

# INSTITUTIONAL DESIGN POLICY FOR COMPETITION LAW IN PALESTINE

---

B A S H A E R R I S H E Q \*

## TABLE OF CONTENTS

<b>I. Introduction</b>	<b>280</b>
A. What This Study Discusses	282
<b>II. Literature Review</b>	<b>283</b>
<b>III. The Importance of the Study</b>	<b>285</b>
A. UNCTAD Model Law	286
B. Competition Law – Definition and Scope	286
C. Scope of Application	286
D. Roles and Responsibilities	287
E. Key Principles for Effectiveness	287
1. Independence	288
2. Accountability	289
3. Transparency	290
F. Competition Agency Models	290
1. The Bifurcated Judicial Model	291
2. The Bifurcated Agency Model	292
3. The Integrated Agency Model	292
<b>IV. The Case of Jordan</b>	<b>293</b>
A. Background	293
1. The Institutional Design of Jordan	294
i. Institutional Goals and Scope	294

---

\* I would like to express my deep appreciation to Professor Liora Salter, Osgoode Hall Law School, York University for her supervision, expertise and guidance, and to Professor Lorne Sossin, Dean of Osgoode Hall Law School for his invaluable input and commentary on my thesis. Any mistakes or errors remain the author's own.

a. Goals	294
b. Scope	295
ii. Institutional structure	295
iii. Institutional Design Role	297
iv. Judicial Review	298
v. Competition Directorate's Decisions	298
2. Problems to be addressed	299
i. Goals and Scope	300
ii. Institutional structure	300
iii. Roles of Competition Authority	300
iv. Lack of Competition Experience	301
v. Lack of [Human and Financial] Resources	302
vi. Effectiveness	302
<b>V. The Palestinian Competition Case</b>	<b>303</b>
A. Background	303
B. Reform Process	306
<b>VI. First thoughts on how to resolve the problem.</b>	<b>307</b>
A. Goals	308
B. Scope	309
C. Empower the competition authority and narrow the exceptions	309
D. Key Principles for Effectiveness	310
1. Independence	310
2. Accountability	310
3. Transparency	311
E. Designing the Model	311
<b>VII. Conclusion</b>	<b>313</b>

---

## I. INTRODUCTION

The Palestinian Authority (Palestine) is one of the few jurisdictions in the Middle East and North Africa (MENA) region that does not have a competition law. Palestine suffers from complicated political circumstances that have created a patchwork legal system and economic distortion which affects competition in the Palestinian market. However,

after the Oslo agreement in 1993<sup>1</sup>, it started an economic and legal reform program, focusing on reconstruction of its institutions, unifying the legal system between West Bank and Gaza Strip, and creating an effective and competitive environment within the Palestinian market in preparation for eventual statehood.<sup>2</sup>

Palestine's first effort to enact a competition law began in 2003, and at least four attempts<sup>3</sup> were made over the last decade to enact a competition law suited to the needs of the Palestinian market. In 2014 it was working on yet another draft.<sup>4</sup> However, Palestine was confronted by a dilemma about the design of the competition law and policy. The Palestinian Authority is torn between adopting the ready-made, relatively long-lived, competition law models already in place in neighboring (MENA) countries, such as Jordan, and, alternatively, drafting a model specifically tailored to suit the Palestinian market's needs and interests, learning from Jordan's experiences, as the case study of MENA countries, to reduce its learning curve.

While it is important to have a competition law that enables competition authorities to protect the market, as Kovacic and Hyman posit, having a solid institution with the suitable competition policy design is no less important.<sup>5</sup> Without a concrete institutional design and a clear framework, the law cannot be effectively implemented. Thus, Palestine desperately needs not only a competition law, but also an effective institutional design policy capable of adjusting to its needs and characteristics. After the Oslo agreement, Palestine started an economic

---

<sup>1</sup> Pierre Tristam, "Declaration of Principles on Interim Self-Government Arrangements: The Oslo Accords Agreement between Israel and Palestine" (13 September 1993), about news (blog), online: <<http://middleeast.about.com>>.

<sup>2</sup> The National Legislative Plan for the Government (NLPG) was established in 2008; The Palestinian National Authority, The Council of Ministries, Decision No (01/86/12/MW/SF) of 2008, art 2, online: <[www.lacs.ps/documentsShow.aspx?ATT\\_ID=1320](http://www.lacs.ps/documentsShow.aspx?ATT_ID=1320)> [NLPG].

<sup>3</sup> The author of this article was the legal advisor of the Minister of National economy since 2000 and became the Director General for the Directorate of Legal Affairs in the Ministry of National Economy and responsible for all the economic laws including the Competition Draft, introduced in 2003, 2008, 2010, 2012 and 2014.

<sup>4</sup> The author received the Competition Draft of 2014 from the deputy of the Director General of the Legal Affairs in the Ministry of National Economy.

<sup>5</sup> David Hyman & William Kovacic, "Competition Agency Design: What's on the Menu?" (2012) Illinois Public Law and Legal Theory Research Papers Series No 13-26.

reform program and established the National Legislative Plan for the Government, which is responsible for reviewing the economic laws and providing recommendations to the government for legislation to unify the legal systems in both parts of the country – West Bank and Gaza Strip. Further, it suggests new Palestinian laws to attract foreign investment, which achieves harmonization with international trade rules, eliminates barriers to trade, and protects the market from anti-competitive practices. A competition law was one of the pieces of legislation required by the competition plan by 2009.<sup>6</sup>

This dilemma raises the question: *what model of institutional design policy for a competition law is most suitable for Palestine, on the basis of the experience of Jordan as the selected MENA country?* This study chose Jordan as pre-1967 Jordanian Laws are still in force in the West Bank and has influence on the legal system on Palestine. Therefore, the Jordanian Competition Law, and its experience and evolution, will most likely have a direct legislative influence on the Palestinian legal regime.

This study argues that Palestine, in tailoring the institutional design policy for its competition law, needs to avoid the learning curve of the institutional design experienced by Jordan. Palestine should avoid any contradictory and ambiguous rules, general and unclear goals, or any competition agency structure that does not fit with its market's needs. Competition law in Palestine should also define clear powerful roles that empower the competition authority to enforce the competition law in the Palestinian market, in addition to a solid separate institution vested in the Integrated Agency Model with real independence, accountability, and transparency. In this model, the competition authority only has an investigative role and brings enforcement actions to the Court of First Instance and then to the Court of Appeal.<sup>7</sup>

## A. What This Study Discusses

This study first highlights the best practices suggested by UNCTAD Model Competition Law of 2010.<sup>8</sup> Second, it analyzes and evaluates the

---

<sup>6</sup> NLPG, *supra* note 2 at 8.

<sup>7</sup> UNCTAD, Model Law on Competition (2010) – Revised Chapter IX, 11th sess, UN Doc TD/B/C.I/CLP/L.2 (2011), online: <[www.unctad.org/en/Docs/ciclpL2\\_en.pdf](http://www.unctad.org/en/Docs/ciclpL2_en.pdf)> [Model Law].

<sup>8</sup> *Ibid.*

institutional design policy in Jordan, and addresses problems affiliated with its institutional design policy. Third, it discusses the Palestinian competition environment. Finally, this study provides first thoughts on the institutional design policies that Palestine should adopt, learning from the experiences of Jordan and avoiding its learning curve.

The competition regulations in the selected MENA country of Jordan beyond the scope of this study.

## II. LITERATURE REVIEW

Few scholars discuss the institutional design policy that fits Palestine's needs and characteristics. Atyani and Makhool analyzed the 2003 draft Palestinian Competition Law<sup>9</sup> and highlighted the importance of benefiting from the long competition experience in developed countries while taking into consideration the needs and characteristics of the Palestinian market. They also discuss the structure and role of the Palestinian competition authority, and suggest gradually implementing the competition law with an independent competition authority,<sup>10</sup> however, they did not reveal how we could achieve a balance between these two issues.

Milhem discusses the 2012 draft Palestinian Competition Law and briefly compares it with the competition authorities in neighboring MENA countries.<sup>11</sup> His focus was the description and analysis of the regulatory bodies, their structure, roles and responsibilities, and the best practices suggested by UNCTAD, European Union (EU) and other international organizations.<sup>12</sup> Milhem disagrees with Atyani and Makhool, and concludes that the competition agency should be within the jurisdiction of the Ministry of National Economy to avoid additional financial costs. However, he did not reveal how real independence could be achieved if the competition agency functions as another branch of government, with the Minister responsible for the appointment and promotion of its employees. Further, Milhem does not highlight the problems that competition regimes

---

<sup>9</sup> Basim Makhool & Nasr Atyani, "Critical Review of Palestinian Competition Law" (2003) Palestinian Economic Research Institute (MAS), online: <[www.mas.ps](http://www.mas.ps)>.

<sup>10</sup> *Ibid* at 9.

<sup>11</sup> Feras Milhem, "Towards Establishing the Palestinian Competition Commission" (2012) Palestinian Economic Policy Research Institute, online: <[www.mas.ps](http://www.mas.ps)>.

<sup>12</sup> *Ibid*.

in these other MENA countries suffer from, which Palestine must avoid when tailoring its institutional design.

Dabbah focuses on competition laws in the Middle East, arguing that most MENA countries have ineffective competition regimes, as they “parachute in” their competition laws and policies from developed countries—laws and policies that are often unsuitable owing to economic, social and culture differences.<sup>13</sup> He added that these laws suffer from poor drafting and ambiguous provisions. Although Dabbah argues that countries need competition laws with an institutional design that fits their markets’ needs<sup>14</sup>, he does not provide a recommendation as to what model would be best suited to the market needs of MENA countries.<sup>15</sup>

Gal focuses on small-size markets,<sup>16</sup> arguing that, while Western countries with large-sized markets have a rich competition experience, this does not reflect the characteristics of small-sized markets.<sup>17</sup> Small-sized markets, she suggests, require competition policies and laws that fit their unique characteristics.<sup>18</sup> Gal argues, in small-sized markets, competition must be an end by itself and, therefore, economic goals must be the only goals of the competition authority in these markets, as is the case in Australia and New Zealand.<sup>19</sup> Owen, agrees with Gal’s argument, and concludes: “Competition policy in any country must be sensitive to the economic character of the particular product and geographic market in question.”<sup>20</sup>

Michael Trebilcock and Edward Iacobucci, clarify the roles of competition authorities around the world according to three models: the Bifurcated Judicial Model, the Bifurcated Agency Model, and the Integrated Agency Model.<sup>21</sup> These models were acknowledged by the UNCTAD Model

---

<sup>13</sup> Maher M Dabbah, *Competition Law and Policy in the Middle East*, (Cambridge: University Press, 2007).

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*

<sup>16</sup> Michal Gal, “Size Does Matter: The Effect of Market Size on Optimal Policy” (2001) 74 S Cal L Rev 1437.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*

<sup>20</sup> Bruce M Owen, “Book Review: Imported Antitrust” (2004) 21:2 Yale J on Reg 441 at 9, online: <[siepr.stanford.edu/sites/default/files/publications/03-09\\_0.pdf](http://siepr.stanford.edu/sites/default/files/publications/03-09_0.pdf)>.

<sup>21</sup> Michael J Trebilcock & Edward M Iacobucci, “Designing Competition Law

Law of 2010.<sup>22</sup> In the first model, the competition authority only has an investigative role and brings enforcement actions to the Court of First Instance, and then to the Court of Appeal.<sup>23</sup> In the second model, the competition authority investigates and makes decisions in non-criminal cases,<sup>24</sup> and in the third model the competition authorities combine between the Bifurcated Judicial and Bifurcated Agency approaches.1.3 Methodology

This study first discusses the UNCTAD Model Law on Competition 2010<sup>25</sup> with the goal of better understanding the parameters of the competition regime, and the various models of competition laws around the world. This paper proceeds to analyze and evaluate the institutional design for competition policy and the applicability of the UNCTAD Model in Jordan as the selected jurisdiction. This methodology enables this study to tailor its focus and recommendations as to the institutional design for the competition law that is best applicable to Palestine and avoid Jordan's learning curve.

### III. THE IMPORTANCE OF THE STUDY

Few scholars have discussed the suitable institutional design policy for the competition law in MENA region, including Palestine. Accordingly, this study adds to a very underserved area of literature in determining and recommending the most suitable institutional design policy for an effective competition law in Palestine, or any other MENA jurisdiction. It might also act as a guideline for MENA countries' policy makers and/or international institutions, such as UNCTAD, International Competition Network (ICN), and World Bank, that provide developmental and technical assistance to the countries of the region in general, and Palestine in particular.

---

Institutions" (2002) 25:3 World Competition at 361. See also, Michael J Trebilcock & Edward M Iacobucci, "Designing Competition Law Institutions: Values, Structure, and Mandate" (2009) 41 Loy U Chi LJ 455 at 459-63.

<sup>22</sup> UNCTAD, Model Law, *supra* note 7.

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*

This study raises many questions surrounding the standards for the composition and decision making of competition authorities in selected MENA countries. These questions are valid and well worth further research.

### A. UNCTAD Model Law

UNCTAD proposed a Model Competition Law that was intended to fit with all competition regimes around the world, irrespective of size and capacity.<sup>26</sup> UNCTAD also suggested the roles, responsibilities, and structure that competition authorities should have, adopting the specific models suggested by Trebilcock and Iacobucci.<sup>27</sup> UNCTAD left it to each country to decide on which model it will adopt, depending on its needs and capacities.<sup>28</sup>

Section 1.1 briefly addresses competition law, section 2.2 highlights scope as defined by the UNCTAD Model Law. Then section 2.3 discusses the roles and structure of the competition authority. Section 2.4 in this study examines the key principles of effectiveness: *independence*, *transparency* and *accountability*. Finally, in section 2.5, this study explores the competition agency models.<sup>29</sup>

### B. Competition Law – Definition and Scope

Most competition laws around the world do not define “*competition*”, as competition is a broad business concept accepted and encouraged in every type of market. Instead, these laws define anti-competitive practices.<sup>30</sup> The purpose of the law is to control, eliminate and/or mitigate restrictive agreements in order to protect and encourage competition in the market.<sup>31</sup>

### C. Scope of Application

The UNCTAD Model Law defined its scope as applying to all enterprises, whether controlled by private individuals or the state, if they are involved in commercial actions, commercial agreements, and actions or

---

<sup>26</sup> *Ibid.*

<sup>27</sup> Trebilcock & Iacobucci, *supra* note 21.

<sup>28</sup> *Ibid* note 26.

<sup>29</sup> *Ibid.*

<sup>30</sup> UNCTAD, Model Law, *supra* note 7.

<sup>31</sup> *Ibid.*



transactions regarding goods and services.<sup>32</sup> Competition law should be applied to “all natural persons who, acting in a private capacity as owner, manager or employee of an enterprise, authorize, engage in or aid the commission of restrictive practices prohibited by the law.”<sup>33</sup> The UNCTAD Model Law noted that competition laws [usually] do not apply to state-owned enterprises, or firms that have received a concession to operate a state-owned or public-serving enterprise.<sup>34</sup>

Anti-competitive actions include all restrictive arrangements including cartels, abuse of dominant position, and mergers that would restrict and cause harm to competition. It is worth mentioning that the cartels discussed within the scope of this study are private industry-based cartels (made up of firms), and not public cartels (made up of governments or government entities).

#### D. Roles and Responsibilities

It is important to take into account the competition authorities' roles, such as investigating, gathering information, conducting research, advocating and making decisions, whether in limited situations for specific mergers, or all type of cases including cartel, abuse of dominant position and merger cases.<sup>35</sup> There are roles that could be applied to all jurisdictions, including economies in transition or economies that shift from planned/centralized to a free market.<sup>36</sup>

#### E. Key Principles for Effectiveness

As noted, UNCTAD identified the building blocks for having an effective competition authority capable of taking the right decisions within the available resources in a limited time: *independence*, *accountability* and *transparency*.<sup>37</sup>

---

<sup>32</sup> UNCTAD, Model Law on Competition, UN Doc TD/RBP/CONF.7/8 (2010), at 3 online: <[www.unctad.org/en/Docs/tdrbpconf7d8\\_en.pdf](http://www.unctad.org/en/Docs/tdrbpconf7d8_en.pdf)> [Model Law, Full Revised Version].

<sup>33</sup> *Ibid* at Ch II, s II(b) at 3.

<sup>34</sup> *Ibid* at Ch II, s II (c) at 3.

<sup>35</sup> UNCTAD, Model Law, *supra* note 7 at 2–3.

<sup>36</sup> *Ibid*.

<sup>37</sup> *Ibid*.

### 1. *Independence*

The institutional design policy must enable competition authorities to enjoy real independence from any branch of government, enabling it to enforce the competition law effectively, and to make the correct decisions that both protect competition from political pressure and encourage its growth in the market.<sup>38</sup>

UNCTAD asserted the importance of structural independence by proposing that the agency should be separate from any branch of government.<sup>39</sup> UNCTAD also asserted the importance of functional independence by answering that it would prevent government from usurping the competition authorities' power and tasks, and controlling their appointments, dismissals and budget.<sup>40</sup> UNCTAD advises countries in transition to establish institutions that are administratively and financially independent from the executive authority. It left it to each country to decide on how to regulate the commission's institutions.<sup>41</sup>

Milhem argued that purpose of the independence of the competition authority is to give the authority the flexibility to execute its roles and responsibilities within the related laws.<sup>42</sup> However, he suggested that independence does not mean separating the authority from the executive branch of the government.<sup>43</sup> Milhem limited the definition for independence by arguing that all it requires is the flexibility to perform,<sup>44</sup> without discussing any other factors that may affect independence.

In this study's view, independence for the competition authority could be achieved by granting it the discretion and capability to exercise power without the influence of political pressure and interference. What about other factors that may influence independence? The administrative bureaucracy in the decision-making, and an immature democracy, would hinder the role of the competition authority if it did not tailor the

---

<sup>38</sup> UNCTAD Secretariat, 9th sess, Independence and Accountability of Competition Authorities (2008), UN Doc TD/B/Com. 2/CLP/67, 15-18 [Independence and Accountability].

<sup>39</sup> *Ibid* at 6.

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*

<sup>42</sup> Milhem, *supra* note 11 at 4.

<sup>43</sup> UNCTAD Secretariat, Independence and Accountability, *supra* note 38 at 5.

<sup>44</sup> *Ibid.*

institutional design well in order to achieve independence. It seems that UNCTAD meant to consider these factors, advising countries—particularly developing and countries in transition—to have a competition authority separate from any branch of government,<sup>45</sup> which would give the competition authority the requisite discretion, capability, and financial and administrative independence to enforce the competition law.

## 2. *Accountability*

Accountability is required when there is independence and, as UNCTAD highlights, it is important to establish balance between independence and accountability.<sup>46</sup> Therefore, as UNCTAD argues, competition authorities must be required to publish their decisions and justifications, as well as their roles and obligations. This leaves them subject to public scrutiny and would enhance their own, as well as others', accountability.<sup>47</sup>

This study agrees with UNCTAD's recommendation that competition authorities must publish their decisions. Voluntary disclosure is not an effective or formal tool since it is discretionary. It can be tailored to reflect the agenda of the agency, and would not prevent competition authorities from exceeding their authority. Therefore, it is important to have laws that require the agency to provide specific disclosure of information, in addition to having internal and external audits, and judicial review. In this study's view, public reporting, periodical review, and public disclosure for issues are important to the market (i.e. major mergers, timely release of information and decisions that are important to the market). Further, as Trebilcock and Iacobucci stated, "budgetary allocation, financial expenditure, periodic mandate and performance review"<sup>48</sup>, enhance independence and accountability. In addition, judicial review is the safety valve for accountability, where the level of review could be determined by the model adopted and the role of the competition authority.

---

<sup>45</sup> *Ibid* at 6.

<sup>46</sup> *Ibid*.

<sup>47</sup> *Ibid* at 10.

<sup>48</sup> Trebilcock & Iacobucci, *supra* note 21 at 457.

### 3. *Transparency*

UNCTAD reports that disclosing the decisions of competition authorities is necessary to have a responsible and effective competition authority. It helps both the competition authority and the business community.<sup>49</sup> However, as UNCTAD highlights, disclosure should not extend to business secrets and sensitive information that would affect competitiveness.<sup>50</sup> It urged competition authorities to have clear and reasonable justifications for releasing information, suggesting that this would increase the credibility of the authority.<sup>51</sup> Publishing decisions also works as a safety valve for preventing political pressure or lobbying, as well as limiting the tendency for corruption by competition authority staff, since they know that their decisions will be subject to scrutiny.

According to UNCTAD, having an effective competition authority requires the following conditions: administrative and financial independence, sufficient financial resources, and highly qualified staff.<sup>52</sup> As UNCTAD also indicated, competition authorities should build the internal capacity of staff, ensuring that the staff are properly trained (technically), can deploy the agency's resources wisely and with the most impact, and cooperate with other regional and international competition authorities.<sup>53</sup>

This study argues that effectiveness is achieved through financial and administrative independence, accompanied by accountability and transparency. It is also crucial to establish an institutional design that facilitates procedures and empowers competition authorities to enforce the law and make the right decisions.

## F. Competition Agency Models

Recall that, according to Trebilcock and Iacobucci, there are three competition agency models.<sup>54</sup> These models were adopted and

---

<sup>49</sup> UNCTAD, 11th sess, Agenda Item 3(a), Foundations of an Effective Competition Agency, UN Doc TD/B/C.I/CLP/8 (2011) at 8, online: UNCTAD <[unctad.org/en/docs/ciclpd8\\_en.pdf](http://unctad.org/en/docs/ciclpd8_en.pdf)> [Foundation of an Effective Competition Agency].

<sup>50</sup> *Ibid.*

<sup>51</sup> UNCTAD Secretariat, Independence and Accountability, *supra* note 38. See also UNCTAD, Foundation of an Effective Competition Agency, *ibid.*

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.*

<sup>54</sup> Trebilcock & Iacobucci, *supra* note 21 at 459.

recommended by the UNCTAD Model Law, as representing all competition agency models around the world (with some having mixed models).<sup>55</sup>

### *1. The Bifurcated Judicial Model*

In this model, the competition authority only has an investigative role and brings enforcement actions to the Court of First Instance, and then to the Court of Appeal.<sup>56</sup> This model's disadvantage is the lengthy and costly process.<sup>57</sup> It also fails to build expertise in competition issues, which requires the exercise of legal and economic expertise within the authority. However, the Bifurcated Judicial Model does achieve accountability, separation between investigation and decision-making, the protection of confidential information about the firms, and it ensures due process.<sup>58</sup> There is solid accountability review through two levels of adjudication: the Court of First Instance and the Court of Appeal.<sup>59</sup> The U.S. is closer to this model, where the Department of Justice and the Federal Trade Commission investigate competition cases and bring enforcement actions to the court.

This model, as Trebilcock and Iacobucci highlight, requires very clear guidelines and strict rules, particularly if there is no specialized court capable of analyzing competition cases, which would likely lead to undesirable results in new competition regimes.<sup>60</sup> In addition, the nature of competition rules are generally flexible because, unlike other laws, competition decisions, as in the case of mergers, are made upon the predicted (i.e. potential) impact of a proposed merger, opening the door for different analysis and predictions. Thus, this model increases legal uncertainty within the business community in the absence of competition experience owing to a model that does not facilitate its accumulation.<sup>61</sup>

---

<sup>55</sup> UNCTAD, Model Law, *supra* note 7 at 4.

<sup>56</sup> *Ibid* at 3.

<sup>57</sup> *Ibid*.

<sup>58</sup> Trebilcock & Iacobucci, *supra* note 21.

<sup>59</sup> *Ibid*. UNCTAD, Model Law, *supra* note 7.

<sup>60</sup> *Ibid*.

<sup>61</sup> *Ibid*.

## 2. *The Bifurcated Agency Model*

In this second model, the competition authority investigates and makes decisions regarding non-criminal cases,<sup>62</sup> such as abuse of dominant position and merger cases. The agency investigates and enforces the law, and its decisions are subject to appeal by a specialized Competition Tribunal, which consists of judges and/or other members.<sup>63</sup> Canada is closer to this model, where the Competition Bureau investigates and makes decisions, but the Competition Tribunal adjudicates cases and its decisions are subject to appeal.

As Trebilcock and Iacobucci argue, this second model helps accumulate competition experience and separates the investigative and adjudicative roles.<sup>64</sup> Having two bodies—particularly tribunals—promotes independent authority and high accountability through an appeal system.<sup>65</sup> It is more likely to avoid false negatives/positives because it separates the investigative and judicial roles, with appeals to the specialized Competition Appeal Court.<sup>66</sup> However having two separate bodies increases the costs and length of the different procedures.<sup>67</sup>

## 3. *The Integrated Agency Model*

In this third model, the competition authorities combine the Bifurcated Judicial and Bifurcated Agency approaches. The competition authority has investigative and adjudicative roles, and it refers to a specialized or general court for appeal.<sup>68</sup> The EU is an example of this third model. The European Commission investigates and adjudicates cases of anti-competitive practices and also can refer competition cases to the court.<sup>69</sup>

As per Trebilcock and Iacobucci, this third model integrates the investigative role with the adjudicative role in one agency. However, the lack of separation could encourage a bias on the part of competition authorities'

---

<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.* See also, UNCTAD Model Law, *supra* note 7.

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.*

<sup>69</sup> Trebilcock & Iacobucci, *supra* note 21. See also UNCTAD, Model Law, *supra* note 7.

and less detachment from its decisions.<sup>70</sup> Yet, this third model would enable competition authorities to conduct investigations of competition cases more effectively with respect to the process and procedure;<sup>71</sup> it creates more consistency and coherence in competition policy formulation, and accumulates competition analysis expertise as a result of daily involvement in investigation and decision-making.<sup>72</sup> This third model is less subject to political pressure because it is independent and highly accountable, and there is a high degree of internal and external auditing.<sup>73</sup> As a result, the competition authority has greater experience and appeals to courts are less likely to be overturned.<sup>74</sup> The authority is compelled to have credible and transparent procedures, which increases legal certainty and protects competition. This third model also has the advantage in developing and building competition expertise and knowledge within the new competition agency<sup>75</sup>, as well as helping to avoid lengthy and costly procedures.

#### IV. THE CASE OF JORDAN

##### A. Background

With the increase of globalization, most countries sought to harmonize their competition rules in order to better integrate with the multi-national trading system, enter into bilateral and multilateral trade agreements, and both attract foreign and encourage domestic investors.<sup>76</sup> Over the last 20 years, MENA countries were no exception.<sup>77</sup> All have implemented Structural Adjustment Programs.<sup>78</sup> These programs included economic reforms, privatization of government-owned enterprises, trade liberalization, and the adoption of laws to ensure the protection of foreign

---

<sup>70</sup> Trebilcock & Iacobucci *supra* note 21.

<sup>71</sup> Trebilcock & Iacobucci, *supra* note 21. See also UNCTAD, Model Law, *supra* note 7.

<sup>72</sup> Trebilcock & Iacobucci, *supra* note 21.

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*

<sup>75</sup> See also UNCTAD, Foundation of an Effective Competition Agency, *supra* note 49.

<sup>76</sup> Dabbah, *supra* note 13.

<sup>77</sup> *Ibid.*

<sup>78</sup> *Ibid.*

investments. One of the essential parts was the adoption of Competition Laws.<sup>79</sup>

Jordan was the second country to enact its competition law after Tunisia. It enacted the 2002 temporary competition law,<sup>80</sup> which was replaced in 2004.<sup>81</sup>

### *1. The Institutional Design of Jordan*

Jordan is one of the smallest economies in the Middle East with few natural resources, limited water, no significant petroleum, and a GDP/capita of USD 4,909.<sup>82</sup> It made several unsuccessful attempts to enact a competition law.<sup>83</sup> In 2000, the Jordanian government began a campaign of privatization. Seventy-one government-owned entities were privatized.<sup>84</sup> It issued a temporary competition law in 2002, which was replaced in 2004 with its Competition Law.<sup>85</sup> In fashioning its Competition Law, Jordan drew upon the technical assistance of Tunisia and the European Commission.<sup>86</sup>

## **ii. Institutional Goals and Scope**

### **a. Goals**

There are no specific goals in the Jordanian Competition Law. The Jordanian Competition Law did not define clear goals and put in place broad, universal economic and social goals within the Competition Law.<sup>87</sup> It focuses on increases in prices and granted the authority for setting prices

---

<sup>79</sup> *Ibid.*

<sup>80</sup> The Ministry of Industry, Trade & Supply, "Competition Law No 33 of 2004", online: <[www.mit.gov.jo](http://www.mit.gov.jo)> [MITS, Law No 33].

<sup>81</sup> *Ibid.*

<sup>82</sup> The World Bank, "GDP per Capita", 2013, online: <[data.worldbank.org](http://data.worldbank.org)>.

<sup>83</sup> Luna Abbadi, "Jordan" in CUTS International, *Competition Regimes in the World – A Civil Society Report* (2006) 80, online: <[competitionregimes.com](http://competitionregimes.com)>.

<sup>84</sup> OECD, *OECD Investment Policy Reviews: Jordan 2013* (OECD: Paris, 2013) at 48.

<sup>85</sup> MITS, Law No 33, *supra* note 80.

<sup>86</sup> Dabbah, *supra* note 13 at 190.

<sup>87</sup> Ministry of Industry & Trade, *The Competition Law: Law No 33 of the Year 2004* [The Competition Law]. See also Trebilcock & Iacobucci, *supra* note 21.



for the essential commodities (flour, sugar, etc.), and interim measures—for no more than 6-months—to cabinet, which is appointed by the king.<sup>88</sup>

### b. Scope

The Jordanian Competition Law applies to all domestic manufacturing, commercial and service industries, as well as practices outside Jordan that have anti-competitive effects on the domestic market.<sup>89</sup> The Competition Law considers *cartels*<sup>90</sup> (price fixing, market division, and bid rigging), *abuse of dominant position*<sup>91</sup> (imposing prices, placing conditions on the resale or any other unilateral behavior), and any procedures to restrict or exit competitors from the market, as illegal. Concentrations of more than 40 percent of the market are within the scope of the law,<sup>92</sup> and are regulated under *rule of reason*, where analysis of the predicted impact of a proposed concentration in the relevant market is made on a case-by-case basis.

In particular, Article 5 of the law prohibits any anti-competitive practices that restrict the production of goods or providing services. It also prohibits bid rigging and any other practices that aim to restrict entry or create barriers to trade. However, section 5 excludes any enterprises concentrations of less than 10 per cent of the market, with the exception in the cases of price fixing and market divisions.<sup>93</sup> This means that concentrations of less than 10 percent are excluded from oversight, leaving it unclear whether concentrations between 10 and 40 percent are subject to oversight.<sup>94</sup>

### iii. Institutional structure

The competition regime in Jordan is a *Multi-Agency Model* where the *Directorate of Competition* in the Ministry of Industry and Trade, and an independent *Competition Committee* composed of members of public and private sectors enforce the law.<sup>95</sup>

---

<sup>88</sup> Dabbah, *supra* note 13.

<sup>89</sup> Ministry of Industry & Trade, The Competition Law, *supra* note 87.

<sup>90</sup> *Ibid*, art 5.

<sup>91</sup> *Ibid*, art 6.

<sup>92</sup> *Ibid*, art 9.

<sup>93</sup> *Ibid*, art 5(b).

<sup>94</sup> *Ibid*.

<sup>95</sup> *Ibid*.

The Directorate of Competition is understaffed, with less than 10 officials who have legal and/or economic expertise. The Directorate consists of: Director, Assistant Director, Chief of Economists and the heads of its three departments—The Competition Policy Department, the Concentration and Exemption Department—and, lastly, the Investigation and Consultation Department.<sup>96</sup> With the Directorate being part of the Ministry, appointments, promotion and demotion of its staff is subject to the authority of the Minister under the Civil Service Law, and its budget is not independent, but rather part of the general budget allocated by Cabinet and approved by Parliament.<sup>97</sup>

According to the Competition Law, the Competition Committee is an independent body with a board of 11 directors. It includes: The Minister of Industry and Trade who is Committee Chair; the Deputy Minister who is Vice-Chair; the heads of the telecommunication and transportation regulatory sectors; the heads of the Chamber of Commerce and the Chamber of Industry; and the Director-General of the Insurance Commission.<sup>98</sup> It is unclear why the Insurance Commission is represented on the board, while other players in the financial sector (such as banks, brokers, etc.) are not.

The Minister appoints four members of the committee.<sup>99</sup> The members appointed by the Minister are for a two-year term (renewable once), and the Law authorizes the Minister to remove them at any time.<sup>100</sup> In my view, the ability of the Minister to appoint and remove four members of the committee diminishes the independence of the committee, particularly since the four appointed members, along with the Minister and Deputy Minister, comprise a majority of the committee.

In this study's view, the diversity of the regulatory sectors represented on this committee enhances formulation of a coherent competition policy, although whether the committee's diversity is representative of the market is still debatable—why were other sector's regulators left out? How are recommendations for new competitive concessions or extraordinary rights

---

<sup>96</sup> Dabbah, *supra* note 13.

<sup>97</sup> The Hashemite Kingdom of Jordan, Parliament, Constitution of 1952, arts 111-119, online: <[www.parliament.jo/en](http://www.parliament.jo/en)>.

<sup>98</sup> Ministry of Industry & Trade, The Competition Law, *supra* note 87, art 14.

<sup>99</sup> *Ibid.*

<sup>100</sup> *Ibid.*

made to the Minister of Industry and Trade? Is there compromise between regulatory sectors when competition policies are formulated? These questions are beyond the scope of this study, but they are important and require further research.

#### iv. Institutional Design Role

The competition authority in Jordan is closer to the Bifurcated Judicial model. The Directorate has an investigative role and makes recommendations to the Minister of Industry and Trade, who makes decisions in merger cases.<sup>101</sup> The Minister in Jordan is authorized to make exceptions in cases of abuse of dominant position and cartel cases.<sup>102</sup> He is also authorized to exempt parties from the application of the law.<sup>103</sup> The Competition Committee has an advisory role and shares responsibility with the Directorate in enforcing the competition law by approving the general plan for competition.<sup>104</sup>

The Directorate of Competition is responsible for investigation, gathering information, cooperating with the related partners, exchanging information, participating in competition plans and drafting legislations.<sup>105</sup> It is also responsible for notifying, analyzing the impact of the proposed mergers, making recommendation to the Minister,<sup>106</sup> in addition to advocating for and fostering a competition culture.

The Directorate is not empowered to make decisions in competition cases, but makes recommendations to the Minister of Industry and Trade, who is authorized to issues decisions clearing mergers, outright or with adjustments, block mergers, or grant/revoke an exception in cases of cartels and/or abuse of dominant position.<sup>107</sup> While this is intended to be for the consumers' benefits, the law fails to detail the nature of these, which opens the door for broad exceptions under the justification of "public interest".

The Competition Committee has no judicial power. It has an advisory role. The Committee approves the General Plan for Competition, studies

---

<sup>101</sup> *Ibid*, art 10.

<sup>102</sup> *Ibid*, art 7.

<sup>103</sup> *Ibid*, art 14.

<sup>104</sup> *Ibid*.

<sup>105</sup> *Ibid*, art 12.

<sup>106</sup> *Ibid*.

<sup>107</sup> *Ibid*.

issues relating to regulation of competition, granting of privileges or exceptional rights that might affect competition.<sup>108</sup> Its mandate does not clarify what “privileges and exceptional rights” entail or provide clear standards/requirements for the granting of them. In this study’s view, this allows the Minister incredibly wide latitude in granting exceptions and privileges which, among other things, increases legal uncertainty and puts into question the credibility of the competition regime.

#### v. Judicial Review

The Court of First Instance (CFI) adjudicates cases of anti-competitive practices, as there are no specialized tribunals to adjudicate competition cases. Its authority is limited to the imposition of fines and/or ordering compensation on firms for cartels and the abuse of dominant position.<sup>109</sup>

The Amman Court of First Instance received special training to adjudicate competition cases before the law came into force, owing to a complete lack of competition expertise in Jordanian courts. Two years later Courts of First Instance in all jurisdictions received the same training.<sup>110</sup> The rationale was to focus training for two years for the judges who are responsible for competition cases, since there was no adjudicative body for competition cases.<sup>111</sup> Further, the flexible and complicated issues of these cases require an understanding of the policy goals in order to render the right decisions, and avoid false positives and false negatives.

In general, decisions of the Court of First Instance are subject to appeal to the Court of Appeal. However, decisions by the Minister in cases of concentration and exemptions are appealed to the Supreme Court of Justice, as it is the specialized court to appeal administrative decisions by ministers, and its ruling is final. In this study’s opinion, the flexible nature of the competition cases, requires an opportunity to appeal decisions from the Supreme Court of Justice.

#### vi. Competition Directorate’s Decisions

The Seventh Annual Report of the Competition Directorate reported that, in 2009, the Competition Directorate dealt with 66 files: 20

---

<sup>108</sup> *Ibid*, art 14(C).

<sup>109</sup> *Ibid*, art 16(D).

<sup>110</sup> MITS, Law No 33, *supra* note 80.

<sup>111</sup> Dabbah, *supra* note 13.

complaints, 15 requests for guidance or advice, 16 studies/investigations, 1 concentration request and 4 requests for opinion, in addition to 4 requests for exemptions.<sup>112</sup>

It is worth mentioning that the cases investigated by the Directorate and published in its 2009 report did not appear to reflect any significant cases or studies of practices in vital sectors. One possible explanation may be the limited resources of the Competition Directorate. In addition, the Directorate does not seem to distinguish between cases where there may be abuse of dominant position and where there is no dominant position present in the market. For example, the Directorate, in its investigations of the “Mahmoud Shaban Co.” complaint against “The Mall Commercial Market”,<sup>113</sup> failed to distinguish between dominant position and lack of dominant position, finding a violation of the law and referring the defendant to the prosecutor. In my view, the Directorate should not have referred “The Mall” to the prosecutor, since it had no dominant position and, therefore, there was no potential effect on the function of competition in the market.

## *2. Problems To Be Addressed*

Scholars have frequently been critical of “parachuting” competition laws from large-sized developed economies into MENA countries, laying the blame for the ineffectiveness of their institutional design on the adoption of developed countries’ models that do not fit with their markets’ needs and characteristics.<sup>114</sup> However, this is only one piece of the problem, and there are other crucial aspects that affect the success of any competition authority, including: ambiguous goals and scope, as well as structure and design that allows for the usurping of the competition authorities’ responsibilities. In addition, newly established competition authorities have weak roles, and are lacking in competition experience and human resources.<sup>115</sup> Overall, the institutional design of the competition law in Jordan hinders the effectiveness of its competition authorities, and its ability to protect and maintain competition in the market.

---

<sup>112</sup> Ministry of Industry & Trade, Competition Directorate: Seventh Annual Report (2009), Ministry of Industry & Trade, online: <[www.mit.gov.jo](http://www.mit.gov.jo)> [Competition Directorate Annual Report].

<sup>113</sup> *Ibid* at 22.

<sup>114</sup> Dabbah, *supra* note 13.

<sup>115</sup> *Ibid*.

### **i. Goals and Scope**

There are no clearly defined goals, or they are so broad that they are better described as general goals for the economy. Further, they do not fit with the needs and interests of the market from a competition perspective. There are policy goals that developed economy competition regimes do not address as they focus on pure economics. Jordan, as a developing economy, must take into consideration other social and economic policy goals, such as: protection of consumers, protection of indigenous enterprises, and the empowerment of local companies to compete internationally.

### **ii. Institutional Structure**

The competition authority in Jordan includes the Competition Directorate, and the Advisory committee. The Jordanian Competition Directorate is embedded in the Ministry of Trade in Jordan and part of its structure.<sup>116</sup> This means that the Directorate is under the control of the Minister, subjecting it to the possibility of political interference and thus, creating conflict between the long-term policies that protect competition in the market and short-term policies that might seek to support business lobbying, involving the competition authorities in non-competition considerations.<sup>117</sup> In addition to the three appointed experts, the competition committee includes the heads of the telecommunication and transportation regulatory sectors; the heads of the Chamber of Commerce and the Chamber of Industry; and the Director-General of the Insurance Commission.<sup>118</sup> The diversity of its board of directors raises many questions regarding the standards for selecting members, and determining who are left out and why? Also, it is not clear how compromises (or trading favors) between members can be prevented. These questions are beyond the scope of this study, but may be well worth investigating in further research.

### **iii. Roles of Competition Authority**

Competition law in Jordan granted the competition authority power to advocate and investigate. It is often disempowered by the Minister who frequently usurps its role. In Jordan, when the Directorate of Competition

---

<sup>116</sup> Ministry of Industry & Trade, The Competition Law, *supra* note 87.

<sup>117</sup> Yasmine Afifi, "Independence of the Egyptian Competition Authority: Assessment and Recommendations" (2010) 3 Global Anti-Trust Rev 4, online: <[www.icc.qmul.ac.uk](http://www.icc.qmul.ac.uk)>.

<sup>118</sup> *Ibid.*

finds cases of restraints in the market, only the Minister [of Trade] is authorized to make decisions or even refer these cases to court.

It is worth mentioning that the competition law in Jordan granted wide discretion to the relevant minister to exempt firms from the applicability of the law “in the public interest”, without defining standards for these exemptions. These relaxed provisions open the door for political influence and interference. Further, these wide exceptions are reflected in the culture of the institution, explaining why Jordan created the “Concentration and Exceptions Department” as one of only four departments within the structure of the Competition Directorate.<sup>119</sup>

Disempowering the competition authorities to make decisions, or granting wide exceptions, allows political interests to ride roughshod over competition policy and hinders the ability to instill a “culture of competition.”

#### iv. Lack of Competition Experience

Competition law is a specialized branch of law that requires specific expertise to determine suitable rules and the correct policy for a specific market. The competition laws and the institutional design in Jordan may be characterized as ambiguous, which most likely results from a lack of competition experience. The Jordanian competition law set a threshold of 40 percent of market share to scrutinize impact of mergers in the relevant market, excluding agreements that represent less than 10 percent of the relevant market.<sup>120</sup> This threshold raises questions about concentrations that are more than 10 and less than 40 percent of the market: do they fall within the scope of the law? Moreover, the Directorate fails to distinguish between dominant position and lack of dominant position. This is seen in the case of “Mahmoud Shaban Co.” vs. “The Mall Commercial Market”<sup>121</sup> where, according to the Directorate’s 2009 annual report, it found a violation of the law and referred the defendant to the prosecutor – even though it has no dominant position.<sup>122</sup> In actuality, the Directorate should not have investigated the case, since there was no possibility of impact on the market’s effects. These examples of ambiguity in drafting legislation

---

<sup>119</sup> Dabbah, *supra* note 13.

<sup>120</sup> Ministry of Industry & Trade, The Competition Law, *supra* note 87.

<sup>121</sup> Ministry of Industry & Trade, Competition Directorate Annual Report, *supra* note 112.

<sup>122</sup> *Ibid.*

reflect a lack of competition experience which can confuse the task of competition authorities, burdens competition authorities unnecessarily, and decrease legal certainty.

Owing to the lack of competition experience in Jordan, developed countries were considered models for the development of their competition regimes, despite different in social and economic characteristics. This has led scholars to criticize the “parachuting” of competition laws unsuited for Jordan’s special markets’ characteristics and needs.<sup>123</sup>

#### **v. Lack of [Human and Financial] Resources**

Jordan suffers from a lack of human resources, attributable to inadequate financial resources allocated to competition authority.<sup>124</sup> The lack of financial resources is exacerbated further given that the authority is embedded within a ministry and must share resources with other departments whose impact on society is very clear and essential (i.e. consumer protection, industrial safety, etc.). It is especially disadvantaged as the competition authority’s roles are misunderstood or ambiguous, and the competition laws themselves promote universal goals, such as: economic development, social welfare, attracting foreign investment, and benefit to consumers, etc.

#### **vi. Effectiveness**

Competition authorities cannot take actions or bring charges without the express permission of the Minister responsible in Jordan.<sup>125</sup> The Jordanian competition authority is part of the Ministry of Industry and Trade.<sup>126</sup> Their staff is subject to civil service regulations, and their appointments and promotions are in the hands of the relevant ministers,<sup>127</sup> which influences the discretion of competition authorities and permits interference, likely affecting their decisions.

Moreover, its budget is part of the general ministerial budget allocation,<sup>128</sup> which effectively deprives them of the necessary financial

---

<sup>123</sup> Dabbah, *supra* note 13.

<sup>124</sup> *Ibid.*

<sup>125</sup> Ministry of Industry & Trade, The Competition Law, *supra* note 87.

<sup>126</sup> *Ibid.*

<sup>127</sup> *Ibid.*

<sup>128</sup> *Ibid.*



independence. As the absence of relevant provisions should demonstrate, there is no independent oversight of their decisions or independent audit of their budget.<sup>129</sup>

The competition authorities can have their authority subverted, pursuant to the broad exceptions available by law to the responsible minister. Namely, this occurs by excluding companies from the scope of the law without specifying clearly the standards for these exceptions, as in Jordan.

Owing to the restricted authority of the Jordanian Directorate of the Competition, and the broad discretion and exceptions that the law grants to the Minister of Industry and Trade, there is weakness and uncertainty, which calls into question the credibility of the Jordanian competition regime. While the processes and procedures are clear for notification in cases of concentrations, enhancing transparency, the standards and conditions for granting exceptions are too flexible.

To conclude this section, the institutional design policy for competition laws in Jordan reveals ambiguous, general goals, poorly drafted legislation, and excessive bureaucracy, all of which hinders proper operations and allows for political interference, negatively affecting the credibility of the competition regime. Therefore, it should not be replicated in Palestine.

## V. THE PALESTINIAN COMPETITION CASE

### A. Background

The jurisdiction of the Palestinian Authority, encompasses the West Bank of the Jordan River and the Gaza Strip along the Mediterranean Sea, with a population of 4.4 million<sup>130</sup> and a GDP per capita of US\$2,900.<sup>131</sup> It is in transition from an occupation, a planned economy and a multi-jurisdictional, “quasi-system” legal environment. The competition environment is besieged by a multitude of impediments. The Palestinian legal system is a patchwork consisting of pre-1917 Ottoman Empire (Ottoman Civil Law and the Land Use Law),<sup>132</sup> pre-1948 British Mandate

---

<sup>129</sup> *Ibid.*

<sup>130</sup> Palestinian Central Bureau of Statistics, “Annual Population Statistics: Palestinian Territory” (2013), online: <[www.pcbs.gov.ps](http://www.pcbs.gov.ps)>.

<sup>131</sup> Central Intelligence Agency, “The World Factbook: Economy, West Bank” (2014), online: <<https://www.cia.gov>>.

<sup>132</sup> Mudar Kassis & Asem Khalil, “Legal Reform in Palestine: Decolonization and State

laws (which changed the legal system to the “British Common Law”),<sup>133</sup> pre-1967 Jordanian law (in the West Bank),<sup>134</sup> pre-1967 Egyptian law (in the Gaza Strip),<sup>135</sup> pre-1994 Israeli military orders (Israeli Army Civil Administration), and finally Palestinian Authority laws from 1994-present.<sup>136</sup>

While there is no specific competition law in Palestine, different provisions deal with anti-competitive practices with different enforcement mechanisms. For example, this includes the Consumer Protection Law of 2005<sup>137</sup>, which deals with prices, the Corporation Law of 1964,<sup>138</sup> and the Penal Code that is still applicable in Jordan.<sup>139</sup> The multitude of systems and regulations, and the various authorities consisting of different enforcement agencies and procedures, has created a patchwork of overlapping, frequently contradictory and highly subjective system of laws and regulations. As a result, Palestine requires a solid institutional design that empowers the competition authority to have a unified policy to advocate for coherent competition policies and effective enforcement across the Palestinian market.

The competition in Palestine suffers from political, economic and administrative impediments. The Israeli practices have affected the economic growth and development in the Palestinian territories, according to the World Bank (2012):<sup>140</sup> separating the West Bank and Gaza Strip; imposing a complete siege on Gaza Strip; installing hundreds of checkpoints strategy between the cities and towns in the West Bank; and the restrictive practices at international border crossings (between the West Bank and

---

Building” (Institute of Law, Birzeit University: Palestine, 2009). See also Institute of Law, Birzeit University, “Legal Status in Palestine” online: <lawcenter.birzeit.edu/iol>.

<sup>133</sup> Kassis & Khalil, *supra* note 132.

<sup>134</sup> *Ibid.*

<sup>135</sup> *Ibid.*

<sup>136</sup> *Ibid.*

<sup>137</sup> Consumer Protection Law No 21 of 2005, online: <muqtafi.birzeit.edu>.

<sup>138</sup> Company Law No 12 of 1964, online: <pbf.org.ps>.

<sup>139</sup> Penal Code (16) of 196, Gazette, No1487 at 374, online: <[http://www.mowa.pna.ps/Local\\_laws/LL11.pdf](http://www.mowa.pna.ps/Local_laws/LL11.pdf)>.

<sup>140</sup> World Health Watch, “World Bank Report 2012: Israel/Occupied Palestinian Territories”, online: <<https://www.hrw.org/>>.

Jordan and the Gaza Strip and Egypt) has nearly paralyzed the movement of goods and people.

The Palestinian Authority also practiced economic distortion. It granted the telecommunication a “concession” to Paltel, a private company in 1997, which had monopoly control over telecoms until 2006, when a second cellular operator was allowed to enter the market.<sup>141</sup> Similarly, the Palestinian Electricity Company was awarded a concession to be the exclusive generator for electricity in the Gaza Strip.<sup>142</sup> Neither of these concessions were granted in adherence to the legal procedures stipulated in granting these contracts according to the Palestinian Public Bidding Law.<sup>143</sup> These companies enjoyed a monopoly position in their sectors and, although they were subject to strict regulation on price, the Palestinian Authority did not have the capacity to monitor the quality of service, nor to investigate the myriad of consumer complaints in these vital sectors.<sup>144</sup>

Marie Chêne, in *Literature Review of Corruption and Anti-Corruption in Palestine*, indicated that many sectors suffer from ineffective regulations as a result of public officials granting special treatment and privileges to the private sector.<sup>145</sup> The World Bank (2011)<sup>146</sup> recognized the potential abuse of dominant position by the few powerful business community in vital sectors, stemming from the privileges that Palestinian officials granted to them for many years. This illustrates the need for a competition law and an effective competition authority to regulate and oversee competition in all sectors.<sup>147</sup>

---

<sup>141</sup> Hisham Anabtawi, “Reform in Institutional Framework and Economic Policies” (2007) 14:3 Palestine-Israel Journal, online: <[www.pij.org](http://www.pij.org)> [Anabtawi].

<sup>142</sup> *Ibid.*

<sup>143</sup> *Ibid.*

<sup>144</sup> *Ibid.*

<sup>145</sup> Marie Chêne, *Literature Review of Corruption and Anti-Corruption in Palestine*, U4 Experts Answers, Anti-Corruption Resource Center, online: U4 <[www.u4.no/publications/literature-review-of-corruption-and-anti-corruption-in-palestine/](http://www.u4.no/publications/literature-review-of-corruption-and-anti-corruption-in-palestine/)>.

<sup>146</sup> World Bank, *West Bank and Gaza - Improving governance and reducing corruption* (Washington, DC: World Bank, 2011), online: <[documents.worldbank.org](http://documents.worldbank.org)>, cited in Marie Chêne, “Overview of corruption and anti-corruption in Palestine” (Transparency International, U4 Anti-Corruption Resource Center, 2012), online: <[www.u4.no](http://www.u4.no)> [West Bank and Gaza].

<sup>147</sup> *Ibid.*

The Palestinian Authority also suffers from administrative impediments that influence effectiveness and achievement within its institutions. The appointment of many of the Palestinian Authority's staff was not based on qualifications, but rather based on political considerations, rewarding those active in the Palestinian liberation movements—particularly those who returned with the Palestinian leadership from abroad.<sup>148</sup> There was also a conscious decision to increase the level of employment to absorb those who were no longer allowed to work inside Israel by appointing them within the Palestinian Authorities' institutions.<sup>149</sup> Promotions were frequently based on political nepotism, which left many within the Palestinian Authority seeking opportunities elsewhere or, alternatively, devoid of all desire to be effective.

This dilemma caused the Palestinian Authority to vest critical functions to independent agencies that were not required to adhere to the public sector pay scale, and which were started from scratch with new staff that were highly trained and well compensated.<sup>150</sup> This includes, for example, the Capital Markets Authority, the Monetary Authority (i.e. central bank), and the Anti-Corruption Commission. In the early 2000s, in an effort to instill the rule-of-law, the judiciary was made entirely independent and their pay scale was separated from the public sector, which had an immediate effect on corruption.<sup>151</sup> Consequently, judges were no longer put in a position to have to seek other means of income in order to live comfortably.

## B. Reform Process

After the peace process and the signing of the Oslo Agreement between Israel and the Palestinian Authority in 1993, the Palestinian Authority started an economic and legal reform process, focusing on rebuilding its institutions and unifying its legal system between West Bank and Gaza Strip, all in preparation for eventual statehood.<sup>152</sup> The Palestinian Authority started to adopt economic legislative policies to encourage trade and

---

<sup>148</sup> Anabtawi, *supra* note 141.

<sup>149</sup> *Ibid.*

<sup>150</sup> The author is a member of the public officials since 1997 and witnessed all these changes.

<sup>151</sup> Anabtawi, *supra* note 141.

<sup>152</sup> *Ibid.*

eliminate barriers to entry on products and services in the Palestinian market.<sup>153</sup> It also sought to create a modern system of regulation to encourage foreign investment, promote domestic economic activity, and bring the economy into alignment with the international trading system.<sup>154</sup>

In 2007, the Office of the Prime Minister established the *National Legislative Plan for the Government*.<sup>155</sup> Its first priority was a focus on the unification of legal system between the West Bank and Gaza Strip, ending conflicting and ambiguous regulation, and enacting laws that fits with the Palestinian needs and interests including competition law.<sup>156</sup> Having a solid institutional design policy for a competition law that fits with Palestinian market needs and characteristics will bring the certainty and transparency necessary for the business community to continue to operate, and put the Palestinian Authority in a good position for an effective global economic integration once it achieves independence.

All of the obstacles and impediments notwithstanding, the Palestinian Authority has taken the position of engaging in a proper and systematic preparation of all institutions necessary for the proper operation and oversight of a transparent free market economy including the adoption of competition law.

## VI. FIRST THOUGHTS ON HOW TO RESOLVE THE PROBLEM.

Designing the institutional policy for competition law in Palestine requires careful consideration to enable Palestine to avoid the learning curves and the problems revealed in the institution design policy in Jordan, and to tailor what might be the best institutional design policy for competition law in Palestine. This section provides first thoughts for the general institutional design policy for competition law in Palestine and offers recommendations regarding goals, scope, the design model and the key principles of effectiveness.

---

<sup>153</sup> See for example, Palestinian Investment Promotion Agency, Law on the Encouragement of Investment in Palestine, Law No 1 for 1998 and its Amendments, online: <[www.pipa.ps](http://www.pipa.ps)> [Encouragement of Investment Law].

<sup>154</sup> *Ibid.* See also NLPG, *supra* note 2.

<sup>155</sup> NLPG, *supra* note 2.

<sup>156</sup> *Ibid.* See also Palestinian Investment Promotion Agency, Encouragement of Investment Law, *supra* note 153.

## A. Goals

Palestine must adopt clear goals that align with its small-sized developing market. It cannot design its competition policy in isolation of other policies, nor without consideration of economic and social goals.

This study of the Jordanian competition law reveals that MENA countries are not taking into consideration the special characteristics of their economies, or the social and economic development goals that are critical in developing markets. This would include the protection of indigenous enterprises, encouragement of local firms, and protecting consumers from exploitation. In this study's view, Gal's findings that economic goals must be the only goals of competition laws in all small size-markets, is not applicable for Palestine as a developing (emerging) small-sized market. As Owen argues, Australia and New Zealand are wealthy small-sized economies, and thus require integration between economic and social goals.<sup>157</sup> In contrast, Palestine is a small-sized market, and one of the least developed countries in the MENA. Ninety-nine percent of the Palestinian economy is made up of Micro, Small and Medium Enterprises.<sup>158</sup> Therefore, the competition law in Palestine must adopt policies to protect competition in the market as means to prevent consumer exploitation. It must adopt policies to empower firms to grow in the market, approving mergers if the benefits to consumers (better prices or/and better quality) outweigh negative effects of the anti-competitive practices of the proposed mergers. The competition law in Palestine must adopt a policy that strikes the balance between social and economic goals, which is vested in the Total Welfare (TW) Standard, where both consumers and producers are considered.<sup>159</sup>

---

<sup>157</sup> Owen, *supra* note 20.

<sup>158</sup> Wajih Amer, ICTS and the Economic Performance of MSMEs in Palestine, University of Pavia, Department of Economics CIEI at 6, online: <[https://staff-old.najah.edu/sites/default/files/ICTs\\_and\\_the\\_Economic\\_Performance\\_of\\_MSMEs\\_in\\_Palestine\\_.pdf](https://staff-old.najah.edu/sites/default/files/ICTs_and_the_Economic_Performance_of_MSMEs_in_Palestine_.pdf)>

<sup>159</sup> See An Renckens, "Welfare Standards, Substantive Tests, and Efficiency Consideration in Merger Policy: Defining the Efficiency Defense" (2007) 3:2 J Comp L & Econ at 149. See also ICN, "Merger Guidelines Project" (2004) at 23, online: ICN <[www.internationalcompetitionnetwork.org](http://www.internationalcompetitionnetwork.org)>.

## B. Scope

Palestine should clearly define the scope of its competition law. The competition law address all anti-competitive practices in the market. *Cartel* and *Abuse of Dominant Position* should be dealt with as per se illegal without the requirement to prove intent,<sup>160</sup> while *Merger Policy* must be dealt with on *the rule of reason* and studied on *a case by case* basis. Irrespective of an extension of scope to cover those practices occurring outside Palestine, but taking effect on the Palestinian market, the mechanism to monitor these practices make these efforts almost academic, given the limited resources of the Palestinian Competition Commission. However, Palestine and the entire MENA region would benefit from a regional agreement to exchange their experiences and information, and to cooperate regionally to combat the negative effects of anti-competitive practices. Accordingly, Palestine should adopt a notification policy and lower its threshold for anti-competitive practices. As Gal argues, the effects of anti-competitive practices are more pronounced in small-sized economies than in large economies.<sup>161</sup>

## C. Empower the Competition Authority and Narrow the Exceptions

Competition law in Palestine must empower the competition authority to make decisions (unlike Jordan) and avoid limiting its role to merely making recommendations in competition cases to the Minister. The competition law must empower the competition agency to initiate investigations and make decisions in order to have coherent and consistence competition policies.

In contrast to Jordan, the institutional design policy for the competition law in Palestine should not allow exceptions by responsible ministers. Allowing for exceptions gives the government considerable discretionary powers, and opens the door for political intervention and lobbying. However, the competition law might allow narrow exceptions in limited cases to empower the indigenous Palestinian firms by authorizing proposed mergers, enabling them to achieve efficiency and to compete internationally, as Dabbah suggests.<sup>162</sup>

---

<sup>160</sup> See Law No 3 of 2005 on the Protection of Competition and Prevention of Monopolistic Practices, Egypt, 15 February 2005.

<sup>161</sup> Gal, *supra* note 16.

<sup>162</sup> Maher M Dabbah, *International and Comparative Competition Law*, (New York:

## D. Key Principles for Effectiveness

In order to have an effective institutional design in Palestine, there are requirements and polices that must be adopted to establish a solid and effective competition authority capable of enforcing the competition law and achieving the goal of protecting competition in the Palestinian market.

### 1. Independence

The competition authority in Palestine must have real independence, meaning that it should be given the discretion and the capability to practice its roles and conduct its responsibilities without political intervention. Independence can be achieved by empowering the competition authority administratively and giving it the necessary financial independence.

The Palestinian competition institution must avoid being under the organizational structure of the Palestinian Authorities' ministries, unlike Jordan, which are governed by the Civil Service Law and suffer from bureaucracy and immature democracy. Political interference should be discouraged as appointments and promotions should not be at the pleasure of the minister responsible. An independent competition agency in Palestine could be achieved by having a stand-alone agency, council or commission with independent board members appointed for a fixed term and cannot be dismissed without cause, as recommended by UNCTAD for countries in transition.<sup>163</sup>

Palestine should adopt an institutional design that enables financial independence. The competition authority must have an independent budget allocated by the general budget, approved by the cabinet, and ratified by Parliament. Unlike Jordan, its budget should not function as a part of the budget of another ministry. The competition law may also empower the competition authority to generate additional resources by allowing it to collect fees for merger review.

### 2. Accountability

Accountability is the safety valve for independence and effectiveness in all markets. If the competition authority operates within the relevant ministry, accountability will adhere to the same procedures as do other

---

Cambridge University Press, 2010).

<sup>163</sup> UNCTAD Model Law, *supra* note 7. See also UNCTAD Secretariat, 11th sess, Effectiveness of capacity-building and technical assistance extended to young competition agencies, UN Doc TD/B/C.1/CLP/11/Rev.1 (29 June 2011).



government departments, which might be that of a lower standard. Whereas, if the competition authority operates as an agency independent from any ministry, a higher degree of accountability is expected, with compulsory external auditing and oversight by Cabinet and Parliament.

The Palestinian competition law must define the mechanism for accountability. Annual public reporting and public disclosure for issues that are important to the market (i.e. major mergers, timely release of information and decisions) must be required. The competition law in Palestine, unlike Jordan, must allow for effective public scrutiny and clearly ensure that its decisions would enhance competition for the benefit of the consumer as an end in itself. It also must require annual reports to parliament detailing its activities and its decisions.

### ***3. Transparency***

The Palestinian competition law must adopt policies that enhance transparency. The decision-making process in Palestine should be defined clearly by competition regulations, the timelines for notifications, and the required information. Also, a timely decision making process should be clear to all parties. Moreover, the decisions of the competition authority, as well as its justifications, must be published to the extent that it does not reveal commercially sensitive information. The published decisions must clearly explain the reasons for their decisions and clearly illustrate that it would benefit consumers by having lower prices and/or better quality. The competition law in Palestine, unlike Jordan, must not open the door for exceptions. In this study's view, exceptions could open the door for ambiguous, unclear standards and procedures, which contradicts the principles of transparency, which are crucial for the credibility of the competition authorities' decisions.

Independence, accountability and transparency, are the vital intangible requirements for having an effective competition authority in Palestine, and would enhance its credibility and increase its ability to enforce the competition law, shielding it from political pressure or business lobbying. This can be achieved by adopting the Integrated Agency Model, as is further discussed below.

## **E. Designing the Model**

There are different roles for competition authorities. Most entail the responsibility for oversight of anti-competitive practices to protect

competition. They are also responsible for collecting and analyzing business information, conducting studies, providing opinions on competition issues, advocating, and spreading the “competition culture” in the market. In addition, competition authorities must have investigative and adjudicative roles that are defined by the model that will ultimately be chosen by the competition law. This study, recommends the Integrated Agency Model as the best model for an effective institutional design in Palestine. Recall that, in the Integrated Agency Model, one agency investigates and adjudicates competition cases, as is the case in EU and Egypt. The Integrated Agency Model works with the unitary executive or board member model, where in this model one agency enforces the competition law.<sup>164</sup>

Palestine suffers from the lack of competition experience, as well as lengthy and exhausting court procedures, which often take many years. It further suffers from excessive bureaucracy and immature democracy within its ministries. Moreover, the low salary scale of the public sector hinders any incentive for growth within the competition institution, and thus diminishes the accumulation of competition experience. The low salary scale also gives a strong incentive for employees to engage in inappropriate activities to gain additional income. These factors speak in favor of a competition agency separate from any ministry, as UNCTAD suggests.<sup>165</sup>

In this study’s view, adopting the Integrated Agency Model with an independent board of directors in Palestine would enable the new competition authority to build the requisite expertise and knowledge within the competition agency, as well as to overcome the bureaucracy in the ministries, and to avoid the lengthy court’s procedures in adjudicating competition decisions. Moreover, this model would enable the new competition authority in Palestine to have the discretion and flexibility to enforce the competition law effectively. This could be achieved by establishing a council, agency or commission—one that is financially and administratively independent, with an independent board of directors that reports directly to Cabinet, as required by the Palestinian Basic Law.<sup>166</sup> The board of the competition agency must be diverse to enable competition authority, not only to protect the market, but also to advance economic and

---

<sup>164</sup> See UNCTAD, Model Law, *supra* note 7.

<sup>165</sup> *Ibid.*

<sup>166</sup> 2003 Amended Basic Law, Ramallah, 18 March 2003.

social goals, taking into consideration the special characteristics of small-sized economies.

## VII. CONCLUSION

Competition law in Palestine must carefully tailor its institutional design, learning from the experiences of the selected MENA country of Jordan to avoid the errors revealed in its competition policies. Unlike scholars who lay the blame for the ineffectiveness of the competition laws in the selected MENA country on the of “parachuting” of competition laws from developed large-sized economies that do not fit with their needs and interests, this study takes the view that Palestine must avoid the learning curve that the institutional design in Jordan suffers from. In particular, it must avoid ambiguous goals and scopes, an unsuitable structure, and ineffective roles that allow ministers to usurp the role of the competition authority. It must achieve independence, accountability and transparency, all of which are crucial for the success and credibility for the competition authority.

This study recommends that Palestine develops clear goals for its competition authority to ultimately protect consumers from exploitation. The Integrated Agency Model, with the creation of a separate independent agency that is capable of advocating, investigating and adjudicating competition cases might be the most suitable model applicable to the Palestinian market.

Of course, these elements are one piece of the puzzle. Other pieces include those *intangibles* that are taken for granted in developed economies: a culture of accountability and transparency, and respect for institutions, an abhorrence for political interference and mature democracies that punish violations of the public trust harshly. The political situation in Palestine makes competition scrutiny, not only outside, but also within the Palestinian market, very challenging. However, it is essential to design a solid institutional policy that avoids the learning curve experienced in Jordan, to ensure that competition in the market is protected for the benefit of consumers as an end goal, while taking into consideration the economic and social development goals of an emerging economy and anticipated statehood.

