antitrust rules by requiring these manufacturers to exclusively pre-install Googles' applications and services, in addition to other infringements. According to the Commission, Google is obstructing development, innovation, and market access for rival mobile operating systems, applications and services.

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[114] Karakas, Cemal: **Google Antitrust Proceedings: Digital Business and Competition, European Parliamentary Research**, July 2015, page 1.

Available at: Official website of the European's Parliament.

[115] A written communication addressed by the European Commission to persons or firms, during competition proceedings and antitrust investigations, containing all charges.

[116] Karakas, op. cit., pp. 5-6

On June 27, 2017[117], Google was therefore found guilty of favoring their services over their competitor's services, and it was fined an amount of 2.42 billion Euros[118].

In June 2011, the US Federal Trade Commission (FTC) also initiated official investigations against Google[119]. However, in the 3rd of January 2013, the FTC closed the file on the basis that no evidence has been sufficiently presented to support Google's anti-trust law infringement allegations. The FTC held that[120]:

"*In sum, we find that the evidence presented at that time foes not support the allegation that Google's display of its own vertical content at or near the top of its search results page was a product design change undertaken without a legitimate business justification. Rather, we conclude that Google's display of its own content could plausibly be viewed as an improvement in the overall quality of Google's search product. Similarly, we have not found sufficient evidence that Google manipulates its search algorithms to unfairly disadvantage vertical websites that compete with Google-owned vertical properties …"*

By reference to the above-mentioned political considerations, US authorities seem to lack interest in announcing that Google, being a US company, is violating its anti-trust laws on grounds that USA controls the global search engine and advertising services, and it is attaining huge number of revenues into the US economy.

They probably consider Google a *de facto* monopoly yet an advantageous one due to the presence of other minor competitors such as Yahoo and Bing; knowingly that those two other platforms are also US oriented.

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[117] Google Incorporation v European Commission (2017) AT 39740
Available at: Official website of the European Commission.
[118] European Commission, Press release: Antitrust: **Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison-shopping service**, 27, June, 2017.
Available at: Official website of the European Commission http://europa.eu/rapid/press-release_IP-17-1784_en.htm.
[119] Google Incorporation v Federal Trade Commission (2013) 111-0163
[120] Statement of the Federal Trade Commission regarding Google's Search Practices, in the matter of Google Inc. vs FTC, file Number 111-0163, 3 January, 2013, page 3.
Available at: Official website of the Federal Trade Commission:
https://www.ftc.gov/sites/default/files/documents/public_statements/statement-commission-regarding-googles-search-practices/130103brillgooglesearchstmt.pdf

We can conclude that the United States of America favors its own interests over the interest of other countries as long as it has the power to satisfy its political and economic affairs, being globally the strongest player. Nonetheless, we cannot deny the efficiency of the US anti-trust law and its dual enforcement.

1.2 In Developing Countries

Apart from USA, EU and other developed countries and following the debt crises of 1980 and the collapse of Soviet Union[121], several developing countries sought economic reform from centralized and planned economy to liberalisation and privatisation[122].

As a mean to succeed, competition law was an efficient factor. They considered that efficient and well-operating markets would not be attained in the presence of artificial barriers to market entry.

The United Nations through the UNCTAD played an important role in assisting some developing countries in adopting competition laws. Moreover, bilateral exchanges between developing and developed countries have also emerged. The World Bank took also the initiative in examining the efficiency of competition law to developing countries[123].

In short, until the last quarter of the twentieth century, there was a tendency in many countries around the world to have strict control over the activities occurring in the market.

However, as the twentieth century approached to end, countries began to seek liberalisation and privatisation rather than governmental control. Accordingly, competition has been recognised as an effective mechanism to protect the market, enhance innovation and lead to economic development.

To several countries, the policy of competition regulation has been a long-standing factor and a reachable outcome which evolved over the years and has

[121] Kovacic and Lopez-Galdoz: op. cit., page 87.
[122] Dabbah: **International and Comparative Competition Law**, op. cit., p 275.
[123] Ibid., pp 292-293.

witnessed substantial enhancement and development. Yet other countries have recently witnessed this policy after a long suffering with considerable challenges, while others have still been unable to take a final decision towards the adoption of this law. These countries have been so long exerting gradual efforts to overcome some of the obstacles. They rather seek competition protection through applying principles of free market, provisions of unfair competition, provisions of restrictive businesses or trade practices, in order to regulate behaviors of market players[124].

Over one hundred present competition laws are new. Most of these new competition laws are laws of developing countries[125]. Despite this great achievement, a large number of developing countries face implementation obstacles and constraints derived from the lack of sufficient financial and powerful resources, economic and political inequality, political power phenomenon, government's market shares and control in several industries, weak administrative capacity and of course the severe rampant corruption spread within certain governmental bodies.

Due to the wide differences in countries' economic conditions between developed and developing countries, each developing country shall legislate and implement a competition regime convenient with its economy, policies, culture and other conditions.

A 2006 publication of the OECD had addressed this matter and thus concluded:

"Modern regulatory regimes for private sector development should include competition policy regimes .... The design of the law should reflect the level of economic development of the country concerned, the structure of its economy and its constitution and culture. A competition law should not simply be transplanted from a developed country or even from another developing country."[126]

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[124] Ibid., p 5.

[125] Aydin, Umut and Buthe, Tim: **Competition Law and Policy in Developing Countries: Explaining Variations in Outcomes: Exploring Possibilities and Limits**, 2016, p 2.
Available at: https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4801&context=lcp

[126] OECD, Promoting Pro-Poor Growth, Private Sector Development 43 (2006)
Available at: Official website of the Organisation for Economic Co-operation and Development.

1.2.1 People's Republic of China

Despite being one of the powerful countries around the world in the field of manufacture, trade and economy, China has recently enacted its own domestic competition law.

Prior to enacting Anti-Monopoly Law (AML) in 2008, and following the economic reform in China and the open of its markets, competition was regulated by several legislations promulgated by the State Council which were: The Provisional Rules on Expediting Economic Alliance 1980[127], the State Council Provisional Rules on the Launching and Protecting the Socialist Competition 1980[128] and the State Council Rules on Further Expediting and Protecting Socialist Competition 1986[129].

Since 1988, AML had been proposed and it had undergone through several stages until the 1st of August, 2008 where it was put in force as a comprehensive system of competition law within the People's Republic of China (PRC). This law applies throughout the PRC; except in the two Special Administrative Regions of Hong Kong and Macau.

The AML prohibits any monopolistic agreement which might create an abuse of a dominant position and mergers which might affect, restrict or prohibit competition in the relevant market[130]. However, little guidance has been available for competent authorities to properly and effectively apply the AML, in addition to the insufficient staffing of competition agencies.

In 2008, soon after the AML had come into effect, the Ministry of Commerce of the People's Republic of China (MOFCOM) challenged and prohibited the proposed

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[127] The Provisional Rules on Expediting Economic Alliance aimed at eliminating territorial blockades and departmental barriers. It was effective as of the 1st of July 1980 until the 23rd of March 1986.

[128] The State Council Provisional Rules on the Launching and Protecting the Socialist Competition aimed at reforming the already existing economic management system and protecting competition. It was effective as of the 17th of October 1980 until the 6th of October 2001.

[129] The State Council Rules on Further Expediting and Protecting Socialist Competition replaced the previous Provisional Rules on Expediting Economic Alliance of 1980. It was effective as of the 23rd of March 1986 until the 6th of October 2001.

[130] Slaughter and May: Competition Law in China, November 2016, page 1.
Available at: https://www.slaughterandmay.com/media/879862/competition-law-in-china.pdf

acquisition of China Huiyuan Juice Group Co., Ltd (Huiyuan Juice) by Coca-Cola Company (Coca-Cola)[131].

In the 3rd of September 2008, Coca-Cola declared that it had offered the purchase of the Huiyuan Juice, a PRC large domestic juice manufacturer, for an amount of $2.4 Billion. Coca-Cola notified the MOFCOM in accordance to the provisions of the AML.

MOFCOM had prohibited the proposed acquisition and it was the first prohibition issued by the latter after the AML had entered into force. This decision was subject to intensive criticism arguing that it had been based on political considerations rather than legal grounds. However, Article 26 (7) of the AML grants the MOFCOM the discretion to decide based on policies rather than the promotion of competition such as restriction of foreign influence in certain market sectors.

Nonetheless, it was considered that the decision of the MOFCOM had been unreasoned, neither with respect to market definition nor with respect to grounds of prohibition. The decision raised debates on how the MOFCOM had defined the relevant market and to then conclude that it was fruit juice market not soft drinks market.

As a result of this decision, the Anti-Monopoly Commission of the State Council published Guidelines on the Definition of the Relevant Market; being the first guidelines adopted by the latter. The Guidelines clears out that relevant market shall be defined based on the analysis of both demand and supply sides depending on the case in question. And when the market scope is not clear, the SSNIP test shall be applied; being the same test adopted by the US and EU competition authorities.

The Guidelines also state that small entities may have the ability to impede competition in the market. Even if after merging, merged firms remain below 50% of market shares, competition concerns may still be raised in the presence of other factors such as the number of competitors and the presence of capacity constraints.

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131 Coca Cola Company/China Huiyuan Juice Group Co., Ltd v Ministry of Commerce of the People's Republic of China (MOFCOM), 2008.

Accordingly, it is obvious that the acquisition of a local leading fruit juice producer by Coca-Cola, being an international huge beverage company holding 60.6% of carbonated drink market, would entail Coca-Cola the ability to dominate the fruit market in the Republic[132].

Several regulations have then been issued for competition agencies in order to properly implement the AML.

Another significant decision was also taken under the AML was in Huawei Technologies Co., Ltd vs. Interdigital Corporation, Inc (2011). On the 5th of December 2011, Huawei Technologies Co., Ltd (Huawei)[133], a Chinese multinational company, filed lawsuits before the Shenzhen Intermediate People's Court in China against Interdigital Corporation, Inc. (IDC)[134], a US company. Huawei first[135] alleged that IDC had provided it discriminatory high royalty rate compared with rates offered to other companies such as Apple and Samsung, and second[136] that IDC had abused its dominant position in the market in relation to the licensing of standards essential patents for 3G wireless communication.

Guangdong High People's Court upheld the Shenzhen Intermediate People's Court's finding that IDC infringed the AML by offering discriminating royalty rate to Huawei constituting an abuse of dominant position. It awarded damages of RMB 20 million as per Huawei's claim. The Court also determined the appropriate royalty rate in accordance to fair, reasonable, and non-discriminatory (FRAND) principles taking into account the rates offered to other companies such as Apple and Samsung, the quality and quantity of IDC's patents, IDC's reputation, etc.

Another important factor in this decision is that the Court affirmed its jurisdiction to decide on the filed case nonetheless IDC's allegation that the alleged abuses occurred in the United States of America and that it does not have a domicile in China. This decision illustrates the principle of extraterritoriality providing that as long as

[132] Huang Xian Yu: Huiyuan's Acquisition by Coca-Cola in PRC – Case Analysis
Available at: International Journal of Economics, Business and Management
http://www.joebm.com/papers/193-W10043.pdf

[133] Huawei is a Chinese networking, telecommunications equipment, and services company.

[134] IDC is a mobile technology research and development company that provides wireless technologies all over the world.

[135] Huawei Technologies Co., Ltd vs. Interdigital Corporation, Inc, no. 857, Case 857, 2011

[136] Huawei Technologies Co., Ltd vs. Interdigital Corporation, Inc, no. 858, Case 858, 2011

the abuses that had been conducted outside China carried anti-competitive effects into the Chinese market, IDC shall be sanctioned under the AML and by the Chinese authorities.

Chinese Anti-Monopoly Bureaus have been increasingly prohibiting potential anti-competitive conducts in China imposing excessive fines against infringers of the AML.

Pharmaceutical sectors in China have acquired great attention where plenty of companies were challenged and sanctioned. For instance, in July 2016, Jiangsu Price Bureau fined three pharmaceutical companies an amount of RMB 2.6 million for reaching “estazolam” monopoly agreements[137].

Several challenges have encountered the enforcement of the AML. One challenge is that the role of enforcing the AML is vested within several scattered agencies; the National Development and Reform Commission (NDRC), the State Administration of Industry and Commerce (SAIC) and the Ministry of Commerce of the People’s Republic of China MOFCOM, in addition to the Anti- Monopoly Committee of the State Council (AMCSC).

The involvement of three authorities in implementing competition law is very rare around the world. Nonetheless, experience in recent years showed that the three agencies competing with each other promoted the enforcement of China’s AML.

Huang Yong[138] reported, in the conference held in New York University School of Law in October 24, 2014, that the Anti-Monopoly Bureau under the Ministry of Economy (MOFCOM) has successfully reviewed more than 900 cases within 6 years with only 30 staff members.

In addition to that, there has been insufficient staffing of competition agencies compared to officials within the European Commission, United States Department of Justice and Federal Trade Commission.

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[137] Global Legal Insights: Overview of the Law and Enforcement Regime Relating to Cartels. https://www.globallegalinsights.com/practice-areas/cartels-laws-and-regulations/china#chaptercontent1

[138] Huang Yong is a professor in the University of International Business & Economics School of law Beijing.

Accordingly, on the 17th of March 2018, the 1st Session of the 13th National People's Congress NPC approved the proposed plan on institutional restructuring submitted by the State Council. Many important adjustments have been proposed to the AML enforcement system. A unified and independent AML enforcement agency was established; the State Administration for Market Regulation (SAMR)[139].

It is worth mentioning that in parallel to the AML, there is Anti-Unfair Competition Law (1993), Price law (1998) and Law on Bid Invitation and Bidding (2000) which might overlap with some provisions of the AML.

China, being a prominent country in the field of trade and commerce, has made considerable development with respect to competition regulation.

1.2.2 The Republic of South Africa

Prior to the enactment of the Competition Act of 1998, competition was regulated by virtue of a series of legislations notably: the 1949 Act of Undue Restraint of Trade followed, after criticism, by the 1955 Regulation of Monopolistic Conditions. This Regulation was also criticized for its enforcement inefficiency. In 1968, the first anti-competitive practice related to resale price maintenance was criminalized in South Africa. Very few companies were fined for conducting this practice[140].

In S vs South African Phillips (Pty) Ltd and Others[141], suspended prison sentences were imposed over several infringing parties. Therefore, Mouton Commission; a

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[139] Competition Policy International: 2008-2018: **A Retrospect of China's Anti-Monopoly Law Enforcement System and Prospect and Commentary on the New System**, 12th of June, 2018. Available at: https://www.competitionpolicyinternational.com/2008-2018-a-retrospect-of-chinas-anti-monopoly-law-enforcement-system-and-prospect-and-commentary-on-the-new-system/

[140] Prins, Deon and Koornhof, Pieter: **Assuring the Nature of Competition Law Enforcement in South Africa**, Volume 14 (2014).
Available at: SciELO which is a bibliographic database, digital library, and cooperative electronic publishing model of open access journals. http://www.scielo.org.za/pdf/ldd/v18/07.pdf

[141] S vs South African Phillips (Pty) Ltd and Others 1977 (1) SA 446 (C)

commission of inquiry, was established in order to advise on the possibility of a new legislation[142].

Later on, several laws were enacted until the Competition Act number 89 of 1998[143] came into effect on the 1st of September 1999 which reformed South Africa's competition legislation by strengthening the powers of competition authorities in line with those of the EU and the USA. It established the independent Competition Commission, the Competition Tribunal and the Competition Appeal Court.

The aforementioned Competition Act regulates competition in the market by prohibiting restrictive horizontal and vertical practices, abuse of dominant position and horizontal and vertical mergers that have the effect of carrying potential anti-competitive effects in the market.

It is worth mentioning that the Act includes provisions of public interest considerations. This means that substantive assessment of the proposed conduct shall be weighed against likely social benefits or gains such as employment matters. For example, if a proposed merger was held likely to result in substantial prevention or lessening of competition, merging parties would have to prove that the merger's efficiency, technological or pro-competitive gains outweigh its anti-competitive effects[144].

On the other hand, a lawful proposed merger would be prohibited, if it failed on public interest grounds. For example, In Anglo American Holdings Limited/ Kumba Resources Limited v Competition Tribunal case[145], the Competition Tribunal examined whether the purchase of 34.9% of Kumba Resources Limited (Kumba) by

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[142] Prins and Koornhof: *op. cit.,* pp 138-139.

[143] Competition Commission in South Africa: Competition Act number 89/1998. Available at: Official website of the Competition Commission of South Africa http://www.compcom.co.za/wp-content/uploads/2014/09/pocket-act-august-20141.pdf

[144] Drecl Josef and Bakhoum, Mor and Fox, Eleanor and Gal, Michal, and Gerber and David: **Competition Policy and Regional Integration in Developing Countries,** published by Edward Elgar Publishing Limited, UK 2012 and Edward Elgar Publishing Incorporation, USA 2012, Chapter 4, pp 68-72.

[145] Anglo American Holdings Limited/ Kumba Resources Limited v Competition Tribunal (2003) 46/LM/Jun02, ZACT 4, 4th of September 2003.

Anglo American Holdings Limited (Anglo) would lessen competition in the market through the creation of dominant position. And if so, whether there would be any efficiency gains resulting out of the proposed acquisition and its impact on the public interest in accordance with Section 12(A)[146] of the Competition Act.

The Tribunal approved the merger holding that[147]:

"... 171. We have found that, provided we include the condition proposed in relation to one of the horizontal issues in the iron ore markets, the merger between Anglo and Kumba raises no concerns that it will lead to a substantial lessening or prevention of competition. For this reason it is not necessary for us to consider whether the merger will bring about any efficiency gains.

172. We have also concluded that the merger is not against the public interest.

173. Accordingly we approve the merger subject to the condition set out in the attached order".

Another important case in this respect is **Harmony Gold Mining Company Ltd/Pamodzi Gold Free State (Pty) Ltd v Competition Commission**[148]. The Competition Tribunal found that the merger between the two companies would not substantially prevent or lessen competition, but it would result in the loss of 1600 jobs rather than 3600 employees who could have lost their jobs if the merger was not

[146] Section 12 (A): … "(a) if it appears that the merger is likely to substantially prevent or lessen competition, then determine – (i) whether or not the merger is likely to result in any technological, efficiency or other pro-competitive gain which will be greater than, and offset, the effects of any prevention or lessening of competition, that may result or is likely to result from the merger, and would not likely be obtained if the merger is prevented; and (ii) whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3); or (b) otherwise, determine whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3) …"

[147] Competition Tribunal Republic of South Africa, Decision and Reasons, Case No.: 46/LM/Jun02, 4th of September, 2003, page 37.
Available at: Official website of the Southern African Legal Information Institute http://www.saflii.org/za/cases/ZACT/2003/45.pdf

[148] Harmony Gold Mining Company Ltd / Pamodzi Gold Free State (Pty) Ltd v Competition Tribunal (2010) 71/LM/Oct 09, ZACT 11, 5th of February 2010

approved. The Tribunal approved the merger under a condition that Harmony re-employs 2400 employees within a period of two years[149].

Importing public interest considerations into competition laws is essential for developing countries that face consumer and employment issues.

The Competition Commission plays an essential role in maintaining and protecting consumers' welfare and interests. The Commission is granted wide range of powers to investigate and refer any anti-competitive conduct to the Competition Tribunal or to the Competition Appeal Court for prosecution.

Several regulations have been issued for the purpose of enhancing the conduct of these authorities such as the 2004 Corporate Leniency Policy. This Policy has helped in detecting numerous cartels operating in several industries such as milk, steel, bread, construction, etc... One of the important features of this Policy is that it has the effect of attracting cartel members to disclose information on a particular cartel in return of being granted immunity from prosecution and fines.

The Competition Act was amended by the Competition Amendment Act in 2000 introducing, among other features, measures such as personal criminal liability[150] against directors and managers who participate directly or indirectly in any cartel conducts. However, the criminal case shall fall within the jurisdiction of criminal courts where the National Prosecuting Authority has the discretion to prosecute the case. Penalties could reach R 500, 000 and/or 10 years imprisonment[151].

Similar provisions can be found in other competition law systems such as that of USA and Australia.

Establishing threatening procedures and sanctions against infringers is indeed an efficient tool in deterring managers and other concerned persons from engaging into

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[149] Drecl, Bakhoum, and Fox: op. cit., pp 71-72.

[150] Section 73A: "(1) A person commits an offence if, while being a director of a firm or while having engaged or purporting to be engaged by a firm in a position having management authority within the firm, such person – (a) Caused the firm to engage in a prohibited practice in terms of section 4 (1) (b); or (b) Knowingly acquiesced in the firm engaging in a prohibited practice in terms of section 4 (1) (b) (2) For purposes of subsection (1) (b), knowingly acquiesced means having acquiesced while having actual knowledge of the relevant conduct by the firm".

[151] Article 74 of the same Act.

anti-competitive conducts. However, one shall not disregard the challenges that the imposition of criminal liability might arise in South Africa.

Most importantly, conducting civil procedures before Competition authorities in parallel with criminal procedures before national criminal courts could lead to contradicting decisions.

In short, many developing countries around the world have been exerting hard efforts in the enactment, development and implementation of competition laws. Despite the improvements and the success elements revealed mostly in case law, every country around the world has been facing certain challenges and hurdles with respect to competition regulation.

Continuous knowledge and training shall be exercised by every competition law party and access to foreign experience and case law are a must. And most importantly, cooperation between countries shall play a role in reforming, amending, improving, implementing and even adopting domestic competition laws. This has been affirmed by globalization, open markets and the existence of extraterritorial transactions.

Section 2: Internationalisation of Competition Law: A Response to Market Globalisation

In the era of globalisation and liberalisation, the effects of economic transactions have not been restricted by national political or geographical limits. In the course of globalisation, the number of cross-border transactions between companies and governments has increased and has therefore enabled companies to create a presence and attain profits in several countries. Google for example has been providing services globally, and it has been accordingly subject to investigations in several countries[152].

Accordingly, anti-competitive practices have also increased and have been widely spread in several essential sectors such as pharmaceuticals, fuel, steel, aluminium and telecommunications. These practices have taken several forms such as international

[152] Whish and Bailey: op. cit., p 519.

cartels, harmful mergers, and abuse of dominant positions, among others. The economic effects of these practices would definitely carry adverse effects that go beyond national boundaries. This situation would lead to the transfer of wealth from consumers to producers domestically and from consumers of one country to consumers of another country internationally.

As a consequence, several competition authorities have found themselves concerned with a foreign transaction carrying anti-competitive impacts within their markets, and they have been incapable of remedying the situation due to their lack in resources, knowledge and power. No doubt that this situation has led to considerable legal, political, and economic issues through which the internationalisation of competition law has been therefore a self-imposed necessity.

The idea of internationalisation of competition law can be traced back to the 1940s and 1950s where determined efforts have been exerted to fight international cartels and other anti-competitive practices affecting different countries[153]. It is noteworthy to mention that several developments have occurred in this aspect including the Draft Havana Charter that aimed at creating an International Trade Organisation (ITO) and the United Nations Economic and Social Council (ECOSOC) recommendation for a draft convention on restrictive business practices[154].

Despite the failure of above two efforts, initiatives supported by international organisations, scholars, competition authorities and several countries, proposed that international organisations should be established in order to internationalize competition laws[155].

Indeed, several international organizations were formed such as World Trade Organisation (WTO), Organization for Economic Cooperation and Development (OECD) and the United Nations Conference on Trade (ICN). Nonetheless, and despite their efforts and achievements in this respect, no binding multilateral agreement on competition law has been signed to date.

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[153] Dabbah: International and Comparative Competition Law, op. cit., p 78.
[154] Ibid., pp 543-544.
[155] Ibid., pp 78-79.

The necessity of internationalisation of competition laws arises from several factors. The direct policy underlying this phenomenon is the desire to achieve uniformity and harmonisation in competition rules of different jurisdictions and cooperation among their competition authorities[156].

Internationalisation created flounder among states who considered that the process of internationalisation infringes their sovereignty by allowing foreign states to interfere and exercise power within their territories[157]. Some countries considered that internationalisation of competition laws through bilateral or multilateral conventions requires certain commitments from their side creating therefore a direct limitation to their sovereignty. The European Union's competition law is a clear example of the limitations of sovereignty it creates on individual member states having to abide by its provisions.

However, in fact, the issue of sovereignty should not be overstating. The process of internationalisation is unlikely to abandon the absolute sovereignty of the state. This concept has been confirmed in early jurisdictions of the European Court of Justice. Indeed, none of the European member states has lost its sovereignty completely by virtue of the European treaties[158].

It is worth mentioning that the interests of companies, whose businesses and transactions go beyond a single market and state, would be caused harm due to the fact that their transactions are investigated by different competition authorities of different jurisdictions. In addition to that, such matter would most likely cause political and economic conflicts between states especially when different competition authorities do not reach same conclusions.

It is important in this respect to consider some of the important types of internationalisation which have emerged over time; unilateralism (extraterritoriality), bilateralism: bilateral cooperation, and multilateralism: multilateral cooperation.

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[156] Ibid., p 81.
[157] Ibid., pp 79-80.
[158] Ibid., pp 90 and 91.

2.1 Unilateralism (extraterritoriality)

Unilateralism is not closely related to the internationalisation phenomenon of competition law, but it carries an international character by applying domestic provisions over foreign transactions[159].

Extraterritorial application of competition laws refers to the situation where the national competition authority of one country applies its domestic competition law on alleged anti-competitive practices conducted by a foreign firm outside its territory, but these practices are likely to carry anti-competitive effects within its territory[160].

Over years, the use of the doctrine of extraterritoriality has given rise to sovereignty issues. It was clear that a countries' assertion of its jurisdiction over practices conducted beyond its borders might be considered an infringement of another states' sovereignty and eventually a violation of public international law[161].

Nonetheless, this doctrine, notwithstanding its unilateral nature, has played an important role in fighting international cartels and other anti-competitive practices conducted by multinational firms.

At some point, it has become clear that the principle of absolute sovereignty is no longer compatible with the evolved and developed public international law and with free trade and open markets. Exceptions to this principle were after wards found inevitable and necessary. This has moved countries to take actions unilaterally.

USA was amongst the first countries to recognise the effects doctrine in this field in **Sisal Sales Corporation v United States of America case**[162]. The Supreme Court concluded that US competition law may be applied in relation to practices conducted within and outside the USA borders.

Both the U.S. and the EU competition authorities have been conducting investigations on international cartel activities for years. For instance, Microsoft and

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[159] Ibid., pp 84-85.
[160] Dabbah: **The Internationalisation of Antitrust Policy**, op. cit., pp 164-165.
[161] Ibid., p 160.
[162] Sisal Sales Corporation v United States of America (1927) 274 U.S. 268
Available at: Official website of the US Supreme Court Center
https://supreme.justia.com/cases/federal/us/274/268/

Google have been subjected to competition rules of several jurisdictions including USA and EU[163].

In the field of merger control, international mergers between car manufacturers, aluminium producers and other industries which were likely to produce anti-competitive effects in a number of countries were all subject to investigations by competition authorities of different jurisdictions[164].

European Courts supported the Commission's trend towards the application of EU competition rules over extraterritorial anti-competitive practices. One of the recent cases is the LG Electronic v. European Commission case[165] where the General Court upheld the Commission's decision on exerting an extraterritorial jurisdiction over an undertaking conducted outside the EU.

Case law of the Republic of South Africa affirmed also the extra-territorial application of the latter's Competition Act. The Competition Tribunal, the Competition Court of Appeal and the Supreme Court of the Republic have pronounced on this application in the ANSAC cases in accordance to Section 3(1) of the Competition Act[166].

ANSAC is an association of American soda ash producers that sells natural soda ash outside the United States of America. The alleged practice of price fixing and market allocation was conducted outside the territory of the Republic of South Africa. Nonetheless, it carried effects within the borders of the territory.

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[163] Refer to Section 1.1.3 of Part One of this Thesis.

[164] Whish and Bailey: op. cit., p 519.

[165] LG Electronics v European Commission (2015), Case T-91/13 EU:T:2015:609, 9th of September 2015.
Available at: official website on case law from the Court of Justice of the European Union http://curia.europa.eu/juris/document/document.jsf;jsessionid=96AA4168906EB48EC02E67B9213BE010?text=&docid=167150&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1186131

[166] Section 3(a) "This Act applies to all economic activity within, or having an effect within, the Republic…"

Accordingly, in American Natural Soda Ash Corporation and Another v Competition Commission Case[167], the Competition Tribunal held that the cartel behavior shall be challenged in accordance to the country's Competition Act. This position was recognized by the Competition Appeal Court and by the Supreme Court.

In an attempt to assess the doctrine of extraterritoriality in comparison with other means of cooperation, it has not been usually seen as a positive, effective and fit reaction to internationalisation of competition law. It can be seen from a perspective of distorting countries rather than bringing then closer together.

From one side, extraterritoriality undermines countries' incentives towards bilateralism or multilateralism as long as they are able of extending their jurisdiction independently towards the territories of other countries[168]. If they wanted to cooperate, they would cooperate merely to satisfy their own interests. In this sense, stronger countries would impose their strengths and conditions over weaker countries who find themselves forced to obey.

On the other side, the situation would be become much worse, if the concerned country opted for extraterritorial application of its competition provisions in an aggressive way whereby the other country would consider it as interference in its sovereignty. This would eventually amount to conflicts between countries and between their competition authorities[169].

Consequently, closer means of cooperation between countries is crucial.

2.2 Bilateralism (bilateral cooperation):

Bilateral cooperation represents cooperation between competition authorities of two countries in the course of implementing their domestic competition laws. It commonly takes the form of formal agreements[170]. It is a more developed and

[167] American Natural Soda Ash Corporation and Another v Competition Commission (2001) 49/CR/00, 30th of November, 2001.
Available at: http://www.saflii.org/za/cases/ZACT/2001/46.html
[168] Dabbah: **International and Comparative Competition Law**, op. cit., p 429.
[169] Ibid., pp 429-430.
[170] Ibid., pp 494-495.

advantageous approach than extraterritoriality. It has echoes around the world, and it has been adopted by many competition authorities.

Both USA and EU have been leading supporters of bilateral cooperation. Examples can be seen in the 1991 and 1998 agreements concluded between the EU and the USA[171].

Within this approach, different types of bilateral cooperation exist, namely negative comity cooperation and positive comity cooperation. Bilateral cooperation can also take the form of *de facto* cooperation whereby two competition authorities choose to cooperate without concluding any formal agreement.

2.2.1 Bilateral agreements with negative comity

This type of agreement aims at the coordination of concerned competition authorities through sharing non-confidential information, consultation on a regular basis in competition law related matters, assistance and coordination in their enforcement activities. Each competition authority takes into account the interests of the other one and notifies it whenever its enforcement activities might impact those interests. This is known as negative comity[172].

For instance, USA has concluded several agreements with other countries such as Germany[173], Australia[174] and Canada[175].

Some argue that these agreements tend to promote trade and investment between countries and enhance the enforcement of competition law globally. However, it should be noted that this type of agreement cannot be considered an ideal method for the proper settlement of transnational competition law cases due to the non-binding nature and the loose language of its provisions which would create ambiguity[176] and ease out evasion from cooperation.

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[171] Ibid., p 501.
[172] Ibid., pp 496-497.
[173] Mutual Cooperation Regarding Restrictive Business Practices -1976
[174] Cooperation on Antitrust Matters - 1982
[175] Memorandum of Understanding between Canada and the US as to Notification, consultation and Cooperation with Respect to the Application of National Antitrust Laws -1984
[176] Dabbah: **International and Comparative Competition Law**, op. cit., pp 497-498.

2.2.2 Bilateral agreements with positive comity

By virtue of positive comity, one party to the agreement (Competition Authority A) referred to as the "requesting party" requests another party (Competition Authority B) referred to as the "requested party" to address a particular anti-competitive behaviour occurring within the latter's territory but having effect on the interests of the requesting party[177].

A virtuous example[178] of an agreement with positive comity is the 1991 agreement between the EU and the USA on the *Application of Positive Comity Principles in the Application of their Competition Laws*[179], which was extended by another agreement on the 29th of May 1998[180].

In addition to several agreements concluded between the EU and other countries such as the "*Framework Agreement for commercial and economic cooperation between the EU and Canada*"[181] establishing principles of reciprocal notification and cross-border requests for enforcement action. By virtue of this Agreement, each party is required to take into account other party's interests, and information collected during the enforcement process are kept confidential.

Another example is the "*Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, of the one part,*

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[177] Ibid., p 498.

[178] OECD: **List of Fifteen Cooperation Agreements**, 2015.
Available at: https://www.oecd.org/daf/competition/competition-inventory-list-of-cooperation-agreements.pdf

[179] Text of the Agreement.
Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:21995A0427(01)&from=EN

[180] Decision of the Council and of the Commission concerning the conclusion of the Agreement between the European Communities and the Government of the United States of America on the application of positive comity principles in the enforcement of their competition laws
Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31998D0386&from=EN

[181] This Agreement had been signed on the 6th of July 1976 and entered into force on the 1st of October 1976.
Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:21976A0706(01)&from=EN

and the Republic of Lebanon, of the other part[182]" establishing an association between EU and its Member States and the Republic of Lebanon, allowing closer relations between the said countries in all areas and promoting cooperation in matters of mutual interest, etc.

Bilateral agreements with positive comity principle provide an effective alternative to countries depending on the doctrine of extraterritoriality.

However, it is worth mentioning that the use of these agreements should not be exaggerated and conducted without limitations due to the potential risks represented by the tendency of competition authorities not taking into account the effects of their decisions on the interests of other countries.

2.2.3 De facto use of positive comity

This type of cooperation represents a situation where a competent authority makes use of positive comity in the absence of a bilateral agreement between itself and other authorities[183].

Kodak/Fuji case (1998)[184] is a clear example of a *de facto* bilateral cooperation. The US Eastman Kodak alleged that it was incapable of entering the Japanese photographic and paper market due to the barriers of entry created by the Japanese Government and Fuji Photo Film Co.

The US Trade Representative (USTR) filed a complaint with the World Trade Organisation (WTO) arguing that the practices of the Japanese authorities and Fuji Photo Film Co amounted to unreasonable hindrances and limitations. The USTR also referred the claims to the Japan Federal Trade Commission (JFTC); the Japanese competition authority.

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[182] This Agreement has been effective as of the 1st of April, 2006.
Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22006A0530(01)&from=EN

[183] Dabbah, Maher: **International and Comparative Competition Law**, op. cit., p 499.

[184] WikiLeaks Document Release: Congressional Research Service Report 98-442, **The Kodak-Fuji Film Case at the WTO and the Openness of Japan's Film Market**, Dick K. Nanto, Economics Division Updated on May 8, 1998.
Available at: https://file.wikileaks.org/file/crs/98-442.pdf

The USTR then communicated with the JFTC in order to address this matter and assist the latter along with the US Department of Justice in order to remedy this anti-competitive practice. Use of positive comity was made knowingly that, at that period, no bilateral agreement had been concluded between the countries of the two competition authorities.

The two competition authorities reached conflicting decisions where the JFTC concluded that Fuji's behaviour was not in breach of Japan's Anti-Monopoly Law and that the entry to the relevant market, whether to foreign or local firms, was not constrained.

Despite their differences over the case, USA and Japan entered in 1999 into a cooperation agreement for the enforcement of their competition laws[185].

Indeed, bilateral cooperation promoted greater uniformity in the outcomes of competition law enforcement by different competition authorities. This uniformity enhances competition authorities to consult each other whenever they deal with competition issues of an international character, eases fundamental harmonisation and procedural convergence of competition laws of different countries, enhances efficiency in the enforcement of competition laws, and most importantly, it reduces conflicts between countries as it is a good alternative to extraterritorial approach.

It is worth mentioning that the Organisation for Economic Cooperation and Development (OECD) have played a considerable role in this regard through the publication of several guidance and recommendations such as the 1995 Recommendation of the Council Concerning Cooperation between Member Countries on Anti-Competitive Practices Affecting International Trade[186].

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[185] Agreement between the Government of Japan and the Government of the United States of America concerning Cooperation on Anticompetitive Activities (October 1999)

[186] Text of the Recommendation
Available at: https://www.oecd.org/daf/competition/21570317.pdf

By giving countries access to each other's markets through the elimination of tariffs and taxes for example, they would witness an increase in trade and economic growth.

However, the above three types of bilateral cooperation are subject to certain limitations due to the following reasons[187]:

– *Confidentiality concerns* where the exchange of confidential information related to companies under investigation by concerned competition authorities may be restricted. Recently, several competition authorities, mainly in cross-border mergers, have encouraged companies to waive their rights to confidentiality.

– *Complexity concerns* in which building a network of bilateral agreements with other competition authorities require long process and substantial resources. Presently, the number of bilateral agreements (especially those with positive comity) is not very considerable. This is due to the fact that one competition authority has to take into account considerations of a huge number of competition authorities around the world that have different cultures, concerns, policies, etc.

Thus, practically speaking, adopting the bilateral approach exclusively does not suffice in remedying all competition law concerns.

Accordingly, multilateral strategy would be the rescuing tool.

2.3 Multilateralism (Multilateral Cooperation):

Multilateral cooperation represents a collective approach by countries (or competition authorities) in order to address any issues related to competition law enforcement globally.

The multilateral strategy is the most promising among other strategies in the field of internationalisation of competition law and the one which has not yet been accomplished successfully to date.

[187] Dabbah: **International and Comparative Competition Law**, op. cit., pp 517-522.

Multilateralism can be classified into two forms; binding obligations and non-binding obligations.

2.3.1 Binding obligations

Multilateralism through binding obligations takes the form of concluding binding multilateral agreements, drafting international competition law codes and establishing international competition laws with independent institutional authorities for handling competition law cases.

In the past, it was thought that multilateral cooperation takes the form of binding international agreements only. This was the fact behind the several efforts exerted right after Second World War, especially the Draft Havana Charter initiative and the determination to create an International Trade Organisation at that period.

These efforts have led later on in the 1990s to the introduction of competition policy within the World Trade Organization (WTO). A prominent effort in this respect was the attempt in 1993, by a private group of 12 scholars and experts called the Munich Group, to agree on an international competition law code[188].

The code included substantive principles and minimum standards which had been planned to be incorporated into the WTO and to be applied by national competition authorities, in addition to a permanent international competition law panel for disputes' settlement[189].

The loophole of the proposed code was its failure to take into account the political matters accompanied with the implementation of competition laws. Some countries such as the USA considered the creation of an autonomous competition authority a violation to the state's sovereignty. Consequently, this was the paramount reason behind the failure of the code. Other reasons existed such as the difficulties in enforcement this draft code would encounter without amendments being made by countries to their national competition systems.

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[188] Ibid., pp 542-548.

[189] Gifford, Daniel: **The Draft International Antitrust Code Proposed at Munich: Good Intentions Gone Away**, University of Minnesota Law School, 1996
Available at:
https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1326&context=faculty_articles

Another proposal was also formulated calling for the establishment of a Global Antitrust Competition Law Framework (GAF). GAF presented several recommendations and guidelines to be used in the course of internationalisation of competition law through binding commitments. Some of GAF's eight recommendations aimed at binding countries to enact competition laws suitable with their own conditions and cultures. This is to be done with the assistance of countries of advanced systems of competition law.

Furthermore, GAF was also expected to smooth cooperation procedures among competition authorities and to enhance the use of positive and negative comities. After a period of 5-10 years as of GAF's creation, a dispute resolution mechanism was supposed to be created in order to settle any disputes arising between countries in the course of cooperation.

In addition to the aforementioned efforts, a number of other proposals had been arisen with time, but they also failed. These failures induced what's-so-called convergence and harmonisation between competition laws of different countries.

2.3.2 Non-binding Obligations

Multilateralism through non-binding obligations takes the form of multilateral mechanisms presented within a smooth institutional framework. The multilateral mechanisms include guidelines, best practices and recommendations, and they are formed by several international organisations active in the field such as the International Competition Network (ICN), the Organization for Economic Cooperation and Development (OECD), and the United Nations Conference on Trade and Development (UNCTAD)[190].

In the 1990s, it became largely acknowledged that countries were not ready to bind themselves by substantive provisions of competition laws under public international law despite being prepared to cooperate in the field globally. As a response, the Asia-Pacific Economic Cooperation Forum (APEC)[191] particularly

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[190] Ibid., p 541.

[191] APEC is a forum for 21 Pacific Rim member economies that promotes free trade throughout the Asia-Pacific region.

argued in favour of proceeding with some convergence and harmonisation of competition laws of different countries without any binding commitments.

Apart from APEC, the International Competition Policy Advisory Committee (ICPAC) was set up in November 1997 to study about new tools and concepts that are required to address competition law issues arising globally.

As a result to the above, multilateral cooperation through non-binding commitments has been adopted by the successful International Competition Network (ICN) since 2001. After wards, the ICN has become the principal champion of what is widely referred to as multilateral cooperation based on soft-law instruments. Therefore, countries apply the established principles and recommendations voluntarily and without any binding commitments.

Indeed, some countries have started to abide by international competition law rules, and they have thus proved that mere recommendations and non-binding principles are much preferable and are widely accepted than binding ones.

It is worth mentioning that harmonization and convergence through non-binding commitments, bilateral cooperation, and informal consultations between competition authorities, in addition to the assistance provided by countries of developed competition laws to countries in transition, have played an important role in identifying differences between developed competition laws (such as those of the EU and US) and developing countries. They have also clarified what strength points developed systems have compared to developing systems.

Convergence and harmonisation founded on non-binding recommendations have several advantages.

– Most importantly, they do not threaten countries since they do not result in interference with their national sovereignty.

– They create equity between countries since this approach takes into account the special conditions of developed countries.

– Through non-binding recommendations, each country has the opportunity to implement internationally agreed principles in accordance to their own circumstances.

On the other hand, it is worth mentioning that convergence and harmonisation are not smoothly achieved. This approach requires slow and lengthy procedures. Even within the EU, cooperation between its countries has been in progress for almost sixty years and has not yet been totally accomplished. Practically speaking, each country understands and enforces the law from its own perspective depending on its own policies and tactics. Also, the non-binding nature of this type of cooperation creates some difficulties in application.

Nonetheless, the ICN proved the success of internationalisation of competition law through non-binding commitments implemented by developed and new competition authorities. The ICN also provided a number of recommendations and principles applicable in the area of merger control, many of which have been applied by several competition authorities including EU, USA, Germany, Canada, Brazil and Australia.

Among all efforts exerted in the process of multilateralism, achievements of the ICN have created prosperous soft convergence whereby competition laws have been widely applied and trusted by a considerable number of developing and developed countries[192].

As illustrated above, it appears that the development of trade and the opening of markets into each other have given rise to cross-border transactions with effects going beyond country's territory. This type of transactions has led to a flounder between countries where each country seeks its own interests disregarding the impact of its conducts on other countries.

Therefore, it has been necessary for countries to cooperate together in order to minimize the risks of these transactions on their markets and economy. The dominant form of cooperation between countries in competition law cases is bilateral cooperation which has the potential power to minimize conflicts between countries[193].

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[192] Ibid., pp 573-577.
[193] Dabbah: **The Internationalisation of Antitrust Policy**, op. cit., p. 244.

However, the number of bilateral agreements is still minimal. In addition to that, binding multilateral agreements have not yet existed. Therefore, international organisations have played a considerable role in this regard.

Part two of this thesis tries to demonstrate particular pros and cons of some international efforts exerted by two main organisations, shedding the light on the situation of Lebanon in this context.

Part Two: International Efforts in the Field of Competition Law

Starting from the mid-twentieth century, international trade has significantly increased as a result of globalization, open markets and complex interrelationships between countries. Companies around the world have been expanding their businesses by whatsoever means in order to increase their profit margins.

Import and export, extraterritorial investment, e-commerce, computer networking, intellectual property rights and international banking services have all contributed in this wide expansion of international trade.

International trade has a tremendous importance to all countries involved as it speeds up economic flourishment, enhances exchange of interests, cultures and expertise, opens markets to each other, provides wider range of products and services, improves employment and facilitates businesses.

However, international trade on the other side may sometimes be disadvantageous to particular countries that are still in the promotion phase to respond to globalisation and open markets' requirements.

Accordingly, international trade regulation has become the center attention of several international trade systems such as the General Agreement on Tariffs and Trade (GATT), World Trade Organisation (WTO), Organisation for Economic Cooperation and Development (OECD) and United Nations Conference on Trade and Development (UNCTAD).

It should not be totally admitted that international bodies have fairly regulated international trade among countries of different economies, policies, cultures and monetary capabilities.

Lebanon, for example, has been since long in the transition phase of adopting a comprehensive competition law despite its tremendous need for competition regulation.

Chapter I: Role of International Bodies in the Field of Competition Law

A general overview of the role of several significant international bodies in the field of competition law shall be illustrated in this chapter shedding lights on each one's improvements and drawbacks.

Section 1: The General Agreement on Tariffs and Trade (GATT) System

The General Agreement on Tariffs and Trade (GATT)[194] was the initial worldwide multilateral free trade agreement signed in Geneva on the 30th of October, 1947 by 23[195] countries[196]. However, three of these countries refused to ratify it; China, Lebanon and Syria. It came into force on the 1st of January, 1948.

On 1994, the number of Contracting Parties increased to 123 countries. The main purpose of this agreement was to organize and manage international trade among several countries after World War II just like the idea of the establishment of the United Nations, International Monetary Fund and the Word Bank[197].

GATT took effect from the 1st of January, 1947 until the 1st of January 1995; when it was updated to include further obligations and to be changed into the World Trade Organization (WTO).

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[194] Text of the Agreement
Available at: Official Website of the World Trade Organization https://www.wto.org/english/docs_e/legal_e/gatt47.pdf

[195] Australia, Belgium, Brazil, Burma (now Myanmar), Canada, Ceylon, Chile, China, Cuba, Czechoslovakia (now Czech Republic and Slovakia), France, India, Lebanon, Luxembourg, Netherlands, New Zealand, Norway, Pakistan, Southern Rhodesia (now Zimbabwe), Syria, South Africa, the United Kingdom and the United States.

[196] Goldstein, Judith, and Rivers, Douglas, and Tomz, Michail: **Institutions in International Relations: Understanding the Effects of the GATT and the WTO on World Trade**, Volume 61, issue 1, Cambridge University Press, January 2007, p. 40.
Available at: Official website of the Cambridge University Press.

[197] World Trade Organisation: **The GATT years: from Havana to Marrakesh**.
Available at: Official Website of the World Trade Organisation.

Although GATT had not been an international organization from the legal perspective such as the International Monetary Fund or the World Bank, it *de facto* gained, for almost half a century, the status of a non-permanent international organization operating through a permanent secretariat based in Geneva. However, the acceding States of GATT were not referred to as "Member States" but as "Contracting Parties".

One of the most important works of the GATT's Secretariat was to oversee the rounds of negotiations on tariffs and the rules and procedures governing international trade among the acceding States. The number of GATT rounds reached eight, including the last important Uruguay round, which ended its tasks on the 15th of December 1994 converting GATT into the WTO.

GATT's main objective was to enable its Member States, mainly through reducing trade barriers and removing tariffs, to access the markets of each other in a way that maintains domestic production, and to balance the flow and stability of international trade. GATT's aim at that time was to remove harmful trade protection that had sent global trade down 65 percent during the Great Depression[198].

Achieving this aim, GATT stipulated several essential principles to be followed by all Contracting Parties. The major debatable principles were: the principle of reciprocity whereby all Parties must be treated equally when it comes to tariffs[199], and the principle of preferential trade treatment for the benefit of developing countries. GATT gave these countries a special protection within its provisions and in particular in Article XXXVI.

Lebanon had joined the GATT on the 29th of June 1948, and later on demanded to withdraw from it on the 27th of September 1950 in line with the conditions of the Arab boycott of Israel[200].

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[198] The Great Depression was a worldwide economic depression that lasted 10 years. It started on October 24, 1929 when traders had sold 12.9 million shares of stock in one day, triple the usual amount. Over the next four days, stock prices fell 23 percent in the stock market crash of 1929.

[199] Ossa, Ralph: **A 'New Trade' Theory of GATT/WTO Negotiations**, Economic Research and Statistics Division at the World Trade Organisation, 2nd of February, 2009, p. 2.
Available at: Official Website of the World Trade Organisation.

[200] بسما، دلال **من الـغات إلى منظمة التجارة الدولية**، مجلة الدفاع الوطني، العدد ٣٧، تموز ٢٠٠١

However, GATT was in practice established to satisfy trade needs of developed countries while those of developing countries were ignored. The principle of reciprocity was not applicable due to the huge differences existing between countries of different economic structure, nature, policies, social background, etc.

Reduced tariffs impede certain national industries, contributing to high unemployment in those industries[201]. For example, if developed country A that has high industrial and marketing power of product X reduced its tariff on the import of a similar product, a developing country B has to apply the principle of reciprocity and reduce its tariff on product X imported to its market from country A.

That situation would constitute unfair competition to country B that already has limited number of entities producing and selling the same product. The market of Country B would not be able to absorb the entry of products that are similar to its national ones. Therefore, it would be forced to reduce the price of its national products in order to remain at a competitive rate with the imported ones.

It should be noted that the provisions in favor of developing countries stipulated within the GATT were provisions of a recommendation nature, not of a binding one. Developed countries therefore found no obligation to apply the principles of GATT and mainly the principle of reciprocity for the benefit of developing countries.

GATT also lacked an enforcement authority to ensure compliance of its member countries with its international code of conduct. It also lacked an international dispute mechanism to resolve disputes arising out of international trade. Disputes at the very early stages of the GATT were referred to the Chairman of the GATT Council. Later on, disputes were referred to working groups comprised of representatives of all interested contracting parties including the parties to the dispute. These working parties, who adopt reports by consensus decisions, were replaced by panels comprised of three or five independent experts. Those panels used to draft reports and refer them

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Available at: Official website of the Lebanese Army
https://www.lebarmy.gov.lb/ar/content/من- الـغات-إلى-منظمة-التجارة-الدولية

[201] Amadio, Kimberly: **GATT, Its Purpose, History, with Pros and Cons**, The Balance, 22nd of September, 2018.
Available at: The Balance; an American digital media company
https://www.thebalance.com/gatt-purpose-history-pros-cons-3305578

to the GATT Council for approval. The weakness of this dispute mechanism is that the referral of any dispute to the panel requires consensus of the GATT Council i.e. all contracting parties to the GATT shall approve the decision to become binding[202].

And most importantly, GATT had acted in favor of the industrial countries, and it consequently lost confidence and trust among the developing ones.

In addition to the above, because two-thirds of international trade occurred among rich countries, the general negotiations have witnessed severe crisis caused by the presence of a large number of representatives of developing countries, whose trade accounts for very little of the volume of international trade.

Despite being a mere set of rules with no constituent basis, GATT attained considerable achievements as to the liberalization of international trade, improvement of world productivity and reduction of tariffs. Nonetheless, GATT suffered great weaknesses since it had not been able to achieve the interests of developing countries, to address the trade of services and intellectual property rights, and to manage with international changes.

Therefore, GATT through its Uruguay Round (1986-1994) was converted into the WTO in order to complete the mission of GATT in accommodation with the changes in the international arena and to achieve what GATT failed to achieve.

Section 2: World Trade Organisation: *the successor organization that inherited GATT*

World Trade Organization (WTO) is an intergovernmental organization based in Geneva Switzerland, and its main purpose is to regulate and liberalize trade among its member countries. With the Marrakesh Agreement, WTO was founded on the 1st of January, 1995 during the negotiations of the Uruguay Round (1986-1994) replacing its predecessor GATT[203]. Several countries have entered the WTO reaching 164

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[202] World Trade Organisation: **Historic development of the WTO dispute settlement system.** Available at: Official website of the World Trade Organisation

[203] Dabbah, **International and Comparative Competition Law**, op. cit., p. 120.

countries as of the 29th of July, 2016. Lebanon is an acceding party to the WTO, but it is not yet a member[204].

WTO is a forum for member governments to negotiate and conclude trade agreements called WTO agreements[205], to settle trade disputes arising between them, to share expertise, and to assist each other in tackling trade obstacles faced by any of them. The WTO also operates a system of trade rules in order to regulate trade and protect consumers. WTO rules, except those of anti-dumping, have not focused on practices of private firms[206].

WTO agreements[207] cover goods, services and intellectual property rights in contrast to GATT whose framework encompassed only goods. Many agreements have been negotiated under the Doha Development Agenda, launched by WTO trade ministers in Doha, Qatar, in November 2001. The WTO also provides a legal and institutional framework for the execution and supervision of these agreements and a dispute settlement mechanism for the settlement of disputes arising out of the interpretation and implementation of the agreements.

Every WTO agreement has to ensure a series of WTO principles including most importantly:

a. *Principle of non-discrimination*[208] which is divided into two sub-principles[209]; most favored nation (MFN) and national treatment. Under the MFN[210] principle,

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[204] World Trade Organisation: **Member and Observers**
Available at: Official Website of the World Trade Organisation www.wto.org
[205] Such as the General Agreement on Trade in Services GATS
[206] Dabbah: **The Internationalisation of Antitrust Policy**, op. cit., p. 251.
[207] The WTO recently compromises 16 multilateral agreements (to which all WTO members are parties) and two different plurilateral agreements (to which only some WTO members are parties). The most well-known three agreements are: The General Agreement on Tariffs and Trade (GATT), the General Agreement on Trade in Services (GATS), and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).
[208] Included in the GATT, GATS and TRIPS
[209] Hoekman Bernard, Mattoo Aaditya, and English Philip: **Development, Trade and the WTO, A Handbook**, The World Bank, 2002.
Available at: Official website of the World Bank
http://documents.worldbank.org/curated/en/805981468763835259/pdf/297990018213149971x.pdf
[210] This principle was stipulated in Article 1 of the GATT, and it had been intended to mean that any advantage, immunity or other preferential treatment (relating to tariffs or other charges of any

when member country A grants trade benefits to Country B, Country A is obliged to grant the same trade benefits to all remaining member countries.

Under the national treatment principle, a member country has to treat foreign goods, services or items of intellectual property as same as it treats its domestic products, services and items of intellectual property.

b. *Binding and Enforceable Commitments*[211] whereby a member country commits itself to implement and maintain the agreement it concludes with another country. This would enhance transparency and predictability.

c. *Principle of Transparency*[212] under which member countries have to publish their trade regulations, share information and the like.

Below is a brief discussion on certain facilities afforded by the WTO or practiced by member governments which have contributed in the development of international trade. However, they have also prejudiced markets and economies of certain countries, mainly developing ones.

a. Risks associated with the MFN principle:

Theoretically, the MFN principle seems advantageous for developing countries for various reasons. It first grants them access to larger markets whereby they can export their domestic products freely and smoothly, reduces the cost of their exports since trade barriers are at the lowest level, and enhances their productivity power and quality in order to compete with the productivity of larger markets. Accordingly, MFN principle would increase their exports, and it would enhance their economic growth.

However, one must not absolutely accept the advantages of this principle because of its negative reflection that might in some situations prevail over its positive ones.

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kind imposed on imports or exports or for the transfer of international payments to finance exports or imports, or to the rules and procedures relating to international trade) granted by a Contracting Party to a producer originating in any other Contracting State or a Contracting Party, shall be immediately and unconditionally granted to all other Contracting States of the GATT. This principle is also found in Article 2 of the General Agreement on Trade in Services (GATS) and in Article 4 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)

[211] Hoekman, Mattoo and English op. cit., p. 43.

[212] Ibid., pp. 43-44.

When developing countries are granted trade facilities such as low tariffs on their exports, they are required under the MFN principle to grant the same facilities to foreign imports.

As a result of this principle, domestic industries might get highly affected and sometimes might wipe up along with the smooth entry of competing products of very competitive prices. The same applies to the services' sectors.

Although the WTO exempted developing countries from the MFN principle by allowing them to receive a preferential treatment by what's-so-called provisions of special and differential treatment, the extent of which developed countries, under the non-binding nature of this exemption, are implementing this preferential treatment is highly debatable.

Accordingly, this has been a serious reason why certain developing countries have not yet entered the WTO.

For example, Lebanon has not entered into the General Agreement on Trade in Services (GATS)[213] for several reasons. Lebanon's Commitment with the GATS would require the Lebanese government to remove and/or amend certain measures the Lebanese government imposes in order to protect its domestic services' markets. Entering into the GATS would most likely lead by each member country to impose its demands as it deems fit to its own interests.

Under the Lebanese law, some professional services such as the practice of law and pharmacy shall solely be practiced in Lebanon by Lebanese individuals[214]. While in engineering for example, the Lebanese law does not treat all foreigners equally and this is a violation to the MFN principle. For example, according to law number 636 organizing the Engineering profession[215] in Lebanon, a non-Arab engineer has to be graduated from engineering school since at least ten years in order to practice engineering in Lebanon. However, this condition is not required from an Arab engineer.

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[213] A treaty of the WTO entered into force in January 1995 as a result of the Uruguay Round negotiations.

[214] بسما، دلال مصدر ذكر سابقاً

[215] Text of the Law
Available at: Official website of the Order of Engineers and Architects www.oea.org.lb

It should be noted, however, that in both cases, the foreign engineer has to be domiciled in Lebanon and his country's legislation shall treat the Lebanese engineers similarly.

In addition to that, the establishment of a company in Lebanon requires, under the Lebanese Commercial Code, the preservation of a minimum number of capital shares for a Lebanese shareholder and a minimum number of directors (majority) to be of the Lebanese nationality[216].

Lebanon is protecting its local competition from foreign unfair practices that the Lebanese services' markets might encounter as a result of the GATS.

However, opening services' markets shall also be examined from the consumer's perspective especially that allowing foreigners, subject to flexible conditions, to provide services in Lebanon would decrease fees on one side and provide diversity in services and expertise on the other side. The decision whether to ratify GATS needs further analysis, negotiations and governmental improvements in order to minimize potential risks as much as possible.

b. Government Subsidies and WTO

A subsidy is a grant of financial benefit (cash payment, loan guarantee, tax reduction or the like) given by the government directly to businesses[217] in order to encourage their production and consumption capabilities.

In the absence of tariffs, sometimes governments subsidize their local industries in order to boost their domestic businesses into exporting products for unbelievably cheap prices and sometimes for cheaper than the price they charge in their own country. This constitutes what's-so-called "dumping"; an unfair practice which might impede competition and lead by companies of the imported markets to wipe up.

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[216] Article 144 of the Lebanese Code of Commerce, Legislative Decree number 304 dated on the 24th of December, 1942.

[217] Amadeo, Kimberly: Government Subsidies (Farm, Oil, Export, Etc), the Balance, 15th of August, 2018.
Available at: https://www.thebalance.com/government-subsidies-definition-farm-oil-export-etc-3305788

Under the WTO Agreement on Subsidies and Countervailing Measures, most types of subsidies are allowed, although subject to certain rules. However, two types of subsidies are explicitly prohibited[218].

A subsidy can lead to a structural competitive imbalance into the market for a product which is unrelated to the natural comparative advantages of the different countries producing that product. When this happens, it would be impossible for the unsubsidized product to compete with the subsidized one.

Governments use subsidies for various reasons. One reason is market failure, i.e. when the market lacks sufficient quantity or quality of a certain product than the economically optimal level. Other hazardous reasons are imposing downward pressure on other countries and unfairly competing with domestic producers of several developing countries.

In USA and EU, the largest government subsidies are granted to farmers. Developing countries were seriously harmed by the practices of exports' subsidiaries abolishing their local industries and agriculture, impeding competition in their markets, leading to unemployment and eliminating creativity, innovation and development.

These practices were mostly injurious to the African agriculture and industry. For example, 47 billion dollars' subsidies had been paid to rich country producers in the past years which formed barriers for 15 million cotton farmers across West Africa who were trying to obtain a living. This practice also led by 5 million of the world's poorest farming families to leave their businesses and live in deeper poverty[219].

The WTO through its 1994 Anti-Dumping Agreement entails the aggrieved country to take necessary action to protect its domestic industry from the dumping

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[218] Article 3 of the Agreement
Text of the Agreement is available on the Official Website of the World Trade Organisation www.wto.org

[219] Aurelie Walker: **The WTO has failed developing nations**, The Guardian, 4th of November, 2011.
Available at: https://amp.theguardian.com/global-development/poverty-matters/2011/nov/14/wto-fails-developing-countries

practices of another country. These actions are represented by the imposition of countervailing duties or import tariffs. The prejudiced country would in-turn be entailed the right to revert to the WTO dispute settlement body (DSB), if it considered that the measure taken by the aggrieved country against it violates the Agreement.

Despite that, African countries have not been able to take necessary actions, and they have not even been capable up to date of using the WTO Dispute Resolution Body (DRB) due to their weak economy and internal economic and political issues[220].

WTO failed for twenty years to prevent prohibited export's subsidies since its establishment in 1995 and until 2015 where the US and EU agreed to stop resisting. All WTO members agreed to abolish export subsidies for agriculture during the 10th Ministerial Conference in Nairobi on December 2015[221].

This reveals WTO's dereliction in imposing binding obligations against prohibited subsidies and proper measures and sanctions against infringers.

c. Dispute Settlement Body

WTO has also worked on providing an active Dispute Settlement Body (DSB), attached to the General Council, for resolving trade disputes arising between member governments whenever any of them finds out that another member is violating a WTO rule or refrained from implementing a WTO commitment that it has made within the WTO[222]. Since the establishment of the DSB on 1995, over 500 disputes have been brought to the WTO and over 350 rulings have been issued[223].

One of the important and critical situations where a member country may highly refer to the DSB against another member country is the case of subsidies granted by

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220 Rasheed Khan, Humayun: **Concerns of developing countries in dispute settlement mechanism of WTO**, International Journal of Law, Volume 3; Issue 6; November 2017; p. 95. Available at: www.lawjournals.org/download/236/3-6-78-133.pdf

221 Strubenhoff, Heinz: **The WTO's decision to end agricultural export subsidies is good news for farmers and consumers,** Brookings, 8th of February, 2016.
Available at: https://www.brookings.edu/blog/future-development/2016/02/08/the-wtos-decision-to-end-agricultural-export-subsidies-is-good-news-for-farmers-and-consumers/

222 Dabbah: **International and Comparative Competition Law**, op. cit., p. 122.

223 World Trade Organisation: **Dispute Settlement**
Available at: Official Website of the WTO www.wto.org

a member government to enhance its domestic industry disregarding its impact on other markets of other countries.

WTO's points of failure lie also in its Dispute Settlement Body that has been for long bias against developing countries or in another word ruling mainly for the interests of the United States of America. It is obvious with clear evidence that the DSB is disadvantageous to developing countries despite the latter's involvement, in plenty of cases before the DSB as plaintiffs (except South Africa), defendants or third parties.

Apart from the system's high litigation costs, instances of bias and failure in implementation constitutes major and critical drawbacks of the system that is supposed to be acting fairly for the benefit of the aggrieved party against the infringing party not the other way around.

This is not to neglect the success the system achieved over the years. Until March 2017, 524 cases in more than 228 different subject matters from WTO members have been brought before the system; the fact that reveals the confidence and trust of member countries towards the system. Nonetheless, several weaknesses, as referred to above, lie within the system.

It is important in this respect to reflect the above-mentioned US dominance in one of the important cases EC-Bananas case[224] whereby the US Government, acting at the behest of Chiquita Brand International[225], filed a complaint before the DSB alleging that an EU arrangement giving banana producers from former colonies in the Caribbean special access to European markets had infringed free trade rules.

However, only seven per cent of Europe's bananas come from the Caribbean while US multinationals which control Latin American's banana crop hold three quarters of the EU market and the US itself does not export bananas to Europe.

Nonetheless, US won in 1997 and accordingly EU was ruled to alter its rules.

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[224] EC-Bananas case, WTO Case (1996) DS32/R.
Available at: Official website of the European Commission ec.europa.eu

[225] Chiquita Brands International Sàrl, formerly known as Chiquita Brands International Inc., is a Swiss producer and distributor of bananas and other produce founded on 1870, Boston, Massachusetts, United States.

Despite that, the ruling did not totally satisfy the US and the latter then imposed a retaliatory range of 100 per cent import duties on European products.

It is noteworthy to mention here that the former European colonies in the Caribbean/Latin America and the poor farmers were also negatively affected by the ruling of the panel despite that they had not been direct parties in the case. This case shows how a success in a complaint before the Dispute DSB became worthless for developing countries, whenever the parties on the other side are powerful and developed[226].

An important potential challenge confronted by some developing countries might be their fear towards developed member countries due to their special political and economic relationships. Also, a developing country might not dare to bring an action against a country that is providing it with development or financial assistance. On the other hand, developing countries might be threatened by dominating countries if they did not comply with their rules. One example of threatening practices includes cutting off economic and banking relations.

Finally, it is worth mentioning that private parties are excluded from the right of bringing actions before the DSB. Their only chance to do so is by persuading their governments to launch an action before the DSB on their behalf. This of course is not easy to happen especially for small entities. In Kodak vs Fuji case[227], the American technology company Eastman Kodak had gone through intensive lobbying for a period of time with the Government in Washington, until 1995 where the USA complained to the WTO against the alleged anticompetitive practices of the Japanese authorities and the Japanese Fuji Photo Film Ltd. company.

d. WTO and competition law

At first, it should be mentioned that there has been no emergence of an international completion law framework within the WTO despite the several attempts

[226] Humayun: op. cit., p. 96.
[227] The case will be discussed below.

in this respect by the EU and by the Working Group on the Interaction between Trade and Competition known as the Singapore Group[228] since its creation in 1996[229].

Nonetheless, competition law concepts appear in several WTO agreements and cases presented before the WTO. However, whether the WTO is well equipped to handle competition law cases is highly arguable.

In the aforementioned Kodak vs Fuji case[230], USA on behalf of Kodak alleged before the WTO that this latter was not able to access the photographic film and paper market in Japan due to anticompetitive practices of the Japanese Fujifilm company, such as resale price maintenance with its national distributors (vertical restraints). The Dispute Resolution Panel (DRP) of the WTO, deciding to take a 'broader view' on measures of Article XXIII:1(b)[231] of GATT, ruled in favor of Fujifilm.

On the one hand, the DRP decision proved the possibility of dealing with competition policy issues within the WTO system. However, on the other hand, the interpretation and strict application of Article XXIII:1(b) of the GATT has carried negative effects. The request of strict evidence by the panel has discouraged other countries to raise an action before the WTO panel and has indirectly allowed governments to take indirect and hard-to-prove anti-competitive behaviors against other governments.

Accordingly, the WTO dispute resolution system has not yet been capable of effectively handling competition law cases. WTO should conduct intensive studies and provide guidelines for the proper interpretation and application of its Articles.

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[228] Dabbah: **International and Comparative Competition Law**, op. cit., p. 123.

[229] Numerous reports and studies were published in this regard and these can be found online on the WTO's website.

[230] Kodak v Fuji, WTO case (1998) 98442 E
Available at: Official website of the World Trade Organisation www.wto.org

[231] Article XXIII "Nullification or Impairment
1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of
(a) the failure of another contracting party to carry out its obligations under this Agreement, or
(b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or…"

Being unable to handle competition law cases contravenes with the free international trade policies of the WTO, because governments and private entities seek high profits by expanding their businesses and overcoming fair competition policies.

Today, there is a big number of dominating firms owning ginormous number of brands distributed across markets creating an obstacle for smaller entities to compete them. Nestlé S.A.[232], a Swiss transnational food and drink company, owns over 8400 brands distributed in over 80 countries. Procter and Gamble (P&G)[233], an American corporation, owns numerous brands dominating several industries such as dishwashing, menstrual hygiene, haircare, healthcare, household, laundry detergents, skincare, etc.

Further examples of dominating companies are Coca Cola, Kraft, Johnson&Johnson, Pepsico, Unilever, MARS and Kelloges. This is in addition to the dominance of digital advertising services' companies such as Google, Facebook and Amazon.

It is clear now how international trade and the opening of markets have enlarged the scope of businesses all over the world and how large companies have thus acquired market power and dominance. Also, the detrimental impact of these dominating companies on local industries and production, and on small and medium-sized entities is obvious.

Accordingly, competition law is the regulator of international trade and it should be given a significant attention within the WTO in order to lessen the detrimental effects caused by large companies on competition.

Despite the aforementioned drawbacks, among others, of the WTO and its predecessor GATT, deciding not to take an active part on the international arena would cause an economic and commercial isolation for the inactive countries.

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[232] Dominating a series of industries such as beverages (such as Nespresso, Nescafé, San Pellegrino and Perrier), yogurt (such as Acti-V and ActiPlus), cereals such as Cerelac and Nestlé Corn Flakes), Frozen food (such as Häagen-Dazs), chocolate (such as Kit Katt and Smarties), health care nutrition (such as Fibersource), Infant food (such as Cérélac and Neslac).

[233] Among the brands P&G owns: Ariel, Bounty, Douny, Tide, Bonux, Always, Braun, Crest, Gillette, Head&Shoulders, Pantene, Pampers, Pringles, etc.

Membership gives the member country the right to Most Favoured Nation (MFN) treatment in respect of its exports to other Member States and the benefits it is granted from mutual tariff reductions, as well as assistance in resolving trade disputes and avoidance of bilateral agreements.

Opening markets and engaging into commitments with other countries would enhance economic and banking activities, introduce new resources, products and services into the domestic market, reduce unemployment and most importantly create potential opportunities for the entry of new industries into the market. In addition to that, foreign companies would establish subsidiaries in other member countries which would also have a positive reflection on the economy in all aspects.

But in fact, these features are not easily attained at least in the short term.

Section 3: EU – Canada CETA Agreement: the creation of Investment Court System

Alternatively, the European Union is working on establishing an investment court that will function more like the WTO tribunal system moving away from the traditional arbitration system to a court system, with permanent, qualified, impartial and independent judges, strict conflict-of-interest rules, public and transparent proceedings, in addition to an appeal system. The European Union and Canada concluded an agreement called a 2016 Comprehensive Economic and Trade Agreement known as CETA trade agreement.

On the 20th of March 2018, the Council of the European Union permitted the Commission to negotiate, on behalf of the EU, a convention establishing a multilateral court for the settlement of investment disputes[234].

The EU-Canada CETA Agreement was signed on the 30th of October 2016 after its approval by the Council of the European Union, and it was then ratified by Canada

[234] Council of the European Union: **Multilateral investment court: Council gives mandate to the Commission to open negotiations**, press release 144/18, 20th of March, 2018
Available at: Official website of the Council of the European Union http://www.consilium.europa.eu/en/press/press-releases/2018/03/20/multilateral-investment-court-council-gives-mandate-to-the-commission-to-open-negotiations/.

on the 16th of May 2017. On the 21st of September 2017, CETA entered into force provisionally until its ratification by all European countries.

The aim of this Agreement is to strengthen the economic relationship between Canada and the European countries, to create an expanded and secure market for their goods and services through the reduction or elimination of barriers to trade and investment, and to liberalise trade as stipulated within its Articles[235], etc.

One of the important benefits of CETA on Canada is that the latter would relieve a lot of pressure and dependency from the US since Canada highly relies on its exportation to the USA. Coordination with EU countries through CETA would put Canadian economy in a safe mode in cases of US recession or US Dollars recession.

Of course, CETA would enhance productivity and creativity within the Canadian market as long as trade doors between EU countries and Canada would be opened, with reference that the European products differ from those of the American; thus enhancing productivity of new products in Canada.

According to a CETA overview presented by the Canadian government, the CETA agreement would eliminate 98 percent of all tariffs on products traded between Canada and the EU. For instance, CETA would remove the 8 percent tariff on Canadian maple syrup exported to EU countries, making it more competitive in the European market[236].

On the other hand, the potential disadvantages that this agreement carries shall not be denied. The main problem is that as the result of open markets, European companies would be permitted to bid on Canadian governmental contracts smoothly without any surplus costs. Consequently, this would impede competition within the Canadian market and Canadian companies might get defeated by the domination of big European companies.

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[235] Text of the Agreement:
Available at: http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf

[236] CTV News: **How the trade agreement with the EU could benefit Canada**, 27th of October, 2016.

Available at: Official website of the CTV television network across Canada www.ctvnews.ca

CETA agreement, which does not enter into force without its ratification by all European countries, was highly objected by Walloons[237] of Belgium for two ultimate reasons; its impact on their agricultural sector and their investor-state dispute resolution system. Walloons were worried about their agriculture sector where farmers and producers might get unfairly competed by Canadian farmers. They also argued that multinational corporations would have a say before the European governments and sometimes they, especially US multinationals who have offices within Canada, might sue them before a special court overstepping the national court whenever the latter imposes any regulation which those corporations are dissatisfied with.

Walloons were concerned about the Investment Court System (ICS) despite the latter's considerable departure from the arbitration mechanism that was associated with the existing Investor-State Dispute Settlement[238] (ISDS). Walloons wanted the preservation of the role of domestic courts within the Agreement. They believed that in most cases, tribunals would act for the benefit of the stronger over the weaker[239].

Nonetheless, the Wallonia regional government voted yes[240] for the CETA deal after its clear objection on October 2016. But prior to their approval, their demand claiming the European Court of Justice to determine the legality and compatibility of the ICS with the EU laws was accepted. This was considered a victory for the Wallonia.

The ICS that CETA would establish has proved to be controversial and thus the European Commission has decided that the ICS shall not come into force directly. EU

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[237] Walloons are the French-speaking natives of southern Belgium and have significant influence in the Belgian government. The Walloons have an effective veto over the Agreement because Belgium's constitution entitles them that power over the country's government.

[238] Investor-State Dispute Settlement is a system through which investors can sue countries for alleged discriminatory activated and is usually connected with international arbitration.

[239] The Star: **5 reasons Belgium's Walloons won't sign the Canada-EU trade pact**, Canadian Press, 24th of October, 2016.
Available at: Official website the Star Press https://www.thestar.com/business/2016/10/24/five-facts-about-belgiums-walloons-and-the-canada-eu-free-trade-deal.html

[240] The Guardian: **Belgian politicians drop opposition to EU-Canada trade deal**, 27th of October, 2016.
Available at: https://www.theguardian.com/world/2016/oct/27/belgium-reaches-deal-with-wallonia-over-eu-canada-trade-agreement

member countries insisted that national parliaments should have a say on features of the Agreement that have an impact on national competences.

Previous experiences in this respect, the dominancy of strong countries and the impact multinationals have on the dispute settlement body, drives countries even developed ones to raise questions and doubts whenever an international agreement is proposed to them. The reason behind this is that such agreements are always accompanied by potential risks and drawbacks whereby a party to the agreement or a third party has to pay the bill.

Despite the long journey that this Agreement has gone through and despite the challenges it has been facing, EU and Canadian authorities feel optimistic about it.

In this regard, it is important to mention that this matter requires a comprehensive comparison between the potential pros and cons of any agreement brought before countries and a deep examination of the repercussions of the agreement on the political and economic domestic affairs of concerned countries, their sovereignty and their consumers' welfare.

It is also essential to take into consideration that the era of technology and the rapid increase of globalisation dictates the necessity of opening markets to each other.

This is a double-edged sword and the CETA Agreement which is considered to be a revolution to the dispute settlement mechanism from arbitration oriented to tribunals headed by judges, deserves a try as long as it appears that its benefits overlap its negative impacts.

Chapter II: The Situation of Lebanon

With the transformation and development of the Lebanese economy, complexity of economic processes, the opening of local and international markets into each other, and in-line with the requirements of the international community in the field of international trade, a draft of competition law has been submitted to the Lebanese Parliament on the 24th of January, 2007 by the Lebanese Council of Ministries through Decree number 1021. It was then published in the Official Gazette on the 7th of December of the same year.

However, until today, this draft of law has not yet been enacted due to numerous reasons, some of which shall be illustrated below.

Section 1: Competition Draft of Law, 2007[241]

Article 1 of the aforementioned draft of law stipulates the aim of this latter; promoting competition by preventing acts of monopolization and anti-competitive agreements within the market, in addition to preventing activities which would have the impact of exploiting a dominant position within the market. Accordingly, consumer's rights would be guaranteed, economic efficiency would be achieved and production, innovation and technological progress would be promoted.

The draft of law encompasses all Lebanese or non-Lebanese, natural or moral persons of economic businesses, including, institutions of Electricity of Lebanon, the Water Authority, and the Casino of Lebanon, in addition to the wholly or partly state-owned entities such as the Middle East Airlines company.

This is considered to be one of the most important provisions of the draft of law as it affects all persons regardless of their nature and power.

This draft of law also encompasses all Lebanese activities of production, sale and services, and even activities that are carried out outside the Lebanese market, but have effects within its territories.

[241] Full text, Appendix 1

It also identifies and defines activities that are considered to be infringing and/or limiting competition within the market such as activities of economic concentration and governmental subsidies.

It defines economic concentration as a process whereby two or more parties who were previously independent merge or consolidate their work, fully or partly, through the purchase, sale or through joint projects or joint management.

Economic concentration is also referred to the activity through which one or more parties who manage one company, manage another one, or any other activity which has an impact on the professional decisions of another party whether by purchasing shares, bonds, assets or by obtaining a definite voting power in bodies entrusted with the power of making decisions, or by any other means.

Under the competition draft of law, an independent competition board is established to handle competition affairs. The draft of law also specifies the board's duties and obligations and mainly its investigating duty in any matter raising competition concerns. This board shall be subject to the supervision of the Ministry of Economy and Commerce and of the delayed surveillance of the Court of Audit.

In spite of this draft of law that is composed of 43 Articles, it has not yet witnessed its enactment by the Lebanese Parliament.

This raises the following problematics:

1) What are the obstacles facing the enactment of the Lebanese competition draft of law?

2) What legal provisions protect competition in the Lebanese market in the absence of an integrated competition law?

Section 2: The main obstacles facing the enactment of the Lebanese competition draft of law

Two main obstacles hinder any efforts that have been exerted towards the enactment of an effective competition law.

2.1 Legislative Decree number 34 of the 5th of August 1967 on Commercial Representation[242]:

The most important obstacle facing the enactment of the 2007 competition draft law is the Legislative Decree number 34 issued on the 5th of August 1967 on Commercial Representation. This Decree entitles foreign suppliers the right to import their products into the Lebanese market and sell them through Lebanese commercial representatives.

This Decree, by virtue of Article 1 paragraph 2, also entitles the Lebanese representative the right to claim sole representation or sole distributorship of a particular product.

Exclusive commercial representation contracts have proven to have the effect of monopolising the market and limiting competition in the relevant market. In Lebanon, these contracts have almost covered all sectors of the market; clothing, electrical tools, cars and most importantly pharmaceutical and medical equipment and products.

Based on the negative repercussions of this law on remaining traders, especially small and medium-sized ones who are prohibited from importing and marketing products subject to exclusive commercial representation contracts, a draft of law was introduced on 2002 by the Decree number 7484 for the purpose of enhancing competition and lowering prices for the benefit of the consumer. Unfortunately, this draft of law has not been enacted by the Lebanese legislator up to date due to conflicting political statuses.

One of the most important risks accompanied by the commercial representation Decree is the right entitled to the Lebanese commercial agent to be the sole representative or sole distributor of several uncompetitive products. Accordingly, this Decree has permitted the right for powerful and big corporations to control several markets by granting them the right to obtain exclusivity for a big chain of brands.

The critical impact of exclusivity reaches its peak when it targets unreplaceable products; those of which customers are unable to revert to another cheaper product with the same characteristics.

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[242] Full text, Appendix 2.

A clear example is pharmaceutical products and mainly those prescribed by doctors and pharmacists who in many instances prescribe a particular medicine for commercial purposes and primarily for implementing agreements and achieving mutual interests with sole and exclusive representatives or distributors i.e. win-to-win agreements. This is with notice that patients usually obey by their doctors' and pharmacists' instructions and prescriptions.

SADCO SAL[243] for example, is the sole and exclusive distributor of Deanxit® coated tablet; mostly purchased medicine for anxiety, depression and asthenia. SADCO SAL entered on the 15th of June 1999 into a sole distributorship agreement with H. Lundbeck A/S; the Denmark manufacturer of Deanxit®.

SADCO SAL is also the sole and exclusive distributor of numerous Panadol products such as normal Panadol, Joint Panadol, Panadol Cold & Flu all in one, solpadeine, Panadol Night and Panadol Elxir.

SADCO SAL has also entered into other sole distributorship and representation agreements with around 15 other pharmaceutical foreign companies, and therefore obtaining exclusivity for a big chain of pharmaceutical daily used products.

Also, L.A.S ABELA FRERES SAL[244], for example, is the sole and exclusive distributor of AUGMENTIN®; an antibiotic medicine which is mostly purchased to treat several infections caused by bacteria, such as ear infections, bronchitis, urinary tract infections, and skin infections.

L.A.S ABELA FRERES SAL entered on the 21st of August 2003 into a sole distributorship agreement with GlaxoSmithKline plc; a British pharmaceutical company headquartered in Brantford, London, manufacturer of AUGMENTIN®.

L.A.S ABELA FRERES SAL has also entered into other sole distributorship and representation agreements with around 25 other pharmaceutical foreign companies.

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[243] SADCO SAL is a Lebanese joint stock company registered before the Commercial Registrar of Beirut under the number /36680/.

[244] L.A.S ABELA FRERES SAL is a Lebanese joint stock company registered before the Commercial Registrar of Mount Lebanon under the number /66054/.

Nonetheless, the president of the Lebanese Pharmaceutical Importers and Wholesalers Association Mr. Armand Phares declared, under the call to abolish exclusive agencies[245], that the government does not protect commercial representation in the pharmaceutical and food sector despite that Phares prefers this exclusivity for the reason that it limits responsibility and guarantees quality and accountability.

Commenting on the statement of Mr. Phares, the above-mentioned two examples represent two of out several companies in Lebanon concluding exclusive distributorship or representation agreements with foreign pharmaceutical companies which contradicts Mr. Phares' allegation that pharmaceutical products are outside the context of exclusivity.

Furthermore, the President of Beirut Traders Association pointed out, under calls to cancel exclusive agencies, that traders do not control prices and that monopolisation do not exist within the Lebanese market. He also pointed out that competition exists within the sector (intra sector) and not within the same brand (intra brand).

Owners of exclusive agencies consider that exclusivity protects consumers from the illegal importation of products, and that exclusive agents can follow up with the mother company regarding any defects in any imported product. They also consider that mother companies control these agencies and guarantee the well importation and marketing of their products; the matter which is not attained by ordinary traders[246].

To a certain extent, their defence makes sense especially in the absence of sufficient governmental supervision over traders and over their imported products.

Indeed, many traders import products by virtue of illegal means, evade customs and taxes, evade inspection and bribe custom employees. Many also counterfeit particular brands; most of which are capable of escaping judicial recourse.

The defect lies within the governmental institutions which are incapable of combating corruption.

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[245] On 2002, the Board of Ministries submitted a draft of law by virtue of Decree number 7484 to the Parliament for the abolishment of exclusive agencies.

[246] سماحة، مايا: **الوكالات الحصرية... الاحتكار يرفع الأسعار**، جريدة الاخبار ٢٦ أيلول ٢٠١٧
Available at: https://al-akhbar.com/Finance_Markets/238201

On the other side, the abolishment of exclusive agencies and the allowance of small and medium-sized entities to enter into the Lebanese market would eventually adjust prices and optimize quality. This is because every player in the market would be motivated to provide his best products/services with the least competitive prices in order to attract customers and attain high profits.

However, the abolishment of this law requires extensive and intensive preventive measures and comprehensive control over all imported products. All concerned entities such as the Consumer Protection Department of the Ministry of Economy, the Ministry of Health, the Ministry of Agriculture, the Customs, the Internal Security Forces, the Commercial and Industrial Property Protection Division, and the Municipalities shall effectively inspect all imported products and ensure their legality. They shall also ensure their proper storage and marketing. Courts shall also take strict measures and decisions against infringers, counterfeiters, smugglers and tax evaders.

Therefore, it is not possible to call for the abolishment of the Legislative Decree number 34 of the 5th of August 1967 in the meantime under the current situation.

2.2 Public Sector's Monopoly:

Although two decades have elapsed since the end of the Lebanese civil war, Lebanon still suffers from substandard infrastructure of the principal public services. Electricity has still not been continuously supplied, internet access has still been slow and telecommunication services have still been week when compared with other countries' services. This is with notice that the Lebanese government charges very high tariffs incompatible with the services provided.

This primarily relates to the public sector's monopoly over the primary public services[247]. This entails the government to be the sole player in the market and accordingly to set tariffs at its own discretion without taking into account social considerations.

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[247] Credit Libanais SAL: **Public – Private Partnership in Lebanon**, Economic Research Unit, November, 2011.
Available at: https://www.creditlibanais.com.lb/Content/uploads/Public-Private_Partnership_Report.pdf

Therefore, the need for the involvement of the private sector in the public sector was realized as the rescuer of the prevailing situation. At first, privatization or what's-so-called denationalization was first introduced. Privatization entitles the government the right to sell in whole or in part the public sectors against an agreed upon consideration[248].

The Telecommunication Regulation Law number 431 dated on the 22nd of July, 2002, entitles the government the right to sell not more than forty percent of the shares of the Liban Telecom[249] to an investor in the private sector by way of an international bid[250].

The Regulation of the Electricity Sector Law number 462 dated on the 2nd of September, 2002, stipulates that one or more joint-stock companies (known as privatised companies) may be incorporated in order to carry out all or part of the production and distribution activities. This law calls for the privatisation of generation and distribution of electricity through the sale of not more than forty percent of the shares of the above-mentioned companies[251].

The Regulation of the Civil Aviation Sector Law number 481 dated on the 12th of December 2002, entitles the government also the right to incorporate a joint stock company called Beirut International Airport Company to provide all related services (airport, telecommunication, air aviation, etc). This law calls also for the privatization of this sector in whole or in part in accordance with this regulation and with the Privatization Law number 228 dated on the 31st of May, 2000[252].

The privatization concept has been introduced as a mean to enhance competition in the market, to tackle crippling debt burden, to protect consumer interests, and to attract private investment, and many others.

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[248] Ibid.

[249] Liban Telecom is a joint stock company to be established by virtue of Article of Law number 431/2002 whose subject is to regulate the telecommunication sector.

[250] Article 46 of the Law.

[251] Articles 4 and 5 of the Law.

[252] Article 14 of the Regulation of the Civil Aviation Sector.

However, political parties have entered into a long-lasting debate about the privatization of public sectors, and they have not reached a unified decision regarding it to date[253].

Indeed, it is not an easy decision to take for several reasons:

a. First, the government would lose a considerable percentage of its revenues because these sectors constitute primary resources of revenues.

b. Second, the Lebanese government does not have the full capabilities of competing with private big corporations who would eventually attract customers in what's-so-ever means for attaining high profits.

c. Third, the government is incapable of maximising the enterprises' value within the current inappropriate market and economic conditions.

d. Fourth, in case of whole purchase of the sector, all risks and responsibilities of providing the services will be reserved solely to the private sector. The government's role shall be restricted to overall supervision.

e. Last but not least, many public employees would lose their jobs due to the involvement of private firms into the public sectors.

This led to the introduction of the Public-Private Partnership (PPP). The PPP is a long-term agreement concluded between the public sector as the first party and a private corporation as the second party.

By virtue of this agreement, the ownership of the sector remains reserved for the government while the private corporation regulates this sector through several means; management, design and building, maintenance, operation, financing, etc. Furthermore, the type, range and price of the provided services are determined by the government within the PPP.

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[253] Credit Libanais SAL: op., cit.

By virtue of this partnership, the private entity does not acquire any shares in the sector, and it is not entitled for profits. It rather obtains management fees[254].

One of the important features of the PPP compared to the privatisation concept is that both parties share the risks and responsibilities of providing the services to the customer.

Another important characteristic of the PPP is that the private corporation manages the supply of the service, monitors and supervises the sector. This would accordingly limit corruption. PPP would also reactivate investments in Lebanon and attain a good economic situation.

The aforementioned regulations related to the regulation of the telecommunication, electricity and civil aviation sectors entitle the government the right to conclude PPP agreements.

The introduction of the PPP in Lebanon has received wide acceptance and it has been materialized by the submission of the draft PPP law before the council of ministers in July 2010 for discussion and approval.

For example, the Lebanese mobile telecommunication sector is totally owned by the government; Alfa[255] and Touch[256]. These mobile telecommunication networks have been operated by two private companies[257] in return of a management fee while all revenues revert to the government.

The prime responsibility lies within the government which has to contract with appropriate private corporations capable of managing the concerned sector efficiently by offering transparent tenders in accordance with the public procurement provisions and international best practices.

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[254] Ibid.
[255] Mobile Interim Company 1 (MIC1)
[256] Mobile Interim Company 2 (MIC2)
[257] Zein of Kuwait operating Touch and Orascom Telecom Media & Technology of Egypt operating Alfa Telecom since 2009

It should be noted that the legal framework for public procurement in Lebanon constitutes of a number of scattered laws and regulations related to public procurement such as[258]:

a. Public Accounting Decree Law number 14969 dated on the 30th of December 1963.

b. Law number 2866 of Decree number 2866 dated on the 16th of December 1959 related to the bidding system.

c. Decree number 3688 dated on the 15th of January 1966 related to the prequalification of contractors.

   In addition to:

d. Privatization Law number 228 dated on the 31st of May, 2000. By virtue of this law, the High Council for Privatization is granted the authority to tender projects under concession or similar modern structures. However, it does not provide for a specific tendering mechanism.

e. Regulation of the Telecommunication Sector law number 431 dated on the 22nd of July, 2002.

f. Regulation of the Electricity Sector number 462 dated on the 2nd of September, 2002.

g. Regulation of the Civil Aviation Sector number 481 dated on the 12th of December 2012.

h. Law number 48 dated on 7th of September 2017, related to the regulation of the partnership between the private and public sectors (PPP).

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[258] United Nations Development Program (UNDP): **Review of the Public Procurement Legal Framework in Lebanon, Possibilities for Incorporating Environmental and Social Sustainability Criteria**, 2013, pp 20-23.
Available at: https://civilsociety-centre.org/sites/default/files/resources/APD%20Eng_report.pdf

i. In addition to many other laws, legislative decrees, regulations, principles, etc.

Furthermore, protecting the environment and maintaining social and economic interests shall constitute an essential part in public procurement and PPP. The Lebanese legislator has enacted various laws related to the protection of the environment[259] and related to social and Labor matters[260].

Also, Lebanon adopted and signed several environmental, humanitarian and economic conventions.

Notwithstanding the huge number of legislations and conventions, public procurement has not been conducted as appropriate and in line with international principles for several reasons, some of which are:

a. The absence of a unified public procurement law constitutes a major obstacle for a transparent and a lawful tender. With the presence of many scattered laws, many flaws and contradictions rise. This would affect transparency and accountability. This is with notice that the Lebanese government drafted a public procurement law and another law allowing the establishment of a public procurement management agency. Unfortunately, it has not yet been enacted to date[261].

b. Non-implementation of the existing laws turns them into dead laws with no effect. For example, disabled people have still been suffering from unemployment or low wages[262]. Also, employment has still been undertaken, in many situations, based on considerations not related to intelligence and experience

c. Non-adoption of social and environmental criteria in industries would lead to contracting with disqualified contractors.

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[259] Such as Environmental Protection Framework Law No. 444 dated on the 29th of July,2002, Law No. 64 dated 12/08/1988 related to the protection of the environment against pollution from hazardous wastes and materials and Decision No. 52/1 dated 29/08/1996 which determines the specifications of air, water and soil pollution reduction, UNDP: op. cit., pp 24-26.

[260] Such as Labor Law dated on the 23rd of September, 1946 and its amendments, Social Security Law dated 26/9/1963 and its amendments, and Rights of People with Disabilities Law 220/2000 issued on 29/05/2000, ibid, p 26.

[261] Ibid., p 31.

[262] Ibid., p 38.

d. Insufficient monitoring and supervision of public procurement by one competent administration makes the modernization process more problematic.

Accordingly, public procurement system in Lebanon lacks transparency, clear and effective regulations and fair considerations of bids. This entails to what's-so-called bid-rigging whereby a commercial contract is promised to one party nevertheless appearing that the contract is open for other parties to present a bid.

Bidders can eliminate competition in public procurement in many ways. For instance, the government submits a non-competitive bid that is too high and is unlikely to be accepted or includes clauses that are unacceptable to the buyer.

The government may neglect the application of the competent laws and regulations and choose contractors not full-filling all the requirements and conditions. For instance, Illicit Enrichment Law number 154 dated on the 25th of November, 1999 considered that illicit enrichment occurs when an employee, judge or any other person in charge of a public mandate, obtains an enrichment by way of bribery, exploitation of its job or by any other illicit means[263]. It considers it a criminal act.

An example of illicit enrichment is when an employee, in charge of the supervision over the work of the workers on a governmental construction project, exploits them and requests them to conduct work for their personal benefits. In this way, the government is paying full wages to the workers while the latter are not fully committed to the government.

However, we find out that this law has not been applied. It has also been intended not to be applied through Article 10 which requires any plaintiff to present a bank guarantee of twenty-five million Lebanese Liras before submitting his complaint. If the indicted employee was not been found caught guilty of the alleged illicit enrichment acts, the plaintiff would lose the bank guarantee.

For the above reasons, among others, the High Council for Privatization has worked since 2007 on a law regulating PPPs where it defines a proper and detailed

[263] Article 1 of the Law. With notice that there are other forms of illicit enrichment stipulated within the law.

tendering mechanism for PPP projects in accordance with international best practices and in line with principles of transparency and professionalism.

On the 7th of September 2017, Law number 48[264] related to the regulation of the partnership between the private and public sectors (PPPs) was enacted.

All PPPs concluded by virtue of the telecommunication, electricity and civil aviation regulations shall be subject to law number 48/2017. However, municipalities are not obliged to subject their projects to this law.

Four characteristics, among others, distinguish the PPP Law and make it of high importance:

a. By virtue of Article IV of this law, the decision-making power is vested in three authorities; the Council of Ministers, the High Council for Privatization and PPP[265] and a project committee[266]. The involvement of several parties in the bidding process would enhance transparency and would limit corruption.

b. By virtue of Article VII, tender documents and the PPP agreement shall be made public. Public invitations, including the prequalification criteria that suit the size and nature of the PPP, shall be published in local and international press. This would also enhance transparency and would limit corruption. It also gives opportunities for a wide range of interested parties to join the tender without discrimination; thus enabling competition and combating practices of bid-rigging.

c. By virtue of Article XI, PPP projects shall be monitored by the public entity at two phases; construction and operational.

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[264] Full text, Appendix 3

[265] High Council for Privatization and PPP replaces the High Council of Privatization by virtue of Article III of PPP Law.

[266] Formed by the Council of Ministers, chaired by the Secretary General of the Council and includes one representative of the Concerned Minister, one representative of the Ministry of Finance and a chairman of the sector's regulatory body where it exists. This Committee shall appoint financial, legal and technical consultants (Article IV section 3).

i. *Constructional phase*: as of the date of signature of the PPP agreement, the public entity shall appoint a project management office which includes, in addition to its members, specialized experts and local and/or international consultants. Its mission is to receive and evaluate the reports submitted by the project company related to the execution of its work.

Furthermore, a steering committee shall be appointed by the public entity consisted of representatives of the concerned minister (in case the public entity was other than the state), the Council's Secretariat General, the Ministry of Finance and the regulatory body of the sector, if it exists.

Its mission is to review the monitory reports submitted by the project management office, to issue the necessary instructions, and to submit reports to the public entity and the concerned minister (in case the public entity was other than the state) and to the Council's Secretariat General.

Accordingly, the public entity, upon the approval of the concerned minister, takes appropriate and necessary measures and decisions based on the aforementioned reports of both the project management office and the steering committee.

ii. *Operational phase:* another project management office shall be appointed for this phase which shall also include, in addition to its members, a representative of the regulatory body of the sector (if it exists), specialized experts and local and/or international consultants.

The mission of this office is to monitor the operations of the project company with regards to the output, level and quality of the services, to propose measures to remedy any breach of the project company's obligations, to impose sanctions over the latter in case of breach, to manage arising dispute', and to ensure the general compliance of the project company with the PPP agreement.

The project management office shall submit the monitoring reports to the concerned minister (in case the public entity was other than the state) and to the Council's Secretariat General for their feedback. These reports are referred to the Council of Ministers, if necessary.

d. By virtue of Article XII, the Council's Secretariat General shall train the employees of the public sector in order to be qualified for studying and managing PPP projects effectively.

Furthermore, the aforementioned Secretariat shall submit to the High Council for Privatization annual reports proposing recommendations for the development of the PPP projects. This Council will then refer them to the Council of Ministers.

Based on these articles, if implemented correctly and effectively, public procurement would become transparent, competitive and fair. Accordingly, the most qualified and impartial project company would win the tender and run out the concerned public service. Monitoring and accountability would motivate the project company to provide the services in the best quality and to implement all of its obligations stipulated within the PPP agreement. Therefore, the concerned public sector would flourish and meet consumer's satisfaction in terms of price and quality.

In addition to the above, concerned parties of implementing the PPP law shall maintain the proper implementation of all relevant laws such law environmental and labor laws.

Any complaints filed by any person shall be examined and resolved without delay in the benefit of the public interests and consumers' welfare.

It is worth mentioning also that a major obligation is vested within political parties who have to unite their purposes for the interest of the country and to take the appropriate decisions on time.

Section 3 Existing provisions regulating competition in the Lebanese market

The Lebanese legislator has been concerned since long in regulating Lebanese markets, protecting the consumer, and prosecuting unfair competition activities.

Competition law directly or indirectly related provisions are distributed among many scattered laws, regulations and legislative decrees.

3.1 Consumer Protection Law number 659 dated on the 4th of February, 2005

This law aims at attaining a modern consumer protection framework in Lebanon that maintains consumers' interests. It was amended by law number 265 dated on the 15th of April, 2014.

It indirectly relates to competition by virtue of a number of articles such as article 48 that prohibits acts of counterfeiting and Article 64 where the Directorate of Consumer Protection, in coordination with the official and private bodies, is obliged to monitor prices in the market.

This law revolves around consumers' welfare, and it does not regulate the relationship between the market players themselves[267].

It does not sufficiently regulate competition in the market, but it is rather concerned with providing consumers with products of good quality and price. It prohibits all actions of fraud, deception and exploitation of consumers, and it imposes criminal sanctions over infringers.

However, this Law does not deal directly with practices that are likely to affect competition in the market between market players, such as mergers and acquisitions.

3.1 Lebanese Criminal Law: Legislative Decree number 340 issued on the 1st of March, 1943.

The Lebanese Criminal Law, under Section XI, deals with commercial crimes. Chapter four of this section deals with fraudulent transactions. Article 677 till Article 683 punish the usage of illegal and fraudulent measurement tools and acts of fraud in the quantity or in the nature of the product sold. By virtue of these provisions, the defendant shall be punished by imprisonment up to two years and by a fine up to Six Hundred Thousand Lebanese Liras.

[267] Article 1 of the Consumer Protection law number 659/2005

Furthermore, Article 684 of the said law punishes acts of impeding sales in auction by imprisonment up to six months and by a fine up to One Million Lebanese Liras.

Unfair competition acts are also punishable under the Lebanese Criminal Law from Article 685 till Article 688.

Article 685 imposes sanctions for any attempt to form a trust or any other similar monopolising activity. This Article is vague and general. It does not stipulate a particular threshold for determining which acts constitute unfair competition.

The public prosecutor is authorized to investigate in the infringement disregarding the value of the transaction. However, referring the matter of assessing which transactions are considered to be infringing the market to the complete discretion of the public prosecutor without specifying clear monetary thresholds is a very critical matter.

Also, the public prosecutor is not bound by a specific time limit to review and decide on the case. This would accordingly keep cases pending for years without an appropriate action.

Acts of counterfeiting intellectual property rights are also punishable under the aforementioned Law from Article 701 till Article 721.

Article 714, for example, criminalizes acts of transferring customers in bad faith and by fraudulent means[268]. This Article entitles the Court absolute discretion to prescribe unfair competition acts.

The Penal Court of Appeal of Mount Lebanon issued on the 26th of February, 2015, decision number 87/2015 which ratified the judgment of the Court of the First Instance that had convicted the defendant for committing the two misdemeanours stipulated in Articles 703 and 714 of the Criminal Law.

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[268] Article 714: Any person who, by means of fraud or false allegations or by indirect reference and in bad faith, transfer clients of others to him, shall be punished based on the injurer’s complaint by a file ranging between One Hundred Thousand and Five Hundred Thousand Lebanese Liras.

The Court of the First Instance ordered the defendant to pay a fine of One Hundred Thousand Lebanese Liras in addition to an amount of Five Hundred Thousand Lebanese Liras as compensation for the plaintiff.

The Penal Court of Appeal held that similarity between the two trademarks CESARE CANALI and CANALI exists which would confuse customers between the two products. The adopted criterion is whether the act in question has the effect of confusing a customer of average care and attention.

Article 730 of the Criminal law does not apply solely on practices of imitation of marks, but its application extends to cover practices of selling or offering products of imitated marks as long as these practices have the effect of deceiving the purchaser.

Therefore, the Court of Appeal held that the sale of products of a trademark similar to another trademark is considered an act of unfair competition, and it is accordingly subject to Article 714 of the Criminal Law.

In another decision for the Penal Court of Appeal of Mount Lebanon issued on the 20th of April, 2016 number 134/2016, ratified the decision of the Court of the First instance that had convicted the defendant for committing the two misdemeanours stipulated in Articles 702 and 714 of the Criminal Law.

The Court of the First Instance ordered the defendant to pay a fine of One Million Lebanese Liras and an amount of Six Million Lebanese Liras as compensation for the plaintiff. The defendant had imported products from China related to the plaintiff, and he then sold them in low prices (Article 702 of the Criminal Law). He therefore transferred customers to him by fraudulent means (Article 714 of the Criminal Law).

It is worth noting that the Lebanese Criminal Law does not effectively meet the objective of maintaining competition in the Lebanese markets for several reasons, some of which are:

a) The Articles related to unfair competition practices are insufficient, old and incompatible with the rapid development of economic transactions and with the expansion of the scope of illegal commercial practices.

b) These Articles have not been updated to keep up with economic development and the opening of markets into each other.

c) The crimes covered by the said articles are of misdemeanour nature and they are punishable by low fines and very short-term imprisonment. Accordingly, these Articles are not considered to be a deterrent for infringers.

d) The Articles are applicable after or during the commitment of the crimes. However, Article 7 of the competition draft of law obliges every person who is intending to conduct a transaction of economic concentration reaching 40% of a particular market share to notify the competition authority and obtain its prior approval. Therefore, this article provides, in advance, market and consumer protection.

e) The application of the said Articles is fragile. This is apart from the slow and long-lasting judicial procedures in Lebanon.

f) Also, Judges in Lebanon are not professionally qualified to inspect and examine market practices and economic considerations.

3.3 Legislative Decree number 73 dated on the 9th of September, 1983 related to the possession, trade and sale of goods, materials and crops:

This law relates to the possession, trade and sale of goods, materials and crops. It was amended by Law number 72 dated on the 24th of July, 1991 and then by Law number 490 dated on the 15th of February, 1996.

By virtue of this Decree, the Minister of Economy and Trade is entitled the right, under Article 6, to set the maximum services' fees and products' prices, in addition to the determination of the profit percentages. The said Minister establishes for that purpose special committees consisting of professionals and experts.

In regards to the products whose prices and profit percentages have not been set by the Minister in accordance to Article 6 mentioned above, this Decree prohibits the sale of these products in prices exceeding double of their costs.

By virtue of this Decree, the legislator prohibits all activities that have the effect of limiting competition in the products' and services' markets. Article 14 of the

Decree specifically prohibits cartels and other agreements that would lead to the limitation of competition, to an artificial increase in prices or to the prevention of reduction of prices.

A cartel in accordance to Article 14 is:

a. Any agreement or conglomerate aimed at reducing competition in the production, purchase, import or export of goods, materials and crops which would facilitate their artificial increase in price or prevent reduction of these prices.

b. Any agreement or conglomerate dealing with services aiming at reducing competition in the performance of these services, facilitating their artificial increase in fees or preventing the reduction of these fees.

c. Any work aimed at the collection or concealment of materials, goods or crops in order to raise their value, or aimed at closing their offices and repositories for illicit reasons in order to generate profit; which is not a natural consequence of the supply and demand rule.

The competent authorities of interdicting infractions, for the purposes of this Decree, are employees of the Customer Protection Directorate and members of the Judicial Control appointed for this mission. The interdicted infractions are then transferred to the competent penal courts.

By virtue of Article 34 of the aforementioned Decree, an infringer of Article 14 shall be sentenced to a fine and imprisonment[269].

This is a weak legal prevention for the simple reason that, in practice, it is not an easy and practical task to prove, in the absence of efficient guidelines and sufficient market studies, which agreements would lead to an "artificial" increase in price or to "prevention" in reducing prices. Neither clear definition nor fixed benchmark exists for defining and detecting such behaviors.

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[269] Any person who contravenes the provisions of Articles 14 and 16 of this Legislative Decree shall be liable to a fine of five thousand to fifty thousand Lira (this fine shall be multiplied by 200 times the minimum and maximum by Law Number 72 of 24/7/1991 and shall be increased ten times the minimum and maximum by Law Number 490 of 15/2/1996) and imprisonment from ten days to three months or one of these two penalties. The penalty shall be doubled in case of repetition.

Furthermore, competent authorities for interdicting infractions would lack professionalism and experience. This is apart from the wide spread corruption that would protect infringers.

Accordingly, a strict and independent authority shall be established for the proper monitoring, interdiction, examination and prosecution of infringing transactions.

3.4 Resolution number 2385 of 1924 on Commercial and Industrial Property Rights:

Unfair competition activities are also punishable under Resolution number 2385 of 1924 on Commercial and Industrial Property Rights by virtue of Articles 97 and 98.

Article 97 considers the following as acts of unfair competition:

a. Any violation of this Resolution in which one of the necessary requirements for the application of the sanctions provided for in Section 6 below is missing.

b. Any act subject to the free jurisdiction of courts and determined to be unfair competition.

This provision reserved absolute discretion for the court to prescribe the concerned act as an unfair competition act based on ethical and factual basis and principles of integrity and honesty imposed by commercial practices.

For example, in a decision number 109/2011 issued on the 5th of July, 2011 by the Court of the First Instance in Keserwan-Lebanon, the Court held that the criterion for assessing the illegality of competition, is considerations of integrity and ethics imposed by commercial practices. It also held that bad faith is not a condition for constituting an unfair competition act.

By virtue of Article 98, acts of unfair competition may only be subject to legal proceedings for cessation of the unlawful act and for seeking compensation for the damages incurred; except where such acts are considered violations subject to penalties under criminal codes or under the provisions of this Resolution.

For example, in decision number 83 issued on the 5th of November, 1970 by the Court of Cassation, the Court affirmed the decisions of both the Court of Appeal and

the Court of the First Instance that obliged the defendant Lebanese company to stop using the trademark that is similar to the trademark of a French company. The Court in its finding applied Article 97 and 98 of the aforementioned Resolution.

Section 6 of this Resolution determines cases of unfair competition such as:

a. Acts which cause damage to the rights of patent owners. This constitutes imitation crime. The provisions related to these acts were cancelled. Law number 240 issued on the 7th of August, 2008 regulates patents and imposes sanctions for imitating them.

By virtue of Article 42 of this Law, the infringer is punishable by a fine ranging between Five Million and Fifty Million Lebanese Liras and by imprisonment for a duration ranging between three months and three years or by any of these penalties.

b. Imitation acts of trademarks or the use of filed trademarks before the Ministry of Economy and Trade without the prior consent of its owner and acts of selling or offering for sale products with imitated trademarks or with trademarks similar to other ones with the intention to deceive the purchaser. These acts are punishable by a fine and/or imprisonment in accordance to Article 701 till Article 714 of the Criminal Law.

This is with notice that secondary penalties are also imposed, including: seizure and damage of the products in question, denial of civil rights, publication of the judgment, in addition to compensation for the injured party.

However, if the committed acts appear to lack a criminal character, the infringer shall revert to civil courts in order to take appropriate actions towards infringers and to be granted fair compensation for the damages incurred.

This Resolution regulates the registration of intellectual property rights and grants them legal protection against infringers. But again, this protection is insufficient, outdated and incompatible with economic developments.

And most importantly, the protection granted by virtue of this Law is centred on owners of intellectual property rights. It does not deal directly with anti-competitive activities which would have the effect of impeding competition in the market.

3.5 Code of Obligations and Contracts[270]:

Lebanese courts also refer to the general provisions of the Code of Obligations and Contracts and in particular to Articles 122, 123 and 124.

By virtue of the aforementioned articles, restitution shall be paid to sufferers of illegal acts whether it was committed deliberately or not.

Articles 259 to 264 entitle sufferers the right to compensation against all material and moral damages, occurred or are likely to occur.

The court in this regard is the competent authority of conducting all the necessary examination with the assistance of professional experts.

3.6 Miscellaneous Laws:

- Privatization Law number 228 dated on the 31st of May, 2000 which establishes the Investment Development Authority of Lebanon (IDAL) and it has given utmost priority to information technology projects.

- Law number 360 dated on the 16th of August, 2001 regulating investments in Lebanon, and providing investors with incentives and business support services.

  This Law recognized a series of priority sectors that appeared to be the most promising opportunities reflected in their investment potential and in their impact on social and economic growth. The recognized sectors comprise: Agriculture, Industry, Agro-Industry, Media, Tourism, Information, Communication and Technology.

- Telecommunication Regulation Law number 431 dated on the 22nd of July, 2002.

- Regulation of the Electricity Sector number 462 dated on the 2nd of September, 2002.

[270] Code of Obligations and Contracts was issued on the 9th of March, 1932.

- Regulation of the Civil Aviation Sector number 481 dated on the 12th of December 2002

- Recent Lebanese Regulation of the partnership between the private and public sectors (PPPs) Law number 48 dated on 07/09/2017.

The purpose of competition law shall not be limited to the protection of traders from their illicit activities towards each other and to the protection of consumers in terms of purchasing products and/or services of good quality and reasonable prices. However, competition law shall also aim at scaling down and preventing harmful practices in a wider scale by stabilizing the market and criminalizing complicity between traders, suppliers, producers and distributors which leads to manipulation of prices and of the displayed products. This law shall also aim at preventing the exploitation of the market power of companies and at regulating the process of mergers and acquisitions among them.

Furthermore, taking into account social, environmental and other public interest considerations is of crucial importance especially in a country like Lebanon.

In order to achieve the aforementioned purposes, it is necessary to establish an independent and integrated entity with all powers and authorities required to implement competition law provisions. This entity shall be provided with well-trained human professional resources and with sufficient information and data base from the concerned parties in the government. This would lead to professionalism and transparency in conducting its obligations.

Unfortunately, none of the above laws stipulates the establishment of this entity.

By reference to the aforementioned Lebanese provisions, it appears that the responsibility for the implementation of competition-related provisions lies within a number of scattered authorities, such as: Consumer Protection Directorate, public prosecutions, Judicial Control, courts and ministries.

However, by virtue of the Lebanese Draft of Law, an independent Competition Council shall be established, and it shall be vested with all necessary powers to

implement the provisions of the said law. It shall consist of four bodies; board of Council, office of rapporteur of competition-related matters, technical office for prices' policies, and a secretariat. Each of these bodies is vested with several tasks.

For example, the office of rapporteur of competition-related matters is a specialized body responsible for monitoring market practices to ensure the proper application of this law, and for conducting investigations on cases submitted to the Council, etc.

The technical office for prices' policies is a specialised body responsible for tracking the changes in prices and their development, studying the internal and external factors that affect prices; submitting periodical reports and recommendations for adopting a general policy for price and profits determination.

In addition to that, the Lebanese aforementioned competition-related provisions are applied after the commitment of the infringements by imposing sanctions. However, they do not take efficient pre-emptive measures to prevent anti-competitive acts from occurrence.

The Lebanese draft of competition law states that any transaction of economic concentration exceeding forty percent of the total market share in a particular market shall be notified to the Competition Council within thirty days as of the date of signature of the agreement draft, and it shall be obtained prior approval from the Council. The application shall also be notified to the concerned minister for his comments, and it shall be published in two newspapers for concerned parties to present their comments.

The Council then decides on the application within forty-five days as of date of receipt. It grants his approval, if the transaction does not carry anti-competitive effects. The Council is entitled the right to impose monetary sanctions over parties who do not submit their applications to the Council or those who submit false or missing applications.

Articles 11 and 12 of the draft of law determine the transactions that impede competition in the market. Article 11 paragraph (b) provides a threshold for the

determination of anti-competitive practices. Anti-competitive agreements are those agreements that exceed twenty percent of the total market share in a particular market subject to amendment by the Council.

It is worth mentioning also that the Board of Council investigates in any complaint filed before it against transactions impeding competition in the market. The Council has the authority to take precautionary measures and to impose fines over infringers. The sufferer has the right to claim compensation before the Court of Appeal.

The Council's decisions may be appealed before the Court of Appeal within thirsty (30) days as of date of their notification by the concerned parties and as of date of publication by third parties.

This draft of competition law is derived from competition laws prevailing in various countries around the world in terms of the establishment of a specialized competition authority, the mandatory notification process of transactions of economic concentration, and the imposition of sanctions against infringers.

In Canada, for example, three competition law bodies exist; the Commissioner for Competition which investigates in alleged anti-competitive conducts, the Competition Bureau which carries out investigating and advocacy work and makes recommendations to the Commissioner[271], and the Competition Tribunal; an independent administrative body which reviews the decisions of the Commissioner[272].

The Canadian competition law CA 1986 stipulates a mandatory notification of the transaction to the Commissioner through the Competition Bureau, if the proposed transaction exceeds particular thresholds in regards to the size of the parties involved and to the size of the transaction.

Failure to notify is punishable under the CA 1986 Act. For example, failure to notify a proposed merger constitutes a criminal offence punishable by way of a fine

[271] Canadian Competition law Act CA 1986
[272] Canadian Competition Tribunal Act 1985 which established the Competition Tribunal

up to Fifty Thousand Canadian Dollars. Participants to the offence shall also be punishable by a fine of the same amount.

The Competition Commissioner or the Competition Tribunal (if the Commissioner refers the application to it), shall substantively asses the proposed transaction by using the substantive test. For example, in applications of pre-mergers, the substantive test used aims at determining whether the proposed merger prevents, lessons, or is likely to prevent or lesson competition substantially. This depends on whether the merged entity will have the power to exercise market power by influencing prices in a material way.

The CA 1986 Act determines factors and guidelines that shall be taken into account while conducting the substantive test.

In Egypt[273], Law No. 3 of 2005 on the Protection of Competition and the Prohibition of Monopolistic Practices establishes the Authority for the Protection of Competition and the Prohibition of Monopolistic Practices, affiliated to the competent minister, as the competent authority for the application of this Law.

The assessment test shall be conducted to determine whether the proposed transaction prevents, restricts or harms the freedom of competition in the market. By virtue of Article 4 of the said law, dominance is defined by the ability of an entity to hold a market share exceeding 25% of the market, to have an impact on prices or on the volume of supply, as long as competitors lack the ability to limit it. Executive Regulations of this Law[274] determine the situations of dominance.

Accordingly, the enactment and enforcement of the Lebanese competition law, despite all of the obstacles, is a must. Guidelines for the determination of the relevant market and for the substantive assessment of the proposed competition-related

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[273] د. الشهاوى، قدرى: شرح قانون حماية المنافسة ومنع الممارسات الاحتكارية ولائحته التنفيذية وقانون حماية المستهلك ومذكراته الايضاحية، في التشريع المصري، العربي، الأجنبي، دراسة مقارنة، دار النهضة العربية، الطبعة الاولى ٢٠٠٦، صفحات ٣١-٣٥

[274] Executive Resolution of the Law on the Protection of Competition and the Prohibition of Monopolistic Practices issued by virtue of the Prime Minister Resolution number 1316 of the year 2005.

transactions shall be issued, published and updated regularly. The Competition Council shall be constituted of well-trained employees and of professional experts. They shall be paid fair wages and bonuses in order to eliminate any attempts of corruption. Furthermore, they shall be subject to strict control, supervision and accountability.

Complaints submitted before the Council shall be effectively dealt with appropriate measures. Sanctions shall be held and executed over infringers of whatsoever nature.

Efficient supervision of the Ministry of Economy and Commerce and of the delayed surveillance of the Court of Audit, as stipulated by the competition draft of law, shall be practiced regularly.

One important missing provision within the draft of law is the establishment of a competent independent court specialized solely in the application of the competition law as a court of second instance and to apply summarily procedures. The purpose of this proposal is that ordinary national courts and in particular those of commercial nature are always overloaded with numerous cases that keep pending for years.

Furthermore, confidentiality is an important factor when dealing with anti-competitive transactions since the disclosure of information to the public as in the case of ordinary courts harms companies and other concerned entities. Accordingly, its crucial to adopt confidential trials.

Conclusion:

Competition law is concerned with the protection of consumers for being the most vulnerable party, who may always be subject to attempts of fraud, deception and exploitation. This law is also concerned with the protection of the market itself from anti-competitive practices that are mainly conducted by powerful local and foreign companies. Furthermore, it also aims at motivating entrepreneurs, small and medium-sized entities to enter into the market. In general, competition law seeks economic flourishment and consumers' welfare.

Competition law is one of the most critical and debatable topics that require weighty economic, social and legal analysis and studies to be conducted by a number of concerned parties such as lawyers, economists, ministers, scholars, among others.

Assessment of every competition law case raises many questions, some of which are as follows:

- Who are the concerned parties?
- What is the relevant market?
- What is the concerned anti-competitive conduct?
- Is it considered an infringement to a national competition provision?
- Does this conduct prejudice consumers' welfare?
- Does this conduct comply with public interests and social considerations?
- Does this conduct carry extraterritorial effects?
- If yes, is there a binding agreement related to competition law cases concluded between concerned countries?
- In case of a conflict between the concerned countries, has there been an efficient independent dispute resolution system?

The evaluation of the above-mentioned questions varies according to the variations in countries' perspectives towards the importance of adopting a comprehensive competition law, the variations in countries' implementation of their competition laws, the variations in countries interaction and cooperation in the international arena with respect to free trade and market regulation, and most importantly to the impact of international organisations towards countries.

It we wanted to divide the world into two categories, it would be developed and developing countries. We have previously tried to explain the accuracy and professionalism of developed countries regulating their markets and protecting their trade from the acts of local and even of foreign entities. The European Commission for example fined Google LLC, being a foreign American Corporation, 2.42 billion Euros for impeding competition within the European Market.

Also, some developed countries have been keen on their foreign trade and they have been filing complaints before the WTO against countries for the illicit practices of the latter's firms over foreign firms operating in their markets. The United States of Trade Representative (USTR), for example, filed a complaint with the WTO arguing that Kodak, being an American Corporation was incapable of entering the Japanese photographic and paper market due to the barriers of entry created by the Japanese Government and Fuji Photo Film Co.

It is worth concluding that disputes between countries have sometimes led to the conclusion of cooperation agreements between them. USA and Japan, for instance, entered in 1999 into a cooperation agreement for the enforcement of their competition laws.

By reference to the above, and to avoid exaggeration, it is also important to mention that even competition authorities of developed countries might face several constraints when confronted with competition law cases such as political interventions which might create obstacles for the proper enforcement of the law.

Accordingly, and as discussed above, gaps and drawbacks lie within every competition law system irrespective of its efficiency and comprehensive nature.

Anti-trust law of the United States of America, being the strongest competition law system around the world, has been evidence that no ideal implementation of competition law has existed even in the presence of well-structured, comprehensive and up-to-date competition laws.

On the other hand, it has also been illustrated that great and continuous efforts have been exerted by a number of developing countries in this field developing themselves by themselves. They have enacted competition provisions somehow similar to those enacted by developed countries. They have a good source of

jurisprudence and case law in this respect. The Ministry of Commerce of the People's Republic of China had been able to confront a big American corporation, and it therefore challenged and prohibited the proposed acquisition of China Huiyuan Juice Group Co., Ltd, being a Chinese Corporation, by Coca-Cola Company, being a large American Corporation.

But also, a wide range of countries have not yet included competition regimes into their legislation; knowingly that these countries have been in utmost need for regulating their markets from the practices of local players and big multilateral corporations.

This thesis has tried to illustrate that Lebanon is among the aforementioned countries that have not yet enacted a comprehensive competition law system. Lebanon rather relied on scattered, old and general provisions that do not meet the demanded targets of competition laws.

Not only this, corruption in Lebanon has been rampant in its societies in a very troubling way. What is most striking about this painful reality is that corruption has become part of people' lives and part of their cultures. Lebanese societies have been accepting these practices and transgressions as normal or natural. No voices opposing these practices has been heard. Corruption has become a lifestyle in Lebanese societies[275].

In cases like this, responsibility for detecting and combating corruption shall be vested within the administrative bodies and the judicial system. There should be an administrative reform addressing four pillars of the government: the human element, laws governing public administration, methods of work and the structure of the management.

It should be noted that judicial supervision of the administrative work shall not be limited to the role played by the criminal judicial system. However, there shall be an active role for other bodies, such as the Accounting Bureau and the Central Inspection Authority, who have to transfer corruption files with sufficient evidence to the judicial system in order for the latter to be capable of combating administrative corruption[276].

[275] د. حبيب، كميل: **عندما يصبح الفساد.. نمط حياة**، جريدة السفير، تاريخ ٢٠١٦/١٢/٢١، الصفحة ٣.
[276] Ibid.

The challenges and struggles that developing countries have faced cannot be ignored especially in the light of the proliferation of large companies dominating their markets and seeking cheap human power, and in the light of the inability of international bodies to put an end to the effects of multinational activities towards developing countries.

What is more dangerous also is the implications of international disputes arising between developed countries towards poor countries who have not been parties to these disputes. The above-mentioned EC-Banana case is a clear example whereby the dispute arisen between the US Government on behalf of Chiquita Brand International and the European Union before the DSB of the WTO was a curse for the former colonies in the Caribbean despite the fact that the latter had not been party to the dispute.

International bodies that have been established for the purposes of bringing countries together and harmonizing their laws and legal understanding, have devoted little attention to developing countries. South Africa, which has not been able to date to complain before the Dispute Settlement Body of the World Trade Organisation, is a clear example. Other drawbacks lie within the WTO which is considered to be the most important international organisation adopting the benefits of both developed and developing countries.

As previously discussed, and without negligence to the WTO's essential roles and improvements it has presented, no binding multilateral convention has been reached out, no international competition law framework has existed, and most importantly, developing countries have been indirectly marginalised and excluded from the Dispute Settlement Body of the WTO due to several factors. These factors include, without limitation, high litigation costs, non-binding nature of the preferential treatment stipulated for the benefits of developed countries, the requirement of local governmental support for lodging complaints before the DSB since these complaints cannot be initiated directly by private entities, and absence of guidelines for taking into consideration the effects of the Body's decision over third countries.

But, apart from the remedial role that WTO shall undertake in order to efficiently protect the status of developing countries from the dominance of large corporations, national developing governments have a significant role to play before joining the

WTO. In all cases, and as published by the WTO itself, *"It* (WTO) *operates a system of trade rules. But it's not Superman, just in case anyone thought it could solve — or cause — all the world's problems*[277]*!"*

Accordingly, it is also important to highlight in this respect that self medication is the initial key for improvement. It is true that not all countries are to a certain extent unequal in terms of political and social conditions, financial capabilities, resource endowments etc. And it is also true that low wages, low social and environmental standards, and political instability affect the engagement of these countries in free trade and in their collaboration in the international arena.

However, each government shall enact strict laws, enforce effective controls, impose severe punishments, secure job opportunities, combat corruption, reduce taxes, spread awareness, etc. in order to entrench itself as a strong country on the international level. The People's Republic of China for example has changed its economic circumstances, and it has become much richer. It reformed its economy, lowered its tariffs, and liberalized some sectors of its economy. Although it has still been classified as a developing country and it has still been taking fewer commitments while getting tremendous advantages at the WTO[278], the People's Republic of China is much closer to the developed countries than before.

In this regard as well, several matters shall be fulfilled for a proper enforcement of competition law systems[279]:

a. **Investigation tools**: competition authorities shall have wide range of investigation powers and facilities. They shall have access to data basis present at different sorts of ministries and other governmental administrations. It shall have the power to issue interim reliefs against concerned parties in addition to third parties requesting necessary information for a particular investigation with the ability to track

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[277] World Trade Organisation: **Understanding the WTO**, 5th edition, 2005 p. 11.
Available at: Official website of the WTO www.wto.org

[278] Donald Trump objects the continuous classification of China as a developing country tweeting as follows: *"China, which is a great economic power, is considered a Developing Nation within the World Trade Organization. They therefore get tremendous perks and advantages, especially over the U.S. Does anybody think this is fair. We were badly represented. The WTO is unfair to U.S."* April the 6th, 2018.
Available at: https://twitter.com/realdonaldtrump/status/982264844136017921?lang=en

[279] Business Europe: **Making Sense of Competition Law Compliance, a practical guide for SMES**, op. cit., pp 9-10.

and detect deleted documents. Furthermore, competition authorities shall have the power to impose sanctions against uncooperative parties and those who submit missing or false applications or information.

And most importantly, competition authorities shall be autonomous from any political interventions and considerations.

b. **Leniency programs**: or immunity programs provide companies involved in cartels the privilege of obtaining reduction or absolute relief from paying fines imposed by the competition commission under a condition of self-reporting and submitting evidences comprising other cartel members. Leniency programs aid in minimizing cartels by causing distrust and suspicion among cartel members. It also motivates companies engaged in a cartel the opportunity to refrain from this activity with total or partial immunity against fines.

Leniency programs have not been limited to developed countries; certain developing countries have active leniency programs such as the Republic of South Africa, Brazil, Chili, Mexico and the Russian Foundation. Other developing countries have less active leniency programs such as Pakistan, Egypt, India and Tunisia.

It is worth mentioning that leniency programs would not be effective unless cartels are actively and strictly punished by competent competition authorities.

c. **Competition law compliance programmes**: these programs aim at spreading awareness and managing risks within companies by identifying, removing and preventing anti-competitive conducts. These types of programs may not stop intentional infringements, but they would at least aid in avoiding unintentional infringements of competition laws by training staff to detect critical situations and to consult legal counsels immediately.

Governments shall oblige companies to establish their competition law compliance programs and implement them properly in order to help minimize anti-competitive practices and to avoid exposing companies to high sanctions.

d. **Countries' Cooperation in cross-border competition law cases**: Cooperation among countries is a prime factor for an effective enforcement of competition laws. It gives competition authorities the opportunity to boost their

resources, reduce costs of regional studies, share knowledge and experience, augment training and facilitate mutual understanding of competition laws, etc.

Because formal cooperating through binding multilateral commitments is not attainable[280], in-formal cooperation is the solution. Informal cooperation is defined as an unofficial, friendly and unconstrained association between competition authorities through the smooth exchange of views, thoughts, knowledge, information, discussions etc.

And at the level of international organisations and specifically at the level of the WTO, it is important to study the possibility of establishing a special committee within the WTO comprising of representatives of developing countries around the world whose mission is as follows:

- Study complaints lodged by a particular developed country against a particular dispute arising between other countries in which this dispute affects, and accordingly introduce the complained country into the trial even as a third party even if the latter is not a member to the WTO.
- Work on granting developing countries special privileges to be able to file complaints before the DSB especially in terms of cost and procedural complications.
- Assist developing countries with the capability of appointing and financing an international law firm to represent them in their cases before the DSB of the WTO.
- Support and guide developing countries whenever they are party to a dispute against developed countries.

[280] A 2013 survey conducted by the Organization for Economic Cooperation and Development (OECD) recognized several constraints for formal cooperation among countries in competition cases:

a. *"Limitations on confidential information sharing;*
b. *Limitations caused by differences in legal frameworks in relation to criminal and civil enforcement;*
c. *Institutional and investigatory impediments: resource constraints and practical difficulties;*
d. *Jurisdictional constraints: differences in legal standards;*
e. *Lack of trust and confidence in legal systems".*

This study has sought to explain competition law in many of its aspects, and it has raised and addressed several debatable problematics through shedding the lights of several jurisdictions of developed and developing countries with an emphasis on the role of several international bodies in this field to reach a serious proposal of establishing the supporting above-mentioned committee within the World Trade Organisation.

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