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Company's Behavior, Time and Teleological Logic in Relevant Market Definition under Morocco–EU Law

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Abstract

This study explores the legal and economic foundations of the concept of the «relevant market» within the Moroccan and European Union competition law systems. It proceeds from the idea that both Moroccan Law No. 104-12 and the EU framework under Articles 101 and 102 TFEU require a precise delineation of the competitive space in which undertakings operate in order to ensure the effective enforcement of competition rules. The objective is to analyse how competition authorities in Morocco and within the EU define the relevant market to identify competitive constraints, assess corporate behaviour, and determine whether practices such as cartels or abuses of dominant position are capable of preventing, restricting, or distorting free competition.

Methodologically, the research adopts a comparative and analytical approach, combining legal interpretation, industrial-economics principles and organisational analysis. It draws on the Structure-Behaviour-Performance paradigm, integrates both macro- and microeconomic considerations, and incorporates temporal and finalistic dimensions that influence the deployment of undertakings within their respective competitive environments. This multidisciplinary method provides a clearer

understanding of how market definition functions as both a normative requirement and a factual diagnostic tool.

The findings reveal three decisive factors that shape a pragmatic understanding of the relevant market in both systems: the structuring role of corporate behaviour; the importance of temporal factors, as cartels and dominance assessments rely on past and present market conditions; and the relevance of purpose, since the strategic intent of undertakings is essential for evaluating anti-competitive effects.

Keywords: Relevant Market; Competition Law (Morocco–EU); Market Power/Dominance; Temporal Factors–Teleological Logic Analysis; Structure–Behaviour–Performance Paradigm

Introduction

The context and epistemic paradigms of the study:

Cartels on prices or those related to the distribution of markets between companies, abuse of dominant position, are esoteric contingencies that have been observed throughout the modern history of the Moroccan market, but also in the Member States of the European Union and in all countries around the world (Combe, E. 2005).

These noxious practices, which aim to enable a single entity to corner a market, or several entities to collude to fix prices or divide up markets, are sources of insecurity. This insecurity undermines the freedom to act, which allows different economic operators to compete fairly and effectively in order to conquer a market. It also leads to a decline in the economic development of nations (Brozen, Y. 1969).

It is widely acknowledged that economic decline leads to greater legal and economic uncertainty and increases the potential risks of escalating violence and conflicts over the integration of national economies into the continental and global economic environment. This insecurity is mainly linked, where applicable, to the absence of more harmonised markets where effective competition should be exercised, allowing for the free movement of goods, services and capital. This insecurity has repercussions on a very large part of the economy, meaning that markets where effective competition is lacking are stagnating or declining. The elimination or hindrance of effective competition is thus a source of insecurity that can cause occasional market inefficiencies. These characteristic inefficiencies can take the form, among other things, of a decline in investment rates and penetration rates. However, they can also take the form of a simple lag in innovation and productivity compared to markets where competition between operators is effective (Genicot, N. 2020).

To enable the competitive economy to play its role fully, it is necessary to focus on a stable and essential «competitive environment» in order to better enable different competitors to access the market and encourage them to invest in different economic sectors without fear of fictitious, unfair or biased competition. This is a very difficult task as long as the restoration of a healthy competitive environment remains dependent on the revitalisation of competition law (Whish, R. And Bailey, D. 2021).

The purpose of competition law is to establish and maintain free competition between market players by ensuring fair conditions of access to the competitive arena and giving all economic actors the opportunity to enjoy freedom of trade. Competition law thus aims to preserve existing business structures and impose healthy behaviour, which is essential to a liberal economy. From this point of view, the ultimate objective of competition law is public policy. It only protects the specific interests of businesses in the context of strengthening collective cohesion focused on maintaining free competition among all market players (Peruzzetto, S. And Jazottes, G. 2008).

When we look back at the History of competition in the Moroccan and European markets, we see that competition law in its current form emphasises the idea of establishing an internal market in which the «four freedoms» are enshrined: freedom of movement of persons, freedom of movement of services, freedom of movement of goods and freedom of movement of capital. In other words, it was a question of establishing the universal principle of «laissez-faire» throughout the entire territory of the sovereign state, i.e. the Kingdom of Morocco and the Member States of the European Union, and even between the sovereign territory of the state in question and the rest of the world.

Against the background of the Moroccan and European legal systems under review, competition law rules can now be found in two places. On the one hand, there are the competition law rules established under Law No. 104-12 on freedom of prices and competition in Morocco. On the other hand, there are the European Union competition law rules established under the Treaty on the Functioning of the European Union (TFEU), also known as the Treaty of Rome of 1957, which took its current name in Lisbon in 2009 and whose rationale is the integration and harmonisation of rules between EU Member States relating to trade.

As they stand today, the Moroccan and European legal systems governing competition are characterised by their pragmatism and even increased empiricism. In this regard, the Moroccan and European legal regimes applicable to competition are, at first glance, considered to be the best for the development of the national and even the Community economy. This is because the systems in question tolerate freedom of private initiative

within the framework of the principle of «freedom of contract» for legal entities operating in the market. However, as soon as this initiative, corroborated by the principle of «freedom of contract» or «freedom of trade and industry», harms the economy or a given market, its restriction may become a matter of hegemony or even public order. This very welcome feature can only be explained by the categorical refusal of the Kingdom of Morocco and most European Union member states to adopt a policy of «unbridled capitalism» or «crony capitalism».

The teleological purpose of competition law in the legal systems under review is to ensure that the conditions necessary for competitiveness between economic players are met. In other words, competition law has the sacred duty of ensuring that competition between companies is effective. It does this by preventing the recurrence of any behaviour deemed to have the object or effect of preventing, restricting or distorting free competition in the market. To achieve this, competition authorities must assess the current and future competitive effects of behaviour suspected of harming competition in the market (Korah, V. 2007).

Under this same trajectory, «relevant market definition» is one of the most important analytical tools available to competition authorities for examining and assessing the difficulties and obstacles faced by market players. Through «relevant market definition», competition authorities seek to systematically assess the deployment of companies in the market. The task of defining the relevant market is an essential step in better understanding how competition works. Defining the contours of the relevant market also makes it possible to identify its key players, draw its boundaries and determine the extent of effective competition (Lianos, I. 2007).

In most instances, barriers to competition are assessed with the aim of identifying the constraints faced by the company and determining whether it has any market power or whether any of its practices are likely to lead to the creation or consolidation of its economic dominance in the market. The authorities responsible for market regulation act, in accordance with common practice, to highlight this objective. This is achieved through the implementation of the process of «defining the relevant market», based in particular on the analysis of «competitive conditions» and «company behaviour» within the market in question (Lopatka, J. 2011).

More significantly, the «definition of the relevant market» is based on a legal logic of implementing competition law provisions that reframe the actions of competitors in the competitive arena, namely when such alleged behaviour is deemed to have the object or effect of preventing, restricting or distorting free competition in a market. This logic is based on the normative and regulatory dimension of competition law (De Gramont, D. 1996).

Analysis through the prism of the arguments put forward by the competition regulatory authorities of the Moroccan and European legal systems only allows them to consider relevant facts, as evidenced by prominent factual elements that enable them to properly apply the rule of law aimed at restoring effective competition between economic players (Kaplow, L. 2010).

It is within this emerging context that we must understand the injunction that «the definition of the relevant market» is essential to guarantee the security of legal trade within the market. This is achieved by fulfilling the first condition for combating practices which have as their object or effect the prevention, restriction or distortion of free competition in the market, namely the identification and assessment of anti-competitive acts in the light of the existing regulatory framework (Deffains, B. And Pellefigue, J. 2018).

The only purpose of defining the relevant market is therefore to establish the scope of application of competition rules by drawing on syllogistic reasoning. This analytical reasoning is based on a series of propositions combining both the legal framework and the factual context, which both the Competition Council of the Kingdom of Morocco and the European Court of Justice are obliged to follow, failing which the competition authorities will be unable to apply the rule of law. Pragmatic reasoning is an inherent feature of legal science, transcending geographical boundaries and meaning that the Moroccan and European legal systems are no exception.

The interest and issues involved in the study:

In most cases, a competition analysis always begins with a «definition of the relevant market». This analysis is based both on «identifying the competitors» involved and on studying the «behaviour of the companies» in question in light of the position held by those suspected of being involved. This practice has been reinforced by the «Structure-Behaviour-Performance» paradigm, which is one of the foundations of industrial economics. According to this paradigm, the structural characteristics of the market guide the behaviour of companies, which in turn affects their performance. The «Structure-Behaviour-Performance» paradigm, considered the basic model of American industrial economics, has clearly influenced competition law in the United States, the European Union and their Moroccan counterpart. Inspired by this paradigm, the Moroccan and European systems under review emphasise the importance of «market structure», suggesting a link between the «position held by the company» in the market and the «potentially resistant behaviour» adopted by the latter.

The emphasis on «the essence of the organisational phenomenon» studied in all its dimensions: «market structure», «position held by the company» and «behaviour of the company», means that the process of «defining the relevant market» is not the same. The process of «defining the relevant market» takes into account the nature and origin of the practice that infringes on free competition, depending on whether it is a cartel or an abuse of a dominant position.

Put another way, the act of «defining the relevant market» should be geared towards demarcating the very nature of the «competitive environment» governing the market. This takes into account the different facets of «behaviour by undertakings» that give rise to the problem of «restriction of free competition», whether it be a cartel or an abuse of a dominant position.

The underlying question is therefore: what is the epistemic posture to adopt when defining the «relevant market» for the purposes of applying Moroccan and European competition law?

Methodology and rationale for the study:

When seeking to establish a «definition of the relevant market», both economic and legal, it is difficult to rely on a single method or approach. Indeed, several approaches and idiomatic concepts can be distinguished, making it difficult today to unify all the legal and technical characteristics that constitute the concept of the relevant market into a single definition. Furthermore, in the continuum of business development, several market configurations, each incomparable to the other, can be distinguished, as well as the related products and services, which vary from one another.

With the aim of identifying the various characteristics of the relevant market that can be included in the overall definition of the business environment in terms of competition, it is necessary to analyse the various elements that make up this concept in order to then present the concepts specific to certain particular forms of the market in question.

In assessing the relevant market as a defender of effective competition in the domestic market, and in reducing, in this case, the economic harm caused by the various players, or even antagonists, in the market, comprehensive methodological techniques need to be developed. Although these are not an integral part of the approach to «defining the concept of the relevant market», it is necessary to take into account their intricacies, deployment and reasoning in order to identify certain enigmatic facets that form the «contours of the relevant market» under the impetus of commercial practice. And, consequently, to subject them to the legal and economic obligations of competition law.

The purpose of this study is to conduct a comparative analysis of the legal and factual understanding of the «relevant market» under Moroccan and European legal regimes applicable to anti-competitive practices, including cartels and abuse of dominant position.

The comparative analysis of the legal and factual understanding of the «relevant market» under Moroccan and European legal regimes applicable to anti-competitive practices, in particular cartels and abuse of dominant position, should focus on defining the very nature of the «competitive environment» governing the market. This should take into account the various facets of «behaviour by undertakings» which give rise to the problem of «restricting free competition», whether in the form of a cartel or abuse of a dominant position.

However, since the main focus is on emphasising the «essence of the organisational phenomenon» studied in all its dimensions : «market structure», «position held by the company» and «company behaviour», the understanding of the process of «defining the relevant market» is not the same. Subsequently, the legal process of «defining the relevant market» should take into account a number of factors related to both macroeconomic and microeconomic conditions. This simply involves examining the nature, origin, purpose and duration of the practice that infringes on free competition, depending on whether it is a cartel or an abuse of a dominant position. This process of «defining the relevant market» should be carried out in the light of the Moroccan and European legal provisions applicable to anti-competitive practices.

There are many reasons for our choice of the Moroccan and European systems applicable to anti-competitive practices. First, the Moroccan and European legal systems are unique in that they have adopted a relatively similar legal arsenal to combat practices that distort free competition. However, our choice of the «relevant market» approach in light of the European legal system – drawing on the French language as a research tool – is motivated by our training as French-speaking lawyers. The understanding of the «relevant market» in the context of the legal system applicable to competition in the Kingdom of Morocco stems from a desire to discover a system which, although relatively young in terms of modern history, has not been the subject of any in-depth analysis in French, or even in national languages, particularly Arabic.

In dealing with the use of the «relevant market» in the context of cleaning up the competitive arena, one of the primary goals of this study is, beyond the comparative analysis necessary to provide benchmarks, to conduct a comprehensive examination of the factual and normative approach to the «relevant market» in its broadest sense, thereby contributing to the body of knowledge on the subject.

Concurrently with the comparison of the practical understanding of the «relevant market» by the Moroccan and European competition legal systems, a number of checks should be carried out to ensure a certain commonality of the concepts being compared, so as to avoid any contradictions or methodological errors later on.

The emergence of anti-competitive practices law is closely linked to the development of the «liberal economy», so it is important to observe how this economy emerged and became established in European and Moroccan societies, and whether the «liberal economy» takes a specific form in each of these two legal systems.

As the modern History of competition law shows, it was when the basic idea enshrined in the Treaty on the Functioning of the European Union, which aims to consolidate the proper functioning of the internal market, including the borderless area in which goods, persons, services and capital can move freely between Member States of the Union, began to take hold. The EU authorities have intervened under Articles 101 and 102 TFEU to ban any act that may affect trade between Member States and which has the object or effect of preventing, restricting or distorting free competition within the internal market.

The emergence of anti-competitive practices in Morocco is closely linked to the resurgence of practices that have the object or effect of preventing, restricting or distorting free competition, in particular through concerted actions, agreements, express or tacit cartels or coalitions, but also the abuse by an undertaking or group of undertakings of a dominant position on the domestic market or a substantial part thereof. In response to these unlimited abuses of private power, the public authorities in Morocco intervened by adopting Law 06-99 on freedom of prices and competition, as repealed by Law 104-12. It is therefore essential to analyse the content of the above-mentioned articles in the light of the decree implementing Law 104-12, but also in the light of emerging facts.

Consequently, the community of concepts that are the subject of comparison in our study can be identified, insofar as the Moroccan and European competition legal systems, in their current economic and normative form, are characterised by their pragmatism and even increased empiricism. In this regard, the Moroccan and European legal systems are, at first glance, considered to be the best for the development of a «liberal economy». This is due to the fact that the systems in question tolerate freedom of private initiative within the framework of the principle of «freedom of contract» for legal entities operating in the market. However, as soon as this initiative, corroborated by the principle of «freedom of contract» or «freedom of trade and industry», undermines the national/community economy or a given market, its restriction becomes diametrically opposed to

hegemony or even public order. This very welcome feature can only be explained by the categorical refusal of the Kingdom of Morocco and most European Union member states to adopt a policy of «unbridled capitalism» or «crony capitalism».

Plan for implementing the study:

The legal framework for the «competitive environment» is based on two key elements that give it a clear normative dimension in relation to its function and context. Consequently, the relevant market will be defined primarily to detect the presence of reprehensible practices. This will be achieved in particular by strengthening the correlation between the «relevant market» and «competitor behaviour» **(A)**. This assessment approach will differ depending on the nature and origin of the practice that undermines free competition. This will depend on whether it is a cartel or an abuse of a dominant position. Hence the need to apply the correlative logic of «relevant market-restrictive effect» **(B)**.

Findings of the study:

This study has enabled us to highlight three conclusive factors that should be taken into account by the competition authorities of the Moroccan and European legal systems in the context of a pragmatic understanding of the « relevant market ». The first is the approach to the « relevant market » geared towards demarcating the « competitive environment », particularly in terms of the behaviour of market players **(1)**. On the other hand, there is the « relevant market » approach based on the « temporal context » of « prohibited behaviour » by a company operating within the competitive arena **(2)**, but also with regard to the « intrinsic and extrinsic purpose » of the behaviour reflecting the strategic dimension of the activities initiated by the undertaking suspected of distorting competition in the relevant market **(3)**.

1. «Company behaviour's» prevalence in defining the « relevant market»:

The overall approach to the perimeter of the market within which competition between companies takes place can only serve as a framework for establishing « legal certainty in trade » if the purpose of this approach is to examine the « behaviour of economic actors » within the competitive arena. The concern to ensure the prevalence of « legal certainty in trade » between undertakings within the competitive market remains dependent on the protection of the rights and interests of those undertakings. In this sense, when an undertaking is sufficiently protected, it can concentrate on carrying out its activities without fear of its rights being infringed or of infringing the rights of a competitor.

Defined as the place where different companies compete in a given market, the « competitive environment » essentially concerns how a company is affected by its competitors and how it adapts its practices to remain competitive. It thus refers to the ecosystem in which different « market players » compete with each other using different decisions relating to the deployment of pricing strategies, distribution channels, promotional tactics, etc. This means that the « business environment » is not immune to the uncertainties generated by the behaviour of companies within the market.

Unwaveringly, « corporate behaviour » in competitive contexts greatly influences the evolution of the overall structure of the business environment. Corporate decisions governing the determination of production quantities (product policy) and the prices at which they can sell the goods produced (pricing policy) effectively impact the position of companies in the market. To the extent that decisions concerning prices, quantities and the nature of goods or services traded define the market power of companies by strengthening their economic dominance through the legitimate or illegitimate creation of added value throughout the competitive process. And even if companies behave in a purely individualistic and autonomous manner and only their individual results are to be consolidated. In the context of a « capitalist spirit » marked by collusion, the competition authorities of the systems under review should, in fact, be resolutely placed in a position to answer the question of whether or not the apparent behaviour of companies belonging to the same system leads to market partitioning.

The « relevant market definition » should be geared towards delineating the very nature of the « competitive environment » governing the market. This should take into account the various facets of « behaviour by undertakings » that give rise to the problem of « restricting competition », whether in the form of a cartel or abuse of a dominant position.

The correlation between the need to « define the relevant market » and understanding « company behaviour » in the market is therefore particularly significant, and should be explored by the competition authorities of the Moroccan and European legal systems as part of their market regulation work.

An effective legal apprehension of competition in a given market remains strictly dependent on understanding the elements that make up the « competitive environment » in which market players operate, with a view to assessing the « performance of a given market » and its compliance with the terms of the law in force. Therefore, when investigating competition, the Moroccan and European competition authorities are required to focus on « the functioning of businesses » in the internal market. The deployment of the « value chains of companies » present in the market in question should also

be taken into account, as should « the networks and expansion strategies of companies » as a whole (Dussange, P. 1986).

To limit complexity and uncertainty and to better understand the « competitive environment » of the company, a strategic diagnosis of the « market structure » and « market performance » by the ad hoc competition authorities should be able to provide consolidated knowledge of competitors in the market (Bienaymé, J. 1998).

Indeed, the « performance of a market » depends essentially on the « behaviour of economic actors » operating within it, in terms of price determination, short-term or implicit cooperation between companies, production strategies and local communication, the investment policy initiated by the company, and the resources made available to defend the company's interests in the market (Porter, M. 1982).

The behaviour of economic actors depends, in turn, on the market structure, in other words, on the number and weight of market players, the degree of product substitutability, and the absence of barriers to entry or exit from the company (Chandler, A. 1972).

The need for competition authorities to implement the concept of « relevant market definition » within the framework of strengthening the legal arsenal governing the « competitive sphere » is therefore an imperative requirement for the consolidation of « economic public order ». This is not an end in itself, but rather an integral part of the framework for analysing the contours of the economic landscape. Aiming to identify all sources of supply exerting sufficient competitive pressure on the market in question, market definition is essential from a legal standpoint, as it allows the characteristics of a market to be identified and, in this case, the actual or potential existence of any restriction of competition to be verified (El Azhary, M. 2022).

Moreover, taking into account the fact that the company is presumed to control its competitive environment by seeking competitive advantage and creating and developing a significant market share through competitive means. It is therefore essential for the competition authorities to diagnose « competitive behaviour » by referring to the « business environment » in order to better qualify the degree of intensity of the act likely to harm « free competition » within the internal market.

2. «Temporal factors'» scale in defining the «relevant market»:

Nowadays, it is clear that the « definition of the relevant market », explicitly repositioned as an efficient tool for implementing competition policy, is considered to be rather fluid, insofar as the conceptual framework for analysis assigned to it fundamentally takes into account the nature of the problem caused by competition and its context.

Contextually speaking, we believe that the approach to the « economic subject » or even the « company » based on a « representation of time » has no other purpose than to bring the « economic subject » in question and the activity it initiates into line with the immaterial space in which that activity takes shape. This involves conceptualising the company's activity in terms of the « time factor ». A more global paradigm consisting of a material understanding of the « deployment of the enterprise », which is carried out by taking into account the « behaviour of the enterprise » on the market, with the aim of gaining the best possible understanding of the competitive environment in which the very essence of the enterprise or economic activity is deployed.

The « time factor » approach to the « relevant market » serves as a conclusive vector for understanding practices aimed at « distorting competition in the market », insofar as such an approach takes into account the perspective of the moment at which « the demarcation of the relevant market » should be carried out.

It has thus been established that the « definition of the relevant market » in relation to cartels and abuse of a dominant position is made on a retrospective basis. Indeed, in the case of cartels and abuse of a dominant position, the future is of little importance, and market analysis focuses mainly on the past and present, in particular with reference to indicators of « company performance », namely the « positioning of the company » in the market and the « market share » held by the company (Lesquins, J-L. 1994).

In addition, in analysing the « actual behaviour of economic actors », objective aspects related to the « actual astronomical time » in which companies experience their genesis and flourishing, in terms of the past and present moments of the company's life continuum. And subjective aspects based on the assessment of « business behaviour » and its repercussions on the market and competition, in terms of positioning strategies or its corollary market share. The two aspects of analysis governed by the time dimension converge in such a way that it can be seen that companies inevitably introduce them into the course of their activities (Sibony, A-L. 2008).

This perspective, based on the prevalence of the « time factor » in the demarcation of agreements and abuse of dominant position, stems from the very nature of the problem and the context of disputes involving its legal categories. Therefore, the texts governing the prohibitions in question should envisage the use of the « time variable » in the context of the « relevant market definition » approach of the companies concerned.

3. «Finalistic logic's» role in defining the «relevant market»:

As regards emphasising the « essence of the organisational phenomenon » studied in all its dimensions, it is not the conventional

meaning that matters most. Rather, it is the meaning that emerges from its « interaction with the surrounding ecosystem », taking into account the economic circumstances.

This may involve the competition authorities implementing « performance indicators » or « relevant indices » that reflect the strategic dimension of the activities initiated by the company suspected of distorting competition in the market. The purpose or even the rebellious intention is derived from the substance under study itself, through exploration of its context, its intrinsic logic or strategies, its aim and its purpose (Posner, R. 2002).

The competition authorities of the legal systems under review are concerned with highlighting critical reasoning based on the « intrinsic and extrinsic purpose » of the prohibited behaviour arising from the company's position within the competitive arena. This contextual, case-by-case approach is initially based on the pioneering role of the « definition of the relevant market » in the implementation of provisions relating to cartels on the one hand, and abuse of a dominant position on the other.

In fact, despite the fact that cartels and abuse of a dominant position are two legal categories that intersect in terms of undermining free competition. Nevertheless, it remains important to examine the specific finalistic interpretation provided by the « definition of the relevant market » with regard to the dissimilar contextual nature of the two anti-competitive practices in question (Bosco, D. And Prieto, C. 2013).

In the case of abuse of a dominant position, it is accepted that the « definition of the relevant market » fits into the context of demonstrating dominance. Therefore, it is necessary to first define the market in which the company is supposed to enjoy a position of economic dominance before being able to establish the abuse of dominance itself (Desaunettes-Barbero, L. And Thomas, E. 2019).

In terms of cartels, the purpose of defining the « relevant market » is to determine the essential question of whether the cartel is likely to have a significant effect on competition (El Azhary, M. 2021).

Finding the purpose behind the recalcitrant behaviour of a company suspected of engaging in anti-competitive practices is a value judgement that needs to be handled on a case-by-case basis depending on what the company has done, whether it's a cartel or abuse of a dominant position. This treatment aims to remove the uncertainties raised by the material existence of damage to competition. It is based initially on the pioneering role of the « definition of the relevant market » of the company in « interaction with the surrounding ecosystem ».

Discussion :

A- The «relevant market-behaviour of the company» correlation:

An overall approach to the market within which companies compete can only serve as a framework for establishing «legal certainty in trade» if the purpose of this approach is to examine the «behaviour of economic actors» within the competitive arena. The concern to guarantee the prevalence of «legal certainty in trade» between companies within the competitive market remains dependent on the protection of the rights and interests of those companies. In this sense, when a company is sufficiently protected, it can focus on developing its business without fear of its rights being infringed or of infringing the rights of a competitor.

Stated differently, the «definition of the relevant market» should be geared towards delineating the very nature of the «competitive environment» governing the market. Taking into account the different facets of «behaviour by companies» that give rise to the problem of «restricting free competition», whether it be a cartel or abuse of a dominant position

Thus the related correlation between the need to «define the relevant market» and the assessment of the «behaviour of the company» within the market is in fact particularly significant, and its content ought to be clarified at the outset **(1)** before considering its practical implications **(2)**.

1- The content of the relevant market-company behaviour» correlation:

The concept of «competitive environment» refers to the system in which different companies compete using various marketing channels, strategies and pricing methods. It is therefore essential to understand the «competitive environment» in which market players operate in order to assess «market performance». Emphasis should therefore be placed on how companies operate in the domestic market. The deployment of the value chains of companies operating in the market should also be taken into account, as should the networks and expansion strategies of companies as a whole, in order to be able to analyse new markets to be entered and any related changes (Dussange, P. 1986).

The aim is to limit complexity and uncertainty and to gain a better understanding of the company's «competitive environment», in other words, the market and its potential. A diagnosis or strategic analysis of the «market structure» and «market performance» should provide consolidated knowledge of competitors in the market by integrating factors and variables that are both external and internal to the organisation (Bienaymé, J. 1998).

In fact, the «performance of a market» depends essentially on the «behaviour of economic actors» operating within it, in terms of price determination, short-term or implicit cooperation between companies,

production strategies and local communication, the investment policy initiated by the company, and the resources made available to defend the company's interests in the market (Porter, M. 1982).

The behaviour of economic actors depends, in turn, on the market structure, in other words, on the number and weight of market players, the degree of product substitutability, and the absence of barriers to entry or exit (Chandler, A. 1972).

In a competitive environment, the company faces various types of «barriers» that can constitute a dead end for its entry into or exit from a given market. Some of these barriers are technical or regulatory in nature, while others may stem from the ability of companies already established in the relevant market to prevent entry by keeping prices above average cost levels over the long term or by limiting supply (March, J. 1999).

The term «barrier to entry» refers to the fact that market conditions are such that it is impossible for new players to enter a given market. The concept of «barrier to entry» is therefore predominant in the orientation of legalistic competition policy. The establishment of this concept makes it possible to better gauge the contestability of the market and also to clearly demonstrate the existence of abuse of economic dependence (Feydel, R. 2015).

The most striking feature of a market is its scope, within which companies can use their respective behaviours to create «barriers to entry» as well as «barriers to exit», thereby placing competitors in a difficult position. The term «barrier to exit» refers to all the obstacles that compel a company seeking to leave a market that no longer offers profitable prospects to maintain a given activity. This may be because the company in question is contractually bound to another economic partner and terminating the current contract would be financially burdensome or unbearable, or because the company's remaining operational activity is essential for it to carry out other operations, or because it hopes to one day recoup the costs generated by this unprofitable activity. These «barriers to exit» from the market may, in fact, constitute a «barrier to entry» for other competing economic players (Brock, W. 1983).

Thus, market definition is not an end in itself, but rather an integral part of the framework for analysing the scope of the economic sphere. With the aim of identifying all sources of supply that exert sufficient competitive pressure on the relevant market, market definition is essential from a legal standpoint, as it allows the characteristics of a market to be identified and, in this case, the actual or potential existence of any restrictions on competition to be verified (El Azhary, M. 2025).

Moreover, given that a company's position in the market is likely to influence its strategic behaviour, insofar as this dominance may indicate the

company's capacity or ability to harm competition by creating «barriers to entry» for other economic players. This is achieved by adopting a strategy aimed at profitably increasing prices for a certain period of time, ultimately to the detriment of the market in general and consumers in particular. The definition of the market will essentially aim to verify the presence or absence of such behaviour, insofar as only this type of behaviour is targeted by the provisions combating anti-competitive practices. Thus, the absence of this alleged behaviour renders any intervention by the competition authorities obsolete (Liebeler, W.1978).

Nevertheless, it is important to clearly state that the correlation between the need to «define the relevant market» and understanding «company behaviour» in the market applies without exception to both cartels and abuse of dominant position (El Azhary, M. 2024).

Furthermore, the implementation of the correlation between «market definition» and «the search for the presence of possible anti-competitive practices» in the market has its origins in the texts and practice of competition authorities. In this regard, it is important to emphasise that the affirmation of this correlation by the two legal systems under consideration remains constant at present.

In European law, long before the European Commission's 1997 Notice on the definition of the relevant market for the purposes of applying competition law established the principle of the correlation between «the definition of the relevant market» and «the possible existence of anti-competitive practices», the Court of Justice of the European Community, now the Court of Justice of the European Union, had effectively established this principle.

Indeed, the European Court of Justice for the first time formally established this correlation. This occurred during the «Michelin case», reaffirming the need to define the relevant market. It observed that the determination of the relevant market should serve primarily to assess whether the undertaking concerned has the ability to impede effective competition and to behave, to an appreciable extent, independently of its competitors, customers and consumers (ECJ, NV Nederlandsche Banden Industrie Michelin v Commission, 9 November 1983, Case 322-81, Rec. 1983-03461, pt. 37).

It is worth noting that this correlation between the «relevant market» and the «behaviour of economic operators» in the market has been systematically adopted by the European Commission (EC Commission, Notice on the definition of the relevant market for the purposes of competition law, OJ C 372 of 3 December 1997).

This correlation was confirmed in the Commission's 1997 Notice on the definition of the relevant market for the purposes of applying competition

law, which clearly states that «*the definition of the relevant market makes it possible to identify and define the area within which competition between undertakings takes place. It establishes the framework within which the Commission applies competition policy. Its main purpose is to identify systematically the constraints that competition imposes on the undertakings concerned*» (EC Commission, Definition of the relevant market for the purposes of applying competition law, OJ C 372 of 3 December 1997, pt. 2).

Further, this correlation has been reiterated and consolidated by recent decisions in European case law (see, in particular: ECJ, Tetra Pak International SA v Commission, 14 November 1996, Case C-333/94P, ECR 1996 I-05951, para. 13; CFI, Kish Glass & Co. Ltd v Commission, 30 March 2000, Case T-65/96, ECR 2000 II-01885, para. 62; CFI, Airtours plc v Commission, 28 June 2004, Case T-342/99 DEP, ECR 2004 II-01785; CFI, Schneider Electric SA v Commission, 31 January 2006, Case T-310/01. ECR 2006 II-00111).

In stating that the main purpose of market demarcation is to systematically identify the constraints that competition places on competitors, the European Commission clearly states that the definition of the market has no other purpose than to understand the competitive pressures on the undertaking in question. This pressure depends heavily on the undertaking's position in the market. If this position is strong, the undertaking will be able to free itself from these pressures. If not, this implies that competition should not be distorted (Diawara, K. 2008).

Furthermore, this thesis has been enshrined in Moroccan competition law under Article 9 of Law No. 104-12, which provides the following: «*The provisions of Articles 6 and 7 shall not apply to any cartel agreements of minor importance which does not significantly restrict competition, in particular to agreements between small or medium-sized undertakings* ».

Following the above -mentioned deployment of European competition law and without prejudice to the exclusions specific to each legal system, the same situation prevails in Moroccan law with regard to the assertion of the correlation between the need to «define the market» and the apprehension of «company behaviour» on the market, both in relation to its competitors and to the end consumer, with the sole difference being that there is much more emphasis on the latter. and understanding «company behaviour» on the market, both in relation to its competitors and the end consumer, with the only difference being that there is much more clarity in Moroccan law than in European law (El Azhary, M. 2021).

In fact, Decree No. 2-23-273 of 2 Kaada 1444 (22 May 2023) amending and supplementing Decree No. 2-14-652 implementing Law No. 104-12 on freedom of prices and competition, as well as the decisions and

opinions issued by the Competition Council, clearly recognise the existence of this correlation.

Hence, the new Decree No. 2-23-273 implementing Law No. 104-12 on freedom of prices and competition stipulates in Article 9 that the general objective of defining the market when analysing the activity of the companies or groups of companies concerned on the market is to identify whether «*these practices affect a market (…)*».

Likewise, beyond setting out the narrative relating to the hegemony of interest in defining the relevant market, the aforementioned decree provides a precise definition of the relevant market in full, stating that «*a relevant market is considered to be affected: if two or more undertakings or groups referred to in point 2 of this form are active in that market and their combined market share is 25% or more. Or if at least one undertaking referred to in point 2 operates in that market and another of those undertakings or groups operates in an upstream, downstream or related market, regardless of whether there are supplier-customer relationships between those undertakings, provided that, in either of those markets, all of the companies or groups referred to in point 2 achieve 25% or more. A market may also be affected by the disappearance of a potential competitor as a result of the transaction.*» (Decree No. 2-23-273 of 2 kaada 1444 (22 May 2023) amending and supplementing Decree No. 2-14-652 implementing Law No. 104-12 on freedom of prices and competition, Appendix -2- Notification file for a merger, pt. 3. Markets concerned, p. 1242).

With all due respect to the precept established under the aforementioned regulatory text, the Competition Council of the Kingdom of Morocco, for its part, highlights this dualistic correlation with unparalleled vigour. It does so by constantly reaffirming it, as in Decision No. 12/10 of 14 October 2010, concerning the request for an opinion from the Moroccan Plastics Association on the safeguard measures filed by SNEP with the Ministry of Foreign Trade (see in this regard: Competition Council of the Kingdom of Morocco. 2010 Annual Report, Competition Council Decision No. 12/10 of 14 October 2010 on the request for an opinion from the Moroccan Plastics Industry Association on the safeguard measures filed by SNEP with the Ministry of Foreign Trade, pp. 38-39).

In accordance with Decision No. 12/10 of 14 October 2010 concerning the plastics industry dossier submitted to the Council by the Moroccan Plastics Industry Association regarding the measures taken by the National Electrodialysis and Petrochemical Company, «*the Council's report examined the general data in the request for an opinion, the various positions of the parties concerned, the legal framework for safeguard measures and an analysis of the PVC market. The main conclusions emphasised the need to protect domestic production and to assess the link*

between safeguard measures and the concept of general interest.» (see: Competition Council of the Kingdom of Morocco. 2010 Annual Report, Chapter 1. General activities of the Council, p. 22).

It can thus be seen that, under Moroccan law, the definition of the market is geared towards the ultimate objective of establishing a link between the affected market and the actions of the economic agent concerned with a view to implementing measures to safeguard «the security of legal trade» on the domestic market.

The objective of safeguarding «the security of legal trade» in the internal market therefore encourages competition authorities in the legal systems under review to seek to better understand the «competitive environment» prevailing in a given market, in particular by highlighting the apparent and hidden strategies of companies, their objectives, strengths, weaknesses and ways of responding to competition.

This body of knowledge, which relates primarily to the «behaviour of companies» in competition with each other, will make it possible to measure the degree of competition and the means of dealing with it, but also the establishment of objectives aimed at anticipating future resistance, such as the identification of strengths and weaknesses that facilitate the detection of areas of differentiation and anti-competitive attacks. Finally, based on information relating to the «business environment», it is now possible for competition authorities to identify typical reaction patterns, enabling them to adjust or even regulate the trajectory of competing companies in relation to the ultimate goal of «maintaining free competition in the market».

The competition authorities absolutely need to understand what creates value for a company in a given market and even strengthens its position. It is therefore necessary to analyse both the strategic characteristics that set the company apart from its rivals and the way in which these characteristics impact its behaviour in the market, by assessing their repercussions on the performance of the various competitors.

In view of the above, we have seen that in order to be successful, a company is expected to master its competitive environment by seeking competitive advantage and creating and developing a significant market share through competitive weapons. It is therefore essential for competition authorities to diagnose «competitive behaviour» by referring to the «business environment» in order to better qualify the degree of intensity of the act likely to harm «free competition» within the internal market.

2- The extent of the «relevant market-company behaviour» correlation:

By this standard, competition law has a symbolic and economic dimension that goes beyond its legal dimension. Without having to mention

its obvious economic dimension, corroborated by its purpose, the functioning of the market, its concepts and methods, its symbolic dimension is fundamentally based on maintaining «peace within the human community», commonly referred to in legal and economic terms as the «presence of the internal market» (Benamour, A. 2010).

By and large, competition law deals primarily with restrictive practices, prohibiting anti-competitive agreements and abuses of dominant positions, thereby ensuring the restoration of «equality and freedom of access to the market», known as «ex ante equal treatment between companies», where the natural forces of the market, favoured by the various facets of «corporate behaviour», would have led to the emergence of economic power. A source of economic power for some, it is undoubtedly a catalyst for constraints for others; depending on which side you are on, competition law will always prove to be both a saviour and a tormentor.

But since our current line of research focuses on the correlation between «the relevant market» and «corporate behaviour» within the competitive arena, we must go further and examine the implementation of this close relationship, specifically in the area of understanding acts that «distort free competition in the market». In this regard, for competition law, research will focus both on the economic power of the undertaking in question and on the deployment of its economic activity from a strategic point of view, in particular through the implementation of the «definition of the relevant market» (Vandencasteele, A. 1999).

The «relevant market definition» based on the «behaviour of the undertaking» under suspicion makes it possible, first of all, to identify the economic power of the entity in question. Thus, the «definition of the relevant market» in relation to «company behaviour» should essentially be taken into account in the analysis of prohibited agreements and practices, as well as in the analysis of abuses of dominant market position (Le Roy, F. 2007).

In assessing agreements and concerted practices, the market penetration capabilities of companies using anti-competitive agreements to strengthen their position are measured in order to ultimately determine the economic power of the colluding entities. Unwaveringly, the «definition of the relevant market» is based on factual foundations that determine the assessment of the impact of the suspected companies on the relevant product and geographic market, the assessment of their financial power, etc. means that the «definition of the relevant market» is certainly a key element, but remains one factor among many in the factual assessment process. The correlative aspect known as the «behaviour of the companies» involved in the prohibited relationship is also taken into account when assessing the violation of competition rules. This includes the company’s distribution

network management strategy, the position of competitors, the brand portfolio, the countervailing power of buyers or suppliers, etc. (Boy, L. 2005).

As part of the analysis of abuse of a dominant position, which necessarily involves first determining whether a company has economic dominance in a given market, the «behaviour of the company» in question will also be taken into account, alongside the «definition of the relevant market» based on market share, in order to determine whether, in advance, there is a dominant position in the reference market. This factual behavioural analysis is carried out by assessing the investment strategies of the suspect company. The technological advancement of a company in relation to its competitors within the competitive arena will also be taken into account as an indicator of economic dominance (Azevedo, J-P. And Walker, M. 2002).

The need for this phase is further reinforced by the fact that «defining the relevant market» in relation to «company behaviour» should be particularly useful in identifying the source of any constraints that could «weigh on the market».

Therefore, in applying the correlation between «definition of the relevant market» and «behaviour of the undertaking», for the prohibition of anti-competitive practices to be applicable, the act in question must be such as to affect trade between Member States or, in terms of Moroccan competition law, «affect the internal market» or even «distort the free play of competition». In order to «affect trade between Member States» or even «affect the internal market», the practice in question should, on the basis of a set of objective legal and factual elements, allow for a sufficient degree of probability that it could have a direct or indirect, actual or potential influence on trade flows in the market. Such influence depends essentially on the «behaviour of the undertakings» party to the concerted practice, which behaviour, combined with the position held by the entities concerned on the market, could undermine the achievement of the objectives of a healthy competitive market. In addition, the practice in question should have the effect of «significantly restricting competition». Thus, this restriction on competition, which is assessed in relation to a reference market or «relevant market» to be defined, but is also assessed on the basis of the «behaviour adopted by the undertaking» under suspicion, should not be insignificant (Peruzzetto, S. And Jazottes, G. 2008).

In this respect, analysis based on the «de minimis rule» or «sensitivity threshold» comes into play. Criteria are therefore essentially linked to the company's position in the market and the deployment of its potential strategies to determine whether agreements between companies can be classified as minor in importance, given that they do not exceed the so-called «restriction threshold». Generally, the «restriction threshold» is

gauged by referring to the market power of the companies party to the agreement, which the competition authorities must assess on the basis of the market shares held by the companies in the market, without prejudice to their «behaviour». It has also been observed that when companies are competitors, the agreement is not considered to «significantly restrict competition» as long as the combined market share held by the parties to the agreement does not exceed ten per cent (10%) of the market share. For non-competing companies, the threshold is set at fifteen per cent (15%) of the combined market share held by the parties to the agreement. However, this quantification is disregarded in the presence of «flagrant restrictions» corroborated by «the behaviour of companies» aimed at consolidating the abusive position of a company or group of companies in the market (On this subject, see: European Commission (EC), Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the EC Treaty, Official Journal No. C368/13 of 22 December 2001).

The same point of view concerning the problematic relationship between the impact of the «market power» held by the companies involved in the cartel and their «competitive behaviour» is enshrined in Moroccan competition law. Indeed, Article 9 of Law No. 104-12 on freedom of prices and competition, promulgated by Dahir No. 1-14-116 of 2 Ramadan 1435 (30 June 2014), as amended and supplemented by Law No. 40-21, provides for the application of the «cartel restriction threshold». This article clearly states that *«Agreements of minor importance that do not significantly restrict competition, in particular agreements between small or medium-sized enterprises, are not subject to the provisions of Articles 6 and 7*».

This is because sanctions for restrictions on competition only make sense if they originate from a company or group of companies with a certain market share, combined with behaviour that is deemed to be anti-competitive. Without this combination, the restriction is not considered to be significant. The theory of «significant restrictions» is thus based on the dominant position of the undertaking or group of undertakings vis-à-vis its competitors on the market, corroborated by conduct aimed at partitioning the market in question.

In both Moroccan and European competition law, this theory of «appreciable restrictions» is accepted and applied, and assessing the «competitive environment» in which a company operates has therefore become a prerequisite for revitalising competition legislation.

This basis for correlation between «the definition of the relevant market» and «the behaviour adopted by the company» in the market in question ultimately demonstrates that «defining the relevant market» is an essential step in the effective application of competition law (Diawara, K. 2008).

Since the definition of the relevant market has no other purpose than to detect and reframe the company's actions on the market, to ignore it would be arbitrary in an economic environment that is so cumbersome for the implementation of competition law.

Indeed, this is why the legal approach emphasises the concrete nature of «market definition», taking into account the different legal categories that give rise to the problem of «restricting free competition», whether through collusion or abuse of a dominant position (El Azhary, M. 2021).

B- The «relevant market-restrictive effect on competition» correlation:

Nowadays, it is clear that the «definition of the relevant market», explicitly repositioned as an efficient tool for implementing competition policy, is considered to be rather fluid, insofar as the conceptual framework for analysis assigned to it fundamentally takes into account the nature of the problem caused by competition, its context and its specific purpose.

Essentially, the «definition of the relevant market» is determined in this case by considering the origin of the infringement of competition. In other words, even if the main purpose of the «definition of the market» is to define the contours of the «competitive environment», regardless of the competition problem at issue, the «definition of the relevant market» is not carried out in the same way in cases of cartel or abuse of a dominant position.

In fact, the «delimitation of the relevant market» has to be done on a case-by-case basis, taking into account the time frame, nature, context and purpose of the cases in question, depending on their legal category. So, it turns out that the «definition of the relevant market» doesn»t have the same scope when dealing with a cartel or abuse of a dominant position.

It is therefore in light of this characteristic that two distinctions must be made with regard to the approach to the relevant market. On the one hand, the definition of the «relevant market» in terms of the «time variable» with a view to restoring the internal market, based in particular on the behaviour of the undertaking and the deployment of the market structure of that entity in «real astronomical time» **(1)**. On the other hand, the «definition of the relevant market» in light of the «finalistic logic» of the act suspected of infringing the free play of competition, whether it be a cartel or an abuse of a dominant position **(2)**.

1- The «relevant market» as assessed in terms of the «time factor» :

We consider that the approach to the «economic subject» or even the company based on a «representation of time» has no other purpose than to bring the «economic subject» in question and the activity it initiates into line

with the immaterial space in which that activity takes shape. This involves conceptualising the company's activity in terms of the «time factor». A more global paradigm consisting of a material understanding of the «deployment of the enterprise», which is carried out by taking into account the «behaviour of the enterprise» on the market, with the aim of gaining the best possible understanding of the competitive environment in which the very essence of the enterprise or economic activity is deployed.

Approaching the «relevant market» from the perspective of the «time factor» serves as a conclusive vector for understanding practices aimed at «distorting competition in the market», insofar as such an approach takes into account the perspective of the moment at which «the demarcation of the relevant market» should be carried out.

It is therefore established that the «definition of the relevant market» in relation to cartels and abuse of a dominant position is made on a retrospective basis. Indeed, in the case of cartels and abuse of dominant position, the future is of little importance ; market analysis focuses mainly on the past and present, in particular by reference to indicators of «company performance», namely the «company's position» in the market and the «market share» held by the company (Lesquins, J- L. 1994).

In a more basic sense, a «company's market positioning» is the way in which the company currently constructs the image through which it wishes to be perceived in a given sector of activity or even a market. This perception, acquired in the present, is the feedback or even the highlight of a «previous positioning strategy» in the market. Effective positioning is legitimately achieved when the perception established at the present moment is synchronous with the strategy developed by the company in the past (Lambin, J-J. And De Moerloose, Ch. 2016).

Companies first set themselves a range of strategic choices to mark the extent of their dominance in a market. As a result, within the same sector, the leading companies in the market are not necessarily in direct competition with each other, but may be competing behind the scenes. Therefore, in order to better differentiate them in an obvious way, the «company positioning» performance index has been used, which refers to the process through which a company or group of companies classified in the same sector of activity is referred to in terms of competition as the «relevant market» (Trout, J. And Rivkin, S. 1996).

The «positioning of the company» can be understood in particular through the de facto deployment of the company's strategies on the market, through a specific marketing policy for a product or service. It is also commonly accepted that a company can use positioning based on the diversification of products or services with distinct positions within the same

product or service. The extreme archetype of positioning is positioning for each product or service segment (Ries, A. And Trout, J. 1981).

As a current state of affairs, «company positioning» serves above all to differentiate itself from other players in the market. And, thanks to this positioning, the company secures a distinctive place in the market by implementing a product or service policy that resonates with the target audience. As a result, «company positioning» in the market offers the advantage of avoiding the imminent risk of finding itself in an undesirable position where it may be impossible to compete with some of its competitors. Worse still, it could find itself in a situation where supply does not match demand (Trout, J. 1969).

It is nevertheless true that the «positioning of the company» in the market plays a dual role. In addition to its obvious effects on the company's deployment in the market, it is an infallible means of measuring, with evidence in hand, the economic power of the company that is likely to have a pernicious influence on the «free play of competition» in the internal market. This is particularly true when the «positioning of the company» in the economic sphere affects many aspects of the functioning of the market. As a result, a constant can be observed in the exercise of power within companies, namely the alignment with the marketing policy (price/product policy) of a significant number of them within the group of companies or outside it. This alignment stems from the profit objective of strengthening the «economic dominance» of the company or group of companies (Ben Dlala Jenhani, S. 2007).

The leverage exerted by «economic preponderance» on competition is expressed, in particular, in the compromise or adherence of a group of companies, constituted as legally distinct entities, and between which there may or may not be a network of links such as to place them under the influence of the same decision-making centre, to a uniform course of action on the market. This alignment is most often manifested through the implementation of a «concerted practice» between companies, giving the parties to the correlation the ability to impose or enforce their will on other players likely to be affected by the effects of the practice put in place (Baillergeau, D. 2006).

The demarcation of a «company's positioning» within the competitive arena is closely linked to the contingent factor known as the company's market share. Market share is a numerical value that provides an overview of the current state of a company's positioning in the market. In other words, this «performance gauge» allows the company to be positioned in relation to its competitors in a specific market. It is expressed as a percentage of total sales of a specific product or service. It is therefore a key indicator for measuring the competitiveness of an offering and the

importance of a company. In other words, the market share ratio of a product or service of a given company compares it to similar products or services offered by competing companies (Miniter, R. 2002).

More revealingly, «market share» is most often the ratio between the sales of a given company and the total sales of companies operating in the same market. Product or service markets are heterogeneous by nature, but the more this market concept is clarified, particularly through the «definition of the relevant market», the more relevant the analysis in relation to competition becomes (Chevalier, M. And Dubois, P-L. 2009).

To calculate a «company's market share», that is to say, to accurately determine «the position of the company concerned in relation to the competition as a whole», it is essential to establish the ratio between the company's turnover or business volume and the turnover or business volume of the entire sector constituting the «relevant market» over the same period (Dubois, P.-L., Jolibert, A., Gavard-Perret, M-L. And Fournier, Ch. 2013).

As a «performance indicator» in the present, market share underpins the process of assessing «the company's position» in relation to its competitors in a given market. It is a «catalyst indicator» of the economic power held by the company, which may be suspected of practices that «affect the free play of competition» (Houle, D. And Shapiro, O. 2014).

If the «market share» of the company in question exceeds fifty per cent (50%) of a given market, with several of its competitors sharing the remainder, the company in question is suspected of abusing its dominant position. This position of power allows the company in question to exert considerable influence and bargaining power, from which it can potentially affect the structure of the market or even distort competition, in particular by creating barriers that restrict access for other competitors (Green, D-H. And Ryans, A-B. 1990).

When analysing the «actual behaviour of economic actors», objective aspects related to the «actual astronomical time» in which companies experience their genesis and flourishing, in terms of the past and present moments of the company's life continuum, must be taken into account. And the subjective aspects based on the assessment of «company behaviour» and its repercussions on the market and competition, in terms of positioning strategies or its corollary market share. The two aspects of analysis governed by the time dimension converge in such a way that it can be seen that companies inevitably introduce them into the course of their activities (Sibony, A-L. 2008).

This outlook, based on the prevalence of the «time factor» in distinguishing between anti-competitive cartels and abuse of a dominant position, stems from the very nature of the problem and the context of disputes involving these legal categories. Indeed, we are attempting to

determine whether this situation already exists under the texts governing the prohibitions in question.

Although Moroccan competition law fails to recognise the practical significance of the «time factor» in dealing with specific cases representing a risk of market partitioning, European competition law provides a good illustration of how the time dimension is taken into account in order to clean up the internal market, based in particular on the past behaviour of the undertaking or the current structure of the market (European Commission EC, Notice on the definition of the relevant market for the purposes of competition law, OJ C 372 of 3 December 1997, pt. 12).

For their part, the competition authorities of the systems under review have an obligation to be in step with the company in order to gain legitimacy, credibility and powers (Competition Council of the Kingdom of Morocco. 2010 Annual Report, Chapter III. Summary of the proceedings of the second Competition Conference in Fez, p. 69).

2- The «relevant market» discernment in light of the «finalistic logic»:

The purpose of this interpretative reasoning is to determine the purpose of the substance under examination, namely the behaviour exhibited by the «economic entity» or even the «company» suspected of engaging in predatory practices likely to distort effective competition within the competitive arena. This method seeks to interpret the contours of the substance under examination on the basis of «uniform variables» such as the importance, scope, value and complexity of the subject of analysis, including the perpetrator of the prohibited act, the prohibited behaviour and the environment in which the prohibited act took place (Bennion, F. 2008).

If such analysis is deemed necessary, it involves the implementation of «performance indicators» or «relevant indices» reflecting the strategic dimension of the activities initiated by the company suspected of distorting competition in the market. The purpose or even the rebellious intention is identified from the substance itself, through exploration of its context, its intrinsic logic or strategies, its goal and its purpose (Posner, R. 2002).

In terms of emphasising the «essence of the organisational phenomenon» studied in all its dimensions, it is not the conventional meaning that matters most. Rather, it is the meaning that emerges from its «interaction with the surrounding ecosystem», taking into account the circumstances of the situation.

The «finality of the substance under examination» is invoked in order to remove the uncertainties raised by its material existence or to restrict or extend its scope. The finalistic approach or argument, reasoning or viewpoint motivated by prospective results, and teleological analysis or objection all

have in common the use of the goal pursued by the institution under examination (Driedger, A. 1983).

Being a configuration of «contextual interpretation», the foundations of such an approach are based on the quest for the intention revealed by the substance under study. This interpretation questions, where appropriate, the purpose of the action initiated by the organisation in order to glimpse its plausible strategic meaning.

Indeed, this is a matter of critical reasoning, which is based on the «intrinsic and extrinsic purpose» of the prohibited behaviour arising from the company's position within the competitive environment. This contextual, casuistic approach is initially based on the pioneering role of the «definition of the relevant market» in the implementation of provisions relating to cartels on the one hand, and abuse of a dominant position on the other.

Despite the fact that cartels and abuse of a dominant position are two legal categories that intersect in their infringement of free competition, it remains important to examine the content of the specific finalistic interpretation provided by the «definition of the relevant market» with regard to the dissimilar contextual nature of the two categories. Nevertheless, it remains important to examine the specific finalistic interpretation provided by the «definition of the relevant market» with regard to the dissimilar contextual nature of the two anti-competitive practices in question (Bosco, D. And Prieto, C. 2013).

For instance, in the case of abuse of a dominant position, it is accepted that the «definition of the relevant market» fits into the context of demonstrating dominance. Therefore, it is necessary to first define the market in which the company is supposed to enjoy a position of economic dominance before being able to establish the abuse of dominance itself (Desaunettes-Barbero, L. And Thomas, E. 2019).

To conclude that the company in question continues to enjoy economic dominance. Is it necessary, a priori, to define the «relevant market» in advance, in order to limit the scope within which the question of whether the suspect undertaking is likely to exploit such a situation of economic dominance in an abusive manner should be assessed at its fair value?

The very process of defining the «relevant market» presupposes first identifying the product market and then the geographical market in which the suspect company operates. Only once the «relevant market» has been defined can the process of examining whether the undertaking in question has economic dominance be initiated.

Notwithstanding, it should be noted that the mere finding that an undertaking holds a position of economic dominance does not in itself constitute grounds for incriminating the undertaking concerned.

Nevertheless, this element places the burden on the undertaking in question not to undermine, through any behaviour, effective competition within the competitive arena (Combe, E. 2020).

In the same vein, the Court of Justice of the European Community, now the Court of Justice of the European Union, reiterated this principle in the Volkswagen case. The European Court of Justice stated that, in the context of the application of Article 86 of the Treaty (now Article 102 TFEU), the proper definition of the «relevant market» is a prerequisite for assessing the allegedly anti-competitive behaviour of an undertaking. This is because, before concluding that there has been an abuse of a dominant position, it is necessary to establish the existence of a dominant position in a given market. This presupposes that the «relevant market» has been defined beforehand (ECJ, Volkswagen AG v Commission, 6 July 2000, Case T-62/98, ECR 2000 II-02707).

The same holds true in Moroccan law, where we note that Decree No. 2-14-652 implementing Law No. 104-12 on freedom of prices and competition, as amended by Decree No. 2-23-273 of 2 Kaada 1444 (22 May 2023), establishes the need to define the «relevant market» as an essential step in understanding the behaviour of the suspected company. This decree stipulates that the «definition of the relevant market» is mandatory, in particular to justify that the suspected company is not in a position of abuse of dominance and that it can, in this case, escape the scope of Article 7 of Law No. 104-12.

In fact, Article 6 of the decree expressly states that: «*The categories of cartels and cartels referred to in the second paragraph of Article 9 of Law No. 104-12 may be recognised as satisfying the conditions laid down in the second paragraph of Article 9 by order of the Head of Government or the government authority delegated by him for that purpose, after obtaining the assent of the Competition Council. In the cases referred to in paragraph 2 of the first subparagraph of Article 9, the following information shall be provided: (...) the definition of the relevant market (...)*».

When it comes to cartels, the purpose of defining the «relevant market» is to determine the essential question of whether the cartel is likely to have an appreciable effect on competition. Moroccan and European competition law recognise this essential principle.

In European law, again in the Volkswagen case, the Court of Justice clearly defines the role played by the definition of the «relevant market» in cases of cartels. The Court of Justice of the European Community, in highlighting the provisions of Article 85 of the EEC Treaty (now Article 101 TFEU), provides that the purpose of defining the «relevant market» is to determine whether the cartel agreement, the decision by undertakings to form an association or the concerted practice at issue is likely to affect trade

between Member States or has the effect of preventing, restricting or distorting competition.

Such is the case under Moroccan law, which gives the same importance to the characteristic role played by the «definition of the relevant market» in determining the significant effect of the above-mentioned practices on competition.

Consequently, under Moroccan law, in order to determine whether the cartel does not constitute a significant restriction on competition, and in order to benefit from the block exemptions provided for under Article 9 of Law No. 104-12 on freedom of prices and competition and, where applicable, not be subject to the provisions of Article 7. Article 6 of Decree No. 2-14-652 implementing Law No. 104-12, as amended and supplemented by Decree No. 2-23-273 of 2 Kaada 1444 (22 May 2023) requires suspect entities to first «define the relevant market» before deciding on their fate.

Such dissimilarity in the roles assumed by the «market definition» in cases of cartels and abuse of dominant position taken on a case-by-case basis is crucial. It provides a guarantee of understanding and resolving the vexed question of whether or not it is necessary to «define the market». It also highlights the importance of «defining the relevant market» in relation to cartels. In other words, this is only relevant insofar as it allows us to assess whether this practice is likely to have an appreciable effect on competition (see, in this regard, TPICE, European Night Services Ltd (ENS), Eurostar (UK) Ltd, formerly European Passenger Services Ltd (EPS), International Union of Railways (UIC), NV Nederlandse Spoorwegen (NS) and Société nationale des chemins de fer français (SNCF) v Commission, 15 Sept. 1998, joined cases T-374/94, T-375/94, T-384/94 and T-388/94, Rec. 1998 II-03141, paras. 93-95).

The trick is to figure out if the cartel has a noticeable effect. If it»s shown that the cartel hurts competition because of what it»s about, then the «market definition» isn»t needed. Similarly, it is also unnecessary to «define the relevant market» in cases where the agreement constitutes a clear restriction on competition (Prieto, C. 2018).

In other words, the focus is on the purpose of the substance under examination, namely the recalcitrant behaviour exhibited by the «company» suspected of engaging in a practice that is likely to distort effective competition within the competitive arena. This appears to be a value judgement that deserves case-by-case treatment depending on the action initiated by the company, whether it be a cartel or an abuse of a dominant position. The aim of this treatment is to remove the uncertainties raised by the material existence of damage to competition. Treatment initially based on the pioneering role of the «definition of the relevant market» of the company in «interaction with the surrounding ecosystem».

With regard to finalistic logic, the use of «relevant market definition» makes it possible to reflect the strategic dimension of the activities initiated by the suspect company within the competitive arena. Therefore, «defining the relevant market» is a prerequisite for judging the allegedly anti-competitive behaviour of a company. That being said, before concluding that an anti-competitive practice exists, it is essential to establish that it is actually occurring in a given market. This is a manoeuvre that presupposes that the «relevant market» has been identified beforehand, given that proof of the existence of the anti-competitive act is established by examining its context, its intrinsic logic, its purpose or its object.

Conclusion

It clearly follows that the task of identifying barriers to market access presupposes, above all, the adoption of an approach that views any «desperado behaviour» as an affront to equal opportunities between companies and a restriction on free competition, which must reign supreme in the «business environment» of the main players in the internal market. This approach, which is likely to contribute to the preservation of equality in competition and even to the promotion of dynamic competition between market players, remains dependent on the interest shown in the act of «defining the relevant market» itself.

The definition of the relevant market is not an end in itself, but rather an integral part of the framework for analysing the contours of the economic sphere known as the «business environment». The definition of the relevant market is an essential step in establishing economic peace within the internal market. It is, in fact, required by the dynamic nature of the influx of operators trading goods and services on the market. Such a substance, the understanding of which depends above all on the location of the sphere of action of these protagonists/antagonists, before the legitimacy of their behaviour can be properly assessed. The act of «defining the relevant market» has no other purpose than to outline the scope of application of competition rules, because without this step, the competition authorities of the systems under consideration will not be able to apply the rule of law in the appropriate manner.

Needless to say, «defining the relevant market» is an essential step in the fight against practices that could undermine the balance within the competitive arena, in particular through the enforcement of competition law provisions relating to cartels or concerted practices, or even more so, abuse of a dominant position. The act of «defining the relevant market» is essential, as it allows legal professionals to examine the existence or absence of the very essence of effective competition in the market.

Admittedly, the competition authorities of the Moroccan and European legal systems have endeavoured to refine the task of cleaning up the competitive market assigned to them under the legislation in force, in particular by using the definition of the «relevant market» to assess as accurately as possible the reality of the competitive situation in question, and to fully adapt the concept of effective competition to the changing reality of the market to which it seeks to respond. It is indeed up to the legislator to tackle this issue in practical terms.

Nevertheless, legislators must determine the scope of the «definition of the relevant market», its legal nature and the processes for its implementation, which could govern the future of the competitive market. While nothing is certain in this regard, the development of tools for «determining the relevant market» is a task that the Competition Council must address, pending the adoption of specific legislation on the methods to be used for «defining the relevant market».

The study has therefore enabled us to outline the role played by the act of «defining the relevant market» in the context of competition law, as well as the epistemic approaches that should be deployed by competition authorities in order to achieve all the objectives of the legal pact for the stability of businesses in the market.

From a legal standpoint, the «relevant market» constitutes the framework for all behaviour emanating from companies, whether they are protagonists or antagonists. The market in question forms the basis of a complex reality that is assessed according to the formal origin of the infringement of competition. As a corollary, the epistemic approach has enabled us to highlight two dual orientations to be taken into account by the competition authorities of the Moroccan and European legal systems in the context of a pragmatic understanding of the «relevant market». On the one hand, there is the «relevant market» approach geared towards demarcating the «competitive environment», particularly in terms of the «behaviour of market players» **(1)**. On the other hand, there is the «relevant market» approach, which is applied on a case-by-case basis with regard to «desperado behaviour» that undermines the internal market **(2)**.

1- Analysis of «Competitive Environment» Based on «Market Operators' Behaviours»:

Unwaveringly, «the behaviour of companies» in competitive contexts greatly influences the evolution of the general structure of the business environment. The decisions of companies governing the determination of quantities to be produced (product policy) and the prices at which they can sell the goods produced (pricing policy) effectively impact the position of companies in the market. To the extent that decisions concerning prices,

quantities and the nature of goods or services traded define the market power of companies by strengthening their economic dominance through the legitimate or illegitimate creation of added value throughout the competitive process. And even if companies behave in a purely individualistic and autonomous manner and only their individual results are to be consolidated. In the context of a «capitalist spirit» marked by collusion, the competition authorities of the systems under review should, in fact, be resolutely placed in a position to answer the question of whether or not the apparent behaviour of companies belonging to the same system leads to market partitioning.

Defining the relevant market should focus on delineating the very nature of the competitive environment governing the market. This should take into account the various facets of corporate behaviour that give rise to the problem of hindering free competition, whether through collusion or abuse of a dominant position.

It follows that the correlation between the need to «define the relevant market» and understanding «company behaviour» in the market is, in fact, particularly significant, and should be explored by the competition authorities of the Moroccan and European legal systems as part of their market regulation work.

2- Analysis of «Market Harm» Grounded in Its «Formal Legal Origin»:

The «definition of the relevant market» should, in this case, be made taking into account the origin of the damage to competition. In other words, even if the main purpose of the «definition of the market» is to define the contours of the «competitive environment», regardless of the competition issue at stake, the «definition of the relevant market» is not carried out in the same way in cases of cartel or abuse of a dominant position.

Indeed, the «delimitation of the relevant market» should be carried out on a case-by-case basis, taking into account the temporal dimension, the nature, the context and the subject matter of the cases in question, according to their legal category. Thus, it appears that the «definition of the relevant market» does not have the same scope in the case of a cartel or an abuse of a dominant position.

As a result, it is in light of this characteristic attribute that the Moroccan and European competition authorities should explicitly take into account that two substantial distinctions must be made with regard to the overall approach to the market concerned. On the one hand, the definition of the «relevant market» in terms of the «time variable» with a view to cleaning up the internal market, based in particular on the behaviour of the undertaking and the deployment of the market structure of that entity in «real astronomical time». On the other hand, the «definition of the relevant

market» in view of the «finalistic logic» of the act suspected of infringing the free play of competition, whether it be a cartel or an abuse of a dominant position. This therefore confirms the choice of adopting a pragmatic, teleological approach to «the definition of the relevant market».

This pragmatic, teleological approach to defining the relevant market has also prompted us to open a discussion on the need for national competition law and practice to adopt a specific methodology for applying the definition of the relevant market in the context of Moroccan competition law. This is similar to comparative European law, which, pursuant to the 1997 European Commission Communication, put forward an unprecedented framework for defining the relevant market for the purposes of applying Community competition law. Moroccan law should enable the Kingdom»s Competition Council, as well as businesses, to have a «charter of good practices for the internal market», the purpose of which would be to set out the steps to be taken in order to «define the relevant market» in light of the «business environment» of companies competing in the market and their respective «behaviour».

In our view, this is a reference text that aims to explain how the Competition Council of the Kingdom of Morocco should apply the concept of the relevant product or geographic market in its implementation of competition law, particularly in sectors such as services, transport, agriculture and other areas of economic activity. A reference text aimed at defining the scope within which competition between market players takes place. A reference text establishing the framework within which the Competition Council of the Kingdom of Morocco should apply the provisions governing competition. A text whose main purpose is to systematically identify the constraints that competition places on companies both inside and outside the market.

A benchmark text establishing «the definition of the relevant market», in terms of both products and geographical scope, in order to determine whether there are any real competitors capable of influencing «the behaviour of the undertakings» in question or preventing them from acting independently of the pressures exerted by effective competition. It is with this in mind that «market definition» will, among other things, enable market shares to be calculated, which provide useful information on «market power» for the assessment of a dominant position or its abuse.

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