

OECD Peer Reviews of Competition Law and Policy

TUNISIA

2022



Please cite this publication as:

OECD (2022), OECD Peer Reviews of Competition Law and Policy:
Tunisia

<https://www.oecd.org/daf/competition/oecd-peer-reviews-of-competition-law-and-policy-tunisia-2022.htm>

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Foreword

Over the years, OECD competition law and policy peer reviews have proved to be a valuable tool for countries, whether OECD members or not, to reform, and strengthen their competition frameworks.

A peer review is a two stage process: first, a report is produced by the OECD Secretariat on the current state of the country's competition framework and its enforcement practice; and second, a peer review based on the report is performed either in the Competition Committee or the OECD Global Forum on Competition.

This peer review was requested by Tunisia and is part of a broader project aimed to support competitive reforms in the country. This OECD report served as basis for the peer review in the presence of lead examiners that took place on 26 October 2021. The country reviewers leading this process were Belgium (Mr. Jacques Steenbergen), Canada (Mr. Matthew Boswell), Kenya (Mr. Francis Kariuki) and Japan (Ms. Reiko Aoki). The delegation representing Tunisia during the peer review sessions was led by: H.E Ms. Fadhila Rabhi, Minister of Commerce and Export Development and Mr. Ridha Ben Mahmoud, President of the Competition Council.

The recommendations were subsequently presented and discussed on a 6 December 2021 virtual session held at the margins of the OECD Global Forum on Competition.

The analysis finds that, despite the progresses brought by several reforms, there is still room for improvement with a view to further strengthening the Tunisian competition regime, in line with OECD competition policy instruments and international practices. The precise recommendations developed by the lead examiners and discussed at the OECD Global Forum on Competition have been included as a separate chapter in this report.

This report was prepared by Paulo Burnier, Said Kechida and Gaetano Lapenta, all from the OECD Competition Division. Antonio Capobianco, Pedro Caro de Sousa and Federica Maiorano, Menna Mahmoud and Cyriaque Dubois provided valuable inputs. Erica Agostinho, Sofia Pavlidou and Angélique Servin provided assistance and formatted the report.

The peer review process was extensively supported by Ms. Fathia Hammed and Mr. Mohamed Cheikhrouhou from the Tunisian Competition Council and Ms. Fadhila Rabhi and Ms. Nawal Khaldi from the Tunisian Ministry of Commerce.

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Abbreviations and acronyms

ACM	Microfinance Supervisory Authority
ARP	Assembly of the People's Representatives - <i>Assemblée des représentants du peuple</i>
ASEAN	Association of Southeast Asian Nations
BCT	Central Bank of Tunisia - <i>Banque Centrale de Tunisie</i>
CCC	COMESA Competition Commission
CGA	General Insurance Committee - <i>Comité général des assurances</i>
CGC	General Compensation Fund - <i>Caisse générale de compensation</i>
CMF	Financial Market Council - <i>Conseil du Marché Financier</i>
CNMC	Spain's National Commission on Markets and Competition - <i>Comisión Nacional de los Mercados y la Competencia</i>
COFECE	Mexican Federal Economic Competition Commission
COMESA	Common Market for Eastern and Southern Africa
DCFTA	Deep and Comprehensive Free Trade Agreement
DGCEE	Department for Competition and Economic Investigations
EC	European Commission
EIU	Economist Intelligence Unit
ENA	National School of Administration - <i>École Nationale d'Administration</i>

HAICA	High Authority for Audiovisual Communication - <i>Haute Autorité indépendante de la communication audiovisuelle</i>
HAICOP	High Authority for Public Procurement - <i>Haute Instance de la Commande Publique</i>
ICA	Italian Competition Authority
ICN	International Competition Network
IMF	International Monetary Fund
INS	National Institute of Statistics
INT	National Telecommunications Authority - <i>Instance Nationale des Télécommunications</i>
MCC	Millennium Challenge Corporation
MENA	Middle East and North Africa
PCA	Portuguese Competition Authority
PISA	Programme for International Student Assessment
PMR	OECD Product Market Regulation
SLC	Substantial Lessening of Competition
SSNIP	Small but Significant and Non-transitory Increase in Price
TCA	Turkish Competition Authority
TFEU	Treaty on the Functioning of the European Union
TND	Tunisian dinar
UNCTAD	United Nations Conference on Trade and Development
UNESCO	United Nations Educational, Scientific and Cultural Organization
UN-ESCWA	United Nations Economic and Social Commission for West Asia
WB	World Bank
WDI	World Development Indicators

Executive summary

Tunisia was among the first countries in Africa and the Middle East to adopt a competition law. An initial bill was produced in 1985, but it was not until July 1991 that Act No. 91-64 was finally adopted. The Act has been revised several times and was finally repealed by Act No. 2015-36 of 15 September 2015 on the reorganisation of prices and competition. The 2015 Act follows on from the previous Act, enshrining all the principles relating to restrictive competition practices, banning anticompetitive or discriminatory practices and establishing control over mergers. The objectives of Act No. 91-64 and Act No. 2015-36 are set out in their first articles, which are largely identical. Nonetheless, Article 1 of the 2015 Act has been revised citing explicitly its ultimate objectives as "ensuring overall market equilibrium, economic efficiency and consumer welfare".

The scope of Tunisian competition legislation is broad and applies to any entity carrying out an economic activity likely to affect the internal market. It therefore includes natural persons, domestic and foreign businesses, private and state-owned/managed businesses and the public authorities, as well as associations or other non-profit legal entities, provided that they are engaged in an economic activity and affect the general equilibrium of the internal market. Competition law in Tunisia applies across the board to all sectors. However, the insurance, banking, audiovisual and microfinance sectors are subject to specific provisions applied by the sectoral regulatory authorities. Another aspect of exemption from the competition system takes the form of price controls over several products, including food and energy products.

In terms of institutional set-up, Tunisia has opted for a two-pronged system comprising an independent authority – the Competition Council – and a competition department (DGCEE) within the Ministry of Trade. The Administrative Court, which rules on appeals against the decisions of the competition bodies, completes this institutional set-up. The Council has legal personality and financial autonomy and performs two main functions since 1995: a jurisdictional function and an advisory function. The Council comprises of 15 members whose mandates are no longer renewable since 2015. The Council's jurisdictional role is carried out by two independent bodies: the investigative body and the decision-making body.

The Ministry of Trade is responsible for the development, implementation and enforcement of competition rules, in particular through its competition department (DGCEE). The Ministry performs the main regulatory function and has major influence over the Competition Council. Since the Council's creation, the Minister has made recommendations to the government on the appointment of the president, the two vice-presidents and the members of the Council to be appointed by decree. The 2015 Act provides that the Council's budget is attached to the Ministry of Trade and that the Minister sets the remuneration package for the president and the two vice-presidents of the Council.

The human and budgetary resources allocated to the country's competition bodies are relatively modest by international standards. A detailed analysis of budgetary and human resources data by groups of countries participating in OECD's COMPSTATS database shows that the resources of the Tunisian Competition Council remain well below the average level of all competition authorities in comparable countries.

Competition law is primarily enforced by the DGCEE of the Ministry of Trade and by the Competition Council. The Competition Act No. 2015-36 establishes a non-exhaustive list of practices that are considered anticompetitive in Tunisia, including cartels, abuse of a dominant position, abuse of economic dependence and excessively low prices.

In terms of enforcement, the Competition Council has rendered 94 decisions during 2016-2020 including 20 on cartels, 34 on abuse of dominant position, 30 on abuse of economic dependence and on excessive low pricing. Decisions that lead to sanctions include 8 on cartels, 5 on abuse of dominance and 9 on abuse of economic dependence.

Both the DGCEE and the Competition Council may conduct investigations into anticompetitive practices. To avoid the duplication of investigative efforts, Tunisian law stipulates that the Ministry of Trade must inform the Competition Council of ongoing investigations, and vice versa. For instance, both competition bodies may conduct unannounced inspections and searches.

An investigation into an anticompetitive practice can be triggered in one of three ways: i) a complaint from a third party, ii) a leniency application or iii) self-referral (ex officio) by the investigating authority. During 2016-2020, there have been 23 self-referrals (ex officio) investigations, nine of which were initiated by the DGCEE and 14 by the Competition Council. Approximately five investigations are initiated by self-referral each year.

In terms of fine setting, the Competition Council may impose fines on companies up to 10% of their turnover in a given financial year. For individuals, the penalties include a prison sentence of 16 days to one year, a fine of TND 2 000 to TND 100 000 or both. This applies in particular to persons who have played "a decisive role" (Article 45) in the infringements set out under Article 5 of Act No. 2015-36 on competition and prices. The Minister of Trade is responsible for implementing the decisions of the Competition Council as well as for the recovery of fines.

Review and control of mergers that fulfil the conditions laid down under Article 7 of the Competition Act No. 2015-36 is under the horizontal jurisdiction of the Ministry of Trade. Sector-specific legislation provides for derogations concerning transactions in the insurance, banking, microfinance and audio-visual sectors, which allegedly fall under the jurisdiction of sector regulators. In addition, Tunisia is a member of COMESA, which has the competence to review mergers with regional dimension, although national and supra-national authorities provide different interpretations of the regional provisions concerning the duty to notify.

The law lays down two alternative conditions for notification, one based on the acquirer's turnover and another based on combined market shares, the latter having given rise to litigation in certain cases as to the existence of a duty to notify. Between 2015 and 2020, the Ministry of Trade Reviewed 26 transactions, blocking only one merger and clearing three of them subject to conditions.

The notification triggers the three-month period within which the Minister of Trade must adopt a decision. The timeframe remains the same irrespective of the complexity of the competition concerns. The Competition Council only issues a non-binding opinion that is usually followed by the Minister, although there have been cases in which the Minister of Trade deviated from it.

The assessment aims to determine whether the merger is likely to create or strengthen a dominant position in the domestic market or a substantial part of it. The analysis is mostly legal rather than focussed on assessing the economic impact of the concentration, and the economic analysis usually limits itself to defining market shares and the effects of the merger on the structure of the market. The standard analysis is not however limited to competition. It shall also verify whether the merger would make a sufficient contribution to technical or economic progress to offset the harm to competition as well as whether it is needed to consolidate or preserve the competitiveness of domestic companies in the face of international competition. The final decision on this trade-off is then adopted by the Minister of Trade.

The final decision can impose structural or behavioural remedies, but the analysis has showed that in practice measures are predominately behavioural and since 2016 no authorisation decisions have been subject to structural remedies.

In accordance with Article 14(4) of Competition Act 2015-36, the relevant departments of the Ministry of Trade must co-operate with the Competition Council in the implementation of programmes and plans to raise awareness and promote a culture of competition.

The opinion of the Competition Council must be requested on all draft laws and regulations imposing conditions for the exercise of an economic activity or profession or establishing restrictions that may hinder access to the market. This opinion accompanies the draft legislation and the legislator must explain the extent to which those suggestions have been taken into account and, where appropriate, the reasons why they could not be taken on board. Beyond the cases of mandatory consultation, several public bodies (parliamentary committees, the Minister of Trade and the sectoral regulatory authorities) may consult the Competition Council on matters relating to competition. However, the Competition Council is not in a position to raise issues and submit proposals on its own initiative before the Minister of Trade or another government minister.

Market research is an effective tool to examine the competitive conditions in one or more sectors. However, neither the Competition Council nor the DGCEE have conducted any market sector studies to date, nor have they any guidelines or methodology in place for future studies.

The DGCEE and the Competition Council dispose of several soft tools to promote a culture of competition, including a website to disseminate decisions and other relevant information, agreements with universities, trainings and workshops with the industry and sectoral authorities, and publications. However, they have not always been successful in promoting a competition culture, as demonstrated for example by the very low rate of adoption of competition law compliance programmes by firms, irrespective of their scale.

There is also room to improve the framework for co-operation with national and foreign authorities. At the national level, with the exception of the Memorandum of Understanding signed in 2012 with the National Telecommunications Authority, there are no formal co-operation agreements in place between the Competition Council and other sectoral bodies. At the international level, although the Competition Council or the competent departments of the Ministry of Trade may share experience, information and documents relating to the investigation of

competition cases with foreign counterpart institutions, the number of co-operation agreements with foreign authorities is very limited and the existing ones have not been effective. At the regional level, Tunisia is a member of COMESA but so far, the regional provisions on competition have made the object of conflicting interpretations. Therefore, it is not clear whether a notification of a merger with regional dimension exempts the parties from notifying the concentration before Tunisian competent authorities.

Chapter 1.

Institutional framework

1.1. Context and foundations

1.1.1. *Country context*

The Republic of Tunisia is located in North Africa and has a population of around 12 million people, mainly concentrated around the capital (Tunis) and around its coastal cities in the centre and south, including its second-largest city, Sfax. Tunisia is bordered to the north and east by the Mediterranean Sea, with more than 1 500 km of coastline, and shares land borders with Algeria to the west and Libya to the south. As the cradle of Carthaginian civilisation and home to several cultures, Tunisia has more than 3 000 archaeological sites, around ten of which feature on the United Nations Educational, Scientific and Cultural Organization (UNESCO) World Heritage List. This has made Tunisia one of the most popular tourist destinations in the Mediterranean basin.

A little over a year after the country became independent in 1956, the monarchy was abolished by a constituent assembly, which established a republic and adopted a new constitution in 1959, creating a presidential system. Between independence and the Revolution for freedom and dignity in December 2010, Tunisia had only two presidents. In October 2011, the country began to hold elections to appoint the constituent assembly that would draft the new constitution. The new constitution was adopted in January 2014 and established a unicameral semi-parliamentary system based on the separation of legislative, executive and judicial powers. The president remains the head of state and is elected every five years by universal suffrage. The country has since progressed in democracy

rankings,¹ holding three major elections that the international community has described as free and transparent.

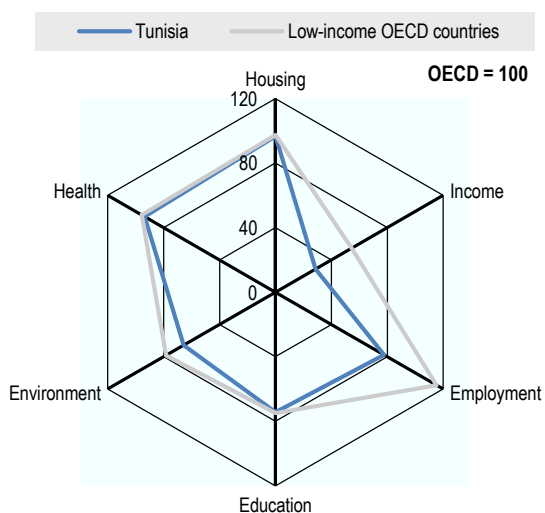
Inclusion has been one of Tunisia's main concerns since independence. The Personal Status Code, adopted in 1956, made Tunisia the most progressive Arab country in terms of women's rights. Schooling, especially for girls, became a national priority for Tunisia long before most emerging countries. Access to basic public infrastructure, such as electricity and water, is much higher than in most emerging countries. A basic welfare system was developed as early as 1960, with a pay-as-you-earn pension scheme and a relatively high-quality health system (OECD, 2018^[1]). A national programme of cash transfers and free or discounted health care was introduced for poor and low-income families. In 2018, free health care was extended to the unemployed. The many social programmes implemented since the 1970s have contributed to reducing the poverty rate, which was 15.2% in 2019² (INS, 2021^[2]). As a result, Tunisia ranks favourably for well-being for an emerging economy in terms of health, housing and access to basic infrastructure (Figure 1.1).

¹ Ranked 53rd globally and first in the Arab world in the 2020 Democracy Index published by The Economist Intelligence Unit (The EIU), and the only Arab country to achieve the "flawed democracies" category. The Democracy Index groups countries into four categories: "full democracies", "flawed democracies", "hybrid regimes" and "authoritarian regimes".

² The extreme poverty rate was below 3% in 2019. The poverty rate is defined as the percentage of the population earning less than TND 1 706 (USD 712) per year (in 2015). For extreme poverty, the threshold is TND 1 032 (USD 431) per year.

Figure 1.1. Well-being indicators for Tunisia

Well-being, key dimensions, OECD = 100



Note: The variables used for these dimensions are the following: (i) Housing: share of population with access to improved sanitation and share of population with access to electricity; (ii) Income: GDP per capita expressed in purchasing power parity; (iii) Employment: employment rate and share of unemployed without paid work for at least one year; (iv) Education: average outcomes from PISA tests in reading, mathematics and science, and share of the over-25 population with at least an upper secondary school education; (v) Environment: inverse of the average annual concentration of PM2.5 and share of population with access to an improved drinking water source; (vi) Health: life expectancy at birth.

Source: World Bank, World Development Indicators (WDI); National Institute of Statistics (INS).

However, democratic renewal has come with economic and social challenges. The combination of increased social unrest, terrorist attacks and the crisis in Libya, which was the country's second-largest trading partner after the European Union, has impacted key sectors of the economy and caused a slowdown in activity.³ The average growth rate was only 1.6% between 2011 and 2019, compared with 4.4% between 2000 and 2010 (ITCEQ, 2020_[3]). Meanwhile, public

³ The World Bank estimates that the Libyan crisis resulted in a 1 percentage point decline in growth from 2011 to 2015 (World Bank, 2017).

spending has increased to meet the challenges of insecurity and social demands, increasing public deficits and debt.

This deterioration in public finances is reflected, in particular, in the change in the wage bill, which accounts for most of the State's operating expenses. Civil service recruitment has been substantial, especially between 2011 and 2013, increasing civil service pay by more than four GDP points since 2010, reaching 14.6% of GDP in 2019 (IMF, 2021^[4]). GDP per capita (in current US dollars) has fallen by more than 20% since 2010 to USD 3 318 in 2019, moving the country from the upper to the lower middle-income countries bracket. Tunisia's external debt has more than doubled since 2010, reaching 92.8% of GDP at the end of 2019 (IMF, 2021^[4]).

These difficulties were exacerbated by the COVID-19 pandemic. Real GDP contracted by about 8.8% in 2020 from 2019, marking the worst recession in the country's history and further deepening public debt and deficits. The unemployment rate reached 17.8% in the first quarter of 2021, disproportionately affecting low-skilled workers, women and young people (INS, 2021^[2]). The World Bank estimates that the poverty rate increased to more than 20% in 2020. The OECD forecasts a partial recovery in growth, estimated at 3% in 2021 and 3.25% in 2022. Private consumption is not expected to return to its pre-crisis level before the end of 2022, while investor confidence remains low due to limited progress in structural reforms and uncertainties related to the financing of the high budget deficit (OECD, 2021^[5]).⁴

Closing this gap and covering the financing needs of the 2021 budget, estimated by the International Monetary Fund (IMF) at 18.3% of GDP, is the current focus of the Tunisian authorities, who are engaged in negotiations to conclude the third financing agreement with the IMF in ten years, following the 2012 stand-by arrangement and the 2016 Extended Fund Facility.

1.1.2. The economic liberalisation process

Since independence, Tunisia's development model has been characterised by a heavy state involvement. The model has been built around an active industrial

⁴ The outlook may worsen if the economy sinks further into informality, mainly because of the wait-and-see attitude of investors linked to a range of uncertainties regarding the country's internal situation, and the expected difficult recovery among the economies of its main partners.

policy to promote the development of certain sectors supported by large state-owned enterprises and public banks. After the failure of the socialist experiment at the end of the 1960s, this state-controlled development model was gradually opened up to foreign trade and direct investment from 1972, with the adoption of a law that introduced a favourable tax and customs regime for companies that were entirely geared towards exports – the so-called offshore regime.

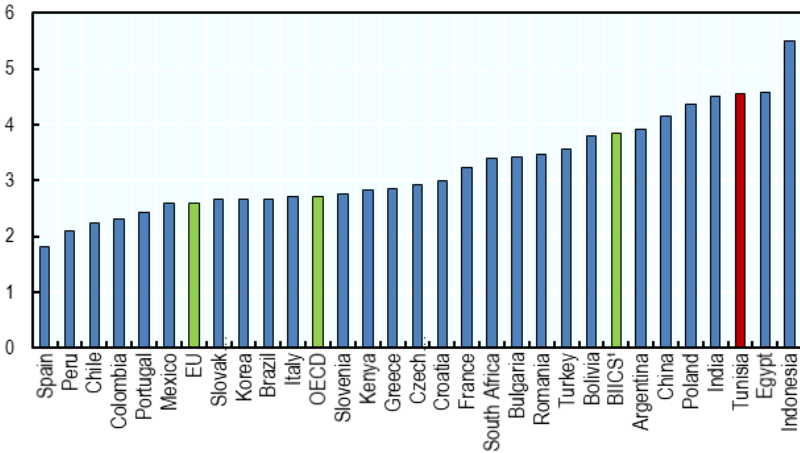
Tunisia has experienced several waves of privatisation, notably in the mid-1980s and in 2006-07. The first wave of privatisation in the 1980s was accompanied by several regulatory reforms as part of an IMF-supported structural adjustment programme. This programme, which was adopted in response to one of the greatest public finance crises in Tunisia's recent history, has enabled the country to gradually open its economy, and as a result, improve efficiency, and promote market mechanisms and free competition.

Despite these efforts, the Tunisian economy is still characterised by a strong state presence, combined with a high level of barriers to entry for new businesses and cumbersome administrative procedures. A World Bank report estimated that more than 50% of the Tunisian economy remains either closed or subject to access restrictions (World Bank, 2014^[6]). The OECD report analysing the impact on competition of laws and regulations in the wholesale and retail trade and freight transport sectors identified more than 259 regulatory barriers to competition, some of which have been in place since the 1960s (see Box 1.1).

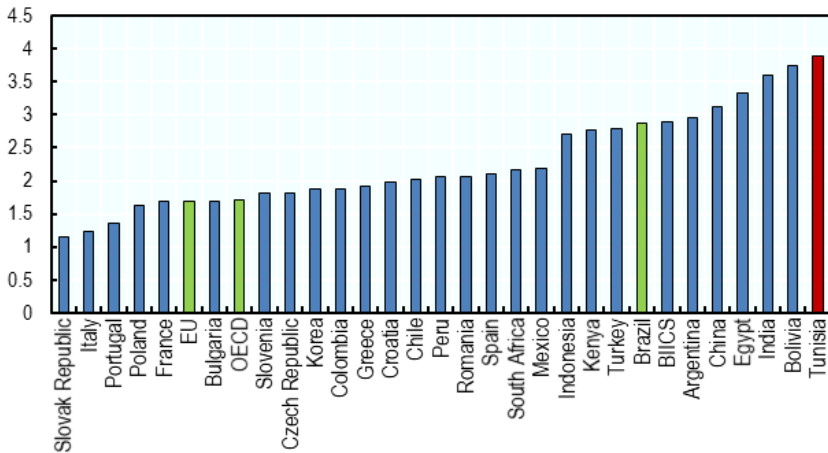
The OECD Product Market Regulation (PMR) indicator shows that direct government intervention in the economy remains higher than in OECD countries and most emerging economies, and that state-owned enterprises dominate many sectors (Figure 1.2.A). In addition to network industries such as electricity, telecommunications and rail transport, state-controlled companies operate in sectors such as banking, phosphates, mining and refining, construction equipment, iron and steel and paper. The confiscation in 2011 of private businesses and assets linked to the former regime's misappropriations has strengthened the state's presence in certain sectors, including telecoms.

Figure 1.2. Product Market Regulation in Tunisia

A. State presence in businesses – Public share ownership



B. Regulatory barriers to entrepreneurship



Note: A. The data show simple averages for the following countries: Brazil, India, Indonesia, China and South Africa. B. The data refer to 2016 for Tunisia and 2013 for the other countries. The indicator ranges from 0 to 6.

Source: OECD-World Bank Product Market Regulation database.

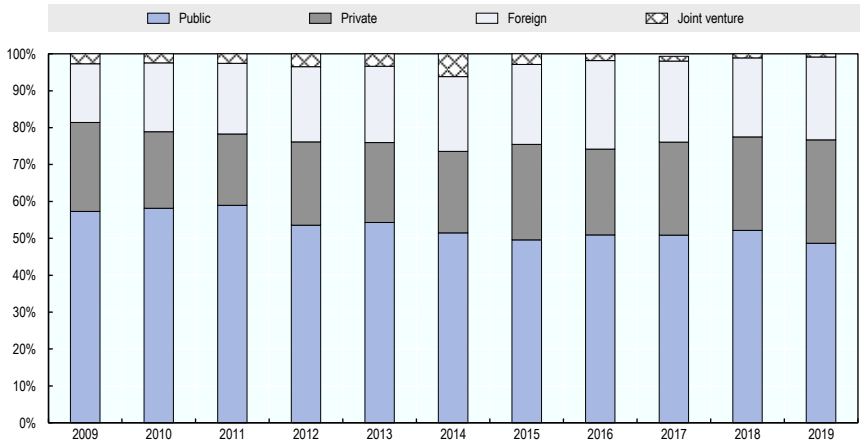
The 102 state-owned enterprises operating in various sectors, both competitive and non-competitive, as well as in commercial public services, accounted for 9.5% of GDP and 4% of formal salaried employment in 201 (Presidency of the Government, 2018^[7]) 4. These companies have a big influence on the Tunisian economy, generating on average more than 50% of the total turnover of the country's 100 largest businesses over the last decade⁵ (Figure 1.3 A). On the other hand, the consolidation by group or conglomerate of the turnover achieved in 2019 by the 61 private companies in this ranking and which accounted for 51% of the overall turnover shows a relatively high concentration of the activity. This share is dominated by five groups, which achieved 60.6% of the total turnover of private companies. Taking into account the performance of the ten largest groups or holdings, this share would increase to more than 80% of the total turnover achieved by the 61 largest private companies in the country in 2019⁶ (Figure 1.3 B).

⁵ It should be noted that the level of activity of state-owned enterprises does not reflect their real commercial performance. Despite generating a high level of turnover, the vast majority of these companies are unable to meet their tax and social security obligations. According to the IMF, the financial situation of state-owned enterprises is significantly worsening the budget position. Data on the financial information of 30 state-owned enterprises at the end of 2019 show that they had debts close to 40% of GDP, of which about 15% of GDP was covered by state guarantees as of mid-2020 (IMF, 2021^[4]).

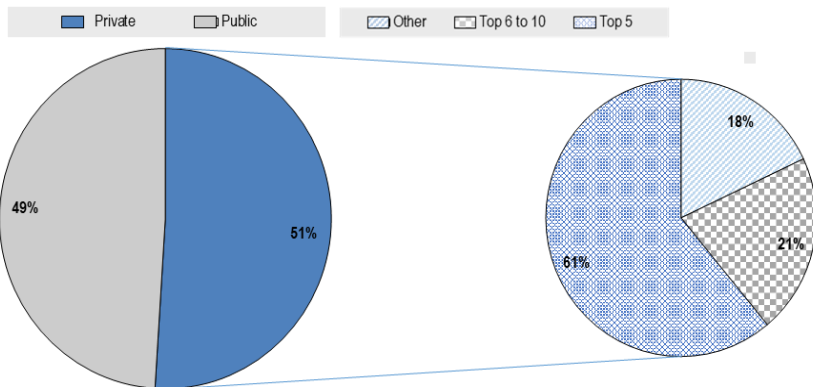
⁶ It is important to note that the share of these same five groups in the total turnover of the largest private companies in the country in 2010 was around 28%. It has therefore more than doubled in a decade

Figure 1.3. Distribution of the total sales of the top 100 Tunisian companies

A. Breakdown of sales by ownership structure (2009-19)



B. Breakdown of sales by conglomerate (2019)



Source: OECD calculations based on data from L'Économiste Maghrébin ranking of Tunisian businesses.

The PMR indicators also shows that preliminary licences and authorisations, as well as the cumbersome administrative procedures that go with them, are particularly restrictive in Tunisia (Figure 1.2-B). Restrictions on entry, investment

and business activity create situations of vested interest for incumbent businesses, which limit their incentive to improve the quality of the services they provide. The fragmentation of legislation and many amendments, coupled with the lack of consolidation and the existence of obsolete laws, can also act as a regulatory barrier by creating legal uncertainty, potentially raising compliance issues and legal costs for suppliers, especially for new entrants (OECD, 2019^[8]).

Box 1.1. OECD Competition Assessment Review of Tunisia, 2019

The OECD partnered with the Tunisian government and the Millennium Challenge Corporation (MCC) in 2018 to conduct an in-depth, independent competition assessment to identify rules and regulations that may hinder the competitive and efficient functioning of markets in Tunisia in the wholesale and retail trade sectors, with particular focus on fruit and vegetables, and red meat, and road and maritime freight transport. The transport and trade sectors accounted for about 16% of GDP and 18% of formal salaried employment in 2018. Overall, the review identified 259 potential regulatory barriers in 251 legal and regulatory texts examined for the assessment. The in-depth analysis involved a qualitative assessment of the harm to consumers and to the economy arising from the barriers, using economic theory and empirical literature, as well as comparative studies of regulation in jurisdictions in other countries. The report made 220 specific recommendations to mitigate harm to competition. These recommendations ranged from matters relating to price controls, hypermarkets and wholesale markets for the trade sector, to matters relating to road freight transport and port services, including specific capital and professional qualifications requirements. If implemented, these recommendations would benefit consumers in Tunisia and the Tunisian economy in both sectors. More specifically, the OECD estimates a positive effect for the Tunisian economy of about 0.6% of GDP.

Source: (OECD, 2019^[8])

The entry and exit barriers faced by firms also hinder the efficient reallocation of resources, both between sectors and between firms within the same sector. The National Business Directory produced by the INS shows that 98.3% of private businesses employed fewer than ten staff in 2019, a percentage that has been steadily increasing since the late 1990s. Once formed, Tunisian businesses

generally remain small, facing significant constraints around access to markets, restrictive regulations, heavy taxation and difficulties in accessing funding (OECD, 2018^[11]). A 2017 study on the relationship between market access regulations and state capture in Tunisia shows that (politically) connected firms are about four times more likely to operate in sectors subject to foreign direct investment authorisations and restrictions than unconnected firms (Rijkers, Freund and Nucifora, 2017^[9]). As a result, many businesses remain in the informal sector, perpetuating an environment of unfair competition that further penalises formal businesses.⁷

1.1.3. Developments in competition law since 1991

Tunisia was among the first countries in Africa and the Middle East to adopt a competition law. An initial bill was produced in 1985, but it was not until July 1991 that Act No. 91-64 was finally adopted. The Act has been revised several times, including in 1993, 1995, 1999, 2003 and 2005, to reflect the changing needs and challenges of the Tunisian economy, and the obligations arising from certain agreements such as Article 36.a) and b) of the 1995 Association Agreement with the European Union. It was finally repealed by Act No. 2015-36 of 15 September 2015 on the reorganisation of prices and competition. When Act No. 91-64 of 29 July 1991 was adopted, it enshrined the principle of freedom of pricing, established the rules of transparency and proper functioning of the market, and prohibited all behaviour that undermined competition. The Act was clearly inspired by French law, in particular Order No. 86-1243 of 1 December 1986 on freedom of pricing and competition, as evidenced by the emphasis on freedom of pricing and the similarities between the institutional frameworks.

The many amendments to Act No. 91-64 over time have broadened the scope of enforcement of competition law in Tunisia and strengthened the powers of the enforcing bodies. The 1993 amendment (Act No. 93-83) enabled, among other things, the enlargement of the list of public agents empowered to note violations

⁷ Depending on the source and definition used, the informal economy is estimated to account for between 30% and 45% of total employment (World Bank, 2014; Centre de Recherches et d'Etudes Sociales [Research and Social Studies Centre – CRES], 2016).

of the provisions of Chapters II and III of Title IV of the law⁸, while the 1995 amendment (Act No. 42-95) introduced merger reviews and a *per se ban* on concessions and exclusive representation contracts. The 1999 amendment (Act No. 41-99) broadened the Council's powers, in particular by introducing an obligation to produce the documents requested by investigators, and made concession and representation contracts more flexible.⁹

The leniency procedure was introduced in 2003 (Act No. 74-2003) along with the recognition of access to information by companies and administrations, consolidation of the right of defence, and more flexibility to deal with emergency consultations by adapting the required quorum.¹⁰ The 2005 amendment (Act No. 60-2005) was particularly important, giving the Competition Council legal personality and financial autonomy, and extending its consultative and jurisdictional powers, in particular through the introduction of self-referral and the obligation for the Minister of Trade to refer any proposed merger to the Council. As part of this amendment, the criteria for controlling mergers were reviewed, the scope of anticompetitive practices was broadened to include offering or practising excessively low prices, and the *per se ban* on concession and exclusive commercial representation contracts was lifted. Finally, the 2005 amendment laid the foundation for the relationship between the Competition Council and sector-specific regulators, and for co-operation between national competition authorities and their foreign counterparts (see Chapter 3.).

⁸ Law 93-83 empowered economic control agents, in accordance with their particular status, municipal regulatory agents, appointed by decree of the Minister of trade and officers of the judicial police.

⁹ The regime of concession and exclusive representation contracts has undergone transitions during the revisions introduced to the law. It went from a *per se ban*, to an authorization system and finally to a case-by-case treatment, allowing an individual exemption to any author justifying the guarantee of a technical or economic progress and the authorization to the users of a fair share of the resulting profit. This flexibility is justified by the need to develop modern retail methods and encourage investment in the trade sector, in order to improve related services.

¹⁰ Law n° 2003-74 of 11 November 2003 introduced more flexible procedures for emergency consultations or those transmitted during holidays. The plenary assembly can rule in the presence of a third of the members with the presence of two judges.

1.1.4. The 2015 Prices and Competition Act

The 2015 Act follows on from the previous Act, enshrining all the principles relating to restrictive competition practices, banning anticompetitive or discriminatory practices and establishing control over mergers. Overall, the structure and content of the two acts are quite similar. However, it contains some additional and others were amended or deleted. Considering the different amendments, a further 6 articles were added to the Act, taking the total from 72 to 78. The legal framework, as it stands today, is comprehensive, close to European regulations and relatively well adapted to national and international requirements.

One of the main changes introduced by the Act of 15 September 2015 is a tougher approach to offences by increasing the ceiling for financial penalties from 5% to 10% of turnover, and by introducing administrative penalties (see Section 2.2). The investigative powers granted to financial inspectors at the Department for Competition and Economic Investigations (DGCEE) and the Council's case handlers were strengthened, with specific provisions on protection of financial inspectors. While the Act abolished the possibility of renewing the terms of office of Council members, its board was enlarged by allowing the head of investigation body (*Rapporteur-General*) and the case handlers to attend deliberations without voting rights, and by providing a mechanism to seek expert opinions.

In terms of merger reviews, the threshold for notifying transactions, particularly with regard to the turnover of the companies concerned, was changed from TND 20 million to TND 100 million, while keeping the alternative threshold relating to market share at 30% (see section 2.3). Notification is now compulsory and cases concerning a failure to notify have been transferred from the ordinary courts to the Competition Council.

In terms of anticompetitive practices, the 2015 act like the 1991 act contains, contains bans on express or tacit collusion and concerted practices, abuse of a dominant position or a state of economic dependence, and the offering or practice of excessively low prices. In addition, new provisions have been introduced in the 2015 act to strengthen the transparency of decision-making, in particular reducing the time required to process applications, providing the reason for the decision and publishing the exemption in the Official Gazette of the Tunisian Republic.

1.2. Objectives and scope

1.2.1. Objectives

The objectives of Act No. 91-64 of 29 July 1991 and Act No. 2015-36 of 15 September 2015 are set out in their first articles, which are largely identical, with the same opening words: "*The purpose of this Act is to lay down the provisions governing freedom of pricing and to establish the rules governing free competition*". Nonetheless, Article 1 of the 2015 Act has been somewhat reworked, explicitly citing its ultimate objectives as "*ensuring overall market equilibrium, economic efficiency and consumer welfare*". This is not a trivial change. It is part of an objective to raise public awareness of the positive effects of competition, since the public still "*sometimes [perceives] competition as more threatening than price regulation, which reassures the consumer*".¹¹ It should be noted that sectoral policies are conceivable and can be adopted for the achievement of specific development objectives, but social considerations remain present in the choices enshrined by the legislator (Articles 3, 4 and 6 of the Act of 15 September 2015).

1.2.2. Scope

In terms of subject matter, the scope of Tunisian competition legislation is broad and applies to any entity carrying out an economic activity likely to affect the internal market. It therefore includes natural persons, domestic and foreign businesses, private and state-owned/managed businesses and the public authorities, as well as associations or other non-profit legal entities, provided that they are engaged in an economic activity and affect the general equilibrium of the internal market. Moreover, the Competition Council, through its case law, has established a broad definition of the notion of economic enterprise. According to this case law, an economic enterprise is any entity engaged in an economic activity, regardless of its legal status, even if it does not have legal personality:

(...) Whereas the concept of economic enterprise cannot be determined according to a purely legal criterion, but rather on the basis of an economic

¹¹ Tunisia's contribution to the 2018 Global Forum on Competition under the heading "Competition law and state-owned enterprises".

*criterion, which does not necessarily presuppose the existence of legal personality (...).*¹²

It follows that the provisions of Article 5 of the Act of 15 September 2015 on anticompetitive practices apply to any type of company, organisation, grouping and all persons engaged in an economic activity related to production, distribution and services, regardless of their nature: public or private, legal or physical, notwithstanding their form and whether they have a legal or *de facto* existence. In addition, the case law produced by the Competition Council has provided important clarifications on the applicability of competition law to state-owned enterprises. In a decision of 26 July 2004, it stated that entities governed by public law are subject to competition law in the same way as those governed by private law as long as they carry out an economic activity related to production, distribution or service.¹³ The Council has, for example, ruled against public operators for abuse of a dominant position.¹⁴ In a decision of 10 November 2005, the Council specified that unilateral acts involving the exercise of public authority by the administration nevertheless remain within the jurisdiction of the administrative courts.¹⁵

It is also important to note that Tunisian law can be applied extra-territorially, taking into account the effects on its market, in the same way as the law of other OECD countries and the European Union. Article 1 of the 2015 Act states that it applies to all anticompetitive practices, "including practices and agreements created abroad that have adverse effects on the domestic market".

Special sectoral regimes

Competition law in Tunisia applies across the board to all sectors. However, the insurance, banking, audiovisual and microfinance sectors are subject to specific

¹² Tunisia's contribution to the 2018 Global Forum on Competition under the heading "Competition law and state-owned enterprises".

¹³ Decision No. 3152 of 26 July 2004 (*La Société des Loisirs de Tabarka vs the Club Municipal de Plongée*)

¹⁴ Decision No. 5181 of 10 November 2005 (the company "MEDIFET" vs the Central Pharmacy of Tunisia and two medical companies) and Decision No. 161419 of 12 July 2018 (*Orange Tunisie and Orange Tunisie Internet vs Tunisie Telecom and Topnet*).

¹⁵ Decision No. 5181 of 10 November 2005 (the company "MEDIFET" vs the Central Pharmacy of Tunisia and two medical companies).

provisions applied by the sectoral regulatory authorities (see section 1.4). For the insurance sector, the exemption from competition law is limited to pricing agreements that are notified to the General Insurance Committee and approved by the Minister of Finance. Article 92 of the Insurance Code (Act No. 92-24 of 9 March 1992) provides that:

"Any agreement concluded by insurance and reinsurance undertakings subject to the provisions of this Code, between themselves or within the framework of their professional association, concerning tariffs, general conditions of insurance contracts, competition or financial management, must be sent to the Minister of Finance. The agreement may only be implemented if the Minister of Finance has not objected to it within two months of the date of its notification".

The Competition Council also raised this issue in its Opinion No. 82235 of 14 May 2009, stating that these agreements distort competition in this market and are harmful to consumers, and recommended that the Insurance Code be harmonised with the competition rules.

For the banking sector, the exemption concerns merger transactions that are subject to the agreement of the Central Bank of Tunisia for the banking sector (Article 34 of Act No. 48-2016 of 11 July 2016), whereas they are simply prohibited in the audiovisual sector (Article 15 of Decree-Law No. 2011-116 of 2 November 2011) (see section 2.3).

It is also important to note that certain sectors such as agriculture and handicrafts can be subject to exemptions from competition rules to support certain activities. Similarly, in the area of public procurement, there are exemptions for small and medium-sized enterprises (SMEs) insofar as public bodies reserve up to 20% of the estimated value of contracts for works, the supply of goods and services and research for SMEs each year.

Price controls

Another aspect of exemption from the competition system takes the form of price controls. Article 3 of the Competition Act stipulates that *"goods, products and services that are essential or relate to sectors or areas where price competition is limited either by a monopoly situation, long-term difficulties in supplying the market, or the effect of legislative or regulatory provisions are excluded from the freedom of pricing regime referred to in Article 2 above"*.

The Tunisian state therefore has direct control over the prices of several products, including food and energy products. The system was established in the 1970s

with the adoption of Act No. 70-26 of 19 May 1970 and its implementing decrees. The current legal basis for price controls is provided by the 2015 Act, which incorporates the corresponding article of Act No. 91-64. The conditions and arrangements for setting the cost or selling prices of the products in question are established by Decree No. 91-1996 of 23 December 1991.¹⁶ Since price controls were introduced, the list of products concerned has only been revised twice, the most recent revision dating back over 25 years (Decree No. 95-1142 of 28 June 1995). The decree defines three lists of products and services that are excluded from the general freedom of pricing regime:

- List A comprises 16 products subject to price approval at all stages (production, wholesale and retail) such as subsidised bread, flour and semolina, subsidised pasta, food-grade oils and sugar, and fuels, including liquefied petroleum gas, electricity, gas and water.
- List B comprises eight products subject to price approval at the production stage, such as salt, roasted coffee, beer, grey cement,¹⁷ concrete reinforcing bars and compressed gas.
- List C comprises 33 products subject to a framework for distribution margins, such as rice, fruit and vegetables; private cars and other types of vehicle; and paper and school exercise books.

The price control regime in Tunisia is accompanied by a subsidy system that applies to List A, including a subsidy programme for energy products and a subsidy programme for food commodities managed by the General Compensation Fund (*Caisse générale de compensation* – CGC). Food subsidies date back to 1945 and the creation of the first subsidy fund.¹⁸ Almost 25 years later, the CGC was established by Act No. 70-26 of 29 May 1970.¹⁹

¹⁶ Decree No. 91-1996 of 23 December 1991 on products and services excluded from the regime of freedom of pricing and its framework as amended by Decree No. 93-59 of 11 January 1993, and Decree No. 95-1142 and Decree No. 2015-307 of 1 June 2015.

¹⁷ Grey cement prices were liberalised in 2014, following the removal of energy consumption subsidies from energy-intensive industries, including the grey cement sector.

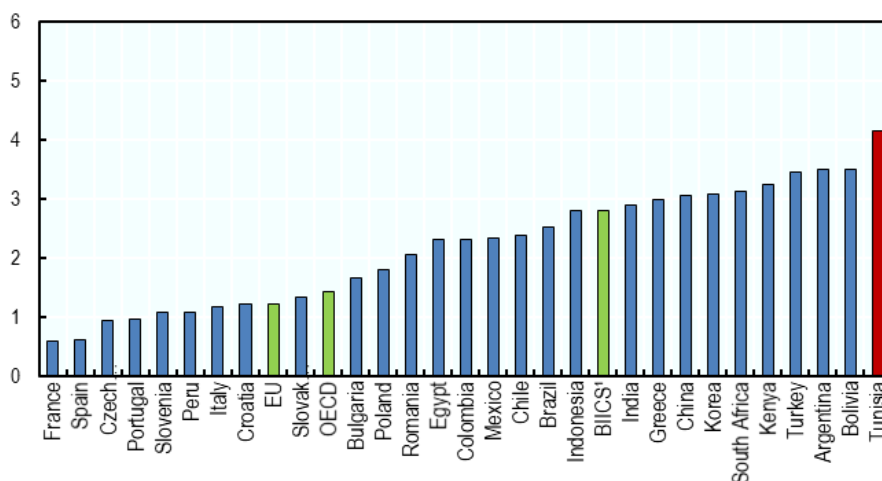
¹⁸ Decree of 28 June 1945.

¹⁹ The body responsible for managing the fund is the Unité de compensation des produits de base [Commodity Compensation Unit]. It was established by Decree 2002-2145 and is attached to the Ministry of Trade.

In addition, Article 4 of the 2015 Act empowers the Minister of Trade, in the event of an excessive increase or decrease in prices, to take temporary measures (for a maximum period of six months) in response to a crisis or emergency, exceptional circumstances or a manifestly abnormal market situation. Such fluctuations could occur because of a natural disaster that severely limits production, for example. In some cases, minimum prices or rates have been used in an attempt to support the income of suppliers of a particular product or service. In this situation, the Ministry of Trade acts as a guarantor for the implementation of a rational pricing policy based on consumer protection and economic sustainability.

However, in practice, these measures can be renewed indefinitely and without restriction, even if data on the implementation and actual effects of the imposition of these restrictions cannot be identified (OECD, 2019^[8]). In addition, OECD's PMR price control regulation indicator for Tunisia reflects the degree of state control over prices. As Figure 1.4 shows, Tunisia's score is significantly higher than the average for emerging countries and higher than the average for OECD Member countries (OECD, 2018^[1]).

Figure 1.4. OECD Product Market Regulation Indicator: Price Control



Note: The data show simple averages for the following countries: Brazil, India, Indonesia, China and South Africa. For Tunisia, the data are from 2016. For the other countries, they are from 2013.

Source: OECD-World Bank Product Market Regulation database.

The OECD Secretariat was informed during exchanges with the Tunisian authorities that Decree No. 95-1142 is currently being revised to reflect the recent changes with the price liberalisation of a number of products.

1.3. Competition authorities

Tunisia has opted for a two-pronged system comprising an independent authority – the Competition Council – and a competition department (DGCEE) within the Ministry of Trade, with 24 regional directorates. Then there is the Administrative Court, which rules on appeals against the decisions of the competition bodies. The roles of the Competition Council and the Ministry of Trade have evolved significantly since the first Competition Act was passed, but there is considerable room for improvement in terms of division of power and co-ordination.

1.3.1. Competition Council

Mandate and responsibilities

Originally, Article 9 of the 1991 Act established a special commission called the Competition Commission to hear applications relating to anticompetitive practices and give an opinion, as requested by the Minister for Economic Affairs, on any competition-related draft legislation or regulation. This commission became the Competition Council in 1995 (Act No. 95-42 of 24 April 1995). The Council has had legal personality and financial autonomy since 2005. Since its creation, it has seen constant changes in its powers and composition. Since 1995, the Competition Council has had two main functions: a jurisdictional function and an advisory function, with its powers increasing over time. More recently, the Council has been given new responsibilities, including raising awareness and promoting a competition culture (see Chapter 3.).

As mentioned earlier, the 1991 Competition Commission was originally set up to "*hear applications relating to anticompetitive practices*". This wording was retained in Article 9 of this first Act as it was amended in 1995, 1999, 2003 and 2005. It can also be found in the 2015 Act, in Article 11. However, after the commission became the Competition Council in 1995, it gradually became a proper administrative court. Since 2008, it has described itself as "*a specialised*

jurisdictional body of the administrative court system".²⁰ Aspects relating to the Council's jurisdictional function, including referrals and sanctions, are analysed in more details in Chapter 2.

The first version of Article 9 of the Act of 29 July 1991 provided that the opinion of the Competition Commission could be requested by the Minister for Economic Affairs on any competition-related draft legislative or regulatory text. Incorporating merger review into Tunisian competition law in 1995 was done through the possibility for the Minister to submit any proposed or actual merger to the Competition Council for an opinion, if considered necessary. Act No. 2005-60 of 18 July 2005, in particular Article 9, substantially changed the consultative function of the Council and made its consultation mandatory in certain cases. Details of this function and its evolution are analysed in Chapter 3.

In addition to its jurisdictional and advisory activities, the Competition Council was given new powers under the Act of 15 September 2015 with a view to making resources more accessible and raising public awareness. Accordingly, Article 14 of the Act states that the Council must monitor competition and develop a database on the state of the markets and the information collected by the Council over the course of its inquiries and investigations, which is likely to be exchanged with the rest of the state's departments. It is also responsible for implementing plans and programmes to raise awareness and promote a competition culture. These missions are carried out in partnership with the relevant Ministry of Trade departments. In addition, the Council must publish its decisions and opinions on its website (see chapter 3).

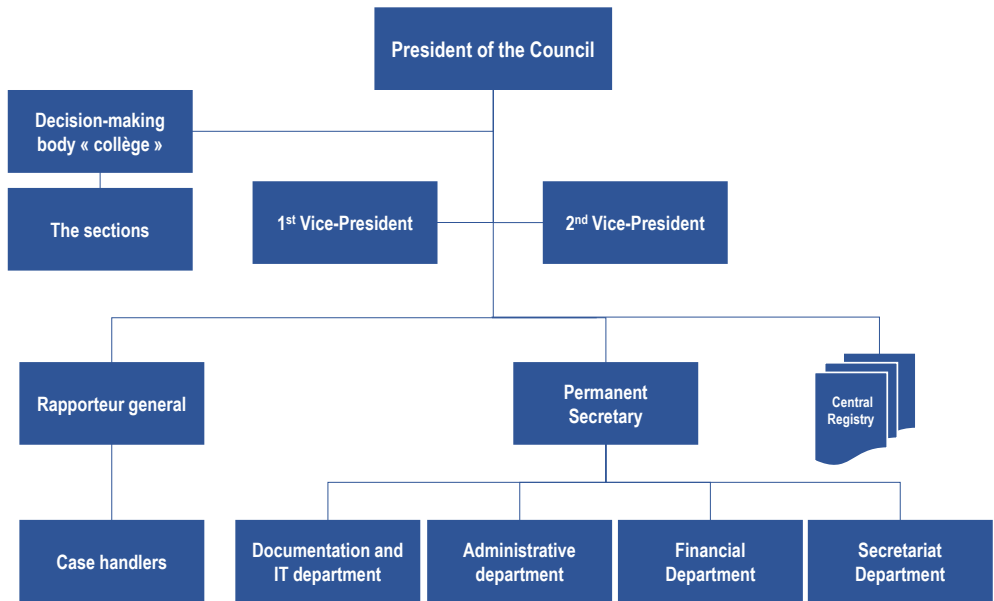
Composition and operation

With the Competition Commission's transition to a Competition Council via the adoption of the Act of 24 April 1995, Article 16 provided for the creation of several sections within the Council, chaired by its president or one of the two vice-presidents. The president decides on the composition of these sections and appoints their members at the beginning of each judicial year. The Council's organisation, now found in Article 21 of the 2015 Act, has remained relatively unchanged since 1995 (Figure 1.5). It should be noted, however, that while the

²⁰ Decision No. 71140 of the Competition Council of 17 July 2008 (the Topnet case).

Council's headquarters remain in Tunis, the 2015 Act adds in Article 11 that it may, if necessary, hold its meetings at any other place within the Republic.

Figure 1.5. Competition Council organisation chart



Source: Competition Council

The composition and obligations of Council members, meanwhile, have changed more significantly. Article 10 of the 1991 Act, as amended in 1995, provided that the Competition Council would comprise 13 members, including the president, two vice-presidents (one adviser to the Administrative Court and one adviser to one of the two chambers responsible for controlling state-owned enterprises at the Court of Auditors), four judges from at least second-class ordinary courts, four people who had worked or were working in production, distribution, crafts or services, and two people selected for their expertise in economic matters or in competition or consumer protection affairs.

This structure was amended slightly by the 2015 Act. Now the Council must comprise 15 members, with four people selected for their expertise in law, economics, competition or consumer protection affairs, instead of two. The

president and two vice-presidents serve on a full-time basis, unlike the other members.

A government Commissioner is appointed to the Council, also by government decree, on the Minister of Trade's recommendation. The Commissioner is primarily responsible for defending the public interest in cases concerning anticompetitive practices and for presenting the administration's observations to the Council. The government Commissioner is usually the Director-General of Competition and Economic Investigations.

Competition Council staff are mainly recruited from civil servants in the Ministry of Trade, mostly through transfers from the DGCEE, or from public service advisers who have graduated from the National School of Administration [*Ecole Nationale d'Administration* – ENA]. No external recruitment campaigns have been held in the last five years.

In terms of internal organisation, staff are not split into particular activities or areas. The Council appears to operate following an integrated model, with all staff involved in several cases at once, including cases relating to the application of competition law and those more concerned with consumer protection. During consultations with Council staff, it was mentioned that the distribution of cases to be investigated is based on two elements, in particular the experience of the case handlers (especially for the opinions) and the volume of files handled by each. An online survey carried out by the Secretariat among Council staff shows that almost two-thirds of participants believe that the lack of specialisation of teams does not facilitate the investigation of cases (see Box 1.6).

The Council's jurisdictional role is carried out by two independent bodies:

- **The investigative body:** this comprises a Rapporteur-General and rapporteurs, who are judges appointed by government decree, as provided for in Article 13 of the 2015 Act, or category "A" civil servants. All take an oath and are assigned an identity card. The Rapporteur-General coordinates, monitors, controls and supervises the work of the rapporteurs, and any other task assigned by the president of the Council. The rapporteurs investigate the applications that the president assigns to them. To this end, they may: (i) request all additional information required for the investigations from the natural and legal persons concerned, under the president's authority, (ii) carry out all on-the-spot inquiries and investigations, in accordance with the law and once authorised by the president, (iii) obtain any documents they deem necessary for the

investigation, and (iv) request, under the president's authority, that inquiries are carried out or expert opinions sought, particularly by the administrative officials responsible for economic or technical inspections. It should be noted that when investigating the cases under their charge, contractual rapporteurs have the same powers provided for in Article 67 of the 2015 Act.

- **The decision-making body:** this comprises one or more sections, chaired by the president of the Council or one of the two vice-presidents. The president of the Council determines the composition of each section and appoints its members at the beginning of each judicial year. Each section comprises a president and four members, at least one of whom must be a judge, who decide on cases referred to them by the president of the Council by a majority vote in open court.

It is also interesting to note that the judiciary is represented by four judges, whereas the Administrative Court, the appeal body for the Council's decisions, is only represented by one judge, namely the first vice-president. During the fact-finding mission, some stakeholders called for a rebalancing of the distribution of judges within the Council to better reflect the Administrative Court's role in the institutional organisation of the competition system in Tunisia, and to strengthen the expertise of administrative judges in competition matters (see Section 1.3.3). The same remark was mentioned with regard to the representativeness of the Court of Auditors with the aim of strengthening the economic analysis, investigation and control aspects of bid rigging related issues.

Appointment and removal

The criteria for appointing the president of the Council and its two vice-presidents, which is done by government decree on the recommendation of the Minister of Trade, have been strengthened. As of 2015, the president not only must have expertise in economic, competition or consumer affairs, and be either a judge or an expert in one of the aforementioned areas, but they must also have at least 20 years' experience. Vice-presidents were already required to have experience, but this was doubled from five to ten years. The five-year experience requirement for judges has not changed since 1995. Like the government Commissioner, the permanent secretary of the Council, the Rapporteur-General and the rapporteurs are all appointed by government decree. It is important to note, however, that the OECD Secretariat has not been able to determine whether there is a procedure for selecting and assessing candidates before their appointment.

The terms of office for the president, vice-presidents and judges have been five years since 1995; as of 2015 they are no longer renewable. None of the 15 members can therefore be reappointed. The term of office for experts was reduced from six to four years, equal to the term of office for people having worked or working in production, distribution and crafts (which was not changed).

The 2015 Act does not provide security of tenure for Council members during their term of office. Article 21, however, provides that the Minister of Trade may, in response to a report by the president of the Council, propose the replacement of any member of the Council who has failed to attend three consecutive meetings of the Council without good reason. In general, and with reference to the principle of parallel procedures, the removal of the president, vice-presidents and other officers of the Competition Council is subject to the same procedures as their appointment.

This could make the process of appointing and dismissal of Council officers vulnerable to political interference. Given that they have ultimate responsibility for the adoption of the institution's decisions, there is a high risk that Council members or the president will be subject to external pressure. It is therefore essential to protect the decision-maker(s) from undue influence, and reviewing this system is vital to strengthen the transparency and fairness of the procedures and hence the independence of the institution.

The potential for undermining the independence of decision-making can be limited to some extent by procedures for the selection, appointment and removal of Council members or the institution's president. To dispel any presumption of undue closeness between Council members and the government, it is important to ensure that the selection and appointment process is transparent and based on objective and qualitative criteria (Alves, Capião and Sinclair, 2015^[10]), (Monti, 2014^[11]), (European Commission, 2014^[12]), (European Commission, 2014^[13]), (Gal, 2004^[14]), (Ottow, 2015^[15]). Establishing independent appointment committees can be an effective way to ensure management impartiality (OECD, 2016^[16]) (see Box 1.2).

Box 1.2. Appointments Committee duties in the United Kingdom and Mexico

In the United Kingdom, the board members of the Competition and Markets Authority (CMA) are appointed by the Secretary of State. This decision is overseen by the Commissioner for Public Appointments, who ensures that appointees are not subject to personal or political influence. The civil service commission regulates recruitment to the civil service. Its commissioners chair the selection panels for the board and the CMA's most senior officers.

In Mexico, the commissioners of the Federal Economic Competition Commission (COFECE) are appointed through a process led by an Autonomous Evaluation Committee. Through an impartial review process, the Evaluation Committee establishes a list of candidates and communicates it to the Mexican President, who then selects individuals. Appointments must then be approved by the Senate.

Source: (OECD, 2016^[17])

With regard to dismissal, given that the president of a competition authority can be dismissed by a simple decision of the head of state or the executive, it is reasonable to question whether the president of a competition authority is able and motivated to act independently (i.e. to make decisions without fear of reprisal). Many jurisdictions have introduced rules that provide that removal from office can only take place in a number of well defined circumstances and where justified by, for example, gross misconduct, inability to perform their duties, criminal conviction, breach of confidentiality rules or conflict of interest (OECD, 2016^[17]).

Guarantees of impartiality

Article 14 of the Act of 15 September 2015 imposed new obligations on the members of the Council, with a view to ensuring the body's impartiality. Under this article, members must take an oath before the Council's plenary assembly before taking up their duties. They must also declare their assets and inform the president of the Council of any potential conflicts of interest so that the necessary steps can be taken.

Article 21 of the 2015 Act provides that members cannot participate in the discussion of any matter in which they have an interest or if they represent or have represented any of the interested parties. Any party concerned may challenge any member of the Council by written application to the president of the Council, who will make a final decision within five days of a hearing attended by both parties. In the event of a challenge to the president, the matter is decided by the Minister of Trade. It is also important to note that the 2015 Act does not prohibit departing Council members from engaging in professional activities in areas related to the application of competition law.

1.3.2. The Ministry of Trade

Mandate and responsibilities

The Ministry of Trade is responsible for the development, implementation and enforcement of competition rules, in particular through the DGCEE. As of 1999, the relevant minister is therefore empowered to take all necessary measures for the implementation and if necessary, enforcement of Competition Council decisions, according to Article 35 of the 1991 Act (now Article 44 of the 2015 Act).

In the event of an appeal against the Council's decision before the Administrative Court, the government Commissioner to the Council, appointed by government decree on the recommendation of the Minister of Trade, is responsible for representing the public party, including the Council. Like the other parties, the Council must forward any response and observations relating to the case in question to the Commissioner. Article 18 of the 2015 Act provides that the government Commissioner is mandated to:

“Present observations and responses on these practices and intervene in related disputes before the Administrative Court, notwithstanding the provisions of Article 1 of Act No. 88-13 of 7 March 1988 on the representation of the state, public administrative establishments and enterprises under state control before the courts”.

As of 1991, the Ministry of Trade can also implement temporary measures, by order and for no longer than six months, in response to a crisis or emergency, exceptional circumstances or a manifestly abnormal market situation in a given sector, to address an excessive increase or decrease in prices. These measures are renewable and require consultation with the Competition Council (see section 1.2.2).

The Ministry, through the DGCEE and its officials throughout the country, is the body best able to investigate anticompetitive practices. To this end, it works closely with

the Competition Council, which may ask it to conduct investigations. In addition to conducting thorough investigations, the Ministry is also responsible for referring matters that may constitute offences to the courts or the Council.

Furthermore, as of 1995, according to Article 6 of the Act of 29 July 1991, the Ministry can grant exemptions – set out in an order stating its reasons and after consulting the Council – to practices or categories of contracts if their authors can prove that they are essential for technical or economic progress, and that they provide users with a fair share of the resulting profit. Two additional conditions have been added for such exemptions since 2015, namely that the practices concerned must not lead to the imposition of restrictions that are not essential to the achievement of the intended objectives, and that they must not lead to the complete elimination of competition in the relevant market or in a substantial part of it.

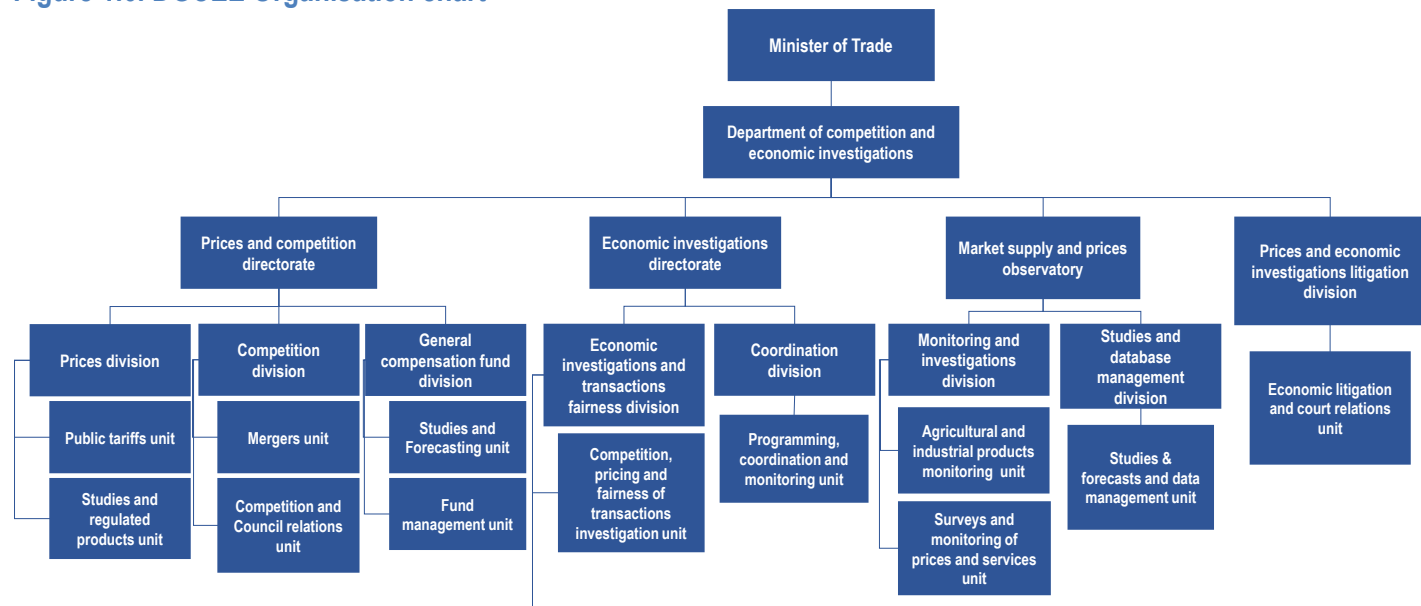
Organisation and operation

Article 29 of Decree No. 2966-2001 of 20 December 2001, on the organisation of the Ministry of Trade, specifies the functions and organisation of the DGCEE, which comprises two directorates: (i) the Directorate of Prices and Competition and (ii) the Directorate of Economic Investigations. Two other structures are attached to the Directorate: (i) the National Observatory of Supply and Prices and (ii) the Sub-Directorate of Pricing and Economic Investigations Litigation (Figure 1.6).

Article 30 of the 2001 Decree specifies that the Directorate of Prices and Competition is responsible, in co-ordination with the investigating authorities, for analysing the results of investigations and drafting administrative reports in the fields of competition and pricing. The Directorate is also responsible for liaison with the Competition Council, including the preparation of case referrals. Regarding merger reviews, the Directorate is responsible for investigating, monitoring and granting authorisations for notified economic mergers, after seeking the opinion of the Competition Council. In addition, the Directorate processes applications for authorisations relating to concession contracts and commercial representation due to economic progress. These functions are carried out by two departments: (i) the Economic Merger Department and (ii) the Competition and Competition Council Relations Department.

The DGCEE's powers also include ensuring the normal functioning of markets, centralising and adding to evidence of anticompetitive practices, and developing competition programmes and investigations and ensuring that they are followed up and implemented.

Figure 1.6. DGCEE Organisation chart



Source: Ministry of Trade

Interactions with the Competition Council

As mentioned above, requests to consult the Council on legislative and regulatory texts must go through the Minister of Trade in accordance with the procedures set out in Decree No. 2016-1148 of 19 August 2016. The same applies to opinions issued by the Council: these are forwarded to the Minister of Trade, who sends a copy to the ministries concerned by the draft texts. Although the advisory function of the Council has been strengthened through legislative changes, the Ministry is not bound by its opinions. It therefore still performs the main regulatory function. Moreover, it has major influence over the Council: Since the Council's creation, the Minister has made recommendations to the government on the appointment of the president, the two vice-presidents and the members of the Council. They are then appointed by decree. This rule has not changed. The 2015 Act even provides that the Minister will fix the remuneration package for the president and the two vice-presidents of the Council based on the same procedure.²¹ Moreover, Article 11 of the 2015 Act specifies that from 2015 onwards, the Council's budget will be attached to the Ministry of Trade for administrative purposes.

In view of these elements, the Competition Council's level of independence may be questioned. It is widely recognised among competition stakeholders that independence from political interference is necessary for competition to produce the desired effects for society as a whole (Box 1.3). Independence is not in the interest of competition authorities per se, but rather a prerequisite for them to make decisions on legal and economic grounds alone, without being influenced by political (or economic) groups.

An OECD survey of competition authorities (2003) found that "greater independence" was the most cited requirement to facilitate the achievement of competition law and policy objectives (OECD, 2016^[17]). Similarly, in a KPMG survey of competition authority officials, competition lawyers and economists, and business representatives, independence from political power was the third most important factor in determining the effectiveness of a competition system across

²¹ The government decree setting the compensation plan for the two vice-presidents, pursuant to article 13 of the 2015 law, hasn't been published until the date of publication of this report.

the sample (KPMG, 2017_[18]).²² For businesses and competition authorities, it was the most important factor.

Competition authorities' independence has symbolic value. "Just as the independence of the courts is a symbol of the rule of law, the independence of competition authorities is a symbol of the commitment to free market forces" (Wilks and Bartle, 2002_[19]). Competition authorities' independence also sends a message to businesses that the government is committed to free and competitive markets. As a result, when this independence is threatened, both their symbolic value and their image in society are undermined.

As explained in Thatcher and Sweet (2002_[20]), "Where delegation takes place in order to secure credible commitment, principals cannot impose many *ex post* controls over the agent without undermining the very purpose of delegation". However, in some regulatory jurisdictions, *ex post* controls or suspension of independence may not have significant consequences and may not alter authorities' image in society because "Where officials delegate to increase technical efficiency, reduce their workload, or improve their information, extensive *ex post* controls are often more compatible with objectives" (Thatcher and Sweet, 2002_[20]).

²² According to the KPMG survey, the factors contributing to the effectiveness of the competition system (from most important to least important) are: 1. technical competence in legal analysis; 2. technical competence in economic analysis; 3. independence from political power; 4. access to an effective right of appeal; 5. clarity of procedures; 6. the ability of officials handling the case or investigation to make independent, impartial recommendations to their superiors; 7. the system's ability to apply sufficiently severe sanctions; 8. the resources available for handling cases; 9. the efficiency of investigations and the effectiveness of competition policy; 10. the speed of decision-making; 11. the technical competence of administrative staff; 12. the ability of the system's key players to communicate with external stakeholders; 13. minimal cost for businesses.

Box 1.3. Competition authorities' independence according to the European Commission

The European Commission has paid particular attention to the issue of competition authorities' independence. In a communication to the Council and the European Parliament in 2014, the Commission stated that legally binding minimum safeguards for competition authorities were needed to ensure their independence. The independence factors considered important in this communication were:

- the existence of transparent and merit-based appointment procedures and the establishment of objective and clearly defined grounds for the removal of senior managers;
- sufficient and stable resources and budgetary autonomy;
- rules governing conflicts of interest and incompatibilities.

Source: (European Commission, 2014^[12]); (European Commission, 2014^[13]).

Moreover, legal independence (official, according to the organisation's statutes and in law) does not always correspond to "*de facto* independence (effective, real and outside any official framework)". Although legal independence does not automatically lead to *de facto* independence, it is still important. The characteristics of legal independence provide competition authorities with minimum safeguards that may not always prevent all political pressure, but make it less likely. In this sense, legal safeguards strengthen the authorities' capacity to act and increase their *de facto* independence.

De facto independence depends on various factors. One of the key determinants of *de facto* independence is the competition authority's operating environment. A competition authority is part of the country's administrative system and is inevitably influenced by the political, social and economic situation. In particular, the unspoken administrative and political rules and traditions of a jurisdiction can play an important role. These can decrease or increase the degree of autonomy that is formally specified in the legal texts and lead to considerable variations in the actual practices of the authority (Kovacic and Wineman, 2015^[21]), (RIC, 2005^[22]), (RIC, 2002^[23]), (CNUCED, 2008^[24]), (Kovacic, 2011^[25]), (Jenny, 2016^[26]).

Senior executives may also affect competition authorities' *de facto* independence: executives who publicise the work of their authority can help to raise its profile within businesses and in society as a whole (CNUCED, 2008^[24]). Finally, a competition authority's *de facto* independence also depends on its own record. Good enforcement results can also significantly increase its *de facto* independence by enhancing its reputation and image in society (OECD, 2005^[27], (Ottow, 2015^[15]), (RIC, 2002^[23]).

Box 1.4. Competition authorities' independence and the effectiveness of competition systems: empirical studies

While it is widely accepted that competition authorities' independence increases the effectiveness of competition systems, there is very little research to support a positive correlation between the two. Dutz and Vagliasindi (Dutz and Vagliasindi, 2000^[28]). tested the relationship between the institutional effectiveness of competition authorities and the intensity of competition in the market by studying 18 competition authorities. In this study, institutional effectiveness was assessed on the basis of three factors: (i) the degree of independence of the authority from political power, (ii) transparency, and (iii) the effectiveness of the appeals process in terms of the relevance of the decision made.

The results of this study indicate that there is a positive correlation between the effectiveness of competition law enforcement and policy and the effectiveness of the institution, and the intensity of competition in the markets. The study also found that institutional effectiveness was more than twice as influential as competition law enforcement and policy effectiveness. According to the authors, "This implies that factors related to institutional effectiveness are indeed critical in ensuring that competition policy has its intended economy-wide impact. The stronger link between implementation effectiveness and ease of expansion of productive enterprises suggests that building a reputation for independent, transparent and appropriate decision-making can be an important prerequisite for more effective enforcement and competition advocacy activities by national competition authorities". (Dutz and Vagliasindi, 2000^[28])

Guidi (Guidi, 2011^[29]) used the number of investigations opened and the number of decisions made to assess the authorities' effectiveness. He hypothesised that the more independent a competition authority, the more

cases investigated and sanctions imposed. The results of his statistical analysis supported this hypothesis and showed that “formal independence turns out to positively influence the effectiveness of the authorities. This means that independence does not only yield a “reputation” effect, but it also brings an improvement in the objective performances of the competition agencies” (Guidi, 2011^[29]). Guidi also looked at the effect of independence on the performance of competition authorities, using foreign direct investment and the consumer price index as indicators. He found conflicting results and concluded that “the results show that the formal independence of a competition agency does not have any significant impact on either indicator, thus calling into question the assumption that independence yields better regulatory performance” (Guidi, 2015^[30]).

Empirical studies on the relationship between the independence and effectiveness of a competition authority must define what an “effective competition authority” is in order to make comparisons across jurisdictions. However, finding a satisfactory definition from a comparative perspective is challenging. It is especially difficult to choose an indicator that correctly measures the effectiveness of an authority at a given time. For example, competition authorities may have similar effects through different types of activities or cases, or by imposing fines of different amounts. However, this may not reveal much about the effectiveness of the competition system. A competition authority can resolve many conflicts through commitments or agreements, or succeed in preventing the formation of new cartels simply through its past decisions. In addition, promoting competition could have a significant impact economy-wide, although this may be difficult to observe in the short term. These elements are difficult to capture with an indicator.

Source: (OECD, 2016^[17])

1.3.3. Administrative Court

The Administrative Court is an independent judicial body. For a long time, the Administrative Court was considered the sole judge because there was no appeal against its decisions. Framework Act No. 2001-79 of 24 July 2001 introduced the principle of a two-tier court system, without creating additional courts. The Administrative Court now consists of several chambers, which act as a Court of first instance, Court of Appeal and Supreme Court. More specifically, it is composed of seven chambers dealing with cases at first instance, five appeal

chambers, three chambers acting as a Supreme Court, two advisory chambers and a Plenary Assembly with jurisdiction over cases being judged at last resort.

The chambers dealing with cases at first instance and appeal chambers mainly hear applications to quash actions or decisions made by the administrative authorities. The plenary assembly, when judging cases at last resort, essentially rules on final appeals against judgments handed down in matters of compensation, taxation, licence to practise and elections.

The Administrative Court has been given the role of reviewing decisions made by various sectoral regulatory authorities, including decisions of the Banking Commission, the General Insurance Committee and the Financial Services Commission. It also decides on appeals and final appeals on decisions handed down by the Competition Council, and rules as a court of appeal on applications to quash actions or decisions made by administrative authorities in the area of exemptions and mergers. It may, on appeal, reverse the decisions of the Council and the Ministry by replacing the grounds for the decision at issue with its own assessment of the facts.

In discussions with stakeholders, the issue of the specialisation of judges at the Administrative Court was raised on several occasions. The limited training opportunities and lack of a specialised competition law chamber or section hinder judges' ability to build up technical knowledge and institutional expertise. This makes their job more difficult, often limiting their assessment to matters of form rather than substance. These difficulties are, moreover, almost inevitably reflected in the average duration of an action before the Administrative Court, including appeal and final appeal, which ranges from five to ten years (see section 2.2).

1.4. Interface with the sectoral regulatory authorities

1.4.1. *National Telecommunications Authority*

The National Telecommunications Authority (INT) is a collegiate body with legal personality and financial autonomy created by Article 63 of the Telecommunications Code. Its mission is to regulate the telecommunications market, ensure that telecommunications operators comply with the legislative and regulatory framework, and organise relations between operators in a non-discriminatory manner that establishes healthy and fair competition between the various market players (operators and telecommunications service providers).

The INT also has powers of decision, investigation and inquiry (including self-referral), dispute settlement and sanctions against operators or service providers who disregard the legislative or regulatory provisions governing the sector, or a decision that it has made. As a result, there is a real risk of a conflict of jurisdiction with the Competition Council, as indicated by the dual investigation of the "*familia offer*" case in 2012.²³

To better prevent such conflicts, a memorandum of understanding was signed by both parties in June 2012 stipulating that the Competition Council has no jurisdiction to issue judgments on cases related to the INT's regulatory decisions, and that the INT has no jurisdiction to rule on appeals submitted to it involving anticompetitive practices as stipulated by Section 5 of the Competition and Prices Act 2015²⁴. In addition, the INT may submit a request to the Council for an opinion on competition matters or file an application concerning anticompetitive practices²⁵. During the consultations, the OECD Secretariat was informed that the new Telecommunications Code would propose a division of roles between the two institutions with *ex ante* powers for the INT and *ex post* powers for the Council. The Secretariat was also informed that the INT is preparing an initial sectoral study. However, it was not confirmed whether the Council will be actively involved.

1.4.2. Central Bank of Tunisia

The Central Bank of Tunisia (BCT) supervises the banking sector and ensures its stability. It is responsible for supervision, regulation and sanctions. It also has the power to deal with competition issues within the industry, including proposed mergers involving banks and financial institutions (see section 2.3). The Licensing Commission, created by Article 26 of Act No. 2016-48 of 11 July 2016 on banks and financial institutions, is responsible for, among other things, handing down decisions on any direct or indirect purchase of shares and/or voting rights of a

²³ A case investigated and judged simultaneously by the INT under reference 38/2012 and the Competition Council under reference No. 121191, with no judgment to date.

²⁴ This principle was also confirmed in the Competition Council's decision No. 121322 of 29 December 2014, in which the Council observed that the INT's jurisdiction did not cover Article 5 on telecommunications practices, since the Telecommunications Code does not refer to either anticompetitive practices or competition law.

²⁵ See, for example, Competition Council opinion No. 122444 of 12 September 2012, which was issued following a request for an opinion from the INT regarding a dispute with Tunisiana referred by Tunisie Telecom.

bank or financial institution, and explicit concerted actions between shareholders after consultation with the Competition Council (Article 27 and Article 29 of the Banking Act). The Council is not represented on the Commission and there is no formal framework for co-operation between the two institutions, although the Council has requested that a representative of the BCT be appointed to the Commission.

The BCT receives complaints from individuals and companies concerning certain bank practices, such as unlawful termination of credit or a lack of transparency in the interest rates charged, but generally they do not lead to sanctions. The Governor of the BCT has the power to impose sanctions on banks and financial institutions (Article 169 of the Banking Act), including a warning or a fine no higher than 15% of the minimum capital in the case of non-compliance with the statutory and regulatory provisions in force. The BCT, through the Sanctions Commission, may also issue financial or administrative sanctions, including the withdrawal of a licence for banking offences. During the consultations, the OECD Secretariat was informed that the Sanctions Committee is not very active and that to date no sanctions have been decided by the BCT. The Competition Council is also not very active in this sector. Apart from Decision No. 3150 of 25 June 2004 concerning the bank cartel on cheque commissions, the Council took up a second case in June 2021 concerning banking practices related to the deferred repayment of loans due to the coronavirus pandemic.

1.4.3. General Insurance Committee

The General Insurance Committee (*Comité général des assurances*) is the supervisory authority for the insurance sector. It was created by Act No. 2008-8 of 13 February 2008. It has legal personality and financial autonomy and is responsible for supervision, regulation and sanctions that can be pronounced by the Disciplinary Committee, under the authority of the CGA Board. Decisions on licensing, mergers and economic concentrations are made by the Minister of Finance based a report by the Committee, which is not obliged to consult the Competition Council (see section 2.3). However, Article 180 of the Insurance Code provides that "the Committee may also exchange information with the competition authorities in the context of their respective missions".

Despite the lack of a formal framework for co-operation with the Competition Council, the OECD Secretariat was informed during the fact-finding mission that the two institutions regularly exchange on issues relating to competition enforcement in the sector. However, apart from Opinion No. 82235 of 14 May

2009 on pricing agreements mentioned earlier, the Council has not dealt with any cases concerning the insurance sector.

1.4.4. Microfinance Supervisory Authority

The Microfinance Supervisory Authority (ACM) is a committee with legal personality and financial autonomy. It was created by Decree No. 2012-2128 of 28 September 2012. It plays an important role in the accreditation process, reviewing the application and preparing the microfinance report. It also has the necessary disciplinary powers to enforce compliance with regulations by the microfinance institutions under its supervision. Decisions on licensing, mergers and economic concentrations are made by the Minister of Finance once the ACM's opinion has been sought. Moreover, it is important to note that Article 25 of Decree-Law No. 2011-117 of 5 November 2011 on mergers in the sector does not provide for consultation with competition bodies.

1.4.5. Authority for Audiovisual Communication (HAICA)

HAICA is a constitutional body. It was created by Decree-Law No. 2011-116 of 02 November 2011 and has broad regulatory and consultative powers. HAICA's mission is to ensure the organisation and regulation of audiovisual communication. It can intervene, by self-referral on prior application, to check compliance with the general principles for audiovisual communication activities and can sanction any breaches found. HAICA is also responsible for preventing concentration of ownership in the audiovisual media and establishing fair competition within the sector (Article 15 of the 2011 Decree-Law). As a result, interactions with competition bodies are almost non-existent (see Section 2.3).

In Opinion No. 202750 of 23 October 2020 on the new bill on the freedom of audiovisual communication, the Competition Council proposed that the prohibition on the concentration of ownership of audiovisual media be abolished, and that comparative experiences be drawn on to adopt criteria and thresholds specific to the sector in line with the principles of pluralism on the one hand, and free movement of capital on the other.

1.5. Resources

Adequate staff and budget are fundamental prerequisites for the proper functioning and independence of a competition authority (European Commission, 2014^[12]). In general, competition authorities' resources, both young and old, are constrained in some form or another and tend to remain so over time (OECD, 2009^[31]). While all authorities are working to increase their budgets, it is important to ensure that their money is used as efficiently as possible.

1.5.1. Budgetary resources

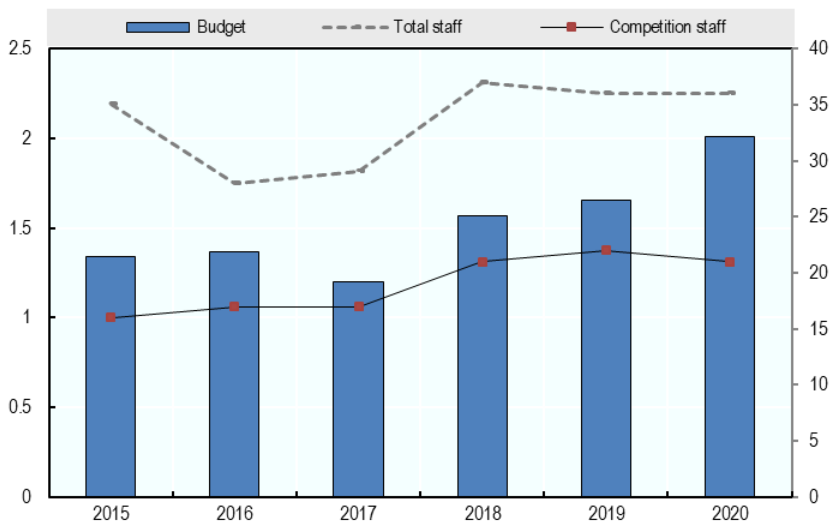
Competition authorities are usually funded from general government revenues. Whether the ruling power approves or disapproves of the authority's decisions, it can increase or decrease the authority's budget depending on its performance (European Commission, 2014^[12]), (European Commission, 2014^[13]), (Monti, 2014^[11]), (Alves, Capiou and Sinclair, 2015^[10]), (Gal, 2004^[14]), (Kovacic and Wineman, 2015^[21]), (Ottow, 2015^[15]). The authority, meanwhile, may tend to adapt its decisions to the expectations of the ruling power to conserve resources. The budget allocation is a crucial parameter that can be subject to undue pressure and must be controlled by adequate safeguards.

According to Article 11 of the 2015 Act, the Competition Council's budget is financed from the general state budget. It is attached to the Ministry of Trade's budget for administrative purposes. Decree No. 2006-477 of 15 February 2006, setting out the administrative and financial organisation and operation of the Competition Council, provides in the section on financial organisation that it is the responsibility of the president of the Council to prepare the draft budget. The budget is split into two headings: heading 1, the operating budget, and heading 2, the capital budget.

It includes estimates of the expenditure necessary for the ordinary operation of the Council and the implementation of its investment programme. The Council (as a programme) prepares its budget each year under the control of the Ministry of Trade (as a mission). The draft budget is discussed with the General Committee for State Budget Administration at the Ministry of Finance, as part of preparation of the Ministry of Trade's annual missions budget. The Ministry of Finance then validates and consolidates the forecasts for all public sector institutions, which it sends to the Assembly of the People's Representatives (ARP) for approval of the annual state budget, which is an integral part of the Finance Act.

The budget is authorised by the president of the Council. All Council expenditure must be subject to prior control, as is the case for all public institutions. This is reflected in the requirement for approval by the expenditure controller before any commitment of appropriations. A second check is carried out before the budget is paid by the accountant.

Figure 1.7. The Council's budgetary (TND million) and human resources, 2015-20



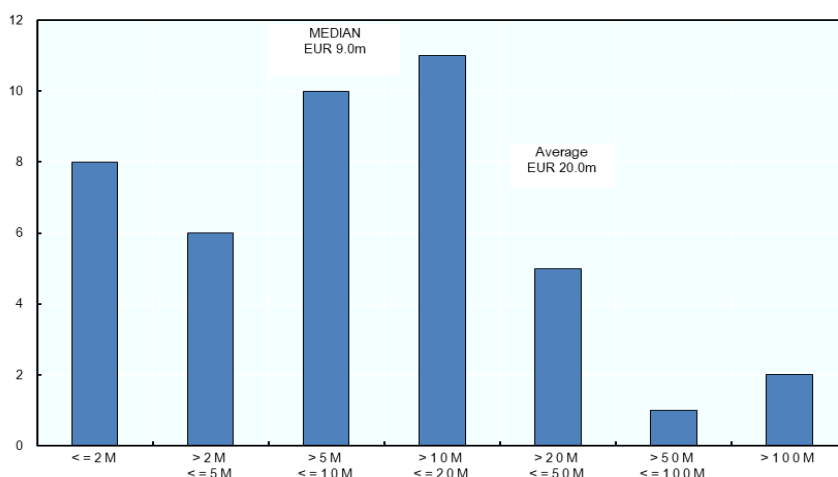
Source: OECD based on Competition Council data

The Competition Council's budget was around EUR 0.65 million in 2020 (Figure 1.7). Although it increased by almost 9% on average over the 2015-20 period, it remains very low by international standards. In 2018, the competition authorities included in the OECD COMPSTATS database²⁶ had an average budget of EUR 20 million, but this amount is somewhat distorted by the inclusion

²⁶ The OECD COMPSTATS database includes data on 55 jurisdictions around the world. Information on the COMPSTATS database is compiled in the publication "OECD Competition Trends 2020": <https://www.oecd.org/daf/competition/OECD-Competition-Trends-2020.pdf>.

of a number of large competition authorities. The median figure for all budgets was EUR 9 million (approximately USD 10.6 million). The average competition authority budget, in nominal terms, increased by about 1% between 2015 and 2018, taking exchange rate effects into account. On the other hand, the average budget of the 26 competition authorities from small countries (fewer than 12 million inhabitants) included in COMPSTATS was EUR 6.3 million, almost 10 times that of the Tunisian Competition Council.

Figure 1.8. Distribution of competition authorities' budgets

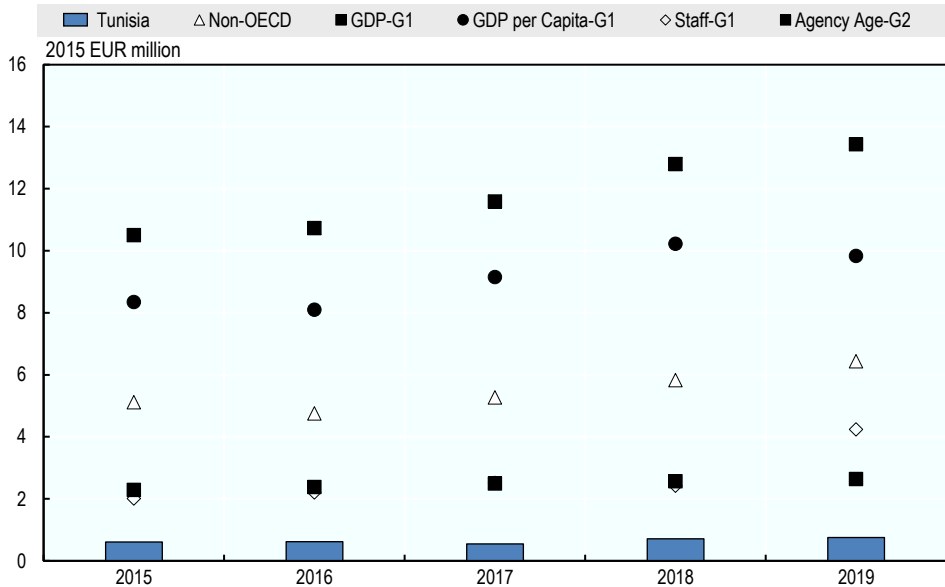


Note: Calculated for the 43 authorities in the COMPSTATS database that provided four years of budget data for competition-related activities only.

Source: OECD COMPSTATS database.

A detailed analysis of the budgetary data by groups of countries participating in the OECD's COMPSTATS database provides a clearer idea of the situation of the Council in relation to the competition authorities of comparable countries, in particular in terms of GDP, GDP per capita, budget, number of staff and age of the competition authority. Figure 1.9 shows that the budgetary resources of the Tunisian Competition Council remain well below the average level of all comparable countries across all the five criteria mentioned above.

Figure 1.9. Budget of the competition Council versus peer groups



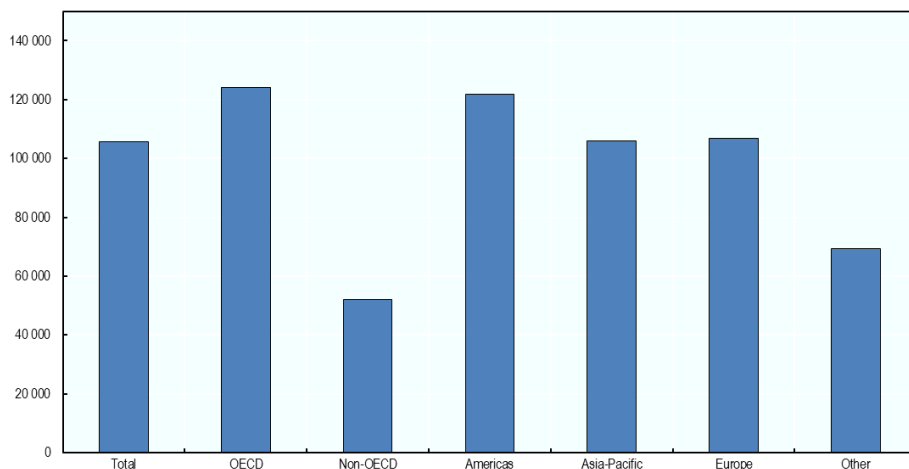
Note: The countries participating in the database were divided into three groups of countries showing comparable performance according to the five comparison criteria retained for this exercise. Beyond the "non-OECD" group which includes 18 non-member countries, the "GDP-G1" group to which Tunisia belongs includes 22 countries with a GDP below 250 billion EUR, the "GDP per capita-G1" includes 26 countries with an average per capita income of less than 25,000 EUR, the "Staff-G1" group includes 22 countries with a number of officials dedicated to competition-related activities of less than 35 and the "Age of authority-G2" group includes 29 countries whose competition authorities have an age of between 25 and 50 years.

Source: OECD COMPSTATS database

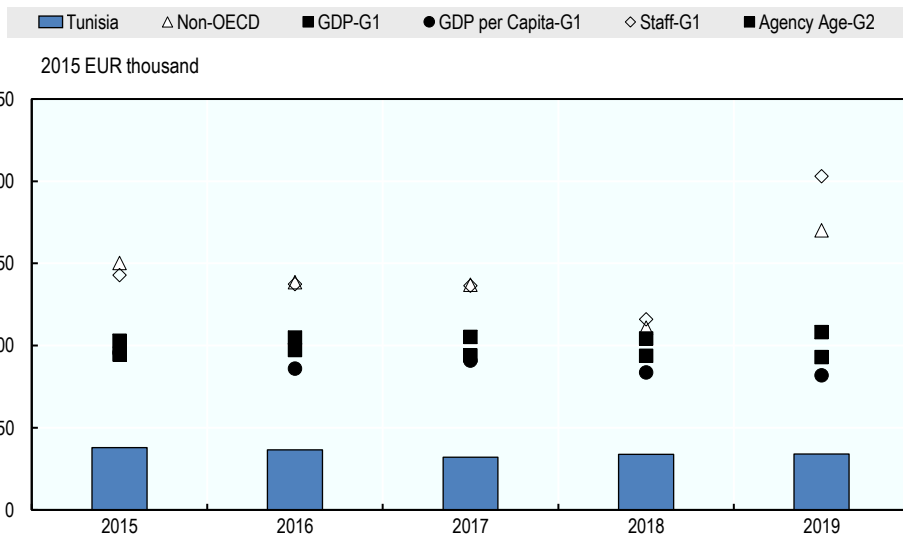
The COMPSTATS database also allows for comparison of budget to number of staff in competition authorities. Figure 1.10-A shows that in 2018, the budget per member of staff was on average higher in OECD countries (EUR 124 000) than in non-OECD jurisdictions (EUR 52 000). For the 26 countries with small populations, the figure was EUR 114 000. In comparison, the average budget per member of staff for Tunisia was below EUR 33 000 in 2018. Although it increased to EUR 37 000 in 2020, this figure is still very low in absolute terms as well as in relative terms, taking into account the average performance of the different groups of comparable countries and demonstrates the lack of resources available to the Competition Council Figure 1.10-B.

Figure 1.10. Average budget per member

A- Budget per staff by region, 2018



B- Budget per staff for Tunisia versus peer groups



Note: Calculated for the 43 authorities in the COMPSTATS database that provided four years of budget data for competition-related activities only.

Source: OECD COMPSTATS database.

Historically, the Ministry of Finance has often allocated a lower budget than that requested by the Council. The budget is granted to the Council each January and is not subject to change during the year, which provides some stability. Heading 1 of the operating budget, which is allocated to salary expenses, accounts for three-quarters of the Council's resources. The remaining quarter is mainly allocated to management expenses (equipment). In practice, the implementation of heading 2 of the budget is often complicated by the fact that some purchases are centralised by the Ministry of Trade.

Funding sources that do not depend exclusively on the discretion of the government in power can shield competition authorities from undue political interference, since an authority that funds itself does not have to negotiate its resources with the government. Some self-funding mechanisms are based on certain taxes and contributions levied on businesses (e.g. in Italy and Turkey) (see Box 1.5) or on fees charged for certain services such as merger notifications (e.g. in Austria, Canada, the United States and Zambia).

However, relying exclusively on these sources of funding has its limitations and may create other difficulties for the authorities. As a result, particularly during an economic crisis, the authority may be short of resources due to a drop in merger notifications (Jenny, 2016^[26]), (Kovacic and Wineman, 2015^[21]). The general recommendation is to rely on a combination of funding sources, such as general revenue and commissions, to reduce the risks associated with dependence on a single source.

Moreover, it makes sense to prioritise activities in an environment where resources are very limited. Competition authorities must have some degree of independence in setting their priorities to ensure that their actions are effective (Ottow, 2015^[15]) (European Commission, 2014^[13]), (Jenny, 2016^[26]).

Box 1.5. Funding of OECD competition authorities: Italy, Portugal and Turkey

Italy

Until 2012, the Italian Competition Authority (ICA) was funded from two main sources: the state budget and the fees paid by companies subject to the merger notification obligation. Decree No. 1/2012 changed the ICA's funding system; it is now based on compulsory contributions imposed on businesses incorporated under Italian law whose turnover exceeds EUR 50 million. The income from these contributions replaces all previous forms of funding. The contribution level, initially set at 0.06 per '000, was gradually lowered by the ICA to 0.055 per '000. The authority's financial statements must be approved by 30 April of the following year at the latest and are subject to audit by the Court of Auditors. Under the old funding system, there was a risk of possible fluctuations in the amount of the annual budget, due to the unpredictability of the number of notified mergers and of state funding. The new system protects the ICA from this risk, allowing for more stable business planning and recruitment. The new funding system is seen as indirect recognition of the positive role played by the ICA in fostering a healthy and fair competitive environment, with a small tax imposed on the largest companies incorporated under Italian law.

Portugal

The Portuguese Competition Authority (PCA) is funded by transfers from national regulators, the fees charged for its activities and the fines it imposes. It can also use the state budget as a last resort, but this has never happened. Contributions from national regulatory authorities are its main source of funding, accounting for about 81% of its budget. According to Article 35 of the new PCA statute, these contributions range from 5.5% to 7.0% of the total revenue of the national regulatory authorities. Article 35 also establishes a default rate of 6.25% in the event that the ministerial order setting the rate to be paid by the national regulatory authorities is not adopted. The competition authority also receives 40% of the fines imposed, with the remaining 60% going to the state budget. The PCA is not the only body to use fines to fund itself: this is common practice for all administrative authorities. The courts make the final rulings on fines and can confirm or amend (upwards or downwards) the fine amounts imposed by the authority. In 2014, this method of funding accounted for 4% of the PCA's budget.

Turkey

The Turkish Competition Authority (TCA) is funded by the state budget, taxes levied on certain businesses and sales of publications. Fines used to be a source of funding for the authority. An article of the law entitled it to withhold 25% of the fine imposed but this was repealed in 2003 in response to criticism from businesses that the authority tended to impose fines to fund itself. Furthermore, while the courts can accept or reject a TCA decision, they cannot decide on the fine amount, giving the TCA free rein. Since its creation in 1997, the TCA has received no funding from the state and, following the law was amended in 2003, its funding has been based exclusively on tax revenues. The tax concerned amounts to 0.04% of the capital of any newly established Turkish limited company and of the new capital in the event of a capital increase.

Source: (OECD, 2016^[17])

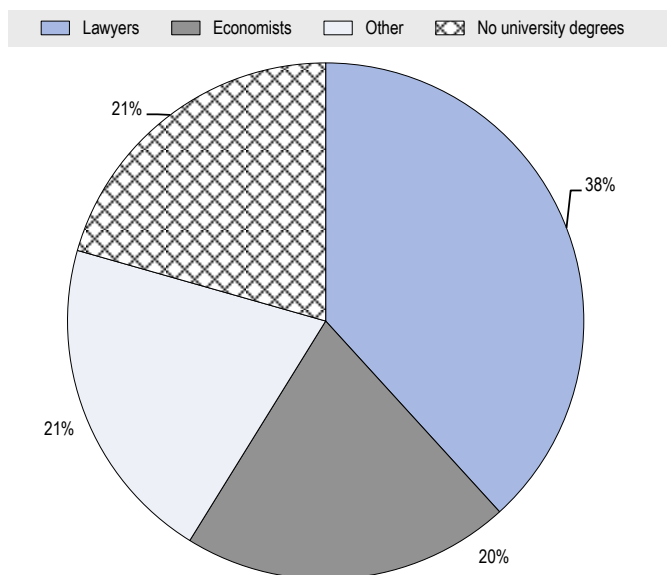
As regards the DGCEE, it should be noted that it does not have an independent budget. Instead, its resources come from the Ministry of Trade's budget. Nevertheless, an estimate of its budgetary expenditure shows that it has more resources than the Council.

1.5.2. Human resources

Human resources play an essential role in the proper functioning of competition authorities. Officials investigate cases, gather all the required data and information, cross-check and analyse these data as necessary, and prepare reports on which the authority's board bases its final decisions. A lack of competent staff undermines a competition authority's ability to demonstrate professionalism, which in turn can compromise its independence.

The Competition Council currently has 34 full-time employees, mainly in the rapporteur and administrative staff. Two-thirds of the staff (62%) are assigned to the Council's main competition activities. In terms of their specialisations, lawyers make up 38% of the staff and economists make up 21%, while 21% have other higher education qualifications, mainly in IT, business management and accounting. Forty-two per cent of the staff have completed further training at ENA, while 20%, mainly administrative support staff, have no higher education qualifications.

Figure 1.11. Distribution of Council staff by profession

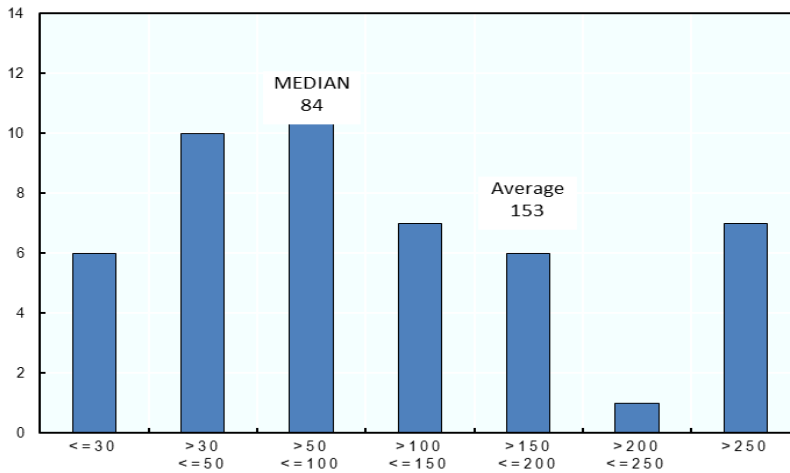


Source: Competition Council.

Two main findings have emerged from the Council's human resources data: first, the relatively high percentage of administrative staff who are not competition specialists and are not assigned to competition-related activities, and second, the number of lawyers compared to economists, with a ratio of 13 lawyers to 7 economists. In addition, there is no chief economist to provide economic information and co-ordinate the Council's economic approach.

More generally, the Council's human resources remain well below international standards. According to the 2018 OECD COMPSTATS database, the median number of competition staff employed by agencies is 84 and the average is 153, both of which are skewed by large competition authorities. In addition, the average of the 26 competition authorities in small countries (with a population of fewer than 12 million) was 53, more than double the number employed by the Council. This gap is narrower and closer to the norm in comparable countries if the number of DGCEE employees is taken into account.

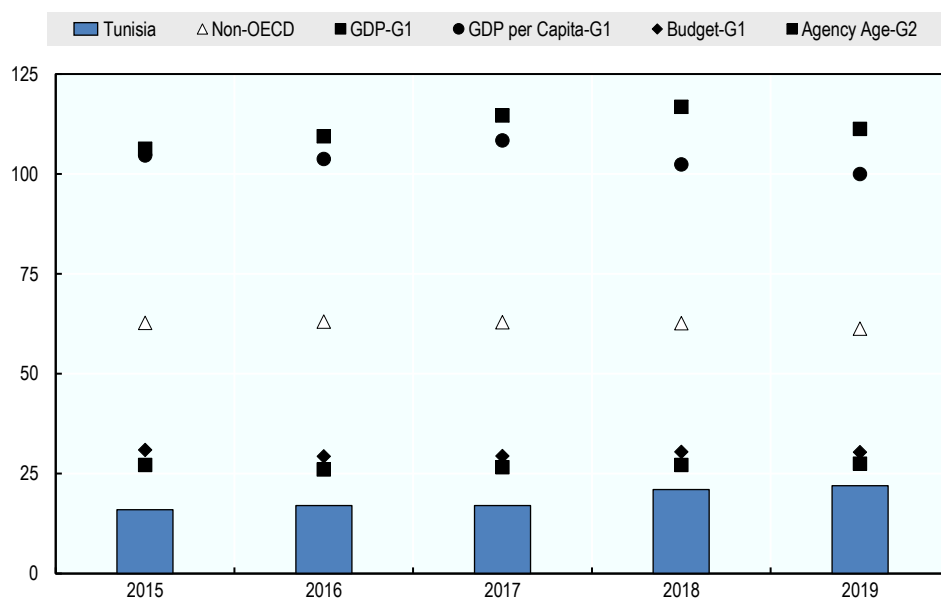
Figure 1.12. Staffing of competition authorities, 2018



Note: Based on the 49 jurisdictions that provided data for all four years.
Source: OECD COMPSTATS database.

The comparison of the human resources of the Competition Council with the authorities of comparable countries according to the same criteria mentioned in Figure 1.13, makes it possible to measure the gap and the need to strengthen these resources.

Figure 1.13. Council staff versus peers groups

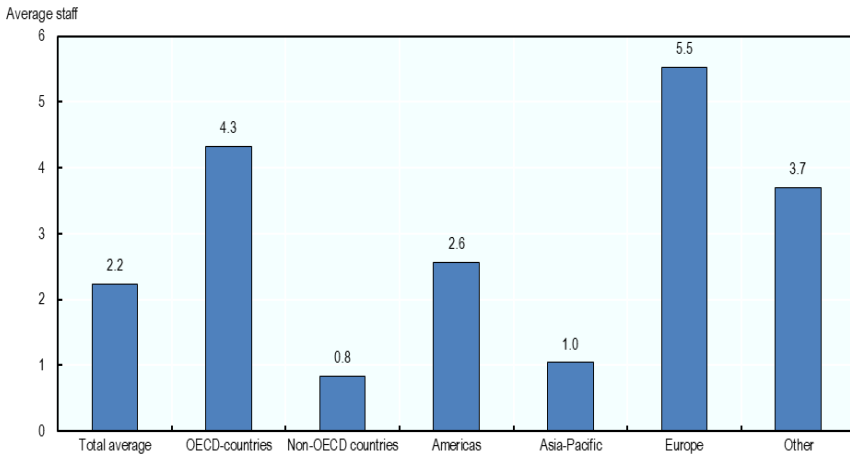


Source: OECD COMPSTATS database.

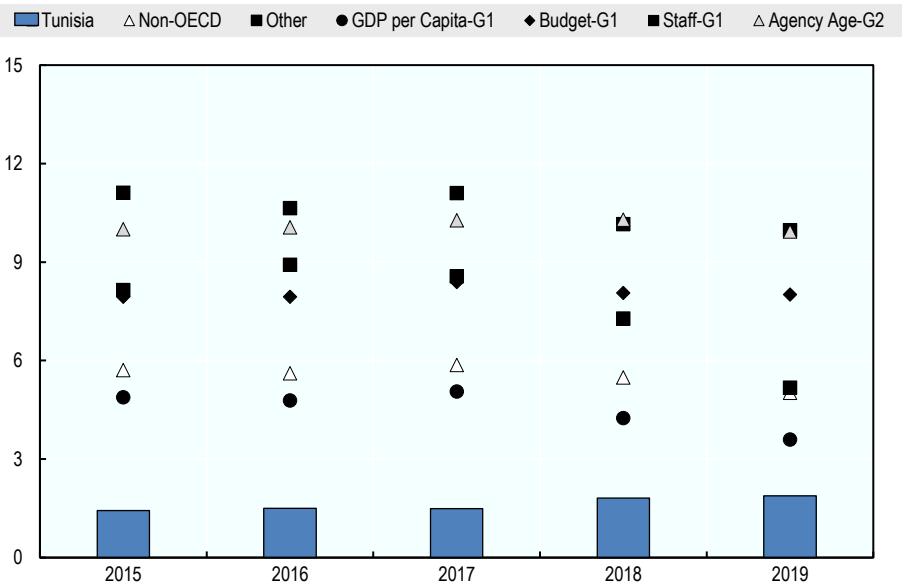
The average number of staff with competition-related roles in the competition authorities participating in the COMPSTATS database was 2.2 per 1 million population in 2018. This average is significantly higher in OECD countries – 4.3 people per 1 million population compared with 0.8 people per 1 million population in non-OECD countries. Tunisia's average in 2018 was 1.82 for only Council staff, and 3.5 including DGCEE staff. In terms of the number of competition staff per million euros of GDP, competition authorities employed on average one person per EUR 100 million of GDP (Figure 1.14-A). For Tunisia, this figure was around 0.5 in 2018, or 1.2 including DGCEE staff.

Figure 1.14. Competition authority staffing per 1 million inhabitants

A- Staff per 1 million inhabitants by region, 2018



B- Staff per 1 million inhabitants in Tunisia compared to peer groups



Source: OECD COMPSTATS database.

The DGCEE, in particular the Directorate of Prices and Competition, has 23 employees dedicated to the various activities at the central level and 55 spread across the country's 24 governorates. Lawyers and economists make up the vast majority of management staff. The Ministry of Trade is thus much better equipped than the Competition Council, particularly concerning field investigations and searches, which can only be conducted by economic control inspectors.

Table 1.1. Distribution of staff in the Directorate of Prices and Competition, DGCEE

Area or unit	Number	Academic education
Directorate of Prices and Competition		
Leadership / investigation of anticompetitive practices	4	Lawyers and economists
Merger controls and exemptions	2	Economists
Consultations	3	Lawyers
Sector studies	4	Lawyers and economists
Competition culture	2	Lawyers and economists
Government Commissioner observations	4	Lawyers
Monitoring of implementation of Competition Council's decisions	2	Lawyers
Monitoring and statistics	2	Administrators
Regional trade directorates		
Regional trade investigations	48	Lawyers and economists Engineers
Leadership / investigation of anticompetitive practices	5	Lawyers and economists
Merger controls and exemptions	2	Economists

Source: Ministry of Trade.

In terms of remuneration, Council and Ministry employees' salaries are determined by the civil service pay scale, which classifies all civil servants into six categories or grades at 25 pay levels each. They are therefore equivalent to salaries in other public institutions. As mentioned earlier, the Council's president's and two vice-presidents' salaries are determined by government decree on the Minister of Trade's recommendation.

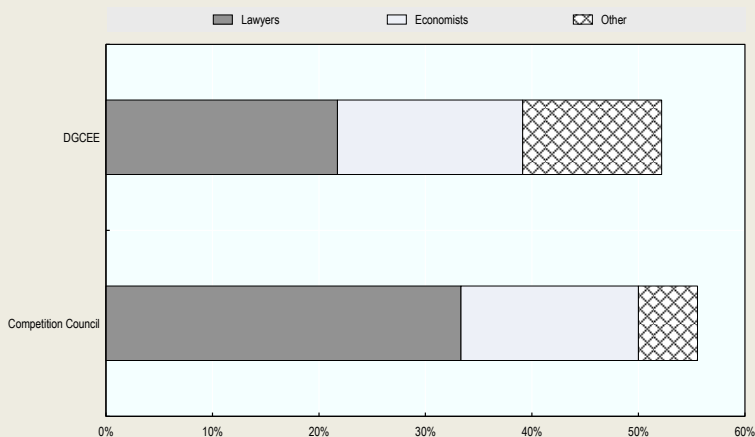
Starting salaries in Tunisia's civil service are relatively competitive with the private sector. As employees gain expertise and move up the hierarchy, the wage gap between the public and private sectors tends to increase in favour of the private sector. In mid-level positions, civil servants generally earn slightly less than their private sector counterparts, while in senior positions, salaries are not competitive with the private sector. This is doubly problematic, as it makes it difficult both to

retain talent in the Council and to attract it from outside. Moreover, the low salary does not seem to be offset by an attractive career path. The online survey carried out by the Secretariat among the staff of the Competition Council revealed that 50% of the participants felt that they do not benefit from an attractive career project with clear prospects.

Box 1.6. Online staff survey of the Competition Council and the DGCEE

In order to complement the information gathered through the peer review questionnaire and the interviews held during the fact-finding mission, the OECD Secretariat carried out an online survey among the staff of the Competition Council and the General Directorate for Competition and Economic Investigations (DGCEE) of the Ministry of Commerce. The survey took place between July and August 2021. It was conducted with the aim of collecting information on the working conditions of staff dedicated to competition. The questionnaire focused on ten questions with satisfaction intervals ranging from 1 to 5. The issues raised by the survey include general working conditions, career plans, training, team specialisation, cooperation with sectoral regulators, advocacy and recognition of the work of competition bodies by the general public. The response rate was 56% for the staff of the Competition Council and 52% for the staff within the central department of the DGCEE.

Figure 1.15. Response rate by institutions and by profession



Source: OECD Online Survey

Competition authorities must make a special effort to develop an effective human resources policy. Careful consideration should be given to recruitment and career management issues. The authority should be empowered to set its own recruitment criteria and employ its own staff to limit the risk of staff recruitment being used to improperly influence the authority. Furthermore, the recruitment process must be based on a transparent and merit-based competition to dispel any suspicion of bias among staff. Transparent and objective staff selection can also help create a culture of independence within the institution.

Finally, it is essential that competition authorities have a strong personnel policy to both attract and retain qualified staff. Creating a work environment that encourages and rewards professional development can help motivate staff to remain in the institution and accumulate the professional knowledge needed within the organisation. Specialised training programmes that are in line with emerging challenges can also help retain qualified staff (OECD, 2009^[31]). The results of the online survey of Council staff show however, that 70% of participants do not feel they have training opportunities that meet their needs.

It is also important to pay careful attention to non-monetary incentives, since these can offset the pay gap with the private sector (OECD, 2016^[17]). Possible solutions include instilling a sense of public service, improving work-life balance, and offering more opportunities for professional development and career prospects within the organisation. The competence and reputation of the authority within society can also help to attract and retain more qualified staff (Gal, 2004^[14]). The online survey of Council and DGCEE staff revealed that more efforts need to be deployed in this field. About 90% of Council participants and 75% of Ministry participants believe that the work of the two institutions is not sufficiently known and respected by the population in general.

Chapter 2. Competition law enforcement

Competition law is primarily enforced by the DGCEE of the Ministry of Trade and by the Competition Council. As discussed in the previous chapter, some sectors are subject to a special merger control regime with their respective sector regulator. This section analyses the types of infringements involving anticompetitive practices, the procedure for these investigations, merger control, as well as aspects relating to the judiciary.

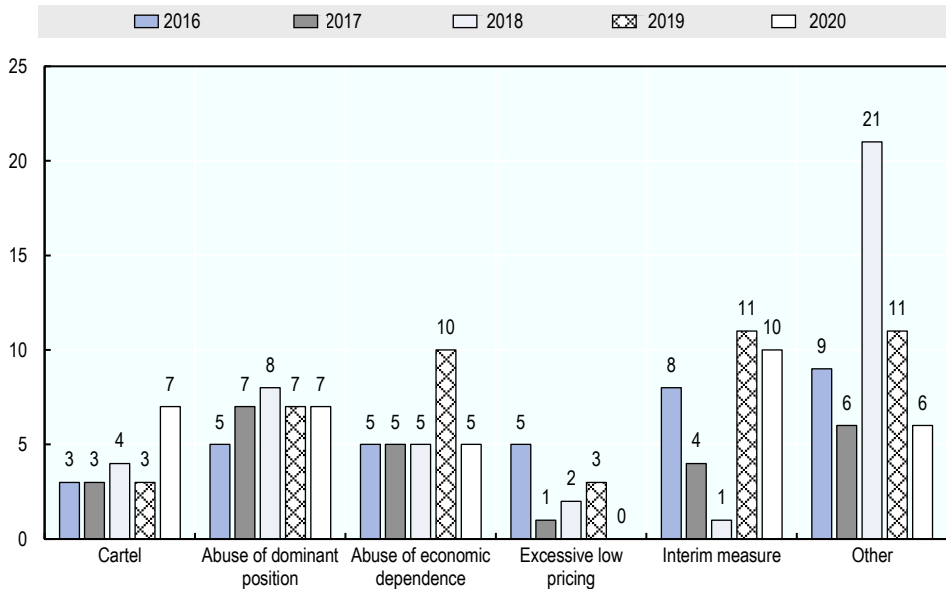
2.1. Types of infringements

Act No. 2015-36 of 15 September 2015 establishes a list of practices that are considered anticompetitive in Tunisia, and therefore prohibited. According to Article 5 of the Act, this includes cartels, abuse of a dominant position, abuse of economic dependence and excessively low prices. This list of prohibited practices is indicative and not exhaustive according to the case law of the Competition Council and Tunisian legal experts (Madani, 2021_[32]).²⁷ Figure 2.1 shows the number of Competition Council decisions by type of infringement over the last five years (2016-20).

²⁷ According to (Madani, 2021_[32]), “There are anticompetitive practices that are not mentioned in Article 5 but are criticised by the Competition Council when they distort free competition. These are cases of unfair competition or economic infringements which, in principle, fall within the jurisdiction of the judicial authorities and which do not constitute anticompetitive practices in the legal sense of the term. However, the Competition Council declares itself competent, according to the provisions of Article 5 of the Competition Act, when these practices distort the market” (pp. 190 et seq.).

Figure 2.1. Antitrust Decisions by Competition Council (2016-20)

Decisions of Competition Council



Note: Decisions to dismiss due to lack of jurisdiction, withdrawal of complaint, statute of limitations, etc.

Source: Prepared by the OECD Secretariat with information from the Competition Council website.

A preliminary analysis of the Figure 2.1 reveals that the Competition Council spends a considerable amount of time on cases that are not central to the competition law and policy of most OECD Member countries (who prioritise cartels and abuse of dominant position cases). In other words, the Competition Council spends significant resources investigating so-called abuse of economic dependence and excessively low pricing practices. This is also the case for requests for interim or emergency measures, most of which are related to commercial distribution contracts and tenders.

The number of procedures in the investigation phase has remained relatively stable in recent years, at around 120 procedures per year. When case files are first analysed, investigations are classified by type of infringement and may be dismissed due to lack of jurisdiction or for other reasons.

The following subsections examine each type of infringement under Tunisian legislation for competition and pricing: cartels, abuse of dominant position, abuse of economic dependence and excessively low pricing.

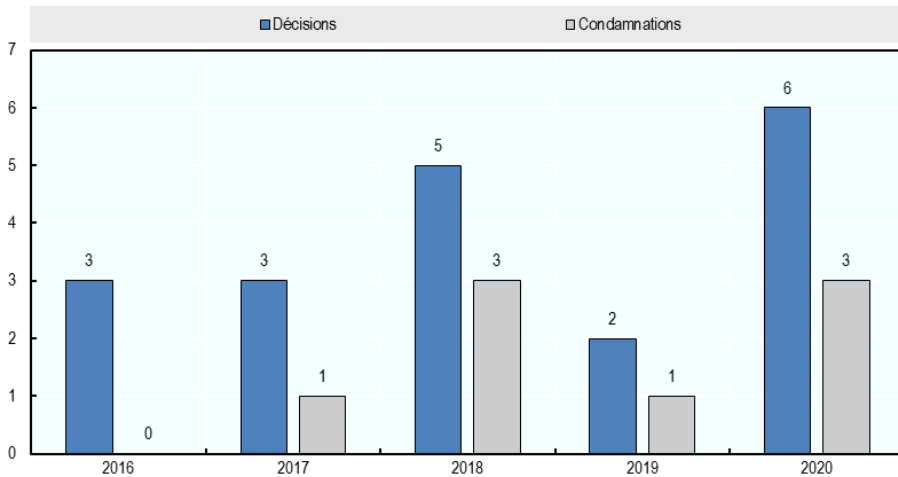
2.1.1. Cartels

Tunisian law states that "concerted actions, cartels, and express or tacit agreements with an anticompetitive object or effect are prohibited when they are intended to: impede the setting of prices through free supply and demand; limit market access to other undertakings or the free exercise of competition; limit or control production, outlets, investments, or technical progress; [or] share markets or sources of supply" (Article 5 of Act No. 2015-36 of 15 September 2015). This article, which is closely modelled on the current Article 101 of the Treaty on the Functioning of the European Union (TFEU), specifically targets certain types of practices according to their effects (price fixing, limitation of market access, limitation of production, market sharing). This provision has remained unchanged in Tunisia since 1991 and was replicated in the Act of 15 September 2015.

The legal definition of the type of infringement appears to be in line with the standards of OECD Member countries, which strictly prohibit hardcore cartels (OECD, 2019^[33]). The latter are agreements between competitors to fix prices, share markets or make concerted bids. They are the most damaging form of competition law violation and must be severely punished.

During the 2016-20 period, around 20 decisions and 10 findings of wrongdoing were issued by the Competition Council in relation to cartels. There has also been a slight increase in the number of cartel decisions in recent years, which is a good sign for competition policy in Tunisia, as shown in Figure 2.2.

Figure 2.2. Cartel Decisions by Competition Council (2016-20)



Source: Prepared by the OECD Secretariat with information from the Competition Council website.

One case clearly illustrates the enforcement of competition law in this area.

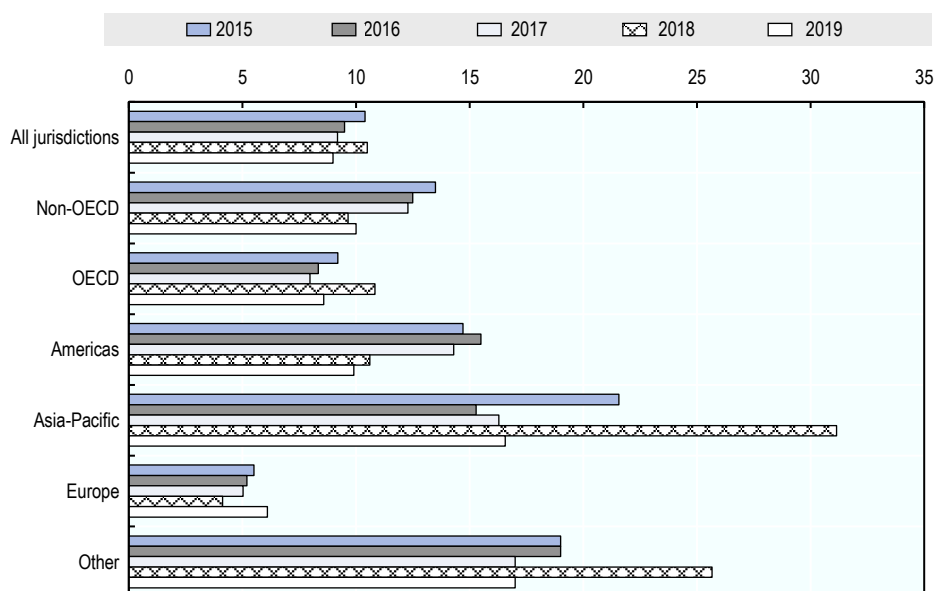
Box 2.1. The public contract for the supply of school furniture: a cartel case

In 2018, the Competition Council sanctioned a cartel operating in the public market for the supply of school furniture to education institutions. Following a complaint by the Ministry of Trade, the case file revealed that the defendant companies had submitted bids at identical prices. The Council found that information exchange had led to tenders being divided between the parties concerned, through data exchange and collusive behaviour. The bids submitted by the companies were identified as so-called spin-off bids, which are a form of collusion in public procurement and result in an increase in the value of the bids. For these reasons, the Competition Council qualified these practices as a cartel and ordered the three companies to pay fines and publish the decision in two newspapers at their expense.

Source: Competition Council Decision No. 141346 of 4 January 2018.

However, the number of final decisions and especially findings of wrongdoing in this area remains low in Tunisia when compared with the average number of decisions in other countries, as shown in Figure 2.3.

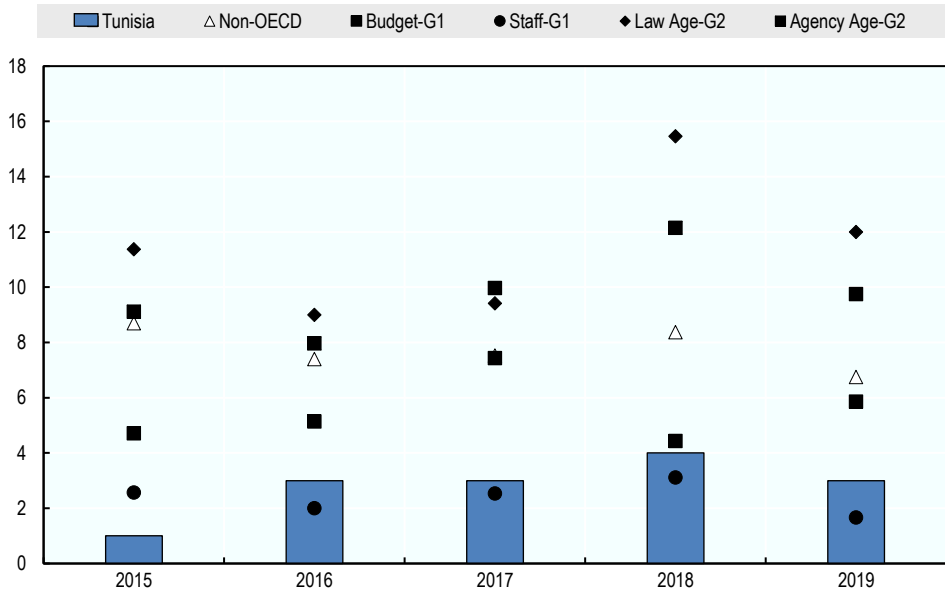
Figure 2.3. Cartel Decisions Worldwide (2016-2019)



Source: OECD Trends (2021).

The figure below compares the cartel decisions in Tunisia and a set of group of countries (as per indicated in Section 1.5.1, Figure 1.9). It indicates that the number of cartel decisions rendered by the Competition Council in Tunisia is considerably lower than in other comparable countries.

Figure 2.4. Cartel Decisions – Comparison between Tunisia and other Countries (2015-2019)



Note: Country groups defined in Section 1.5.1, Figure 1.9.

Source: OECD CompStats.

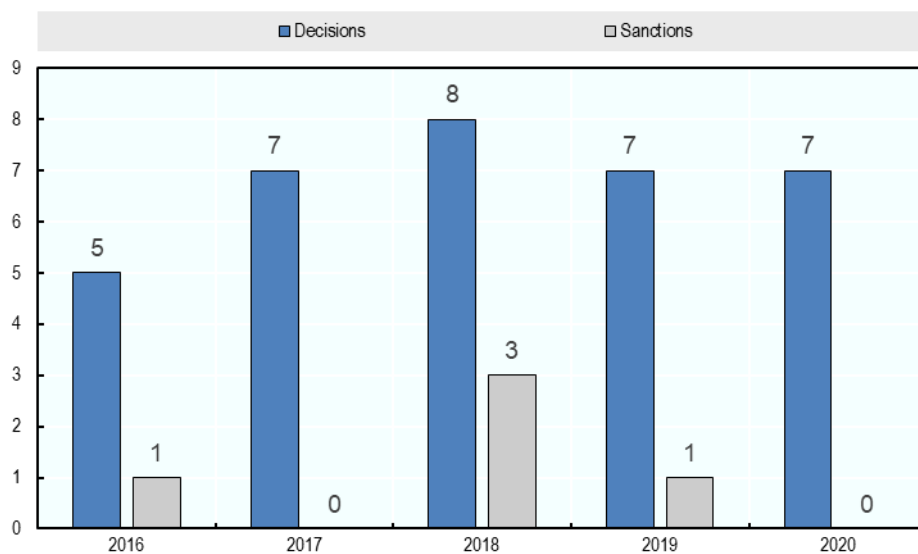
2.1.2. Abuse of dominant position

Act No. 2015-36 of 15 September 2015 establishes that "The abusive exploitation of a dominant position in the domestic market or in a substantial part of it [...] is also prohibited. The abuse of a dominant position [...] may consist, in particular, of refusing to sell or buy, making tied sales or purchases, imposing a minimum price for resale, imposing discriminatory conditions of sale, or terminating commercial relations without valid reason or solely on the grounds that the partner refuses to submit to abusive commercial conditions" (Article 5).

Tunisian law thus prohibits "the abuse of a dominant position on the domestic market or in a substantial part of it", in the same way as Article 102 of the TFEU. This provision was also fully retained in the Act of 15 September 2015.

Figure 2.5 shows the number of abuse of dominance decisions and findings of wrongdoing issued by the Competition Council from 2016 to 2020.

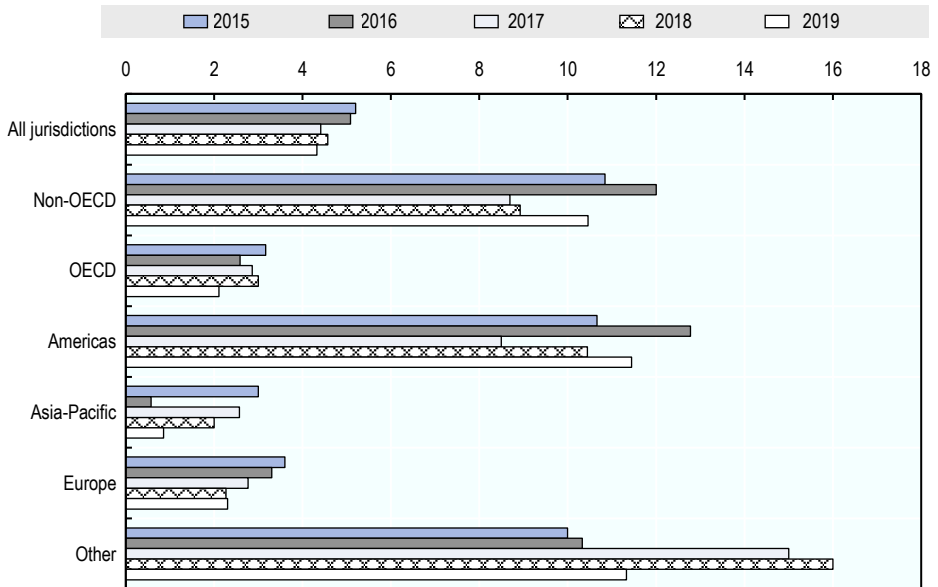
Figure 2.5. Abuse of Dominance Decisions by the Competition Council (2016-20)



Source: Prepared by the OECD Secretariat with information from the Competition Council website.

The number of abuse of dominance decisions is in line with the global average, as shown in Figure 2.6.

Figure 2.6. Average of Abuse of Dominance Decisions Worldwide (2016-19)

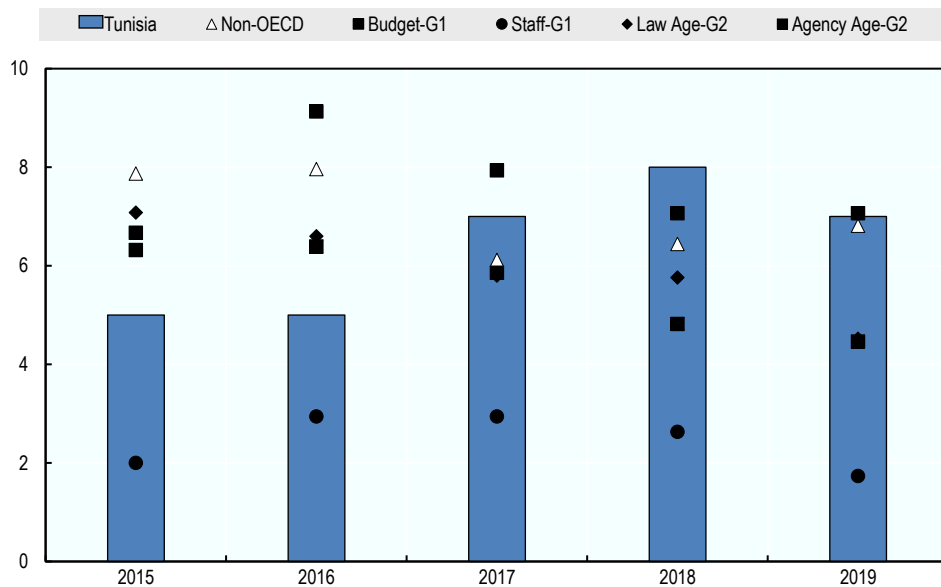


Source: OECD Trends (2021).

This is the most frequent type of infringement out of the decisions handed down by the Competition Council over this period. The following case from the telecommunications sector is a good example of how these rules have been enforced by the Competition Council.

The figure below compares the abuse of dominance decisions in Tunisia and a set of group of countries (as indicated in Section 1.5.1, Figure 1.9).

Figure 2.7. Abuse of Dominance Decisions – Comparison between Tunisia and other Countries (2015-2019)



Note: Country groups defined in Section 1.5.1, Figure 1.9.

Source: OECD CompStats

Box 2.2. The case of abuse of dominance in the telecommunications sector

On 12 July 2018, the Competition Council handed down two decisions in relation to the telecommunications sector.

In the first case, Tunisie Telecom was accused of refusing access to its infrastructure, which was necessary for the marketing of Internet connection services using high-speed fibre-optic technology, and of offering access to Topnet to the detriment of other providers. The Competition Council held that Tunisie Telecom held a dominant position in the relevant market, and that its status as sole provider of the infrastructure imposed an obligation on it to extend the service to all parts of the market and not to give Topnet or others a competitive advantage to the detriment of other providers. It found that this behaviour amounted to an abuse of dominance and had affected the overall balance of the market for the distribution of retail Internet services. In addition, Topnet's marketing of the commercial offering without obtaining the approval of the INT also constituted a breach of competition rules.

In the other case, a complaint filed by Orange Tunisia Internet accused Tunisie Telecom of exploiting its dominant position by promoting a SMART dual asymmetric digital subscriber line (ADSL) offer that involved access to the network and an Internet offering through Topnet. This led to an exclusionary practice, with customers migrating to Topnet as a provider through a one-stop shop system. The Competition Council found evidence that Tunisie Telecom had engaged in discriminatory practices aimed at illegally inducing Orange Tunisia Internet customers to use the one-stop shop service.

In sum, both decisions fined Tunisie Telecom a total of TND 1.7 million and ordered it to publish the decisions in two newspapers. In one of these cases, the Competition Council also fined Topnet TND 200 000.

Source: Competition Council Decisions No. 161429 and No. 161419 of 12 July 2018.

This case demonstrates a classic enforcement of competition law, in particular prevention of abuse of a dominant position, with standard use of the steps of competitive analysis of this type of breach, namely defining the relevant market,

the existence of a dominant position, identifying abuse of dominance, and identifying anticompetitive effects without justifiable efficiency gains.

In other abuse of dominant position cases, there is a close link between competition law and consumer law. One example is the "Délíce" yoghurt case, in which a 50-percent reduction in the price of the yoghurt was accompanied by a reduction in weight. The analysis concluded that this was false advertising. Since the company in question enjoyed a dominant position, this practice was classed as an abuse of dominance.²⁸

2.1.3. Abuse of economic dependence

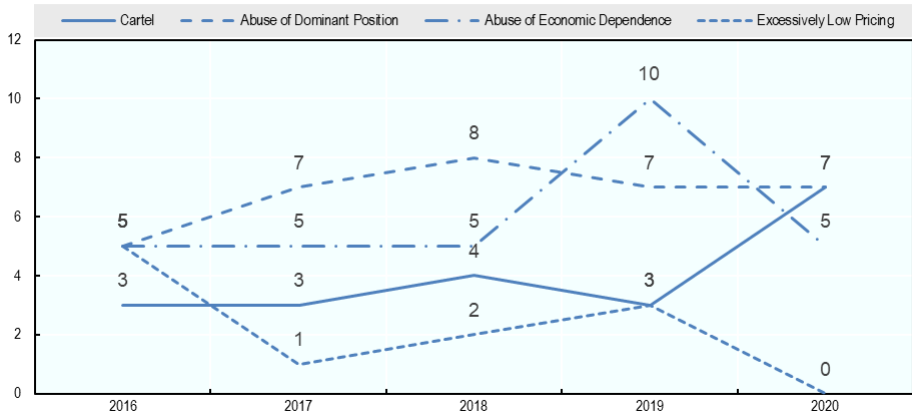
Abuse of economic dependence is also provided for in Article 5 of Act No. 2015-36 of 15 September 2015: "The abusive exploitation (...) of a state of economic dependence in which a client or supplier company finds itself without alternative solutions for marketing, supply or provision of services is also prohibited. The abuse of a dominant position or state of economic dependence may consist of, in particular, refusing to sell or buy, making tied sales or purchases, imposing a minimum price for resale, imposing discriminatory conditions of sale, or terminating commercial relations without valid reason or solely on the grounds that the partner refuses to submit to abusive commercial conditions".

This is based on the French ordinance of 1986, more specifically the fact of abusively exploiting "a state of economic dependence in which a client or supplier company finds itself without alternative solutions for the marketing, supply or provision of services". This provision was also fully retained in the Act of 15 September 2015.

Cases involving this type of infringement account for a significant number of the decisions made by the Competition Council in recent years (see Figure 2.8).

²⁸ Competition Council Decision No. 3146 of 27 March 2004.

Figure 2.8. Decisions by type of Infringements (2016-20)

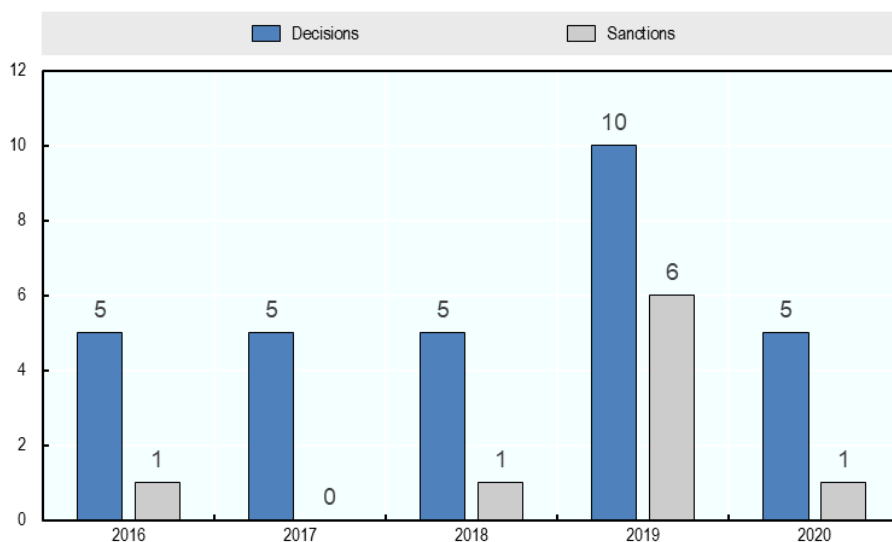


Source: Prepared by the OECD Secretariat with information from the Competition Council website.

It is observed in vertical commercial relationships, generally between a supplier and its customer, where one of the parties abusively takes advantage of the other party's state of dependence to impose its conditions or to break the contractual relationship unilaterally. Some countries refer to the concept of "bargaining power" to analyse the competitive problems caused by these relationships.

Most of the Competition Council's findings of wrongdoing over the last five years have concerned this type of infringement (see Figure 2.9).

Figure 2.9. Abuse of Economic Dependence Decisions by the Competition Council (2016-20)



Source: Prepared by the OECD Secretariat with information from the Competition Council website.

In general, the Competition Council requires four cumulative criteria to examine abuse of economic dependence: (i) the reputation of the supplier's brand, (ii) its market position, (iii) its market share of the claimant's transactions, and (iv) impossibility for the distributor to obtain equivalent products from other suppliers. These criteria are based on the consistent case law of the Competition Council:

"The presence of elements that place a merchant in a position where it is difficult for it to avoid the impact of its supplier on its operations and profits. Such factors include: the reputation of the supplier's brand, the size of its share of the relevant market and of the reseller's turnover, and the impossibility for the reseller to obtain equivalent products from other suppliers, provided that this impossibility is not the result of the strategic choices of the claimant. Economic dependence must necessarily result from coercion and not from free choice".²⁹

²⁹ Competition Council Decision No. 131341 of 26 November 2015.

According to Tunisian academic literature, the primary objective of such a prohibition is to protect the economically weaker party to the contract, since abuses may be committed by the stronger party (Madani, 2021^[32]). It seems that this practice is generally driven by the large Tunisian groups that approach foreign companies and convince them to terminate their commercial relationships with the SMEs that have represented them in the local market for several years. This poses a problem for their investments due to the economic dependence created by the brands' reputation and business continuity.

It is interesting to note that the impact of this practice on consumers is not mentioned in the criteria used by the Competition Council. Consumer protection therefore does not appear to be an element in the analysis of these infringements.

There are also a large number of requests for precautionary or interim measures, most of which are related to this type of infringement. Often, a company files an application complaint of this kind with the Competition Council to maintain a commercial or similar distribution relationship. The following case concerning the distribution of detergents, nappies and shampoos illustrates the fact that a request for a protective measure frequently accompanies applications relating to abuses of economic dependence.

Box 2.3. The case of abuse of economic dependence in the distribution sector of detergents, nappies and shampoo

The case concerns a complaint of abuse of economic dependence against the company ID on the market for the distribution of a number of consumable products including detergents, nappies and shampoo.

The Competition Council found that ID had arbitrarily terminated its commercial relationship with a customer by failing to supply the requested products. The analysis focuses on two elements: the existence of economic dependence, and the extent of abuse of the state of economic dependence.

After examining the complaint, the Council concluded that a situation of economic dependence existed due to the lack of alternative solutions for the complainant. The nature, size and duration of the commercial relationship prevented it from diversifying its supplier base and limited its ability to find and enter into contracts within a reasonable period of time with other suppliers of the same size. This would have enabled it to compensate for the loss of turnover due to the termination of the existing commercial relationship. The exclusive nature of the commercial relationship, its duration, the reputation of the defendant's brands and the size of the turnover involved were thus among the factors taken into account by the Competition Council.

The Council issued an interim measure ordering ID to re-establish the business relationship until it had made its decision. Since ID failed to comply with the interim decision, the Council imposed a fine of TND 100 000. Furthermore, when the Council judged the case on its merits, it decided to sanction ID for abuse of economic dependence and imposed a fine of TND 978 911 946, as well as publishing the decision in two newspapers.

Source: Competition Council Decision No. 141362 of 27 August 2020.

Finally, some cases are analysed for both abuse of dominance and abuse of economic dependence. This leaves open the possibility that a finding of wrongdoing could be based on both infringements³⁰.

One unusual feature concerns the "abuse of collective economic dependence", which is when a business is the victim of abuse by multiple firms. In 2015, the Competition Council decided that the company STID was in a situation of

collective economic dependence in respect of supermarkets and hypermarkets – Carrefour, Magasin Général and Monoprix – particularly in the detergent distribution market.³¹ This was allegedly a special type of economic dependence, and the Council imposed sanctions on the three firms ranging from TND 500 000 to TND 800 000. However, the Administrative Court reviewed the decision and reclassified the anticompetitive practice to exclude the "collective" dimension of the practice which was not provided for in the legislation³².

2.1.4. Excessively low prices

Tunisian legislation also prohibits "any price offer or practice of excessively low prices likely to threaten the balance of an economic activity and the fairness of competition on the market" (Article 5 of Act No. 2015-36 of 15 September 2015). The infringement was created by Act 2005-60 of 18 July 2005, which added an additional paragraph prohibiting any price offer or practice of excessively low prices likely to threaten the balance of an economic activity and fair competition on the market. This provision has been maintained.

In practice, this infringement is usually found in the context of public procurement. Article 65 of Decree No. 2014-1039 of 13 March 2014 regulating public procurement states that:

If a price offer is deemed abnormally low, the public purchaser shall propose to reject it, after requesting in writing any clarifications it deems useful and after verifying the justifications provided. The public purchaser shall inform the Minister of Trade of financial offers that have been eliminated because of

³⁰ See, for example, the "Black & Decker" case in which the company was found guilty of both abuse of a dominant position and abuse of economic dependence. Competition Council Decision No. 51102 of 27 December 2007.

³¹ Competition Council Decision No. 121301 of 25 December 2015.

³² For a critical analysis of the decision, see: Amine Knani, "La nouvelle jurisprudence du Conseil de la Concurrence en matière d'abus de dépendance économique : la dépendance économique collective". InfosJuriques, 2017. It should also be noted that the Administrative Court's decision in the STID case is not a final decision and therefore it cannot be argued that the Administrative Court has indefinitely dismissed the "collective" dimension of the practice.

*excessively low prices prejudicing fair competition. The Minister of Trade may make an application to the Competition Council against such bidders.*³³

This can take place at any stage of the tender procedure: before or after the contract is signed.

The rule is inspired by French legislation, which prohibits "price offers or practices involving consumer selling prices that are excessively low in relation to production, processing and marketing costs, where the purpose of such offers or practices is or may be to eliminate a company or one of its products from a market or prevent access to a market" (Article L. 420-5 of the French Commercial Code). However, French case law has evolved to limit its application to "end consumers" and thus exclude its application to public procurement offers governed by public procurement law.³⁴

In Tunisia, this infringement is not conditional on the prior existence of a dominant position. The Competition Council also states that "companies that do not hold a dominant position are sanctioned"³⁵ for this practice. The existence of a causal link between excessively low pricing and conduct aimed at eliminating competitors from the market is a sufficient condition for this purpose. The case law of the Competition Council points in the same direction³⁶

Analysis of excessively low prices follows a similar logic to that of predatory pricing by a dominant firm, including analysis of the costs of production, processing and marketing of the products concerned. However, excessively low pricing infringements are not limited to the practices of firms in a dominant position. The Competition Council has already had to consider the distinction between predatory pricing and excessively low prices.

³³ Article 65 of Decree No. 2014-1039 of 13 March 2014.

³⁴ Decision No. 09-D-20 of 11 June 2009 of the French Competition Authority: "this assessment [of Article L. 420-5 by the Competition Authority] is aimed exclusively at price or service offers made to the end consumer. On several occasions, when the matter was referred to it under Article L. 420-5 on price offers in the field of public contracts with local authorities, the Competition Council recalled that a local authority could not be compared with an end consumer."

³⁵ Responses to the OECD questionnaire from March 2021.

³⁶ Competition Council Decision No. 141349 of 24 July 2014 on excessively low prices in the driving school sector.

Dominant position and the effects on competition

The existence of a dominant position is usually a preliminary step in the analysis of competitive effects on the market. Conversely, where a competition authority finds that there is no dominant position, a unilateral commercial practice is not normally capable of having negative effects on the market.

In a nutshell, the effects on competition are different when the practice is committed by a firm that holds or does not hold a dominant position.

2.1.5. Exemptions

While Article 5 of Law No. 2015-36 defines the types of infringements, Article 6 establishes a prior authorisation procedure for practices that should not be subject to an investigation by the Competition Council. It states that the practices mentioned (cartels, abuse of dominant position, abuse of economic dependence, and excessively low prices) are lawful when they are "indispensable to technical or economic progress and afford users a fair share of the resulting gains" provided that they do not lead to a substantial loss of competition in the affected market.

The procedure for submitting an application for exemption was set out in Government Decree No. 2016-1204 of 18 October 2016.³⁷ The Ministry of Trade may grant such an exemption, within three months of receipt of the application file, by means of an order stating the grounds of the exemption, once the Competition Council has delivered its opinion (within two months of the transmission of the file). Details of the exemption must be published in the Official Gazette of the Tunisian Republic. The Ministry may determine the duration of the exemption up to a maximum of five years – though this term may be renewed – and subject it to periodic review.

³⁷ Government Decree No. 2016-1204 of 18 October 2016 establishing the procedures for submitting applications for exemption and the duration thereof pursuant to Act No. 2015-36 of 15 September 2015, on the reorganisation of competition and prices.

2.2. Investigative procedures

The procedure for investigating infringements comprises detection, investigative powers and sanctions, as described below. We also analyse alternative ways to conclude cases, including settlements, and how procedural fairness and transparency are ensured.

2.2.1. Detection

An investigation into an anticompetitive practice can be triggered in one of three ways: i) a complaint from a third party, ii) a leniency application or iii) self-referral (*ex officio*) by the investigating authority.

Article 15(1) lists the bodies that may refer cases to the Competition Council: the Minister of Trade (or any person appointed for that purpose), economic enterprises, professional and trade union organisations, legally established consumer organisations or groups, chambers of commerce and industry, regulatory authorities, and local authorities. Most investigations are initiated following a complaint, for example by the *Organisation tunisienne de défense du consommateur* [Tunisian Consumer Protection Organisation].

It is important to note that the 2015 Act increased the number of people who can refer to the Council cases over which it has jurisdiction. In 1991, Article 11 provided that applications could be made to the Commission "either on the initiative of the Minister of the Economy, or on the initiative of businesses, professional or trade union organisations, approved consumer bodies or groups, chambers of agriculture, or chambers of commerce and industry". Regulatory authorities and local authorities were added to this list in 2005. This provision can currently be found under Article 15 of the Act of 15 September 2015. More significantly, the option of self-referral (*ex officio*) was introduced in 1999. Article 11 thereof applied only to those cases where an application, initially filed by the parties, was subsequently withdrawn. This condition was eventually dropped in 2005. The relevant article stated that "the Competition Council may, on the basis of a report by the general rapporteur and after hearing the government Commissioner, take action of its own motion (*ex officio*) in respect of anticompetitive practices in the market". This exact wording was transposed into Article 15 of the Act of 15 September 2015.

Over the last five years, there have been 23 self-referrals (*ex officio*) investigations(), nine of which were initiated by the DGCEE and 14 by the

Competition Council. Approximately five investigations are initiated by self-referral each year.

A leniency programme has been in place since 2003. In this respect, the last paragraph of Article 19 provides that "the Council may, after hearing the government Commissioner, exempt from penalty or reduce the penalty for anyone who provides relevant information not accessible to the administration and likely to expose anticompetitive agreements or practices in which they took part". The leniency programme was supplemented and updated by the Act of 15 September 2015, specifically by Article 26, and the details laid down in Government Decree No. 2017-252 of 8 February 2017.³⁸ A distinction is made between those who benefit from full exemption and those who benefit from partial exemption. Pursuant to this legislation, full exemption is only granted to the first party to provide information not available to the administration or the Council that makes it possible to investigate competition infringements in a given market or that provides decisive evidence that an infringement has been committed. Partial exemption is granted to parties, regardless of their rank, that provide evidence of significant added value or that does not contest the existence of the practices of which they are accused. Partial exemption is also granted to those who take the initiative to implement measures that lead to the restoration of competition in the market. The conditions generally follow the standard found in other OECD countries, except for the requirement of a prior consultation of the government Commissioner by the Competition Council, which, by its very existence, reduces the Council's autonomy as regards the application of the leniency programme.

However, no investigations have been initiated via this detection channel, raising a legitimate public policy question as to why this is the case. During the fact-finding mission, several reasons were given to explain the absence of cases, including the weak culture of competition, inadequate information on the procedure (according to Article 1 of the Decree, the application may be submitted to the DGCEE or to the general rapporteur of the Competition Council), and a certain mistrust of the public administration. Other such reasons include the limited

³⁸ Government Decree No. 2017-252 of 8 February 2017, establishing the procedures for submitting applications for full exemption from penalty or the reduction of the penalty in application of Article 26 of Act No. 2015-36 of 15 September 2015, on the reorganisation of competition and prices.

number of cartels penalised and the low value of the fines, which reduces their deterrent effect and fails to incentivise companies to participate in the leniency programme.³⁹

In this regard, OECD studies show that there are advantages to striking a balance between proactive (e.g. self-referral) and reactive (e.g. leniency programmes) investigations, which can be mutually reinforcing in terms of effectiveness (OECD, 2013^[34]). Indeed, cartel members would have a greater incentive to disclose the existence of the cartel, if there were a real fear of being investigated by the competition authority of its own motion. Improving the balance between the means of detection would, therefore, be a positive step for competition policy in Tunisia.

2.2.2. Investigative powers

The DGCEE and the Competition Council may conduct investigations into anticompetitive practices. According to the information provided by the Tunisian authorities, investigators from both bodies have similar competence in this area. To avoid the duplication of investigative efforts, Tunisian law stipulates that the Ministry of Trade must inform the Competition Council of ongoing investigations, and vice versa.

Both competition bodies may conduct unannounced inspections and searches. According to Articles 67 and 68 of Act No. 2015-36, prior authorisation from the public prosecutor is required if inspections or searches are to take place outside working hours. When an anticompetitive practice is detected, the DGCEE may refer the case to the Competition Council. While inspectors (authorised by the Minister of Trade) conduct searches on behalf of the Ministry, rapporteurs (authorised by the Chair of the Council) conduct them on behalf of the Competition Council. These are called "ordinary" searches and they are the most common. So-called "extraordinary" searches are carried out by an inspector (Ministry) or by a rapporteur (Competition Council) under the supervision of the public prosecutor

³⁹ The Competition Council generally applies a fine of 10% of the turnover of the companies concerned, which are mostly medium-sized companies. The low fines are therefore a result of the legislation, and not necessarily of the performance of the Competition Council.

and, in these cases, without the prior authorisation of the Minister or the Chair of the Competition Council.

Only five unannounced inspections have been carried out in the last five years,⁴⁰ which seems a low figure compared to OECD indicators. A final investigation report must be prepared at the end of an investigation.

The overlapping competence of the DGCEE and the Competition Council can give rise to several challenges. Firstly, it may lead to co-ordination costs between the two competition bodies, which may reduce the effectiveness of administrative action. The overlap also reduces the independence and autonomy of the Competition Council because the government, through the DGCEE, could obtain information about any investigation initiated by the Council.

The competition authorities must also seek the technical opinion of regulatory bodies when investigations concern the sectors for which they are responsible. The legislation does not establish a time limit for sending this technical opinion, which could disrupt the normal course of an investigation. Some OECD countries do lay down a time limit for technical interventions (e.g. 30–60 days) or make the request for an opinion optional.

With regard to the diversity of the economic sectors investigated, most cases remain concentrated in certain markets, notably those related to distribution, health, telecommunications and electricity. Investigations into other economic sectors, such as tourism and finance, are almost non-existent. Since the competition authorities in Tunisia do not appear to have a policy on prioritising the initiation of investigations into anticompetitive practices, this could be an area for improvement. Prioritising investigations would make it possible to concentrate efforts on certain markets, for example, those that play a major role in the country's development or that have a disproportionate effect on the poor.

Finally, regarding the limitation period, Article 11 of the Act of 29 July 1991 provided that cases relating to anticompetitive practices dating back more than three years would be time-barred. Article 14 of the Act of 15 September 2015 extends this period and specifies when it starts: "Cases relating to anticompetitive practices shall be barred after five years from the date that the practice was committed".

⁴⁰ Responses to the OECD questionnaire from March 2021.

2.2.3. Penalties and settlements

If the practice is proven, the decision handed down by the Competition Council must impose a penalty on the perpetrators of the practice in accordance with Article 19 of the 1991 Act. This obligation to impose a penalty can currently be found in Article 43 of the Act of 15 September 2015. The penalty itself, on the other hand, has evolved with the changes in legislation. Article 34 of the first version of the Act of 29 July 1991 provided that the amount of the fine imposed by the Competition Commission could not exceed 5% of the turnover taken in Tunisia by the firm concerned in the last financial year, thereby providing only for a proportional limit. This article was amended in 1995. The proportional cap remained at 5% of turnover until the 2015 reform, which increased it to 10%. There is also a fixed fine in the event the offender is an individual or an organisation without its own turnover. This fine ranges between TND 1 000 and TND 50 000.

However, initially, the Competition Council made little use of its power to impose penalties. Between 1990 and 2000, for example, the decision included a penalty in only 17% of cases. This figure improved in the following years, and in 2004, half of cases led to a penalty. Nonetheless, the inability of these financial penalties to prevent or deter non-compliance has often been highlighted. The Act of 15 September 2015 has therefore strengthened the power of the Competition Council to impose penalties. Indeed, Article 43 provides for a twofold increase in the ceilings, with the proportional limit increased to 10% of the turnover taken in Tunisia by the operator concerned in the last financial year. If the legal entity has no turnover of its own, the fine now ranges between TND 2 000 and TND 100 000.

For individuals, the penalties include a prison sentence of 16 days to one year, a fine of TND 2 000 to TND 100 000 or both. This applies in particular to persons who have played "a decisive role" (Article 45) in the infringements set out under Article 5 of Act No. 2015-36 on competition and prices.

Table 2.1 below shows the penalties imposed by the Competition Council between 2016 and 2019.

Table 2.1. Total amount of penalties imposed by the Competition Council (2016-2019)

(in Tunisian dinar)

	Horizontal agreements	Abuse of dominant position	Abuse of economic dependence	Excessively low prices
2016	140 000		100 000	
2017	1 800 000			30 000
2018	740 850	2 200 000	150 000	
2019	50 000	1 640 000	2 574 500	
2020	612 500		946 978 911	180 000

Source: Competition Council

It should be noted that some decisions are handed down without a financial penalty being imposed, which deprives them of their deterrent effect. This occurred, for example, in the 2018 decision of the Competition Council in the tomato concentrate cartel (See Box 2.4).⁴¹

⁴¹ Decision No. 141356 of 10 May 2018 of the Competition Council on the tomato concentrate cartel.

Box 2.4. The case of the tomato concentrate cartel

Following the Tunisian authorities' decision to liberalise the prices of double concentrated tomato paste in 2013, retail prices of concentrate increased by about 9% for an 800 g carton and 20% for a 400 g carton. The Consumer Protection Organisation submitted a complaint of collusion and consumer price fixing to the Competition Council, which launched an investigation into 24 tomato paste producers in 2014.

The investigation conducted by the Competition Council demonstrated the importance of this product for Tunisian consumers: the country is one of the biggest consumers of double concentrated tomato paste, with a total annual consumption of 109 000 tonnes and an average annual consumption per household of 57 kg, compared with 35 kg in the United States and 24 kg in Italy. The investigation also confirmed that price increases had been coordinated following the entry into force of the Decree of the Minister of Trade of 22 February 2014, which approved the policy to liberalise the price of double concentrated tomato paste. Samples of sales invoices examined by the Council revealed that prices reached TND 1.23 for a 400 g carton and TND 2.05 for an 800 g carton for 22 brands across the country.

The Competition Council made a finding of anticompetitive behaviour on the basis of Article 5 of Act No. 2015-36 on the reorganisation of competition and prices. It required the defendants to cease the anticompetitive practices immediately, but did not impose a fine.

Source: Competition Council Decision No. 141356 of 10 May 2018.

The Competition Council may also impose additional or alternative measures to a financial penalty. The first version of the Act of 29 July 1991 provided, in Article 20, that the Competition Commission may also:

"Impose injunctions on the operators concerned to put an end to the anticompetitive practices, by a given deadline, or to impose specific conditions on their business operations; pronounce the provisional closure of the offending establishment(s), for a period not exceeding three months. However, those establishments may not be reopened until they have ceased the practices of which they were found guilty.

Forward the case to the public prosecutor's office for criminal prosecution".

In 1995, the structure of this provision was slightly revised, specifically by separating the possibility of imposing injunctions from the possibility of imposing provisional closures. Above all, the legislator added the option for the Council, in the case of abuse of a dominant position resulting from a merger, to propose to the Minister of Trade to order by reasoned decision, if necessary jointly with the minister for the sector concerned, the enterprise or group of enterprises in question, to amend, supplement or cancel all agreements and acts that enabled the merger resulting in the breach, notwithstanding the completion of the procedures provided for in Articles 7 and 9 of this Act (notification procedure).

At present, Tunisian law allows the Competition Council to impose injunctions on companies found guilty of anticompetitive practices and to order the provisional closure of offending establishments for a period not exceeding three months (Article 27 of Act No. 2015-36). An establishment may also be closed in other situations provided for by the act. The aim of such measures is to damage the company's reputation to deter it from committing further infringements. But this closure could also harm consumer welfare by reducing consumer choice while the business is closed.

Finally, since 2005, the Competition Council may also order the publication of its decisions or an excerpt from them in the newspapers of its choice, at the expense of the offender. All of these measures are included under Article 27 of the Act of 15 September 2015.

The Competition Council may also transmit the casefile to the public prosecutor's office for criminal prosecution (Article 27 of Act No. 2015-36). This action can be taken against any individual who is likely to have played, in any way, a decisive role in the violation of the prohibitions set out in Article 5 of Act No. 2015-36, that is, all cartels, abuses of dominant position, abuses of economic dependence, and excessively low prices. They may be imprisoned for 16 days to one year, and subject to a fine of TND 2 000 to TND 100 000 in addition or as an alternative to a prison sentence. We note that imprisonment is generally limited to cartels in OECD Member countries where there is criminal liability. This is due both to the serious nature of cartels, and to the lack of clarity around the context in which abuse of a dominant position occurs.

With regard to settlements, Tunisian law allows the Ministry of Trade to conclude investigations into certain infringements set out in Act No. 2015-36. But this does not apply to the anticompetitive practice infringements listed in Section 5 of the Act: "With the exception of violations of the provisions of Articles 5, 7, 8, 9, 10, and 69 of this Act and at the request of the offender, the Minister of Trade may,

before the initiation of public proceedings, or the case if referred to the court, authorise a deal; this applies as long as a final judgment has not been pronounced" (Article 73 of Act No. 2015-36). The Competition Council does not have the power to conclude settlements. In this respect, the experience of OECD Member countries shows that settlements save public resources, allowing case handlers to devote their time to other investigations. Similarly, the autonomy and independence of the competent authority to conclude settlements seems to be a decisive factor for the success of this mechanism.

Finally, the Competition Council may impose interim measures (Article 15), which often happens in the event of proceedings concerning an abuse of economic dependence. This allows companies to ask the Council to order provisional but urgent measures to preserve the rights of the applicant.

2.2.4. Transparency and procedural fairness

Act No. 2015-36 establishes certain obligations to ensure the transparency of the activities of the competition authorities in Tunisia. To this end, the legislation requires the Competition Council to prepare an annual report on its activities, and to publish its decisions and opinions on its website (Article 14 of Act No. 2015-36).

In practice, decisions, opinions and the annual report of the Competition Council can be easily found on its website. These documents are available in Arabic. Full or partial translation into French could widen their audience (including internationally). Merger review decisions issued by the DGCEE should, in principle, be available on the Ministry of Trade website, but they rarely are. The lack of transparency in this respect obstructs the development of competition policy in Tunisia and could easily be rectified.

With regard to procedural fairness, it is important to strengthen the separation of the power to investigate and the power to hand down a decision. For example, when files are assigned to rapporteurs, the Chair of the Competition Council should refrain from participating and leave their assignment to the general rapporteur. This would improve the separation of the Council's investigative and adjudicative powers.

The legislation establishes that anticompetitive practices must be recorded in a report drawn up by two economic control officials (or two officials from the Ministry of Trade) and the judicial police. The original and a copy of these reports must be

sent directly to the Minister of Trade and must contain details of the date, place, subject and the reporting officials, among other things.

As regards professional secrecy, the Competition Council has stated that communications between attorneys and their clients are protected by professional secrecy. It is not clear that the same principle applies to the DGCEE. Furthermore, searches of attorney's offices remain prohibited, or at least exceptional, as attorney client privilege is key to the right of defence.

2.2.5. Enforcement of decisions

The Minister of Trade is responsible for implementing the decisions of the Competition Council as well as for the recovery of fines, pursuant to Article 44 of Act No. 2015-36. The legislation also provides that fines must be recovered following the same methods and procedures as for public debts owed to the Ministry of Finance (Article 75), specifically in collaboration with the General Directorate of Public Accounts of the Ministry of Finance.

According to the Ministry of Trade, almost all fines imposed on domestic companies are recovered; however, the procedure applicable to foreign companies is complicated and the administration has been called on to sign bilateral agreements to define the procedure for these companies. Consequently, none of the fines imposed on foreign companies have been recovered.

It is vital that the amounts recovered is rigorously tracked, as the actual payment of fines is crucial to their deterrent effect.

2.3. Merger review

The first Competition Bill, drawn up in 1985, contained a specific section on merger review. This section was not, however, ultimately retained in the original Act of 29 July 1991, mainly because the Tunisian economy was not yet sufficiently developed to implement this type of review. In its original form, the Act did not, therefore, contain provisions on merger review. The Bill was finally adopted and merger review was only incorporated into the 1991 Act by Act No. 95-42 of 24 April 1995.

Merger review is currently governed by Act No. 2015-36 of 15 September 2015, on the reorganisation of competition and prices. Provisions specific to certain sectors allow for derogation from the ordinary regime, such as in the banking,

insurance, microfinance and audiovisual sectors. These exceptions will be discussed in Section 2.3.5 below.

2.3.1. Competent authorities

The Ministry of Trade and the Competition Council

Pursuant to Article 7 of Act No. 2015-36, horizontal merger review falls under the jurisdiction of the Minister of Trade, who must be notified of any proposed merger by the companies involved if the transaction fulfils the criteria listed in Article 7 (see Section 2.3.2 below). The legislation applicable to some sectors provides for derogation from this jurisdiction: these sectors include the insurance sector pursuant to the Insurance Code, the banking sector pursuant to Act No. 2016-48 of 11 July 2016 on banks and financial institutions, the microfinance sector pursuant to Legislative Decree No. 2011-117 and the audiovisual sector pursuant to Legislative Decree No. 2011-116 of 2 November 2011 (see Section 2.3.5 below). Moreover, Tunisia is a member of the Common Market for Eastern and Southern Africa (COMESA), which has adopted specific rules in respect of mergers with a regional dimension, including rules on the authority responsible for receiving notifications.

Table 2.2 shows that from 2015 to 2020, the Ministry of Trade reviewed 26 planned mergers: 22 were authorised without conditions, three were authorised subject to conditions, and one was denied clearance (in 2017).⁴² In other words, 88% of the mergers were approved without conditions.⁴³ For comparison,

⁴² See Competition Council Opinion No. 162623 of January 26, 2017, on the acquisition of the entire share capital of SGTM by Mosni Gas Bottles (MGB), which concerns the two interconnected markets of metal galvanisation and iron pipe production. The Council found that the merger was against consumer interests. Specifically, it found that the merger would not have contributed to technical and economic progress and would have given the company a monopoly position in both the metal galvanisation and the iron pipe production markets.

⁴³ The Competition Council's opinions on mergers are published in Arabic on its website, pursuant to the last paragraph of Article 14 of Act No. 2015-36. The website has a section where opinions are published in PDF format, but it is not possible to filter opinions by type (for example, advisory opinions on legislative matters or opinions on economic mergers), keyword or the Council's decision. A similar obligation to publish decisions is imposed

according to OECD Competition Trends statistics,⁴⁴ over the 2015-2019 period, 97.9% of notified mergers were authorised without conditions, either in phase one or two, and only 0.22% of mergers were blocked following a detailed examination in phase two.

Table 2.2. Mergers notified to the Ministry of Trade

Year	Number of merger decisions	Number of opinions issued by the Competition Council	Number of Council opinions not followed by the Ministry of Trade	Number of mergers authorised	Number of mergers authorised with conditions	Number of mergers rejected
2015	7	7		6	1	...
2016	6	6		6
2017	5	5	1	4	...	1
2018	2	2		1	1	...
2019	3	3		3
2020	3	3		2	1	...
TOTAL	26	26	1	22	3	1

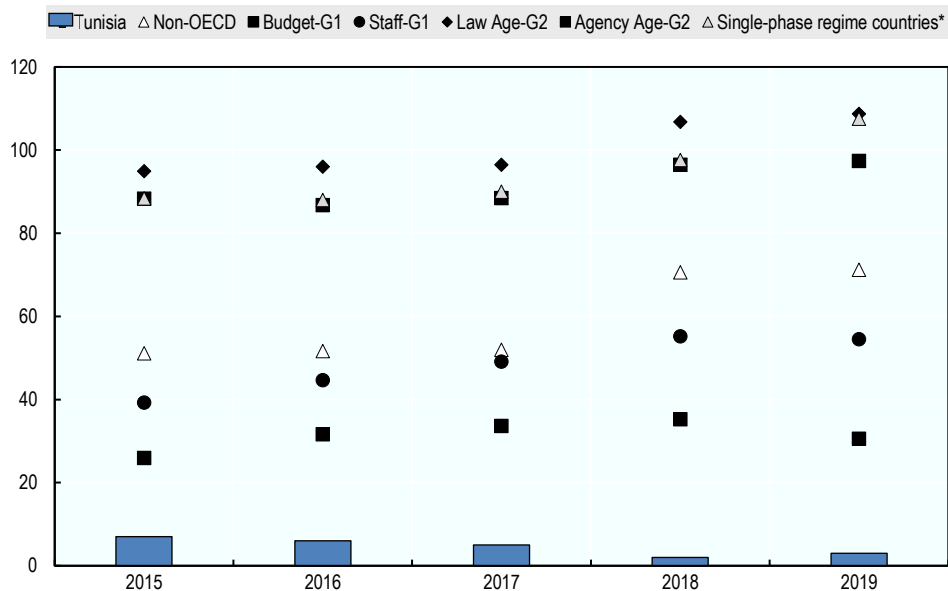
Source: Competition Council; Ministry of Trade.

The figure below shows a comparison, in terms of number of notified mergers, between Tunisia and certain groups of countries as defined below. Such data show that the number of mergers notified before the Ministry of Trade is significantly lower than in other comparable jurisdictions.

upon the the Ministry of Trade pursuant to Article 10, para. 2 of Act No. 2015-36. However, in practice, decisions on merger cases handed down by the Minister of Trade are not promptly made available online or are published only years later.

⁴⁴ The *OECD Competition Trends (2020)* database includes data from 56 countries, including 19 non-OECD Member countries.

Figure 2.10. Merger notifications (2015-2019)



Note: Budget G1 includes 20 countries; Staff G1 includes 22 countries; Law Age G2 includes 25 countries; Agency Age G2 includes 29 countries

Source: OECDCompStats.

In Tunisia, merger review is also carried out by certain sectoral regulators, which will be analysed in Section 2.3.5 below. The arrangements derogate from the ordinary merger review regime for which the competition authorities are responsible.

COMESA Competition Commission

As a member of COMESA⁴⁵, Tunisia is also subject to COMESA competition rules. Article 24 of the COMESA Competition Regulations requires the parties involved in a proposed merger to notify the COMESA Competition Commission (CCC) of any proposal that fulfils the conditions set out in Article 23 of the Regulations⁴⁶. Article 23(3)(a) provides that the notification requirement applies to mergers where the parties are active in two or more COMESA member states. However, these supranational provisions are not interpreted uniformly in all member states.

On the one hand, paragraph 3.10 of the COMESA Merger Control Guidelines interprets Article 23(3)(a) in the light of its supranational nature, which would justify an assignment of exclusive jurisdiction to the CCC (acting as a one-stop-shop) and not to the competent national authority, with regard to the control of mergers with a regional dimension. On the other hand, Tunisian law does not provide for any exemption from the notification requirement for mergers with a regional dimension and, consequently, according to the interpretation of the Tunisian authorities, where the conditions laid down by national law are met, the firms are required to notify the Ministry of Trade in accordance with Article 7 of Act No. 2015-36. This is the interpretation currently provided by the Minister of Trade, who considers that a notification to the CCC would not be sufficient to waive the notification requirement in Tunisia (Jabnoun, 2021^[35]) (Baker McKenzie, 2019^[36]).⁴⁷

⁴⁵ The COMESA member states are: Burundi, Djibouti, Democratic Republic of the Congo, Egypt, Eritrea, Eswatini, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Somalia, Sudan, Tunisia, Uganda, Union of Comoros, Zambia and Zimbabwe.

⁴⁶ Article 23 of the COMESA Regulations empowers the CCC Board of Commissioners to set notification thresholds based on turnover or assets. These have been set out in the "Rules on the Determination of Merger Notification Thresholds and Method of Calculation". In particular, Article 4 provides that a merger must be notified where (a) the combined annual turnover or combined value of assets in the common market exceeds 50 million COMESA dollars; and (b) the aggregate turnover or assets in COMESA of two or more of the firms exceeds 10 million COMESA dollars, unless each of the firms achieves more than two-thirds of its aggregate turnover in COMESA within a single member state.

⁴⁷ According to (Baker McKenzie, 2019^[36]), "Even though the COMESA treaty suggests that under certain conditions the filing with the COMESA Competition Commission

In this regard, the OECD, in its Recommendation on Merger Review, recommends that:

Member countries are encouraged to facilitate effective co-operation and co-ordination of merger reviews, and to consider actions, including national legislation as well as bilateral and multilateral agreements or other instruments, by which they can eliminate or reduce impediments to co-operation and co-ordination.

Table 2.3 shows the mergers notified to the CCC over the 2015-2020 period. According to the decisions available, some of the proposed mergers notified to the CCC also had effects in Tunisia, but were not notified to the Tunisian Ministry of Trade or, where applicable, to other sectoral regulators in Tunisia.⁴⁸

Table 2.3. Mergers notified to the COMESA Competition Commission (CCC)

Year	Total number of mergers considered	Mergers authorised without conditions	Mergers authorised with conditions
2015	21	16	2
2016	32	19	7
2017	34	18	3
2018	45	35	4
2019	46	37	6

Note: Statistics for 2020 are only available until March 2020 and therefore have not been included in the table.>

Source: COMESA Competition Commission, Merger Statistics, <https://www.comesacompetition.org/?p=1286!>>

substitutes the merger filing domestically, we do not have information confirming such an interpretation under domestic competition law".

⁴⁸ See Decision CCC/MER/12/33/2020 of 16 April 2021 concerning the acquisition of the medical insurance branch of Jubilee Holdings Limited by Allianz Africa Holding GmbH; Decision CCC/MER/8/20/2020 of 12 November 2020 concerning the acquisition of control of Società Finanziaria Macchine Automatiche S.p.A. by BC European Capital and BC Partners Fund XI; Decision CCC/MER/6/16/2020 of 4 September 2020 on the joint venture of Ford Motor Company and Mahindra & Mahindra Limited; Decision CCC/MER/11/41/2019 of 22 December 2019 on the merger of Marinvest S.r.l, Ignazio Messina & C. S.p.A. and RORO Italia S.r.l.

2.3.2. Scope

Defining mergers

According to Article 7 of Act No. 2015-36 of 15 September 2015, on the reorganisation of competition and prices, a merger is:

any act, in whatever form, which involves the transfer of ownership or enjoyment of all or part of the assets, rights or obligations of a business, the effect of which is to enable a business or a group of businesses to directly or indirectly exercise a decisive influence over one or more other businesses.

The Act does not provide a precise and objective definition of "merger" and does not explicitly define whether certain operations, such as the creation of a joint venture, should also be considered mergers and thus subject to the regime set out in Article 7. For example, the text of the Act does not appear to cover a *de facto* acquisition of control, where a shareholder acquires control by fragmenting the formerly controlling shareholdings and taking into account the level of shareholdings of the other shareholders, and instead appears to make the obligation to notify a merger dependant on the existence of a legal act between two independent undertakings conferring *de jure* control over the firm.

In the absence of explicit provisions precisely defining the concept of economic merger and control, the competition authorities have explained that in practice a merger is considered to take place when:

- two or more previously independent companies merge
- one or more natural or legal persons, that already control a company, acquire, directly or indirectly, control of the whole or part of one or more other firms, whether by the acquisition of equity or assets, contract or otherwise.

In discussions with the competition authorities, and despite the absence of legislative or regulatory provisions on this point, it has been determined that the creation of a long-term joint venture operating as an autonomous economic entity constitutes a merger. Given the lack of clear and public provisions on this issue,

companies may not know however that they are obliged to notify such transactions.⁴⁹

Conditions for notification

Article 7(3) sets out two alternative conditions, that, if either is met, require companies to notify the proposed merger:⁵⁰

- A **turnover**-based test: the total turnover of these companies in the domestic market exceeds an amount set by government decree. This amount was set at TND 100 000 000 by Article 1 of Government Decree No. 2016-780 of 13 June 2016, setting the total turnover threshold above which mergers are subject to prior authorisation. No guidance has been provided on how to calculate turnover, but it is common practice to include the turnover of all companies in the same group, i.e. the entity involved in the deal as well as all firms under the control of the same entity (Jabnoun, 2021^[35]).
- A **market share** test: the average share of the companies combined market-shares exceeds 30% of sales, purchases or other transactions in the domestic market, or in a substantial part of it, for substitutable goods, products or services, during the last three financial years. In some cases, this test has made it possible to subject transactions that are below the turnover threshold set by the government decree for the ex ante authorisation requirement.⁵¹

While both tests relate to the merging companies together, these provisions do not set thresholds concerning the two companies separately or specifically for the target company. This therefore poses the risk that a large company that exceeds

⁴⁹ In a recent decision, the Competition Council refused to give its opinion on a merger resulting into the creation of a joint venture (decision No. 211475 of 14 July 2021).

⁵⁰ Unlike successive legislation, Act No. 95-42 of 24 April 1995 provided for cumulative turnover and market share thresholds. It is only with Act No. 2005-60 of 10 July 2005 that the two thresholds were made alternatives. This model was replicated in the current legislation.

⁵¹ See Competition Council Opinion No. 182588 of 16 May 2016 on the merger between the subsidiaries of Coty and Procter & Gamble. The Council notes that the turnover of the parties concerned did not exceed TND 20 000 000, but their combined market shares exceeded 30%, making the merger subject to the approval of the Minister of Trade.

these thresholds on its own will be always subject to the notification requirement, including when it plans to take over a small company or when an operation does not lead to a significant change in the structure of the market or have any real impact on competition in Tunisia. This aspect of overall (as opposed to separate) notification thresholds was discussed at the OECD Roundtable on "Jurisdictional nexus in merger control regimes", held in 2016, where it was noted that:

For example, it is clear that a transaction in which only one of the companies has a link to the jurisdiction can be said to have some sort of local nexus. However, since the objective of notification thresholds is to ensure that only those mergers which are likely to have a material impact on competition in the jurisdiction concerned are reviewed, it is arguable that merger review should be triggered only by the presence in the jurisdiction of at least each of two participating undertakings; if the local turnover of only one participating undertaking was sufficient to trigger merger notification, then a significant number of merger transactions that have no or very little impact on competition in the country would have to be notified⁵².

The two tests provided for in Act No. 2015-36 require a link to the Tunisian market, where they require, under the first test, a combined market share of 30% in the domestic market and, under the second test, a turnover in the domestic market set by decree. For the first test, determining the market shares at the notification stage may, however, involve a complex assessment of the relevant market and the companies' activities, requiring specific data on the markets affected. This can lead to high costs for the companies concerned and to considerable uncertainty about how to interpret the notification requirement, which can in turn cause significant delays in notification and even doubts about whether notification is required.⁵³

⁵² See the Executive Summary of the roundtable discussion on jurisdictional nexus in merger control regimes, held by Working Party No. 3 on co-operation and enforcement on 14-15 June 2016.

⁵³ For an example, see litigation that arose from the acquisition in 2017 by Université Centrale of the capital of the private science school UPSAT Sousse. Following the Ministry of Commerce's decision that found that the acquisition did not meet the 30% market share thresholds, the competing Mahmoud El Materi university filed a complaint before the administrative tribunal against the Ministry of Commerce's decision. The doubt arose in particular concerning the definition of the relevant market. The case is pending before the administrative tribunal.

For this reason, the International Competition Network (ICN) report on Setting Notification Thresholds for Merger Review discourages the use of market shares as a notification criterion (International Competition Network - Merger Working Group, 2008^[37]). Similarly, to avoid imposing excessive costs and burdens on the merging parties, the OECD Recommendation on Merger Review recommends that members

use clear and objective criteria to determine whether and when a merger must be notified or, in countries without mandatory notification requirements, whether and when a merger will qualify for review.

Furthermore, according to (OECD, 2021^[38]), of the 54 countries that provided statistical data, 51 have conditions based on turnover, while only 12 have conditions based on the companies' market share.

Tunisia should carefully consider the advantages of a market share test (i.e. the fact that such thresholds are likely to trigger a notification even when the companies concerned have a low turnover) and its disadvantages (in particular, the uncertainty associated with this type of test and the need for a complex and less objective analysis, given that to calculate market share, the relevant market and the main competitors must first be defined).

As indicated below in Table 2.4, the aggregate turnover threshold above which mergers are currently subject to prior authorisation by the Minister of Trade was set by Government Decree No. 2016-780 of 13 June 2016 at TND 100 000 000. This decree repealed the previous Decree No. 2005-3238 of 12 December 2005, which set the threshold at TND 20 000 000 and had in turn increased the previous threshold of TND 3 000 000. As shown in Table 2.4, the number of mergers currently notified to the Ministry of Trade appears to be fairly low compared to OECD indicators, averaging five notifications per year between 2016 and 2020.

Table 2.4. Change in the turnover threshold for notification of mergers to the Ministry of Trade

	Decree No. 2016-780 of 13 June 2016	Decree No. 2005-3238 of 12 December 2005	Act No. 95-42 of 24 April 1995
Turnover	100 million	20 million	3 million*

Note: *Unlike successive legislation, Act No. 95-42 of 24 April 1995 provided for cumulative turnover and market share thresholds.

Source: Decree No. 2016-780 of 13 June 2016; Decree No. 2005-3238 of 12 December 2005; Act No. 95-42 of 24 April 1995

Generally speaking, notification thresholds should be high enough to avoid competition authorities with limited resources having to investigate an excessive number of proposed mergers, which could result in excessive opportunity costs and divert resources from other activities aimed at detecting and preventing anticompetitive practices. On the other hand, the notification thresholds should ensure that proposed mergers that are likely to raise competition concerns in the domestic market are notified to the competent authority (International Competition Network - Merger Working Group, 2008^[37]).

In Tunisia, the gradual increase in thresholds over the years was intended to exclude transactions of minor importance that would not have a significant impact on the domestic market, thereby enabling the competition authorities to focus their resources (financial, technical and human) on the most substantial transactions that could affect the proper functioning of the market (Gani, 2012^[39]). However, the number of notifications seems to be particularly low at present, partly because the turnover threshold set by Government Decree No. 2016-780 is too high when compared with the country's current economic situation.

Finally, it is important to note that if a proposed merger fulfils the conditions listed in Act No. 2015-36 and the companies fail to comply with the notification requirement, they may be fined in accordance with Article 43(2) of Act No. 2015-36, up to 10% of the turnover in Tunisia of the companies concerned. As confirmed by a number of stakeholders, this mechanism applies both to intentional non-compliance and non-compliance due to negligence. However, in practice, no fines have been imposed so far for a breach of the notification requirement (Jabnoun, 2021^[35]).⁵⁴

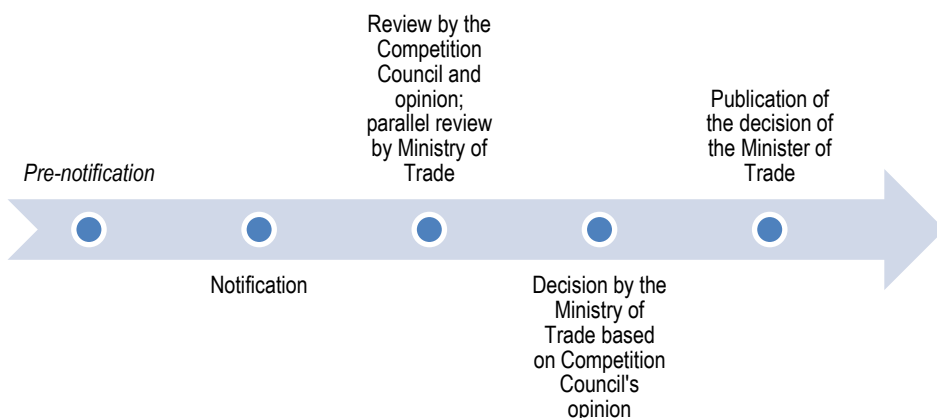
⁵⁴ For example, in its Decision No. 111289 of 16 May 2019 the Competition Council found that one of the accused companies (SNMVT) had acquired another company (SGS TOUTA) in 2003 without notifying the transaction. Although the transaction fulfils the conditions for notification, the right to pursue the breach of the notification requirement had expired. Similarly, another transaction was undertaken in 2009 by the same company, SNMVT, which had acquired the company SAHARA CONFORT but not notified the transaction within the required time period (Competition Council Opinion No. 102400 of 9 August 2012).

2.3.3. Procedure

Pursuant to Article 7 of Act No. 2015-36 of 15 September 2015, on the reorganisation of competition and prices, the Minister of Trade must be notified in advance of "*any proposal or merger likely to create or strengthen a dominant position in the domestic market or a substantial part thereof.*"

As shown in Figure 2.11 below, the merger review procedure comprises a number of phases.

Figure 2.11. Merger review procedure



Source: OECD Secretariat

Pre-notification

The **pre-notification** phase is optional and is undertaken on the initiative of companies involved in a proposed merger that want to consult the DGCEE on whether they are required to notify the transaction or, in the case of complex transactions, to begin the process of reviewing the transaction and in so doing anticipate any adjustments that may be required for its approval. This initial contact, which takes place informally and does not result in any commitment or effect, allows the companies and the DGCEE to exchange information, define the relevant market, identify the data required and compile the notification file jointly, enabling a better and more timely analysis of the possible effects of the transaction. This phase therefore minimises the risk of an incomplete file being

submitted when the Minister of Trade is formally notified of the transaction pursuant to Article 7 of the Act. Once the merger filing is notified, if the DGCEE considers the notification file submitted to be incomplete, it may request additional information from the companies involved and extend the deadline until this information is provided, in accordance with Article 9(6).

Notification

Pursuant to Article 9(1), the parties to a merger must notify the Minister of Trade within 15 days of the conclusion of the agreement, the merger, the publication of the offer to purchase or exchange rights or obligations, or the acquisition of a controlling interest.

Notification of a proposed merger to the Minister of Trade is not subject to a notification fee (Jabnoun, 2021^[35]). In general, the number of mergers notified to the competition authorities or their level of complexity is beyond the control of the competition authorities, and as a result, the competition authorities may be required to analyse several complex transactions at the same time and within the statutory time limits. To manage the costs of the review procedure, it is not uncommon for the authorities conducting the review to impose reasonable and appropriate notification fees.⁵⁵ Although such notification fees will not fully cover the overall costs of merger review, they can, among other things, help to improve the authority's budgetary autonomy. At the same time, it is important that these fees are appropriate and reasonable, considering the costs of the review procedure and that they are not imposed to cover the costs of the authority's other functions and activities.

The start of the notification phase triggers the **three-month period** within which the Minister of Trade must make a decision on the proposed merger. More specifically, this phase only begins once the service responsible for receiving the file within the DGCEE has verified that the file submitted contains all the elements listed in Article 9(5).⁵⁶

⁵⁵ According to (OECD, 2021^[38]), of the 54 countries that provided statistical data, 35 have merger notification fees.

⁵⁶ Article 9(5) provides that the parties must submit a file in duplicate comprising: (1) a copy of the act or draft act to be notified and a note on the expected consequences of the

If the Minister of Trade has not issued a decision within the time limit, the economic merger as described in the notification letter is deemed to be approved.

These time limits apply regardless of the level of complexity of the transaction. Indeed, as regards the procedure and time limits, the Tunisian system does not differentiate cases based on the complexity of the transaction nor on the findings of an initial analysis. In other words, even if the competition concerns are easily identifiable and can be easily resolved in a short period of time, particularly in co-operation with parties who propose conditions from the outset of the procedure, the deadline by which the Minister must take a decision remains the same, i.e. 90 days from notification.

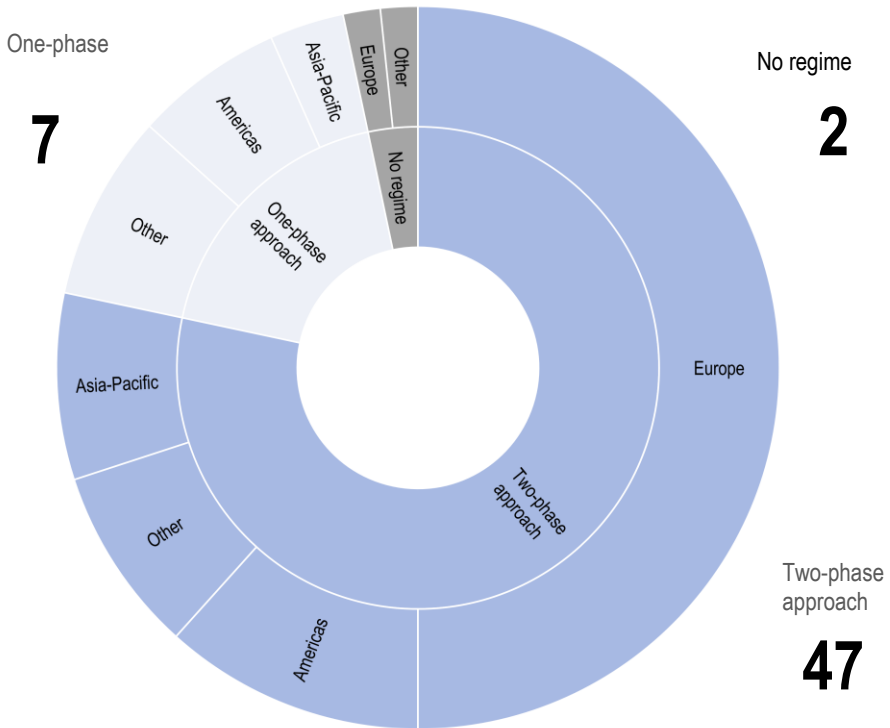
The desirability of having a procedure that comprises different stages depending on the complexity of the transaction under review or the issues raised by it is recognised by the OECD in the Council's Recommendation on Merger Review, which recommends:

establishing procedures to ensure that mergers that do not raise significant competition concerns are subject to expedited review and approval.

Furthermore, according to (OECD, 2021^[38]), of the 56 countries that provided statistical data, 47 have a two-stage merger review system, as shown in Figure 2.12.

transaction; (2) a list of the directors and main shareholders or members of the companies party to the act or subject to it; (3) the financial statements for the last three financial years of the companies involved and the market shares of each company; (4) a list of their subsidiary companies, with an indication of the amount of the shareholding, as well as a list of companies economically linked to them with regard to the merger; (5) a copy of the auditors' reports; and (6) a report on the economic benefits of the proposed merger.

Figure 2.12. Jurisdictions with a one- or two-stage merger review system



Source: (OECD, 2021, p. 15^[38])

Article 9(2) provides that the notification file may be accompanied by commitments intended to mitigate the effects on competition; such commitments are also considered to have been approved in the event of the tacit acceptance of the merger by the Minister.

Suspensive effect of notification

During the three-month period in which the Minister of Trade must review the information submitted, the companies concerned "may not take any measure that would make the merger irreversible or that would permanently change market conditions." The competition authorities interpret this provision as having a

suspensive effect on any merger, which therefore cannot be completed before obtaining the approval of the Minister of Trade. It has been noted that, in practice, this means that the system is one of compulsory *ex ante* merger review, given that companies tend to notify proposed mergers or memoranda of understanding concerning them. However, Article 9 also allows for the notification of a transaction following the "*acquisition of a controlling interest*", which, from a purely legal point of view, would seem to also allow for *ex post* merger review, i.e. after the transaction has been completed.

Moreover, the last paragraph of Article 7 also provides for an explicit derogation from the obligation to suspend the merger. This provision gives courts ruling on cases involving companies in economic difficulty the power to allow these companies to be transferred to their competitors. In this situation, the court may request a technical and non-binding opinion from the Minister of Trade, if it considers that the transfer may lead to a merger that creates or strengthens a dominant position in the market.

Competition Council opinions

Once a notification has been accepted, Article 11(8) provides that the Minister of Trade must request the **opinion of the Competition Council**. The file on the transaction is then registered at the Council's registry office and at the advisory office, and allocated an identification number. The file is then assigned to one or more rapporteurs who are responsible for drafting the report that will be submitted to the plenary session of the Council.⁵⁷ At this stage, pursuant to Article 20, the Council can hear the parties involved (for example to seek clarification on their envisaged commitments),⁵⁸ who may be represented by their attorneys. Following their hearing and the Competition Council's analysis, a report is drafted and sent to the plenary session of the Council in order to allow it to adopt an opinion.

⁵⁷ Pursuant to Article 22, the Council may only validly deliberate in plenary session if at least half of its members, including at least four judges, are present, except in the case of an urgent advisory request or a request submitted to the Council during the judicial recess. Sitting in plenary, the Council must give its opinion no later than 60 days from the date it received the request for an opinion.

⁵⁸ See decision of the Competition Council No. 202744 of 18 October 2020 concerning the sector of private secondary education.

However, the report and the Competition Council's opinion are not accessible to the parties.

Generally speaking, the entire review procedure should ensure procedural fairness to the merging parties and, as provided for in the OECD Council Recommendation on Merger Review:

The opportunity for merging parties to obtain sufficient and timely information about material competitive concerns raised by a merger, a meaningful opportunity to respond to such concerns, and the right to seek review by a separate adjudicative body of final adverse enforcement decisions on the legality of a merger. Such review of adverse enforcement decisions should be completed within reasonable time periods.

With respect to third parties to the merger, the OECD Recommendation on Merger Review also provides that:

Third parties with a legitimate interest in the merger under review, as recognised under the reviewing country's merger laws, should have an opportunity to express their views during the merger review process.

This principle seems to be respected in Tunisia. As competition authorities told the OECD, third parties can be summoned to be heard by the rapporteur(s) in charge of the case and they can also ask to be heard when the merger can have an impact on the market on which they are active. Furthermore, despite the legal text remaining silent on this aspect, rapporteurs are subject to a diligence obligation, and must gather all reliable and tangible information, including from third parties if necessary.

When ruling on a case, the Council must assess whether the proposed merger harms competition and, if so, whether it contributes to technical or economic progress to a sufficient extent to offset this harm. The Council's assessment is not limited to competition considerations alone, but, pursuant to Article 12 of Act No. 2015-36, extends to other public interest considerations, namely "*the need to consolidate or preserve the competitiveness of domestic companies in the face of international competition*" (see Section 2.3.4 below).

The Council may advise the Minister to:

- authorise the transaction under the conditions proposed by the companies involved
- authorise the transaction subject to conditions, while requiring the companies involved to comply with conditions designed to balance the expected economic progress against the harm to competition
- refuse to approve the transaction.

If the Council has not issued an opinion within the 60-day time limit, the Ministry of Trade is entitled to exercise its powers, including to adopt a decision without the Council's opinion.

As can be seen from Table 2.2, the Council issued an opinion on all cases on which the Ministry of Trade issued a decision. Only once in the last five years has the Competition Council issued a negative opinion, when it refused to approve the acquisition of the entire share capital of SGTM by Mosni Gas Bottles (MGB) in 2017, a transaction that would have affected the two interconnected markets of galvanisation and iron pipe production.⁵⁹ This is also the only decision in which the Ministry of Trade explicitly rejected the Competition Council's opinion and cleared the merger based on economic and social grounds such as keeping employment and increasing production capacity (see Box 2.5) In most cases, the Council advised that the mergers be authorised without conditions; in two cases since 2016 it has advised the Minister to apply behavioural commitments to the authorisation of the transaction.⁶⁰

⁵⁹ See Competition Council Opinion No. 162623 of 26 January 2017, on the acquisition of the entire share capital of SGTM by Mosni Gas Bottles (MGB), which concerns the two interconnected markets of galvanisation and iron pipe production. The Council found that the merger was against consumer interests. Specifically, it found that the merger would not have contributed to technical and economic progress and would have given the company a monopoly position in both the metal galvanisation and the iron pipe production markets.

⁶⁰ For example, see Opinion on the acquisition of ESSO shares by Total and Mobil; Opinion on the merger between the Tunisian paint company Astral and the company Flash.

Box 2.5. The refusal to authorise the acquisition of SGTM by Mosni Gas Bottles

The Competition Council's opinion concerned the acquisition of the entire share capital of the galvanisation and metal processing company SGTM by MGB. MGB belongs to the Poulina Holding group, which is active in various markets, such as construction, real estate and the steel industry, and has several subsidiaries and companies active in the domestic and foreign markets.

The transaction was notified to the Ministry of Trade because the turnover of the companies involved exceeded TND 100 000 000, meaning that the companies were obliged to obtain prior authorisation.

The relevant market

The merger would affect two reference markets, namely the galvanisation and the iron pipe production markets. Considering that iron pipes require galvanisation in any event, the Council considered the two markets to be interconnected.

The supply side of the galvanisation market is occupied by companies with the production facilities required to galvanise metals and many companies combine galvanising with other activities related to the steel industry and metal processing. This market is notable for the small number of producers, which can be explained by the high barriers to entry: in addition to high capital costs, galvanising is classed as a polluting activity and therefore requires several licences from the Ministry of the Environment. Galvanising is classed as an essential complementary activity that allows a factory to produce a marketable end product. The focus in this exercise was on the production facilities of companies operating in the galvanisation market. SGTM has a technology that reduces production costs: two automatic galvanising pools, which increase the speed of the galvanisation process. Other companies present in the galvanisation market alongside SGTM cannot provide the same services because these other companies do not have the same production facilities. Moreover, the Council found that the documents submitted in the file expressly stated that SGTM has a monopoly on this type of production.

The iron pipe market is the second market affected by the proposed merger. Notably, the report sent by the parties to the Council as part of the merger

review process addressed only the galvanisation market. The iron pipe market was not mentioned, even though it is directly linked to the galvanisation market.

Competitive analysis and the finding of harm

After studying the relevant market and the documents in the file on the proposed merger, the Council reached the conclusion that the merger would enable companies belonging to the Poulina Holding group to acquire a monopoly in the metal galvanisation market in respect of items between 13 and 15 metres in length, with an aggregate annual production capacity of 70 000 tonnes (i.e. 30 000 tonnes from MBG and 40 000 tonnes from SGTM). Moreover, PAF (another company – in addition to MBG – belonging to the Poulina Holding group) would be able to strengthen its dominant position in the pipe production market, as the proposed merger would enable it to manufacture and galvanise large iron pipes following the acquisition of SGTM and therefore to monopolise this market segment.

Once these potential anticompetitive effects had been identified, pursuant to Chapter 12 of the Competition and Prices Act, the Council examined (1) the extent to which the proposed merger might contribute to technical or economic progress to offset the harm to competition; and (2) the need to improve or maintain the competitiveness of domestic companies in the face of international competition.

According to the information provided in the notification, MBG would simply operate SGTM's production facilities, without making any new investments or developing new technologies in this market. There was therefore no evidence that the merger would lead to technical and economic progress.

As regards the question of maintaining and improving the competitiveness of the companies against foreign competition, the Council highlighted that the proposed merger would strengthen MBG's position in the international market, but that this is not sufficient to compensate for the significant impact of the merger on the domestic metal galvanisation market, which would inevitably affect the balance of several sectors of the economy, including the construction sector and agriculture, and the prices of various services and products.

The Council reached the same conclusions in respect of the pipe production market. The merger would have consolidated PAF's dominant position and enabled the company to impose monopoly prices, increasing the production

costs of companies using this type of pipe as inputs to manufacture their products. This would, in turn, adversely affect the purchasing power of the final consumer. Moreover, the merger would not have had any positive effects on technical or economic progress, since the transaction was intended solely to provide access to SGTM's production methods.

The Council therefore came to the conclusion that the proposed merger would create a dominant position both in the metal galvanisation market and in the iron pipe production market. Moreover, the transaction would neither contribute to technical and economic progress nor generate consumer welfare benefits.

The Competition Council's refusal

On these grounds, the Council advised the Ministry of Trade not to approve the proposed merger.

The Ministry of Trade's decision

This is the only case in which the Minister of Trade explicitly deviated from the Competition Council's opinion. The Minister eventually cleared the merger based on economic and social grounds such as keeping employment levels, controlling costs and increasing production capacity in Tunisia.

Source: Competition Council Opinion No. 162623 of 26 January 2017, <http://www.cct.gov.tn/wp-content/uploads/2019/07/162623.pdf>.

Decision of the Minister of Trade

Once the Competition Council has issued its opinion, or once the 60-day time limit has passed without the Council having issued an opinion, the Minister of Trade is entitled to exercise their powers and issue a **decision on the merger** within three months of the competent service at the DGCEE verifying that the file contains all the elements listed in Article 9(5). Where required, i.e. when the Minister of Trade needs additional information, this information may be requested and the time limit extended until it is provided. Although requests for additional information might be prejudicial to the parties, for example, they might give rise to penalties for non-compliance with the obligation to reply or refusal or failure to co-operate might constitute an aggravating circumstance, such requests for additional information cannot be appealed, as only final decisions can be challenged before the Administrative Court. Consequently, the lack of an effective remedy might result

in requests that are unduly onerous, excessive, disproportionate or irrelevant to the transaction under review. Such requests might also be used as a means of extending statutory deadlines or to undermine norms regarding the protection of confidential information.

In practice, the review procedure, taking into account the pre-notification phase and the need that the notification file includes all relevant information, takes between 6 and 12 months to reach a decision for complex transactions and between 6 and 8 months for simpler transactions. (Baker McKenzie, 2019, p. 127^[36])

If the Minister of Trade does not respond to the notification within three months, they are deemed to have tacitly accepted the proposed merger or merger transaction as well as any commitments made by the parties in the notification letter submitted.

The Competition Council's opinion is not binding; the Minister may deviate from it and decide pursuant to Article 10 of Act No. 2015-36 of 15 September 2015 to:

- authorise the merger under the conditions proposed by the companies involved
- authorise the merger and subject the companies involved to conditions designed to balance the expected economic progress against the harm to competition
- refuse to approve the transaction.

Although the Ministry tends to follow the Council's opinion in the vast majority of cases, as the latter is always based on a more precise analysis of the data,⁶¹ it may deviate from it in practice. For example, in the case of the acquisition of SGTM by MBG (a subsidiary of the Tunisian Poulina Holding group), in the Minister's decision, the considerations relating to the social and industrial benefits of the transaction seem to have been prioritised over the risks to competition identified by the Council, despite the Minister not disputing the Council's objection based on the existence of alternatives that would make it possible to safeguard

⁶¹ Between 2015 and 2020, the Ministry only explicitly deviated from the Competition Council opinion in one case (in 2017) (see Table 2.2).

production techniques and jobs.⁶² Moreover, the brevity of the Minister's decisions published on the DGCEE website can obscure the reasons for deviating from the Council's opinion or why the Minister found, on balance, that other considerations (as listed in Section 2.3.4) would take precedence over the harm to competition. In view of the obligation to provide a reasoned decision pursuant to Article 10 of Act No. 2015-36, the Ministry of Trade's failure to provide a statement of reasons in its decision could be grounds for appeal against the decision to the Administrative Court.

Remedies and commitments

When the Ministry of Trade considers that the transaction would be detrimental to competition and that the benefits in terms of technical or economic progress, or the competitiveness of national companies, are not sufficient to compensate for this detrimental effect, it may either block the transaction or approve it subject to certain conditions being met. These remedies may be proposed by the parties and then made binding by the Ministry in its approval decision.

Pursuant to Article 9(2), the parties have the right to submit a notification with commitments intended to mitigate the effects of the merger on competition. Following their proposals, the Ministry of Trade, once it has received the Council's opinion, may require the companies involved to comply with commitments intended to offset the harm to competition.

Article 43(2) provides that, in the event of non-compliance with the accepted commitments, companies may be subject to a fine of up to 10% of their turnover in Tunisia in the last financial year. A finding of non-compliance may be made by the Ministry of Trade, following a request to the Competition Council (on the basis of a report drawn up by the economic control officials with competence in the area of competition, following which the Ministry of Trade may petition the Competition

⁶² In its opinion, the Council observed that the sale of SGTM shares had not been advertised, but had been carried out by mutualisation and through personal contacts. The failure to announce the sale of shares prevented alternative offers from being made, meaning that the only offer would result in Poulina Holding group companies' dominant position being strengthened, threatening the overall balance of the galvanisation market and the pipe production market. According to the Council, SGTM's economic difficulties could be overcome without necessarily selling its shares to MBG.

Council). Following their acceptance, the Act provides two avenues for revoking or amending the commitments:

- The last paragraph of Article 10 gives the Ministry of Trade the power to withdraw approval for the merger if the companies do not comply with commitments or if the information provided by the parties is found to be inaccurate.
- Article 27(2) provides that in the event of abuse of a dominant position resulting from the merger of companies, the Competition Council may propose to the Minister of Trade "amending, supplementing or cancelling all agreements and acts that enabled the merger resulting in the abuse".

For commitments proposed by the parties to be accepted, they must fulfil several conditions:

- They must be **effective** and enable threats to competition to be remedied effectively.
- Their **implementation** must be clear and straightforward. To this end, the conditions must be precise and unambiguous in their wording and the parties must provide sufficient detail about their implementation.
- They must be implemented **quickly**, to avoid harming competition pending their implementation.
- They must be **verifiable**. To this end, the parties must identify a monitoring mechanism that will enable the competition authorities to ensure that the conditions have been effectively implemented.

The competition authorities may accept or impose two types of remedies:

- **structural** remedies, intended to ensure competitive market structure through the divestment of arms of the business or assets to a suitable purchaser that is able to compete effectively
- **behavioural** remedies, which may complement structural measures, intended to control certain behaviour of the company resulting from the merger. In some cases, behavioural remedies may be considered sufficient, for example, when no buyer has been found.

In principle, the choice between the two types of remedies depends on the effects of the transaction and the harm to competition identified in the competitive analysis. For example, when the competitive harm results from the horizontal overlap of the parties' activities, the divestment of assets is the most appropriate

remedy; however, when the competitive harm results from the risk of market foreclosure, this situation is better addressed by behavioural measures to ensure competitors can access inputs and customers. For example, in the case of the acquisition of control of Esprit SA by Honoris Holding Limited in the private higher education market, although the transaction would change the structure of the reference market in terms of market shares and level of concentration,⁶³ the Competition Council advised the Ministry of Trade to accept behavioural commitments.⁶⁴ Specifically, Honoris Holding Limited was required to maintain the same pricing policy for tuition and enrolment fees, to respect the annual cap on promotion and fee increases, and to improve the standard of academic training for the benefit of students.

Although the competition authorities prioritise structural remedies, our analysis of the decisions taken in practice shows that measures are predominately behavioural.⁶⁵ Between 2016 and 2020, no authorisation decisions were subject to structural remedies.

2.3.4. Context analysis

Criteria for the competitive analysis

As indicated by the competition authorities, merger review seeks to maintain effective competition in the affected markets. When the Ministry of Trade submits

⁶³ As observed by the Competition Council in its opinion, the acquisition would enable Honoris Holding Limited to double its total share of the private higher education market to 33% and thus gain market power and clear economic dominance in two market segments, namely preparatory training with a share of over 50% and engineering education with a share of 40%. Competitors would however retain an insufficient market share to enable them to exert effective competitive pressure and prevent the company from increasing tuition fees, posing a serious threat to effective competition.

⁶⁴ Competition Council Opinion No. 202744 of 18 August 2020 on the acquisition of 56.6% of the capital of Esprit SA by Honoris Holding Limited.

⁶⁵ See Decision on the acquisition of a stake in ESSO Lubrifiants Tunisie by TOTAL and Mobil, pursuant to which the purchasers committed, among other things, to avoid any price discrimination between member and non-member customers and to improve the quality of services offered to consumers; see also Decision on the merger between Astral and Flash, which was subject to the condition of entering into a sub-contracting agreement.

a request for an opinion, the Competition Council takes a systematic approach, starting by defining the relevant markets.⁶⁶ Identifying the relevant market, both from a product and a geographic perspective, is essential, especially as it is a necessary precondition for calculating market shares. In its opinion on the merger between Honoris Holding Limited and Esprit SA, for example, the Council distinguished between the private and public higher education markets due to the large difference in fees for continuing education courses.⁶⁷ Based on this definition of the market, the Council considered that, following the merger, Honoris Holding Limited would occupy 33% of the market, doubling its market share in the private higher education sector and acquiring a dominant position in the preparatory class and engineering education segments.

Once the relevant market(s) have been defined, the Council considers the level of concentration in these markets to determine whether the merger might affect competition, particularly from a structural perspective.

The competitive analysis conducted by the Competition Council and the DGCEE aims to determine whether the merger is likely to create or strengthen a dominant position in the domestic market or a substantial part of it. If this is the case, the competition authorities must assess whether the merger might make a sufficient contribution to technical or economic progress to offset the harm to competition, and they must also take into account the need to consolidate or preserve the competitiveness of domestic companies against international competition.

In accordance with Act No. 2015-36 and as confirmed by stakeholders, the test is therefore focused on whether a dominant position will be created or strengthened, coupled with public interest considerations, namely an analysis of the benefits of

⁶⁶ In its 2012 annual report (p. 23), the Council explained its approach:

verify whether Article 7 is applicable –

if it is, the Council conducts an analysis of the competition in the relevant market

determine whether the transaction will result in economic progress that could offset any harm

if necessary, issue amendments to the proposed merger with the aim of rebalancing the market.

⁶⁷ See Competition Council Opinion No. 202744 of 18 January 2020.

the transaction in terms of technical or economic progress able to offset the harm to competition or an analysis of the necessity of the merger for reasons of industrial policy.

With regard to the focus of the competitive analysis, the vast majority of jurisdictions apply a test based on the substantial lessening of competition (SLC test). As noted at the OECD Roundtable on the Standard for Merger Review held in 2009:

many have argued in favour of changing the merger statutes and adopting a more flexible test, such as the SLC test, which would catch without doubt all possible anticompetitive effects of mergers. Over the years, a number of jurisdictions have changed the legal test for the review of mergers and moved from the dominance test to the SLC test or to equivalent tests.⁶⁸

An SLC test would allow the effects of a merger on the market and the deterioration of competition between companies to be taken into account rather than relying solely on structural considerations such as market share analysis, on which a dominance test is largely based. This SLC test would entrench in the letter of the law the obligation to take into account the anticompetitive effects of a merger, even if it does not create a dominant position. It would also allow for effects other than unilateral effects to be considered, taking into account the likelihood of coordinated and conglomerate effects.

However, based on the test provided for by Tunisian law, the Competition Council has, in some opinions, limited itself to analysing the structural aspects of the merger and whether it could create a dominant position. For example, in its opinion on the merger between Total and the SAFT SA Group, the Council observed that, in the absence of any horizontal overlap between the parties in the local Tunisian market, the proposed merger would not strengthen a dominant position and, consequently, advised the Minister for Trade to approve the merger.⁶⁹

However, where appropriate, the Competition Council also takes into account vertical or conglomerate effects as well as the risk of coordinated effects resulting

⁶⁸ See the summary of the OECD Competition Committee Roundtable on the Standard for Merger Review (2009).

⁶⁹ Opinion No. 162610 of 13 October 2016 on the proposed merger between Total and SAFT SA Group.

from the transaction, for example where the parties create a joint venture that may give rise to the risk of co-ordination between the parent companies. For example, in the merger between Sidel Participations SAS and the French consortium Holcom SAS, owner of the COMEP branch specialising in the manufacture of moulds for the production of polyethylene terephthalate (PET) bottles, the Council considered that there were no significant horizontal effects, given that the transaction did not lead to the disappearance of either of the companies and that each would continue its activities independently.⁷⁰ However, when analysing the vertical effects of the transaction, the Council considered the fact that COMEP was the main supplier of inputs for the production of PET bottles. Similarly, in its opinion on the sale of the Dr Oetker Group's container complex to the carrier Maersk (Sealand), the Council analysed potential conglomerate effects that could hinder competition through the foreclosure of one or more interconnected markets or prevent the entry of new competitors.⁷¹

As this is a forward-looking analysis, the Council conducts a substantive review taking into account a relevant and plausible counterfactual scenario, as it exists at the time of the review, while taking into account possible future developments.

At the 2011 Roundtable on Economic Evidence in Merger Analysis, Working Party No. 3 on Co-operation and Enforcement emphasised how economic evidence can play an important role in assessing mergers and concluded that:

Economic evidence should be based on clear economic theory, and should be transparent, replicable and intuitive to allow non-economists to fully understand the analysis. In order to help companies involved in competition cases to achieve this, a number of competition authorities have issued Best Practice Guidelines on the presentation of economic evidence in merger cases (OECD, 2011_[40]).

However, as some stakeholders have noted, the Council bases its opinions on a legal analysis rather than on an economic analysis of the effects of the merger, which usually limits itself to defining market shares and the effects of the merger on the structure of the market. This is in part due to the composition of the Council's staff, where lawyers (13) outnumber economists (7), and a relatively

⁷⁰ See Competition Council Opinion No. 192726 of 17 October 2019 on the merger between the Swiss global complex "Sidel Participations SAS" and the French consortium "Holcom SAS", owner of COMEP.

⁷¹ See Competition Council Opinion No. 172645 of 20 September 2017 on the sale of the Dr Oetker Group container complex to the carrier Maersk (Sealand).

high percentage of staff are not competition specialists and not assigned to competition enforcement activities. Moreover, as noted in section 1.5.2 above, there is no chief economist who could provide economic information and co-ordinate the council's economic approach.

Other considerations when reviewing mergers

These strictly competition-related considerations must be balanced against the other considerations set out in Act No. 2015-36.

Firstly, under Article 12(1), if the council considers that a transaction would harm effective competition, it must weigh up the aforementioned effect on competition and verify whether the merger would make a sufficient contribution to technical or economic progress to offset the harm to competition. The final decision on this trade-off is then adopted by the Minister of Trade.

However, the concept of technical or economic progress is not precisely defined in the Act and can be interpreted flexibly. For example, in its opinion on the merger between ABB Verwaltungs Ltd and General Electric (GE), the Council took into account the economic benefits of the transaction, such as improved ability to innovate, stronger research and development capabilities, enhanced competitiveness of domestic companies and reduced costs for the acquiring company with a positive impact on the efficiency and competitiveness of its low voltage electrical products, both in terms of quality and price.⁷²

Secondly, pursuant to Article 12(2), the Council must take into consideration "*the need to consolidate or preserve the competitiveness of domestic companies in the face of international competition.*" This provision introduces into the merger review considerations that go beyond the basic economic objectives of competition to take account of industrial policy objectives, such as the competitiveness of domestic companies in the face of international competition, the protection of domestic industry and the preservation of a national champion. These issues are often considered as part of the competitive analysis and play a major role in the final decision. For example, in a case involving the acquisition of 60% of the capital of the company Al Rayan by the company Lesaffre Yeast, the

⁷² Competition Council Opinion No. 172655 of 21 December 2017 on the acquisition of shares and assets in General Electric (GE) by ABB Verwaltungs Ltd.

Competition Council took into account the positive impact on the Tunisian company resulting from the acquisition of new manufacturing and marketing technologies and the commitment made by the acquiring company to provide ongoing training to Tunisian bakers, which would make them better equipped to export.⁷³ Similarly, in its opinion on the merger between Tec MMP, MM Packaging Tunisie and Société Tunisienne d'Emballages Modernes, the Council seems to give considerable weight to the positive impact of the transaction on the development of a domestic product, with a consequent reduction in dependence on exports, a boost to investment, job creation and improved vocational training for local employees.⁷⁴

Although there is no consensus among OECD Member countries on whether to include these considerations in the test normally applied by competition authorities when analysing proposed mergers, the discussion held in 2016 at the OECD Roundtable on Public Interest Considerations in Merger Control indicated that:

Competition authorities tend to prefer to focus on the core economic goals of competition and not assess public interest considerations in merger review.

During this discussion, it was rightly pointed out the extent to which:

Public interest considerations create risks of a) lack of legal certainty and predictability, b) increased complexity and c) questions as to whether the concerns are merger specific.

Moreover, the Tunisian provisions concerning the consideration of the competitiveness of domestic companies in the face of international competition seem to contradict the principles established in several OECD recommendations. In particular, in the Recommendation on Merger Review, the OECD recommends that:

Merger laws should treat foreign firms no less favourably than domestic firms in like circumstances.

⁷³ Competition Council Opinion No. 182662 of 15 January 2018 on the acquisition of 60% of the capital of the company Al Rayan by the company Lesaffre Yeast.

⁷⁴ See Competition Council Opinion No. 162598 of 30 June 2016 on the proposed merger between Tec MMP, MM Packaging Tunisie and Société Tunisienne d'Emballages Modernes, in which the council observed that the merger could boost investments, create jobs, incentivise and contribute to vocational training and improve product quality.

In the Recommendation of the Council for Co-operation between Member Countries in Areas of Potential Conflict between Competition and Trade Policies, considering that:

the effective application of competition policy plays a vital role in promoting world trade by ensuring dynamic national markets and encouraging the lowering or reducing of entry barriers to imports;

the OECD recommends that governments should not:

encourage other restrictive business practices in export or import markets, e.g., export limitation arrangements and import cartels, which restrain competition in these markets.

2.3.5. Special regimes

Under the general merger regime, the Ministry of Trade has horizontal competence over mergers and the Competition Council has consultative powers. Nevertheless, specific legislation does derogate from this regime and provides for special regimes in the insurance, microfinance, banking and audiovisual sectors.

Insurance sector

In the **insurance** sector, Article 62 of the Insurance Code gives the Minister of Finance the power to approve the full or partial transfer by insurance companies of their portfolio of contracts, with their associated rights or obligations, to one or more other licensed insurance companies. This competence extends to mergers or takeovers of insurance companies and, pursuant to Article 92 of the Insurance Code, to any agreement entered into by insurance or reinsurance companies subject to the code, including agreements that might affect competition. Pursuant to Article 92(2), such agreements must be notified to the Minister of Finance and may be implemented only if the Minister has not objected to them within two months of being notified of them.

Act No. 2008-8 of 13 February 2008 supplementing the Insurance Code created a *Comité général des assurances* [General Insurance Committee – CGA], a body under the Ministry of Finance, a legal entity with financial autonomy to carry out

its regulatory functions.⁷⁵ In the exercise of its functions, the CGA may exchange information with the competition authorities within the scope of their respective duties.

This oversight by the Minister of Finance completely replaces the horizontal oversight normally within the remit of the Minister of Trade in the context of merger review. Therefore, as confirmed during discussions with several stakeholders, these companies are not required to notify the Ministry of Trade of a proposed merger pursuant to Article 7 of Act No. 2015-36. At the time of writing, this has not been confirmed in practice, as there have not yet been any mergers subject to review by the Minister of Finance in the insurance sector. Nevertheless, despite the absence of a legal obligation in the strict sense or a formal co-operation agreement, the provisions giving the CGA the option to exchange information with the competition authorities within the scope of their respective duties would allow it to seek the opinion of the Competition Council.

Microfinance sector

Microfinance institutions, as defined by Article 1 of Decree-Law No. 2011-117 of 5 November 2011 on the organisation of the operations of microfinance institutions, are subject to a special regime during mergers and acquisitions.

Article 25 of Decree-Law No. 211-117 provides that two or more microfinance companies may merge and form a new microfinance institution, provided that they obtain the approval of the Minister of Finance once the microfinance supervisory authority has issued its opinion.⁷⁶

⁷⁵ The CGA is tasked with: 1) supervising insurance and reinsurance companies and professions related to the insurance sector and monitoring their activities; 2) ensuring that the rights of policyholders and beneficiaries of insurance contracts are protected; 3) studying legislative, regulatory and organisational issues relating to insurance and reinsurance operations; 4) studying technical and economic issues relating to the development of the sector. During discussions with stakeholders, it was clarified that the CGA also retains the right to oversee agreements between insurance companies and reinsurance companies on tariffs and on the general terms and conditions of insurance contracts.

⁷⁶ This independent authority was established by Article 43 of Decree-Law No. 2011-117. It is responsible for 1) examining the applications for approval submitted by microfinance

Like for the insurance sector, Article 14 of Decree-Law No. 211-117 provides that any merger between microfinance institutions and "*any acquisition, directly or indirectly, by one or more persons, of shares in the capital of a microfinance institution likely to result in the control of that institution and, in any event, any transaction resulting in the acquisition of one-tenth, one-fifth, one-third, half or two-thirds of the voting rights*" are subject to approval by the Minister of Finance once the microfinance regulator has issued its report.

Banking sector

As regards the **banking** sector, the Licensing Commission has the power to approve mergers on the basis of a report prepared by the Central Bank of Tunisia.⁷⁷

Article 34 specifies that prior approval must be sought for any "acquisition, directly or indirectly, of shares in the capital of a bank or financial institution or of voting rights by a person or group of persons linked by explicit concerted action or belonging to the same group, within the meaning of the Commercial Companies Code, likely to result in control of the bank or financial institution and, in any event,

institutions and issuing an opinion on them; 2) informing microfinance institutions of authorisation decisions taken by the Ministry of Finance; 3) carrying out documentary and on-site inspections of microfinance institutions, their unions and associations that have transferred their activities to a subsidiary; 4) appointing a provisional administrator to a microfinance institution in line with the conditions set by order of the Minister of Finance; 5) imposing administrative sanctions, with the exception of the withdrawal of authorisation, in the event of non-compliance with Decree-Law No. 2011-117 and its implementing legislation; 6) imposing penalties, in the event of non-compliance with the provisions of Decree-Law No. 2011-117 and its implementing legislation, payable to the Treasury, the amounts of which are fixed by order of the Ministry of Finance; 7) proposing, with justification, to the Minister of Finance that authorisation be withdrawn from microfinance institutions and their unions; 8) setting up a system to centralise the risks to the sector and communicate them to the microfinance institutions at their request. To this end, it can ask the microfinance institutions to provide all the statistics and information necessary to monitor their activities. It may also enter into partnership agreements with similar supervisory authorities for the exchange of information; 9) giving its opinion to the Minister of Finance on legislation relating to microfinance.

⁷⁷ The Competition Council still has jurisdiction over anticompetitive practices in the banking and financial sectors. See case No. 31510 of 25 June 2004 on cartels relating to cheque charges.

any transaction resulting in the acquisition of one-tenth, one-fifth, one-third, half or two-thirds of the voting rights."

The Licensing Commission is composed of the Governor of the Central Bank of Tunisia⁷⁸ or their representative (who acts as chair) and four independent members, recognised for their integrity and competence in the financial, banking or economic fields, who are appointed by the Board of the Central Bank of Tunisia⁷⁹ for a period of three years, renewable once. The Competition Council is therefore not represented at the Licensing Commission.

On reading the provisions of Act No. 2016-48, and following discussions with stakeholders, it is not clear whether merger reviews conducted by the Licensing Commission once the Central Bank has issued its opinion replace or are in addition to the merger reviews conducted by the Ministry of Trade following the advice of the Competition Council. The Ministry of Trade has never been notified of any transactions in the banking sector (not even for information purposes only) and thus the problem of competence has not yet arisen in practice but, as pointed out by some stakeholders, it could arise in the event of a merger in the banking sector.

Article 27 of Act No. 2016-48 lists the criteria on the basis of which the Commission grants prior approval. These include a work plan submitted by the applicant (which should show the bank's business plan and business model), the status of its direct and indirect shareholders, the adequacy of its financial, human

⁷⁸ Pursuant to Article 46 of Act No. 2016-35 of 25 April 2016 establishing the statutes of the Central Bank of Tunisia, the Governor of the Central Bank is appointed pursuant to Article 78 of the Constitution, i.e. by the President of the Republic on the proposal of the head of government and following approval by an absolute majority of the members present at the Assembly of Representatives of the People. They may be dismissed before the end of their term following the same procedure or at the request of one-third of the members of the Assembly of Representatives and with the approval of an absolute majority of the members of the Assembly.

⁷⁹ Pursuant to Article 57 of Act No. 2016-35 of 25 April 2016 establishing the statutes of the Central Bank of Tunisia, the Board of the Central Bank is composed of the governor (chair), the vice-governor, the chair of the financial market council, the head of public debt management at the Ministry of Finance, the head of forecasting at the Ministry for Economic Development, two university professors specialising in finance and economics (appointed by government decree following deliberation by the Council of Ministers, on the proposal of the Governor, once the Minister of Higher Education has issued its opinion), and two members who have previously held positions at a bank with at least ten years' experience in the field of banking or finance.

and logistical resources (including the amount of capital and equity to be allocated to the work plan), the experience and competence of the management and the governance arrangements, as well as the organisational and administrative structure and the policies and procedures for risk management and compliance. Given the primarily prudential nature of this review, these criteria do not include an analysis of the structure of competition in the market concerned. Therefore, so long as these prudential rules are followed, it is theoretically and legally possible for the Licensing Commission to approve merger agreements that may give rise to competition concerns. Furthermore, in the absence of a formal co-operation agreement among institutions, there is a risk that decisions will conflict or even that the conditions imposed in one decision will adversely affect the interests protected by the decision of another authority.

Given that Act No. 2006-48 is intended to derogate from Act No. 2015-36 and the fact that the analysis conducted by the Licensing Commission does not include criteria on competition, it could be argued that the competition aspects then fall within the horizontal and general competence of the Minister of Trade once the Competition Council has issued its opinion. It should also be noted that Act No. 2015-36 does not formally exclude mergers of banks or financial institutions from its scope, nor from the obligation to notify the Ministry of Trade under Article 7. This seems to be the interpretation offered by the Competition Council, which considered, in Opinion No. 52109 of 24 November 2005, that the review of merger transactions by the Ministry of Trade based on the advisory opinion of the Council may overlap with the review of the same transactions by the Central Bank of Tunisia. However, given that there is currently no co-operation agreement nor clear provisions on the division of competence over prudential and competition aspects, this overlap could lead to conflicts or even enforcement difficulties, for example when the two reviews result in incompatible decisions.

Finally, some stakeholders confirmed the plausibility of the interpretation that the Licensing Commission should seek the opinion of the Ministry of Trade and the Competition Council on aspects of competition law before adopting any decision. It is not clear, however, whether such an opinion would be binding on the Licensing Commission. Moreover, this possibility is not explicitly provided for by Act No. 2016-48, Article 29 of which only provides that the Tunisian Central Bank may request information "*from judicial authorities and the Tunisian Financial Analysis Commission as well as from national or foreign financial regulatory authorities*" under certain conditions.

Audiovisual sector

Finally, with regard to the **audiovisual** sector, Article 15 of Decree-Law No. 2011-116 of 2 November 2011 provides that the Independent High Authority for Audiovisual Communication (HAICA) must "*prevent the concentration of ownership in the audiovisual media and promote fair competition in the sector.*" In discussions with stakeholders, it was confirmed that in practice this constitutes an almost absolute prohibition on consolidation.

In Opinion No. 202750 of 23 October 2020 on the new bill on the freedom of audiovisual communication, the Competition Council proposed that the prohibition on the concentration of ownership of audiovisual media be abolished, and that comparative experiences be drawn on to adopt criteria and thresholds specific to the sector in line with the principles of pluralism on the one hand, and free movement of capital on the other.

2.4. Judiciary Branch

The Judiciary plays two key roles when it comes to competition policy in Tunisia: they provide an avenue to appeal the decisions of the two competition authorities and they handle actions for damages.

2.4.1. Appealing against administrative decisions

The administrative decisions of the Competition Council may be appealed before the Administrative Court, specifically before the administrative courts of appeal and cassation. The chambers of first instance of the Administrative Court do not hear appeals against decisions of the Competition Council.⁸⁰

This is a further indication of how the Competition Council is evolving as a judicial body. The Competition Act, as first drafted in 1995, stated that the decisions of the Competition Council, which were enforceable, could be appealed before the

⁸⁰ As already mentioned in this report, it is the Commissioner-General of the Government (usually the Director-General of the DGCEE) who represents both the Ministry and the Competition Council before the administrative court in the event of an appeal. There may also be criminal proceedings, since Article 45 of the Tunisian Act provides for the possibility of imprisonment for between sixteen days and one year for any individual who has played a decisive role in violating the prohibitions laid down in Article 5 of that Act.

Administrative Court. As of 2003, pursuant to Act No. 72-40 of 1 June 1972 on the administrative court, Article 21 of the 1991 Act states that decisions handed down by the Competition Council may be appealed to the administrative court. However, where appropriate, the council may order the provisional enforcement of its decisions. This provision was transposed into the Act of 15 September 2015, Article 28 of which adds that "the court responsible for hearing these appeals must rule on the case within one year from the date of the appeal".

Acts that may be challenged before the Administrative Court include decisions of the Competition Council, decisions of the Ministry of Trade on merger reviews, decisions of the Ministry of Trade pursuant to Article 6 of the Competition Act (exemptions), and decisions of the Ministry of Trade pursuant to Article 4 (temporary measures motivated by a situation of crisis or disaster, by exceptional circumstances or by a manifestly abnormal situation in the market of a given sector).

The Administrative Court may rehear the case in whole or in part, either to amend or to set aside the earlier decision.⁸¹ While the Administrative Court often upholds the decisions of the competition authorities, some have been amended to reduce the fines imposed by the Competition Council.

Appeals have a suspensive effect on the decisions of the Competition Council, which encourages defendants to appeal. The introduction of an appeal without this suspensive effect could make Competition Council decisions more effective and consequently strengthen competition policy in Tunisia, as could the introduction of damages. That said, Article 28 of Act No. 2015-36, which provides that "the Competition Council may, where appropriate, order the provisional enforcement of such decisions", has not proven entirely effective.

The average length of a case before the Administrative Court, including appeal and higher court (*cassation*), is five to ten years. Table 2.5 shows the number of decisions of the Competition Council that have been appealed to the Administrative Court in the last five years:

⁸¹ The following examples illustrate this possibility in practice: the judgments of the administrative court in cases No. 2488 of 13 December 2006, No. 26049 of 20 February 2010, and No. 29475 of 20 January 2014.

Table 2.5. Appeals to the Administrative Court (2016–2020)

Year	Number of decisions	Number of appeals	Average length in days
2016	35	8	542
2017	26	3	682
2018	52	15	576
2019	45	14	634
2020	35	6	-

Source: Competition Council

Despite the one-year time limit laid down by Article 28(3) of Act No. 2015-36, there are several reasons that may explain the slow progress of appeals against decisions made by the Competition Council. One such reason could be the lack of specialisation among administrative judges in competition matters.

2.4.2. Private actions for damages

The victims of an anticompetitive practice can seek damages before the courts in Tunisia, specifically before a civil judge in the ordinary courts. A finding of wrongdoing by the Competition Council is not a prerequisite for filing a civil claim, but in practice it seems preferable to have such a decision to support the civil claim.

Actions for damages do not, however, fall within the jurisdiction of the competition authorities. For this reason, neither the Competition Council nor the DGCEE have any say in these private applications. The number of such actions is therefore not known to these authorities. In any event, given the low number of condemnations in recent years, especially in cartel cases, the possibility of civil action seems to be more a matter for the future, as it is normally linked to the success of an effective anti-cartel policy and the existence of an active leniency programme. Some also point to a lack of competition culture and the fact that competition law is recent in Tunisia as reasons for the low number of private actions for damages. (Madani, 2021^[32])

Regarding access to information, private parties may access the files of the competition authorities for information on their request. Special legislation was in fact adopted in 2016: Organic Law No. 2016-22 of 24 March 2016 on the right of access to information. According to Article 9: "Any natural person or legal entity may submit a written request for access to information using a pre-established template made available to the public by the body concerned or on plain paper containing the compulsory details provided for in Articles 10 and 12 of this Act". Company secrets continue to be protected by law.

Chapter 3. Promotion of competition and institutional co-operation

This chapter examines the promotion of competition by competition authorities in Tunisia, as well as issues relating to institutional co-operation between them and other bodies – such as consumer protection organisations at the national level, the Common Market for Eastern and Southern Africa (COMESA) at the regional level, and the International Competition Network at the global level.

3.1. Promotion of competition

Promoting competition is particularly important in developing countries where public policies and regulations are undergoing major reviews. The role of competition authorities in reviewing these regulations is crucial to ensure that the principles of effective competition are taken into account. However, this means that they must have the necessary powers to do so. This section examines the tools available to the Competition Council and the Directorate-General for Competition and Economic Investigations (DGCEE) to carry out their task of promoting competition, in both the public and private sectors.

In accordance with Article 14, paragraph 4, of Act 2015-36, the relevant departments of the Ministry of Trade must co-operate with the Competition Council in "*the implementation of programmes and plans to raise awareness and promote a culture of competition.*"

As explained in section 3.1, the Ministry of Trade, which acts as a hub for receiving the various requests for opinions from other ministries and the opinion issued by

the Competition Council, plays a key role in the Council's consultation procedure on legislative and regulatory texts.

Article 29 of Decree No. 2001-2966 of 20 December 2001 establishes the powers of the Ministry of Trade and gives the DGCEE a number of functions in the area of promoting competition, such as the dissemination of regulations to operators in order to contribute to the development of a competition culture and the development of studies and research in the field of applied economics and competition law. In addition, the Minister of Trade acts as a spokesperson during Cabinet meetings for the observations made by the DGCEE on issues that may have an impact on competition policy.

The Ministry of Trade's website is essential for ensuring the transparency of its actions and increasing the impact and visibility of its work in promoting competition. Between 1 July and 29 December 2020, the website received 116 466 visits. However, it seems that several sections of the website are barely available or not updated. As an example, decisions on mergers adopted under Article 7, paragraph 2 of Act 2015-36 are not published promptly on the website.⁸² Moreover, although the site includes a section on competition rules, the information often dates back to before the latest reforms of 2015-2016.

On the other hand, the Competition Council also plays a key role in promoting competition in Tunisia, for example through its advisory role on legislative and regulatory texts (sections 3.1.1 and 3.1.2) or training activities or events to raise awareness of competition law issues.

Finally, there are a number of instruments available to the competition authorities to promote competition. The subsections below present the main competition policy tools in Tunisia.

⁸² As noted in section 2.3.1, Article 14, final paragraph, of Act No. 2015-36 provides for an obligation to publish the opinions of the Competition Council, while Article 10(2) of the Act imposes an obligation to publish decisions of the Ministry of Trade concerning mergers.

3.1.1. Opinions on legislative and regulatory texts

The first version of Article 9 of the Act of 29 July 1991 provided that the opinion of the Competition Commission⁸³ could be requested by the Minister for Economic Affairs on any draft legislative or regulatory text relating to competition.

Today, Article 11 of Act No. 2015-36 gives the Competition Council an advisory role with respect to certain laws and regulations. This provision stipulates that the Competition Council must be consulted when draft laws and regulations⁸⁴ "*tending to directly impose particular conditions for the exercise of an economic activity or profession*" or aiming to "*establish restrictions that may hinder access to a given market*" are presented or discussed. The Council must therefore be heard systematically on draft legislation relating to competition law.

Draft laws, government decrees, orders, and specifications are deemed to be laws and regulations.

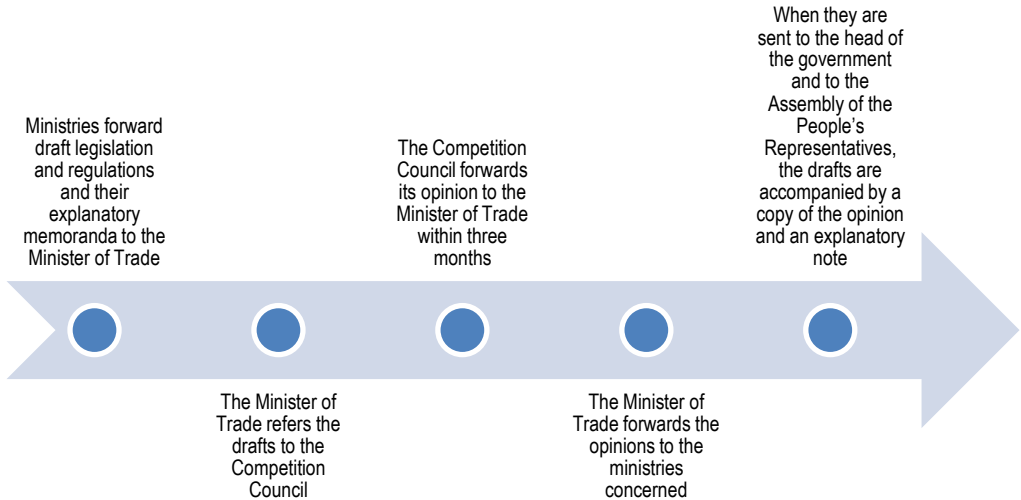
In accordance with Article 11, paragraph 5, the procedures and arrangements for this consultation were established by Government Decree No. 2016-1148 of 19 August 2016, laying down the procedures and arrangements for the mandatory consultation of the Competition Council on draft legislative and regulatory texts.⁸⁵ Figure 3.1 provides an overview of the main steps in this procedure.

⁸³The Competition Commission is the predecessor of the Competition Council. As noted in section 1.3.1, Article 9 of the 1991 Act established a special commission called the Competition Commission to hear applications relating to anti-competitive practices and whose opinion could be requested by the Minister for Economic Affairs on any draft legislation or regulation relating to competition. This body became the Competition Council under Act 95-42 of 24 April 1995.

⁸⁴ The previous Competition Act provided for an advisory role only in respect of statutory instruments. Act 2015-36 extended this consultation to legislative texts.

⁸⁵ Article 6 of this decree repealed the provisions of Decree No. 2006-370 of 3 February 2006 laying down the procedures and arrangements for the compulsory consultation of the Competition Council on draft regulatory texts.

Figure 3.1. Stages of the compulsory Competition Council consultation procedure



Source: OECD Secretariat

Ministries must forward any draft legislation or regulations that seek to impose quantitative or qualitative conditions on market entry or the exercise of an economic activity or profession to the Minister of Trade. The file must also include the explanatory memoranda for the adoption of the text in question.

The Minister of Trade refers the matter to the Competition Council on behalf of the Government.

The Competition Council forwards its opinion to the Minister of Trade within three months of receiving the complete file. This time limit is suspended when the Competition Council requests additional information and/or documents.

Once the Council's opinion has been received, and when draft legislation is sent to the Office of the Head of the Government and the Assembly of the People's Representatives, it must be accompanied by a copy of the Competition Council's opinion and an explanatory note containing the Council's proposals, the extent to which they have been taken into consideration, the comments they give rise to

and, where appropriate, the reasons why they cannot be taken into consideration. *Mutatis mutandis*, this also applies to the transmission of draft regulations to the Office of the Head of the Government.⁸⁶ The requirement to justify any deviation from the Council's proposals is important because it strikes a balance between, on the one hand, the democratic and regulatory autonomy of elected bodies such as the Assembly of the People's Representatives and, on the other, the need to take the Competition Council's technical proposals into account.

Table 3.1. Opinions issued by the Council on legislative and regulatory texts concerning service activities

Year	Number of Competition Council opinions	Consultation on legislative and regulatory drafts
2016	37	2 bills
		13 draft government orders
		8 draft decrees relating to conditions for doing business
		1 other consultation
2017	42	2 bills
		9 draft government orders
		8 draft decrees relating to conditions for doing business
2018	30	8 draft government orders
		8 draft decrees relating to conditions for doing business
2019	38	1 bill
		5 draft government orders
		4 draft decrees relating to conditions for doing business
2020	23	1 bill
		9 draft government orders
		4 draft decrees relating to conditions for doing business

Note: The total number of opinions issued by the Competition Council also includes opinions on mergers, on exemptions as well as opinions issued following a non-mandatory consultation

Source: Competition Council

These opinions concern numerous sectors. For example, the Council's opinions on draft legislation have covered areas such as free competition, industrial products, logistics services, fertilisers, and precious metals.

⁸⁶ In the case of draft regulations, reference must be made to the Competition Council's proposals in the citations of the draft text.

On the other hand, while it is only rarely consulted, the Competition Council is not in a position to refer *on its own initiative* to the Minister of Trade or another government minister in order to submit its proposals when their initiatives, for example, specifications setting the conditions for the exercise of an economic activity, pose obstacles to competition. However, the power of a sectoral authority to propose measures, including legal measures, without prior consultation, in order to ensure compliance with certain principles set out in legislative texts, is not unknown in Tunisia. For example, the Independent High Authority for Audiovisual Communication has the power to "*propose all measures, particularly legal measures, which are likely to guarantee the respect for the principles set out in the Constitution and in the legislative and regulatory texts related to it*" and to "*submit proposals relating to legislative and regulatory reforms required by technological, economic, social and cultural developments.*"⁸⁷

The advisory role of the Competition Council is of significant importance. Its oversight makes it possible, to some extent, to prevent laws or regulations from creating unjustified obstacles to the operation of the market. The Council's opinions assess proposed provisions *before* they come into force to determine whether they are likely to unduly restrict competition.

Furthermore, the existence of this consultation mechanism seems to be in line with international good practice and the principles established by the OECD Council Recommendation on Competition Assessment, which provides that:

Competition assessment should be integrated into the review of public policies in the most efficient and effective way possible, taking into account institutional and resource constraints.

Competition agencies or officials with competition expertise should be involved in the competition assessment process.

Competition assessment of proposed public policies should be integrated into the public decision-making process at an early stage.

In Tunisia, the scope of Article 11 of Act 2015-36 concerning the consultative role of the Competition Council appears to be broad enough to include any draft law or regulation that may pose obstacles to competition. This principle of *ex ante*

⁸⁷ Article 19 of Legislative Decree No. 2011-116 of 2 November 2011, on the freedom of audiovisual communication and establishing an Independent High Authority for Audiovisual Communication.

control is also enshrined in the OECD Recommendation on Competition Assessment, which provides that public policies should be subject to competition impact assessment, in particular:

1. *when they introduce or revise a new regulatory body or regime (the assessment may, for example, verify, among other things, that the new regulatory body is sufficiently independent of the sector being regulated)*
2. *where they introduce price or entry regulation (the assessment may, for example, ascertain that there are no reasonable and less anti-competitive modes of intervention)*
3. *when they restructure existing monopolies (e.g. the assessment can ensure that the restructuring measures actually achieve their pro-competitive objectives)*
4. *where they introduce competitive procedures (e.g. the assessment can ensure that the tendering procedure creates incentives to operate efficiently in the interest of consumers)*
5. *where they establish an exception to competition law for a specified purpose (the assessment may, for example, ensure that any exception is absolutely necessary for achieving the stated objectives).*

While the monitoring mechanism as such is an important instrument to avoid any impediment to competition posed by legislative or regulatory provisions, it would appear that, when issuing its opinions, the Council does not follow a specific methodology based on pre-established and transparent criteria to identify potential restrictions to competition in legislative and regulatory provisions.⁸⁸ The OECD Council Recommendation on Competition Assessment recommends in this regard that:

Governments should put in place an appropriate process for reviewing existing or proposed public policies that unduly restrict competition and develop specific and transparent criteria for evaluating appropriate policy alternatives.

⁸⁸ For an example of a methodology for analysing the impact of laws and regulations on competition, see the OECD Competition Assessment Toolkit, www.oecd.org/competition/assessment-toolkit.htm.

Lastly, in order to promote the consideration of concerns and recommendations submitted by various stakeholders when drafting legislation or adjusting the legislative and regulatory framework, consultations between the various parties, both public and private, are held in the form of national sectoral councils (for example, the National Trade Council, the National Consumer Council, the Anti-counterfeiting Council, the National Services Council, and the National Foreign Trade Council). As noted by the competition authorities, these consultations are also an opportunity to discuss the Competition Council's proposals and their feasibility in the light of the public interest objectives pursued by the legislature.

Nevertheless, these mechanisms, which are aimed at safeguarding the prerogatives of the Competition Council and ensuring the consistency of public policies with competition principles, have not achieved their objectives. On many occasions, the opinions of the Competition Council have been disregarded and/or dismissed. For example, in Opinion No. 82209 of 13 March 2008 concerning the transport of goods, the Competition Council had requested the abolition of the condition that companies must have six lorries in order to operate. However, the legislature increased this figure and ultimately required new entrants to have 18 lorries, thus going against the Council's opinion.

3.1.2. Opinions at the request of certain authorities or organisations

The Council's advisory role, however, also extends beyond this case of mandatory consultation at the request of the Minister of Trade.

Prior to the 1991 Competition Act, only the Minister of Trade could request the Council's opinion, and usually on an optional basis, as noted above.⁸⁹ Act No. 99-41 of 10 May 1999 broadened the basis of requests for consultation with the Council. It added that:

"Professional associations or trade unions, approved consumer organisations or groups, and Chambers of Agriculture or Commerce and Industry may also

⁸⁹ Since 1995, the only cases in which the Minister was obliged to seek the opinion of the Council were the exemptions provided for in Article 5, concerning concession and commercial representation contracts (this measure no longer appears in the 2015 Act) and in Article 6, regarding practices that are justified by those concerned on the basis that they have the effect of technical or economic progress and that they provide users with a fair share of the resulting benefit.

request the opinion of the Council on competition issues in the sectors under their jurisdiction, through the Minister of Trade.”

It should be noted, however, that this expansion was limited, since the new players still had to request the Council's opinion through the Minister. Act No. 2005-60 of 18 July 2005 profoundly altered the Council's consultative function. In addition to the cases of mandatory consultation on legislative and regulatory texts analysed above, Article 11 of Law 2015-36 now provides, with regard to the optional request for an opinion, that:

Parliamentary committees, the Minister of Trade and the sectoral regulatory authorities may consult the Competition Council on matters relating to competition.

Similarly,

Professional associations and trade unions, legally established consumer organisations, and Chambers of Commerce and Industry may also request the opinion of the Council on competition matters in the sectors within their jurisdiction. A copy of the request for consultation and the corresponding opinion of the Competition Council must be sent to the Minister of Trade.

3.1.3. Market research

Market research is an effective tool to assist competition authorities in examining the competitive conditions prevailing in one or more sectors. While the term "market research" is commonly accepted, it should be noted that market research is not necessarily limited to a single market. Market research often targets several markets, or types of behaviour in several markets.

Article 14, paragraph 4, of Act No. 2015-36 tasks the Competition Council, in partnership with the relevant departments of the Ministry of Trade, with developing a database on the state of the markets, also including information collected during inquiries and investigations that can be exchanged with other government departments. However, this database does not exist yet. Moreover, in accordance with the second paragraph of Article 62, any finding of a breach of competition law is based on an analytical study of the market, so that each decision issued by the Competition Council includes a more or less extensive market study. By contrast, in the framework of market studies, the law does not grant competition authorities any power to send mandatory requests for information to private and public entities, subject to fines for non-compliance.

Conversely, neither the Competition Council nor the DGCEE has conducted market sector studies to date, although the Competition Council is currently involved in a study of the banking sector conducted by the OECD. It should also be noted that the National Telecommunications Authority (INT) is about to launch a study of the telecommunications sector.

In those jurisdictions where they are carried out, market studies serve as a diagnostic tool for certain sectors to determine the level of competition in that market and to identify restrictions of competition and possible market failures, their causes, and the best ways to remedy them. They also help to determine which sectors are most in need of intervention by the competition authorities to promote competition, thus enabling the prioritisation of actions by authorities with budgetary constraints. Finally, if carried out by employees of the competition authorities, market studies also provide an opportunity to build up in-house expertise that may prove useful during an investigation into an anti-competitive practice or a merger. The International Competition Network and the OECD have published a handbook and good practice guide on the collection and analysis of market research information (Box 3.1).

Box 3.1. The Market Studies Good Practice Handbook

The OECD published a guide to market research for competition authorities in 2018. This guide should be read in conjunction with the Market Studies Good Practice Handbook prepared by the International Competition Network, which is based on the experience of the network's member authorities.

The OECD guide is structured around the main phases of market studies: the choice of market or sector, methodologies for conducting studies, including stakeholder participation, surveys, information collection and analysis, identification of market structures and their characteristics, and remedies and initiatives that could be launched as a result of such studies.

The International Competition Network Handbook provides additional detail and a wide range of useful guidance, including for:

- Planning the information gathering process, including internal consultations, determining whether the authorities already have the necessary information or can obtain it from public sources, and considering the burden on stakeholders in responding to data requests.

- Organising the research, taking into account financial constraints and considering alternatives if initial efforts prove unsuccessful. The handbook recognises that competition authorities may find it difficult to identify the most promising avenues of research at the outset of the study, and may therefore need to redirect their efforts.
- Choosing methods of information gathering, noting that empirical evidence may carry more weight than more qualitative evidence. The manual highlights the advantages and disadvantages of certain collection methods, such as targeting specific groups and surveys.
- Analysing the information, for example, whether it meets the needs of the authorities and confirms the original assumptions. Some authorities find it useful to publish initial findings and/or possible conclusions, as this helps them to validate their findings, bring out new information, and identify possible gaps in the analysis.
- Ensuring the confidentiality of information through information handling procedures.

Source: OECD (2018), Market Studies Guide for Competition Authorities, www.oecd.org/daf/competition/market-studies-guide-for-competition-authorities.htm; RIC (2016), Market Studies Good Practice Handbook, www.internationalcompetitionnetwork.org/uploads/library/doc1088.pdf.

However, the Competition Council and the DGCEE have not developed guidelines for future market studies, although these types of texts are not unknown in Tunisia. As an example, with Decision 91/2015 of 19 August 2015 issued pursuant to the provisions of Article 3, second paragraph, of Decree No. 2014-53 of 10 January 2014, amending and supplementing Decree No. 2008-3026 of 15 September 2008, the INT adopted guidelines for the analysis of the telecommunications market. The purpose of the guidelines is to set out the general framework for market analysis, including the principles, methods, criteria, procedures, and frequency that the INT should follow when conducting market analyses.

At the international level, some competition authorities or international organisations have also developed guidelines on market research to make the

criteria for prioritising sectors for market research, the methodology used to conduct it and its objectives more transparent (see Box 3.2)⁹⁰.

It is undoubtedly important to publish sector selection criteria identifying certain market characteristics that may indicate *prima facie* competition problems or regulatory failures, in order to direct the authorities' limited resources to those sectors most in need.

Box 3.2. The methodological guide for market studies from Spain's National Commission on Markets and Competition

Spain's National Commission on Markets and Competition (CNMC) has published a methodological guide for market research methodologies. This outlines the steps involved in conducting market research, including the selection of markets for analysis and stakeholder participation, and a plan for the research report. It also describes the main means of disseminating the findings and calls to evaluate the impact of the study. Preliminary research should be carried out before launching a market survey to: (i) identify markets with characteristics that may indicate competition problems or regulatory inefficiencies; and (ii) assess the importance of these markets to the Spanish economy as a whole. If the authority decides to initiate a market study, the sector or market to be studied will be included in the CNMC's work plan, along with the reasons for the study.

Once the study has been formally launched, two of the main tools for gathering information are requests for information and meetings with relevant stakeholders, such as economic operators, associations, sector regulators, and external experts in the field. In its methodological guide, the CNMC recommends identifying interested stakeholders, and establishing contact with the most relevant ones, from the outset. It describes methods for increasing stakeholder participation, emphasising the importance of the CNMC effectively communicating the benefits to stakeholders.

⁹⁰ See *Market Studies Guide for Competition Authorities* published by OECD in 2018 (www.oecd.org/daf/competition/OECD-Market-Studies-Guide-for-Competition-Authorities-2018.pdf); see also *Market Studies Good Practice Handbook* prepared by the International Competition Network in 2016 (www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/AWG_MktStudiesHandbook.pdf).

The core of the methodology concerns the type of information and analysis to be included in each market study: i) the legal nature of the market; ii) the economic nature of the market; and iii) the analysis of the degree of competition in the market. The regulatory framework and recent developments are presented. The study will determine whether there are market failures that warrant regulatory intervention and whether regulation is unnecessarily restricting competition in the market. The methodology specifies the "principles of efficient economic regulation" to be followed in assessing public intervention in the market, including the principles of necessity, proportionality and non-discrimination (see paragraph 124 of the Methodological Guide).

The methodological guide also lists some of the demand and supply indicators to be analysed and stresses the importance of looking at the various factors together in order to draw a conclusion. On the demand side, recommended indicators include international comparisons of price levels, price trends, and demand elasticity. On the supply side, useful information includes understanding the production process and financial data on profitability.

The indicators useful for analysing the degree of competition are divided into structural and behavioural factors. Structural factors include market shares and their stability or variation over time, as well as a number of cost characteristics, such as sunk costs, economies of scale, and learning effects. Behavioural factors include increasing the costs of switching providers, suppliers, or offers, providing inadequate information to consumers or increasing the costs for new entrants (e.g. by increasing advertising expenditure). On the demand side, the methodological guide emphasises the costs incurred by consumers in finding and changing providers, suppliers, or offers.

Source: Comisión Nacional de los Mercados y la Competencia (2013), Instrucción del director del departamento de promoción de la competencia: Metodología para la elaboración de estudios de mercado en la CNMC (Instruction of the Director of the Competition Promotion Department: Methodology for the production of market studies in the CNMC), www.cnmc.es/ambitos-deactuacion/promocion-de-la-competencia/estudios#Metodologia.

3.1.4. Competition assessments

From the discussion with the Tunisian competition authorities, the OECD Secretariat found out that they do not conduct any studies or regular reviews on

the impact of their recommendations, including whether their opinions on legislative and regulatory texts have been followed in practice.

Concerning the evaluation of competition authorities, the actions of all public services in Tunisia are assessed as part of the monitoring and evaluation of economic and social development plans. In addition, the Competition Council publishes an annual report in which, among other things, it assesses the impact of its activities. However, the latest report available on the Competition Council's website dates back to 2017.

With regard to the activities of the DGCEE, target-based budgeting sets specific objectives for it, such as guaranteeing the proper operation of the market and consumer protection, measured, among other things, through indicators collected by the National Observatory of Supply and Prices (which is supervised by the Ministry of Trade) or through inquiries and administrative reports made pursuant Articles 5, 17 and 62 of the Ac No. 2015-36. Government Decree No. 2018-882 of 14 October 2018 created a target-based budgeting unit within the Department of Trade.

3.1.5. Guidelines

In countries where the issuance of guidelines is common administrative practice, the term "guidelines" does not specifically refer to a specific legal document and therefore does not necessarily refer to their legal nature, but rather to their content. These are documents by which an administrative authority, in areas where it has a more or less discretionary margin of appreciation, sets itself in advance and in a transparent manner a course of action, guidelines, decision-making practices, general principles and methodologies applied in individual decisions, in order to avoid disparate approaches by different officials.

The publication of guidelines by administrative authorities is not a common practice under Tunisian law.⁹¹ When it comes to setting criteria or principles, for example to make the stages of certain decision-making processes more transparent, this is normally done through statutes or regulations.

Although there are documents issued by administrative authorities providing guidance criteria, these are not intended for an audience outside the authority

⁹¹ The term "guidelines" does not refer to the legal nature of the document, but to its content.

itself. Rather, they are internal working tools, for example to facilitate the work of officials. For example, the Competition Council developed eight procedural manuals under a twinning programme with the EU in 2006-2008, on the following topics:

- horizontal agreements;
- vertical restrictions;
- abuse of dominant position;
- Mergers;
- survey techniques;
- powers and investigative methods;
- public procurement;
- self-referral.

However, guidelines are of fundamental importance to companies. They enable them to assess their position and behaviour by applying the same criteria as the administrative authority. In the eyes of businesses, they increase the transparency of administrative action, help to clarify the scope of certain provisions as interpreted by the authority, help to create legitimate expectations, e.g. concerning consistency in the application of the rules, and thus increase legal certainty.

In states where independent authorities do not have the power to issue guidelines that apply across the board, these may be adopted by ministerial order, since, as noted above, the term "guidelines" does not necessarily refer to their legal nature, but rather to their content.

Moreover, the adoption of guidelines is not new in Tunisia. For example, Article 2 of Decree No. 2014-53 of 10 January 2014, amending and supplementing Decree No. 2008-3026 of 15 September 2008 setting the general conditions for the operation of public telecommunications networks and access networks, provides that the National Telecommunications Authority (INT) can set guidelines in collaboration with the operators of public telecommunications networks regarding the conduct of market analyses. These were adopted by a decision of the INT on

19 August 2015.⁹² Similarly, the INT adopted other guidelines in 2012 regarding retail service offerings by public telecommunications network operators⁹³ and in 2009 regarding the interconnection of public telecommunications network operators.⁹⁴

Finally, at the regional level, in the area of competition law, the COMESA Commission has issued guidelines on merger assessment,⁹⁵ market definition,⁹⁶ restrictive business practices⁹⁷ and abuse of a dominant position.⁹⁸ Although they are not binding, they help to clarify the COMESA Commission's approach to the application of competition rules and oblige it to provide justifications when departing from its guidelines.

3.1.6. Compliance programs

Among the tools for developing a competition culture within companies, compliance programmes are undoubtedly of particular importance. In addition to

⁹² Decision No. 91/2018 of the National Telecommunications Authority, dated 19 August 2015, adopting guidelines for the analysis of the telecommunications market, www.intt.tn/upload/txts/fr/d%C3%A9cision_de_l'int_n%C2%B091.pdf.

⁹³ Decision No. 159 dated 20 December 2012 adopting guidelines on retail service offerings offered by public telecommunications network operators, www.intt.tn/upload/txts/fr/decision_159-.pdf.

⁹⁴ Decision No. 35 adopting guidelines on the interconnection of operators of public telecommunications networks, www.intt.tn/upload/txts/fr/decision_35_version_fr.pdf.

⁹⁵ COMESA, *Merger Assessment Guidelines*, 31 October 2014, www.comesacompetition.org/wp-content/uploads/2014/10/141121_COMESA-Merger-Assessment-Guideline-October-31st-2014.pdf.

⁹⁶ COMESA, *Guidelines on Market Definition*, 2 April 2019, www.comesacompetition.org/wp-content/uploads/2019/08/Final-Guidelines-on-Market-Definition.pdf

⁹⁷ COMESA, *Guidelines on Restrictive Business Practices*, 2 April 2019, www.comesacompetition.org/wp-content/uploads/2019/08/Final-Guidelines-on-RBP_May-2019.pdf.

⁹⁸ COMESA, *Guidelines on Abuse of Dominance*, 2 April 2019, www.comesacompetition.org/wp-content/uploads/2019/09/Final-Guidelines-on-Abuse-of-Dominance_May-2019.pdf.

the application of competition rules and the imposition of fines by competition authorities, compliance programmes promote a culture of competition within the company and thus help detect and remedy employee breaches. These programmes include online information and seminars on competition law for employees to help them identify potential anti-competitive practices and the procedures to follow if a potential breach is found.

To promote the adoption of compliance programmes that avoid and/or detect breaches, several competition authorities reward companies for adopting them, for example by reducing fines for infringements.

Whether or not a benefit is granted in return for the existence of a compliance programme does not depend on the region in which a jurisdiction is located. In Asia, many jurisdictions are willing to grant reduced fines, and the Association of Southeast Asian Nations (ASEAN) guidelines suggest that a reduction in fines could provide an incentive for companies to introduce or improve these programmes. Some Latin American countries have developed compliance policies, and Brazil, Chile, and Peru grant a reduced fine if the criteria set out in their guidelines are met. Similarly, some European jurisdictions are willing to grant a reduction in fines. In North America, the landscape has changed fundamentally since 2011, with Canada and the United States now making clear their willingness to consider compliance programmes.⁹⁹

In discussions with stakeholders, it was repeatedly confirmed that the adoption of compliance programs in Tunisia is not common practice, regardless of the size of the company.

The Competition Council and the DGCEE can play a key role in this regard, by reaching out to companies to explain their obligations under competition law and to promote the adoption of compliance programmes in all economic sectors.

3.1.7. Training and awareness events

Promoting and popularising a culture of competition is carried out by various means in Tunisia. These include:

⁹⁹ OECD Secretariat background note, "Competition law compliance programmes", prepared for Working Party No. 3 on Co-operation and Enforcement (8 June 2021).

- Agreements with universities. In 2018, for example, the Competition Council entered into a partnership with the Faculty of Law in Sousse with the objective of fostering an exchange of experiences between the two entities and setting up a "*joint action programme to preserve and publish all data related to competition and economic transactions and to work for the dissemination of a culture of competition.*"¹⁰⁰ The same partnership also foresees the creation of a research unit for competition. Furthermore, as part of this partnership, in February 2019, the two entities also organised a symposium on the theme of "Competition and Public Services" to discuss the application of competition law in sectors characterised by a high level of state intervention, such as health, transport and energy.¹⁰¹ In addition, competition policy is part of the entrance exam to the National School of Administration in Tunis and DGCEE officials provide training in the framework of the assisted courses of the School. The DGCEE also welcomes interns from the National School of Administration or from the faculty of law or economics that are working on their thesis or in the framework of a specialised master on competition issues. This in turn can facilitate future recruitment of staff specialised in competition law and economics.
- Master's level university courses specialising in corporate and business law, with specific courses in competition law, for example, at the International University of Tunis and the Central University.
- Training in collaboration with the professional world. As an example, the Competition Council organised a study day in May 2019 on "The Jurisdiction of the Competition Council", in co-operation with the Regional Chapter of Lawyers of Bizerte and the Regional Chapter of Lawyers of Tunis.
- Workshops, seminars, symposia and disclosure conferences to popularise competition law, including with other sectoral authorities.

¹⁰⁰ See www.webmanagercenter.com/2018/03/17/417418/partenaire-entre-la-faculte-de-droit-de-sousse-et-le-conseil-de-la-concurrence/.

¹⁰¹ See www.cct.gov.tn/?p=2214&lang=fr.

- Online publications, including decisions, opinions, press briefings, and other types of information. As an example, in December 2018, the Ministry of Trade and the Competition Council, as part of the US Commercial Law Development Program, published a practical guide on franchising agreements in Tunisia.¹⁰² In addition, the websites of the Council and the DGCEE, provided they are well structured and provide easy access to information, can help to increase the visibility and impact of competition promotion activities. To this end, the last paragraph of Article 14 requires the Competition Council to publish its decisions and opinions on its website. However, such an obligation is not envisaged for the DGCEE, whose website appears to contain outdated information that predates the 2015-2016 competition law reforms.

Table 3.2. Competition promotion events held in 2016-2020

	Number
Workshops and seminars for academics	8
Training for professionals (lawyers, judges, and trade unions)	10
Workshops with regulatory authorities	4
Media	6

Source: Competition Council

As an example, in 2019 the Competition Council delivered a competition law course aimed at lawyers on the following topics:

- “Presentation of the Competition Council”
- “The jurisdictional competence of the Competition Council”
- “Summary proceedings before the Competition Council”
- “The Competition Council’s handling of complaints”
- “The advisory power of the Competition Council”
- “Exemption procedures”
- “Control of economic concentrations”.

¹⁰² *Guide Pratique de la Franchise en Tunisie* (Practical Guide to Franchising in Tunisia), https://tn.usembassy.gov/wp-content/uploads/sites/59/guide_franchise-final-18.pdf.

With regard to the training of sector-specific regulators, following the promulgation of Decree No. 2014-1039 of 13 March 2014 regulating public procurement, the Competition Council presented a training session for the benefit of the public procurement authorities to train them in detecting and preventing concerted bidding in public procurement as well as to clarify the role of the public purchaser in applying the provisions of Articles 65 and 69 on excessively low prices and evident cartels. However, despite its usefulness in teaching techniques for detecting anti-competitive practices, this session only took place once, when the new decree came into force.

In general, the Competition Council and the DGCEE have developed events, training, and competition promotion activities on a case-by-case basis, without a prior general strategy to prioritise or pursue those initiatives that have proven effective in spreading a culture of competition. Training has often been organised on an *ad hoc* basis and without any evaluation of its impact. Interestingly, the survey mentioned in Box 1.6 conducted by the OECD Secretariat showed that 90% of survey participants from the Competition Council and 58% from the DGCEE consider that such initiatives have been ineffective so far in promoting competition policy among stakeholders.

3.2. National co-operation

As noted in Section 1.4 above, some sectoral laws provide for specific circumstances in the application of competition rules, such as the intervention of sector-specific regulators in the procedure or even a derogation from the horizontal powers of the Competition Council. These special schemes have been analysed in detail in Sections 1.4 and 2.3.5 above.

Although they do not have specific competition enforcement powers, other sector-specific regulators or organisations may play a role in ensuring that markets function properly. These entities may co-operate with the Competition Council and/or the DGCEE and there are currently mechanisms, albeit imperfect, in place for co-operation to this end.

In contrast, at present, with the exception of the Memorandum of Understanding signed in 2012 with the National Telecommunications Authority (see Section 1.4.1 above), there are no formal co-operation agreements in place between the Competition Council and other sectoral bodies. However, the existence of a formal framework for co-operation could facilitate relations and joint work between

different bodies, including for the development of competition promotion initiatives.

The staff survey mentioned in Box 1.6 conducted by the OECD Secretariat showed indeed that 50% of participants from the Competition Council and 58% from the DGCEE consider that co-operation with sector regulators *sometimes* works efficiently. By contrast, 40% of survey participants from the Competition Council and 8% from the DGCEE find that co-operation mechanisms with sector regulators *rarely* works smoothly, e.g., when competition authorities request information for the purposes of an ongoing case.

3.2.1. Combating concerted bidding in public procurement

Created under the Presidency of the Government by Decree No. 2013-5096, the High Authority for Public Procurement (HAICOP) is responsible for ensuring the proper organisation and conduct of public procurement. It consists mainly of the Supreme Commission for the Control and Audit of Public Procurement and the Public Procurement Monitoring and Investigation Committee. A commission for the exclusion of economic operators from participation in public contracts was added to the HAICOP mechanism in 2016 (Decree No. 2016-498). This committee ensures respect for the integrity of procurement procedures and decides on the exclusion of any economic operator which, *inter alia*, has been the subject of a final court decision certifying that it has engaged in anti-competitive practices relating to participation in public contracts (Article 13). The Competition Council sits on this commission, whose decisions are included in a database managed by the National Public Procurement Observatory (ONMP).

There is a close link between competition rules and public procurement rules. Article 82 of Decree No. 2002-3158 of 17 December 2021 provides that:

In the event of an obvious agreement between some or all of the participants, the invitation to tender must be declared unsuccessful and a new call for tenders must be issued, except in the event of physical impossibility or absolute emergency; in this case, a contract may be entered into by direct agreement preceded by a consultation under the provisions of Article 39 of this Decree.

In practice, however, direct interactions between the Competition Council and the HAICOP remain rare, unstructured, and far below the expectations of both parties. First of all, while the Council has affirmed its jurisdiction when it comes to anti-competitive practices in the context of public contracts, it has, conversely, set aside its jurisdiction in favour of the administrative courts (in the context of an

application to quash a decision as *ultra vires*) when it comes to deciding a dispute concerning the award of public contracts, because:

*when the public purchaser establishes its needs in the context of a public contract, it is not involved in a commercial activity of production or distribution or services but rather administrative actions within the framework of legislative and regulatory texts*¹⁰³.

The OECD Secretariat was informed during the fact-finding mission that communication to the Exclusion Commission of the Council's decisions concerning anti-competitive practices, such as concerted bidding in public procurement, which is prohibited by Article 5 of Act No. 2015-36, is not systematic. The lack of a formal framework for co-operation between the two institutions and the obligation to go through the Ministry of Trade, in particular to communicate the Council's opinions (e.g. Opinion No. 182669 of 4 May 2018 and Opinion No. 182689 of 13 December 2018, both directly related to public procurement) and to report potential infringements related to excessively low pricing practices (Article 65) or concerted bidding (Article 69 of Decree No. 2014-1039), make any direct exchange difficult. The two articles in question provide that the public purchaser must inform the Minister of Trade of such obvious cases and that the latter "may" submit a request to the Council against participants who submit such bids.

Finally, when the HAICOP was created, the Competition Council shared its experience in combating concerted bidding in public procurement. However, this was the only training and experience-sharing event involving the two bodies.

3.2.2. Co-operation in financial matters

The Financial Market Council (CMF) is an independent public authority with legal personality and financial autonomy. The CMF was created by Act No. 94-117 of 14 November 1994 on the reorganisation of the financial market. It is the supervisory body for undertakings for collective investment in transferable securities (UCITS). It is responsible for the regulation and supervision of the financial market, the control of financial information and the protection of savings. It also has the power to investigate any natural or legal person and to punish breaches or infringements of the regulations in force. The CMF rules on any public

¹⁰³ 2006 Competition Council Activity Report, pp. 39-40. See also (Madani, 2021, p. 141^[41]).

bid by a natural person or legal entity to buy, exchange, sell or withdraw a block of securities issued by a company making a public offering after consulting the relevant sectoral regulatory authorities.

During the fact-finding mission, the OECD Secretariat was informed that at present there are very few discussions with the Competition Council. Over the last five years, the Council has only been asked once to give its opinion on a proposal by the association of stockbrokers to introduce minimum fees and commissions charged to clients (Opinion No. 192735 of 12 December 2019).

Article 46 (new) of Act No. 94-117 specifically mentions the regulatory authorities for the banking and insurance sectors and provides for the signing of co-operation agreements in this regard. Better co-operation and systematic exchanges between the CMF and competition authorities can help detect certain breaches of financial and competition provisions. Moreover, the establishment of a framework for co-operation could enable the CMF to contribute to efforts to raise awareness and promote a culture of compliance.

3.2.3. The interface with consumer protection policies

As highlighted by stakeholders, there is a convergence between competition law and consumer protection policy. This is seen in several provisions of the competition law.

First of all, Article 1 of Act No. 2015-36 includes consumer welfare as a general objective of the Act, along with general market balance and economic efficiency. As noted by the Council, "*competition is not an end in itself but a means by which a benefit for the consumer and for the national economy in general is achieved.*"¹⁰⁴ As a result, the fight against illegal cartels and abuses of dominant positions is ultimately aimed at increasing consumer welfare through lower prices, more choice of products and services, and more innovation.¹⁰⁵

¹⁰⁴ Competition Council Opinion No. 2267 of 12 December 2002.

¹⁰⁵ See, for example, Opinion No. 142514 of 15 May 2014, on electronic cigarettes and their monopoly by the National Board of Tobacco and Matches. The Council gives a favourable opinion on the possibility of their monopolisation because these cigarettes may constitute a danger to the health of the consumer.

At the institutional level, Article 13 of Act No. 2015-36 provides that certain members of the Competition Council have experience in the field of consumer protection.

Act No. 2015-36 provides several mechanisms for the Competition Council to intervene to defend the consumer's interest. Under Article 15, paragraph 8, of Act No. 2015-36, the Competition Council has the power to order provisional measures in order to avoid imminent and irreparable harm that may affect the interest of the consumer until it decides on the merits of the dispute. In addition, consumer organisations that are legally established in Tunisia can apply to the Competition Council for an opinion on competition issues in the sectors within their remit. One of these organisations is the National Consumer Protection Council, created by Act No. 92-117 of 7 December 1992 on consumer protection, which also includes a representative of the Ministry of Trade, in accordance with Decree No. 2004-1108 of 17 May 2004, amending Decree No. 93-1886 of 13 September 1993, on the composition and operating procedures of the National Consumer Protection Council. However, the number of applications filed by consumer organisations is very low (Madani, 2021, p. 226_[41]).¹⁰⁶ Although the National Consumer Protection Council has the power to issue opinions aimed at ensuring product safety, consumer information, and general consumer protection, the OECD Secretariat has not been informed of any co-operation agreement with the Competition Council.

Furthermore, Article 15 of Act No. 2015-36 gives legally established consumer organisations the right to file an application regarding alleged anti-competitive practices with the Competition Council. In this regard, these organisations have filed several complaints which have sometimes led to the opening of an investigation by the Competition Council.¹⁰⁷

¹⁰⁶ (Madani, 2021, p. 226_[41]) gives two possible reasons for the limited number of applications filed by these organisations. The first is the lack of a strong competition culture in Tunisia, where consumers play a passive role and are not aware of their rights. The second is the scattered nature of consumer legislation.

¹⁰⁷ See decision No. 181520 of 3 October 2019, concerning a complaint by the Tunisian Organisation for Consumer Advice against the two brands Délice and Vitaly, which were suspected of having abused their dominant position in the market for preserved milk and of having exerted deliberate pressure on the government in order to impose a successive price increase, which could cause serious harm to consumers; Decision No. 141356 of

Finally, the 1991 Competition Act provided in Title II for a number of consumer obligations and offences relating to restrictive practices. Vertical restraints such as exclusive representation, making the sale conditional on the purchase of a fixed quantity or resale at a fixed price were therefore prohibited. The content has remained broadly the same in the new Act, Title II of which also contains numerous provisions on consumer protection, such as obligations to provide information on prices and terms and conditions of sale to consumers. In accordance with Article 63 of Act No. 2015-36, breaches of these provisions shall be established by the competent departments for economic control and consumer protection under the Ministry of Trade. There is also a close link between this type of breach and practices typically prohibited by competition law, as demonstrated by the "Délice" yoghurt case, in which the 50 cent reduction in the price of yoghurt was accompanied by a reduction in the weight of the product. The analysis concluded that this was a case of false advertising. Since the company in question enjoyed a dominant position, this practice was classed as an abuse of a dominant position. In practice, the close link between these different practices has often led to confusion between anti-competitive breaches and unfair practices, which led the Competition Council to issue a series of opinions in 2002 and 2003 to clarify the distinction between them. Nevertheless, the interface between competition and consumer law can still be improved.

Like the 1991 Act, if Act No. 2015-36 establishes in Article 2 a general regime of free competition and price freedom, Article 3 provides for exclusions from this regime for "*products and services of primary necessity or relating to sectors or areas where price competition is limited either by reason of a monopoly situation or lasting difficulties in supplying the market or by the effect of legislative or regulatory provisions.*" The list of these goods, products, and services remains fixed by the Government Decree No. 95-1142 of 28 June 1995, which defines the products and

10 May 2018 issued following a complaint filed by the Consumer Defence Organisation against 24 food manufacturing companies that simultaneously increased the prices of canned tomato paste after their prices were deregulated; Decision No. 131335 of 27 October 2016 issued following a complaint by the Consumers' Council against a decision by the Minister of Trade and Handicrafts, which set increases in the maximum selling prices and profit margins applied to 800g and 400g cans of tomatoes, considering that this decision resulted from an agreement between producers of canned tomatoes on selling prices to the public, thus hindering the determination of prices according to the rules of supply and demand in breach of competition law...

services that are excluded from price freedom and divides them into three categories according to the degree of freedom, depending on whether there is price control at all stages of marketing, only at the production stage or at the retail stage.¹⁰⁸ This aspect has been discussed in more detail in Section 1.2.2 above.

3.3. International co-operation

3.3.1. Bilateral co-operation with foreign authorities

Article 76 of Act No. 2015-36 governs co-operation between the Competition Council and the DGCEE with foreign competition authorities. This provision states that:

Subject to the principle of reciprocity and within the framework of co-operation agreements, the Competition Council or the competent departments of the Ministry of Trade may, within the limits of their competence and after notification by the Minister of Trade, share experience, information and documents relating to the investigation of competition cases with foreign counterpart institutions, provided that the confidentiality of the information exchanged is guaranteed.

This article sets out several aspects of the possibilities for Tunisian competition authorities to co-operate with foreign authorities.

First, from an objective point of view, competition authorities may, provided that they give prior notification to the Minister for Trade, co-operate with foreign authorities only to the extent that there is a pre-existing co-operation agreement in place and in accordance with the principle of reciprocity. The co-operation may only concern the sharing of experience, information and documents relating to the investigation of competition cases, provided that such exchanges do not affect the guarantee of confidentiality of the information exchanged.

Secondly, from a subjective point of view, the Competition Council and the DGCEE are the only bodies competent to carry out such co-operation, insofar as they co-operate with foreign competition authorities only, thus excluding any other

¹⁰⁸ Since its inception, this price control system has been revised only twice, the last time by Decree No. 95-1142 referred to herein. For more details, see OECD (2019), *OECD Competition Assessment Reviews: Tunisia*, p. 60.

foreign authority. Furthermore, the parties to this co-operation may not go beyond the powers assigned to them respectively.

At present, the only co-operation agreement between the Competition Council and a foreign competition authority that the OECD was able to access is the Memorandum of Co-operation in the Field of Competition between the Turkish Competition Authority and the Tunisian competition bodies, signed in Tunis in July 2017, for an indefinite period. The memorandum consists of 11 articles aimed at strengthening co-operation on three fronts:

- exchange of non-confidential information on legislative developments, competition cases, and respective publications
- exchange of experiences in the field of surveys, through expert meetings, seminars, and conferences
- sharing of experience on the relationship between competition authorities and other national sectoral regulators.

However, although there have been cases in which both the Turkish Competition Authority and the Tunisian Competition Council have both issued a decision, it should be noted that there has been no co-operation on competition cases between the Tunisian competition authorities and foreign competition authorities in the past five years, not even on the basis of this agreement.

On the other hand, this agreement has led to exchanges of experience, for example, by allowing the President of the Competition Council and the First Vice-President to participate in a symposium on competition law and its macroeconomic impact, which was held in Istanbul in November 2017.

In addition to this agreement, the OECD Secretariat has been informed that the DGCEE has other agreements in place with Morocco, Jordan, Egypt, and Uruguay but they have not yet been implemented, not even with regards to exchanges of information and experiences. The texts of these agreements are not published.

3.3.2. Regional co-operation within the Common Market for Eastern and Southern Africa

The COMESA was established by the Treaty establishing the Common Market for Eastern and Southern Africa in 1994. Tunisia became a member of COMESA in 2018.

Article 55 of the Treaty establishes a principle of free competition and prohibits any practice contrary to this principle, including anti-competitive agreements or concerted practices whose purpose or effect is to restrict competition. This provision has served as a legal basis for the COMESA Council to adopt specific competition regulations over the years. At present, competition rules are set out in the following documents:

- COMESA Competition Regulations (2004)
- COMESA Competition Rules (2004) made under the COMESA Competition Regulations, amended in 2012 and 2014
- Rules on Revenue Sharing of Merger Filing Fees (2012)
- COMESA rules on setting merger notification thresholds (2015)
- COMESA Competition Commission (Appeals Board Procedure) Rules (2017).

The COMESA Competition Commission (CCC) comprises several departments, one of which is in charge of co-operation with member states.

As noted by (OECD, 2018^[42]), the COMESA Treaty has adopted a model of joint enforcement of competition rules, in which national authorities as well as the regional authority apply regional competition provisions in regional and national cases. The division of jurisdiction between the CCC and the national authorities is based on several criteria.

With regard to anti-competitive practices, the division is based on whether the practice has a national or cross-border impact. Rule 34 states that the obligation to notify an agreement to the CCC does not apply where the parties to the agreements are businesses from a single Member State or where the anti-competitive practices do not relate to imports or exports between member states, i.e. where the practice has no significant impact on trade between member states. However, according to Rule 39 of the COMESA Competition Rules, as long as the CCC has not initiated proceedings under the rules on anti-competitive agreements and abuse of a dominant position, the authorities of the member states remain competent to apply them. Proceedings may be triggered by:

- a decision that there were no grounds for a finding of anti-competitive practice
- a decision on the non-applicability of COMESA rules
- a decision to order the cessation of an offence.

With respect to competition investigations, the COMESA rules provide for various mechanisms of co-operation with Member State authorities, including the conduct of an investigation by the national authority under the supervision of the CCC or the conduct of an investigation by a CCC staff member in the Member State concerned. Indeed, when the CCC receives a copy of the applications and notifications concerning an anti-competitive practice, it immediately forwards them to the competition authorities of the member states (in Tunisia the Ministry of Trade acts as focal point) and the whole procedure takes place "*in close and constant liaison with the competent authorities of the member states*," which have the right to express their opinions. In addition, following a request from the CCC, member states' authorities undertake such investigations as the CCC deems necessary and CCC officials can assist the national authority officials in the performance of their duties.

With regard to mergers, the rules on the sharing of jurisdiction are not uniformly interpreted in Tunisia and at the level of COMESA. Article 24 of the COMESA Competition Regulation requires the parties involved in a proposed merger to notify the CCC of any proposal that fulfils the conditions set out in Article 23 of the same Regulation. Article 23(3)(a) provides that the notification requirement applies to mergers where the parties are active in two or more COMESA member states.

On the one hand, paragraph 3.10 of the COMESA Merger Control Guidelines interprets Article 23(3)(a) in the light of its supranational nature, which would justify, with regard to the control of mergers with a regional dimension, an assignment of exclusive jurisdiction to the CCC and not to the competent national authority. In other words, according to this interpretation, Article 23(3)(a) has established a one-stop-shop system in which notification to the CCC precludes any notification to national competition authorities.

On the other hand, Tunisian law does not provide for any exemption from the notification requirement for mergers with a regional dimension and, consequently, according to the interpretation of the Tunisian authorities, where the conditions laid down by national law are met, the undertakings concerned are subject to the notification requirement to the Ministry of Trade in accordance with Article 7 of Act No. 2015-36. This is the interpretation currently provided by the Minister of Trade, who considers that a notification to the CCC would not be sufficient to waive the notification requirement in Tunisia (Jabnoun, 2021^[35]) (Baker McKenzie, 2019^[36]). However, as noted in section 2.3.1, although several proposed mergers notified

to the CCC also had an impact on the Tunisian domestic market, the Ministry of Trade did not take decisions on them.

3.3.3. Multilateral co-operation with international organisations

As specified in the latest annual report of the Competition Council available online, in 2017 the Council continued to strengthen its co-operation with international organisations active in its field of competence, including responding to invitations extended to it, participating in conferences, and allowing its executives to participate in events and training abroad.

Tunisia has put in place several competition agreements with international organisations.

First, the DGCEE has benefited from several programmes and actions with the United Nations Conference on Trade and Development (UNCTAD) and as part of this programme, in 2006 the Intergovernmental Group Of Experts on Competition Law and Policy conducted a peer review of competition law and policy in Tunisia. In addition, Tunisia was among the beneficiary countries of the Middle East and North Africa (MENA) programme conducted by UNCTAD's Competition and Consumer Protection Branch aimed at strengthening competition and consumer protection policies in the region. Tunisia has participated, through the DGCEE, in seminars organised by UNCTAD in the MENA region, including on the principle of competitive neutrality, definition of the relevant market, abuse of dominance and investigation techniques in 2017, and on the effectiveness of competition authorities and compliance of enterprises with competition law in 2018.

Secondly, the Competition Council is a founding member of the International Competition Network and regularly participates in its annual conference, such as the 2017 conference on the challenges posed by the digital economy for competition advocacy activities, which took place in Porto.

Finally, the DGCEE and the Competition Council co-operate closely with the OECD. The competition agencies actively participate in the Global Forum on Competition, which meets annually. The Competition Council has had the opportunity to present its cases on anti-competitive practices and has regularly submitted written contributions on the various topics under discussion. Tunisia's participation in the United Nations Economic and Social Commission for West Asia (UN-ESCWA)-OECD-UNCTAD Forum on Competition contributed significantly to the success of the first two events in 2020 and 2021, which were an opportunity to share experiences between peers. In addition, Tunisia presented

the results and recommendations of the competition impact assessment project conducted on the basis of the OECD methodology set out in the Competition Assessment Toolkit (OECD, 2019^[8]).

3.3.4. The principle of free competition in trade agreements

When a trade agreement is signed, it is common practice in Tunisia to set up commissions bringing together the various sectoral regulators and competent departments responsible for their implementation. The DGCEE is part of these committees and gives its opinion on issues related to the openness and freedom of access to markets. In addition, as noted in section 3.1.2 above, government departments and parliamentary committees may refer matters to the Competition Council for an opinion on matters within its area of competence.

These mechanisms allow the competition authorities to co-operate indirectly with foreign authorities and thus ensure that free competition principles are taken into account when signing or implementing trade agreements. For example, even in the absence of a formal co-operation mechanism, the latest version of the EU's proposed text for a Deep and Comprehensive Free Trade Area (DCFTA) with Tunisia includes a chapter on competition, stressing the importance of free and undistorted competition in the face of the risk that anti-competitive business practices could disrupt the proper functioning of markets.

Chapter 4. Recommendations

4.1. Institutional framework

- Clarify the cross-sectoral enforcement of competition law and the alignment of sectoral regulation with competition rules.
- Separate competition and price regulation legislation. Move towards more price liberalisation by ensuring a regular update of Decree No. 95-11 and the related list of products and services. Ensure that a prior authorization or at least a prior opinion of the Competition Council is sought whenever considering enforcement of Article 4 of the 2015 law on temporary price controls.
- Strengthen the mandate and powers of the Competition Council and ensure its independence:
 - give full representation powers to the Competition Council before other public bodies including the Administrative Court and the Court of Auditors.
 - remove the requirement to go through the Ministry of Trade to refer a potential infringement to the Competition Council or to request its opinion;
 - give the Council powers to oversee the implementation of its own decisions;
 - review and make public the procedures and criteria for appointing the President, Vice-presidents, and members of the Council, to avoid political interference and encourage transparent and merit based appointment procedures;
 - provide clear, objective, and substantiated rules for the dismissal of the President and other members of the Competition Council.

- Clarify the roles and separation of powers between the Competition Council and Ministry of Trade to avoid overlapping jurisdiction and enable more effective use of resources.
- Revise the organisation of the Competition Council to enable it to fulfil its mandate and pursue its objectives effectively:
 - allow the Competition Council to independently establish its priorities and business plan, so as to avoid external pressure, with the power not to take or to close cases in view of its priorities and/or availability of resources;
 - review the internal structure to clarify the interaction between competition enforcement and consumer protection, and organise specialised teams accordingly;
 - strengthen the economics skills of the staff and create an economic department, including a position of Chief Economist;
 - consider a better balance between the members of the Judiciary Order and the Administrative Order who have a seat at the Competition Council considering the judicial review role of the Administrative Court in the competition policy framework in Tunisia;
 - review part-time employment of members of the Council and encourage full availability;
 - strengthen the rules governing conflicts of interest and incompatibilities by including clauses on cooling-off periods that may be time-limited for senior positions.
- Strengthen the Council's budgetary and human resources:
 - consider increasing the budget allocation to the Council, diversify sources of funding and thus explore avenues outside of government budget allocations ;
 - allow the Council to set its own recruitment criteria and hire its own staff, ensuring transparent and objective selection of staff
 - provide more training opportunities with regular sessions for staff, including on competition economics issues
 - Hire and allocate more staff to competition analysis positions;
 - review the remuneration of senior positions to make the Council more attractive as a long-term employer.

4.2. Anti-competitive practices

- Promote the use of the leniency programme and improve the use of ex officio techniques for investigations as instruments to fight hard-core cartels.
- Increase efforts towards cartel cases involving public procurement, and adhere to the OECD Recommendation concerning Effective Action against Hard Core Cartels.
- Impose adequate fines, especially in cartel cases, including by considering the duration of the infringement, in order to increase deterrence of wrongdoings.
- Enable the Competition Council to negotiate and conclude both settlements and commitments decisions related to all anti-competitive practices.
- Consolidate the Competition Council's enforcement practice in investigating State Owned Enterprises and adhere to the OECD Recommendation of the Council on Competitive Neutrality.

4.3. Merger control

- Transfer responsibility for merger control to the Competition Council with clearly defined assessment criteria, and grant the Minister of Trade, in exceptional circumstances, powers to adopt a different decision superseding a decision by the Council, for reasons of public interest that are also laid down in the law other than the protection of competition.
- Remove the ex-ante prohibition of all mergers in the audio-visual media sector. If necessary, other mechanisms could be created to protect media diversity.
- Add a second limb to the turnover-based notification threshold, in order to consider also the turnover of the target company in addition to the buyer's turnover.
- Consider the advantages and disadvantages of notification thresholds based on market shares – in particular, whether they ensure legal certainty and avoid excessive costs for companies when assessing the duty to notify (i.e. low combined market shares could be a legal criterion to

presume that a concentration does not raise competition concerns or it could be subject to a simplified procedure).

- Ensure that the acquisition of de facto control is subject to merger control where it meets the other notification criteria.
- Clarify in the law or separate regulations or guidelines the concept of a joint venture performing on a lasting basis all the functions of an autonomous economic entity, in particular with a view to enabling the verification of the duty to notify. This definition should provide legal certainty, so that companies can assess with certainty whether their transactions are subject to a notification requirement.
- Create a simplified procedure for notification of simpler mergers that do not raise competition concerns.
- If the jurisdiction over merger control is not transferred to the Council, ensure that decisions by the Minister of Trade provide clear and precise reasons, including with regards to the arguments raised by the Competition Council when giving its opinion, and any reasons for deviating from this.
- Include in article 12 of the 2015 Act a reference to consumer interests in line with present practice (i.e. by requiring that consumers should receive a fair share of the benefits that are taken into account).
- Make available to the parties the advisory report based on which the plenary session of the Competition Council adopts its opinion on mergers. Similarly, make the Council's opinion available to the parties.
- Remove sectoral exceptions in merger control so as to centralise merger control power within a single competition authority, with the possibility to seek the opinion of the sectoral regulator. When reasons of public interest other than maintaining competition arise, the law may grant the Minister of Trade exceptional powers to intervene with a substantiated decision.
- Ensure that all merger, anti-competitive and legislative/regulatory decisions and opinions are available online, and that decisions and opinions can be filtered according to various criteria.
- Introduce a substantial lessening of competition (SLC) test for merger analysis, in addition to a test based on creating or increasing a dominant position. That will facilitate the taking into account of broader competition concerns as desired by the Council, and also create a legal framework in

which the assessment by the Council is more clearly distinguished from the role of the Minister of Trade.

- Offer guidance to undertakings confirming para. 3 of article 9 of the 2015 Act and indicating that after the expiry of the deadline, authorities may only confirm that the transaction is authorised.

4.4. Judicial review

- Enable the Competition Council to defend its decisions before the Administrative Court.
- Invest in economics and competition-specific training for administrative judges involved in competition cases.
- Hire support staff for judges who have specialised economics, financial and competition training.
- Increase efficiency in competition proceedings before the Administrative Court, including by adding more judges or a competition-specific chamber if needed.
- Remove the automatic suspensive effect when an appeal is made to the Administrative Court against a Competition Council decision.
- Ensure that any action that could potentially harm a company or an individual (i.e. request for information with a penalty for non-cooperation) is subject to appeal to an independent judge.
- Consider additional measures that could reduce the time for Administrative Court proceedings/appeals in order to meet the legislative one-year time limit.

4.5. Promoting competition

- Ensure the website of the Directorate-General of Competition and Economic Investigations (DGCEE) is up to date with the publication of opinions, decisions, and initiatives to promote competition. It should be possible to filter these decisions and opinions according to key words, type of decision, etc.
- Ensure the Competition Council's annual report is published on the website as soon as it is available.

- Give the Competition Council the power to submit proposals to the Ministry of Trade on legislative and regulatory texts (acts, government decrees, orders and specifications) on its own initiative, without prior consultation.
- Develop a methodology with pre-published, specific, and transparent criteria for assessing legislation and regulations.
- In accordance with Article 14, paragraph 4, of Act No. 2015-36, create a database of the markets as well as the information gathered in the context of the inquiries and investigations and likely to be exchanged with the rest of the state services.
- Develop guidelines for market studies setting an overall framework for market analysis, including criteria for prioritising and selecting markets/sectors, principles, methods, analysis criteria, and procedures.
- In the framework of market studies, grant competition authorities the power to gather information and impose fines for not responding or providing misleading information to a request for information;
- Develop public guidelines to enhance legal certainty and predictability of action by competition authorities, for example, in defining the relevant market, calculating fines, and analysing certain types of agreements.
- Develop a general overall strategy for prioritising and/or continuing initiatives that have proven effective in promoting competition. Also ensure that these activities are subject to an impact assessment.
- Encourage companies to adopt competition law compliance programmes.
- Enhance engagement with universities in Tunisia including through internship programmes for students, also with a view to facilitating future recruitment of staff specialised in competition law and economics.
- Improve co-operation with sectoral regulators – such as the Central Bank of Tunisia (BCT), General Insurance Committee (CGA) and Financial Market Council (CMF) – including through formal co-operation agreements facilitating exchange of information and direct channels of communication. Staff exchanges may be considered for areas where more in depth co-operation is needed.
- Require the General Insurance Committee and other regulators to consult the Competition Council on competition-related matters.
- Improve co-operation in public procurement, including in combatting cartels and bid rigging and consider adhering to OECD recommendation on bid rigging. In addition, consider a better coordination with the High

Authority for Public Procurement (HAICOP) to address issues related to excessive low prices in public tenders.

4.6. International co-operation

- Strengthen international co-operation efforts, especially in the area of global merger control.
- Adopt legal provisions ("disclosure mechanisms") allowing the exchange of confidential information between competition authorities, without them needing to obtain prior consent from the source of the information in question.
- Clarify whether notification to the Common Market for Eastern and Southern Africa (COMESA) Competition Commission (CCC) of a merger with a regional dimension exempts notifying the Tunisian authority responsible for merger control.

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