Competition Law and Regional Economic Integration

An Analysis of the Southern Mediterranean Countries

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This is the third regional study prepared by the joint World Bank-European Commission Programme on Private Participation in Mediterranean Infrastructure (PPMI). The study deals with the interface between competition law and economic integration in the context of the Euro-Mediterranean partnership. The study seeks to map out key policy issues that should be addressed for successfully implementing or strengthening competition law regimes in the Partner Countries.

The key finding of this study is that adoption and strengthening of a competition law regime is a key component of the regulatory reforms, which are required to allow a market economy in the region. The study stresses that the implementation of successful competition law regimes involves complex challenges, which cannot be addressed without a substantial involvement of the European Union (EU) and the Mediterranean Partners (MPs). The study argues that the competition rules inserted in the Association Agreements signed between the EU and the MPs do not currently provide adequate protection against anticompetitive practices affecting trade between these blocks. Moreover, the competition law regimes adopted by the MPs are generally poorly enforced with the consequences that many domestic anticompetitive practices remain unchallenged. Efforts will have to be made both at the bilateral and domestic level to provide for competition regimes that will effectively prevent anticompetitive conduct from occurring.

This study also addresses the issue of regulatory convergence between the EU and the MPs in the competition law field, that is, whether the MPs should align their competition rules with European competition rules. It argues that while such convergence would bring a series of benefits to both the EU and the MPs, it would also involve costs. The study argues in favor of a prudent approach whereby the transposition of European competition rules in the MPs would not be automatic, but would be based on the local circumstances of each MP. It is also argued that one of the primary tasks of the competition authorities in the MPs should be to develop a realistic enforcement agenda, to ensure that the limited resources of these authorities are used in the most effective way. In its final part, the study proposes a preliminary list of steps that could be taken by the European Commission and the MPs to strengthen competition policy in the Mediterranean region, including proposals for technical assistance in the field of competition.

While the proposals made in the study do not necessarily represent the official views of the European Commission or of the World Bank, the study can contribute to a broader and more structured debate in the region and among the Mediterranean Partners. Reform efforts by policymakers will, however, be needed to move from strategy to action. The overhaul of the policy framework in the competition law field will also require technical assistance from the donor community.

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This study argues that adoption/strengthening of a competition law regime is a key component of the regulatory reforms, which are required to allow a market economy in the Mediterranean region. It also argues that the competition rules inserted in the Association Agreements signed between the European Union (EU) and the Mediterranean Partners (MPs) currently fail to provide adequate protection against anticompetitive practices affecting trade between these blocks. Moreover, the competition law regimes adopted by the MPs are generally poorly enforced with the consequence that many domestic anticompetitive practices remain unchallenged. In addition, this study addresses the issue of regulatory convergence between the EU and the MPs in the field of competition law, that is, whether the MPs should align their competition rules on European Community (EC) competition rules. It argues that while such convergence would bring a series of benefits to both the EU and the MPs, it would also involve costs. The study thus argues in favor of a prudent approach whereby the transposition of EC competition rules in the MPs would not be automatic, but would be based on the local circumstances of each MP. One of the primary tasks of the MPs’ competition authorities should be to develop a realistic enforcement agenda, which would ensure that the limited resources of these authorities are used in the most effective manner possible. In its final part, this study proposes a series of steps that could be taken by the European Union and the MPs to strengthen competition policy in the Mediterranean region, including proposals for technical assistance in the field of competition law.
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## Abbreviations and Acronyms

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
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<tbody>
<tr>
<td>CEECs</td>
<td>Central and Eastern European Countries</td>
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<tr>
<td>CFI</td>
<td>Court of First Instance</td>
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<tr>
<td>COMESA</td>
<td>Common Market for Eastern and Southern Africa</td>
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<tr>
<td>CPC</td>
<td>Commission for the Protection of Competition</td>
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<tr>
<td>CTC</td>
<td>Competition and Tariff Commission</td>
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<tr>
<td>EC</td>
<td>European Community</td>
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<tr>
<td>ECJ</td>
<td>European Court of Justice</td>
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<tr>
<td>EEA</td>
<td>European Economic Area</td>
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<tr>
<td>EFTA</td>
<td>European Free Trade Area</td>
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<td>EMP</td>
<td>Euro-Mediterranean Partnership</td>
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<tr>
<td>ENCIP</td>
<td>European Network for Communication and Information Perspectives</td>
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<tr>
<td>EU</td>
<td>European Union</td>
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<tr>
<td>FDI</td>
<td>Foreign Direct Investment</td>
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<tr>
<td>FEMISE</td>
<td>Forum Euro-Méditerranéen des Instituts Economiques</td>
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<tr>
<td>FTA</td>
<td>Free Trade Area</td>
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<tr>
<td>FTC</td>
<td>Fair Trading Commission</td>
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<td>GATT</td>
<td>General Agreement on Trade and Tariffs</td>
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<td>GDP</td>
<td>Gross Domestic Product</td>
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<tr>
<td>IAA</td>
<td>Israeli Antitrust Authority</td>
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<tr>
<td>ICN</td>
<td>International Competition Network</td>
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<tr>
<td>MCR</td>
<td>Merger Control Regulation</td>
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<tr>
<td>MENA</td>
<td>Middle East and North Africa</td>
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<td>MPs</td>
<td>Mediterranean Partners</td>
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<tr>
<td>NAFTA</td>
<td>North American Free Trade Area</td>
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<tr>
<td>NC</td>
<td>Neighboring Countries</td>
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<tr>
<td>NMS</td>
<td>New Member State</td>
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<tr>
<td>OECD</td>
<td>Organisation for Economic Cooperation and Development</td>
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<tr>
<td>OJ</td>
<td>Official Journal of the European Communities</td>
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<tr>
<td>PPMI</td>
<td>Programme on Private Participation in Mediterranean Infrastructure</td>
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<tr>
<td>UNCTAD</td>
<td>United Nations Conference on Trade and Development</td>
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<td>WTO</td>
<td>World Trade Organization</td>
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Competition law regimes have long been present in industrialized countries, but a large number of emerging economies are now also adopting domestic competition rules. It was estimated that, in 2002, more than 90 countries enacted competition law regimes. The adoption of competition law regimes in developing and emerging economies can be explained by a variety of reasons, such as their participation in regional trade agreements which they request their members to adopt competition law regimes or the adoption of such regimes as part of comprehensive regulatory reforms, such as privatization or market-opening reforms.

Against this background, this study examines the state of adoption and implementation of competition rules in the twelve Mediterranean countries engaged in partnership agreements with the European Commission in the framework of the Barcelona Process. The legal mechanisms organizing this partnership take the form of international cooperation or Association Agreements. These agreements contain provisions regarding the free movement of goods, services and the freedom of establishment, public procurement, payments, economic and financial cooperation, etc. They also replicate the competition rules contained in the Treaty of Rome. Independently of these agreements, some Mediterranean Partners (MPs) have adopted domestic competition law regimes. In some MPs, the adoption of regimes patterned on the competition law of the European Community (EC) was a pre-condition for joining the European Union. In other cases, the development of competition rules was the result of a spontaneous process, although it was generally supported by industrialized countries and their competition authorities, as well as by institutional donors.

This paper seeks to achieve three main objectives. First, it seeks to clarify the content, as well as the overall effectiveness of the competition provisions found in the Association Agreements signed between the EC and the MPs, as well as in the domestic legislation of the MPs. Second, this paper reviews the plans of the European Commission to encourage MPs to engage in a process of regulatory convergence whereby they would progressively approximate their competition rules with EC competition rules. Third, this paper contains a number of policy proposals offering an agenda for further action by the European Commission and other relevant international organizations in the field of competition law in the Mediterranean region.

EXECUTIVE SUMMARY
Chapter 2: Objectives and Instruments of Competition Law

This chapter argues that competition law is the best way to allocate resources and the most efficient means of providing for technological and commercial innovation, as well as consumer satisfaction. Though competition is beneficial for society as a whole, firms have incentives to acquire market power, in effect, to be in a position to influence prices and other factors determining business transactions. When firms exercise their market power this leads to inefficient results. The purpose of competition law is thus to control market power in order to promote economic efficiency.

Competition rules are applicable to most economic activities, unless specific exemptions are granted. They fall broadly into three categories. First, some competition rules prevent the conclusion of anticompetitive agreements between operators. Second, other rules deal with firms which enjoy substantial market power. Their objective is to prevent those firms from abusing their dominant or monopoly position vis-à-vis end users or other operators. Finally, another set of rules prohibit mergers which would “substantially lessen competition.” Given their wide scope of application, competition rules tend to be general: they tend to prohibit or impose broad categories of behaviors defined in relatively general terms.

As far as institutions are concerned, a plurality of entities can potentially play a role in the implementation of competition rules, including the courts and ministerial departments. However, given the complexity of the issues to be addressed, an increasing number of countries have opted to rely on specialized institutions to play a major role in implementing some or all of those rules. The specific characteristics of each type of institution vary from country to country. However, because competition authorities must monitor the behavior of a large number of firms, they tend to have one characteristic in common. They tend to act on a case by case basis, when needed, rather than closely regulate enterprises on a permanent basis.

Chapter 3: Competition, Trade and Emerging Economies

This chapter reviews the relationship between competition law and trade, as well as the relationship between competition law and economic development.

The point of connection between competition and trade policies is that it is widely believed that free trade among nations requires not only the removal of public barriers to trade, but also a series of obstacles originating in private restraints, such as the abuse of dominance, import cartels, and vertical restraints. Competition law is thus a necessary complement to trade policy. The importance of competition law as a tool to promote market integration has long been understood in the EC, where competition rules have been applied to prevent vertical restrictions, which would contribute to dividing markets along national lines. More recently, the EC has inserted competition rules in a series of regional or bilateral trade agreements, such as the European Economic Area (EEA) and the Association Agreements concluded by the EC with a variety of third countries. Similar approaches can also be found in agreements concluded in other parts of the world, such as Mercosur. The relationship between trade and competition policies is also a major issue at the World Trade Organization (WTO) level, as illustrated by the Doha Ministerial Declaration, which provided that negotiations over competition would take place in the next round of multilateral trade negotiations.

These last two decades have seen a large number of developing economies adopting competition law regimes. The development of such regimes in developing economies, however, remains a controversial matter. On the one hand, many authors argue that adoption of competition law regimes will be beneficial for emerging economies. The main arguments in favor of adoption of such regimes are that: (i) the existence of a competition law regime is a factor contributing to economic development; (ii) the adoption of a competition law and the setting up of an enforcement authority will be beneficial to investments; (iii) developing countries are particularly vulnerable to international cartels involving firms based in the developed world and need to protect themselves against such cartels; (iv) at the domestic level, the high degree of concentration and the barriers to entry that often characterize developing economies increases the risk of collusion, as well as abuses of a dominant position; and (v) one of the benefits of creating effective competi-
tion law institutions in developing economies is that such institutions could engage in “competition advocacy.”

On the other hand, arguments are sometimes raised that developing economies do not need a competition law framework. These arguments are that: (i) free trade would by itself be sufficient to protect the competitive process; (ii) because of the complexity of competition law analysis, combined with the weak institutional endowment of most emerging economies, the adoption of a competition law regime might produce more harm than good; and (iii) competition law would be a luxury for developing economies, which have other, more pressing priorities. A number of commentators do not oppose the adoption and implementation of competition laws in developing economies, including in the majority of the Mediterranean Partners, but argue that such laws and the way they are enforced, should take into account the specific characteristics of these countries.

After reviewing the arguments for and against the adoption of competition law regimes in developing and emerging economies, this chapter concludes that there are powerful arguments in favor of adopting and implementing competition law regimes for these economies. Attention should, however, be paid to the specific characteristics of such countries, such as the high degree of concentration in some industries and their limited institutional endowment, and so forth. Because developed and developing countries have different market structures and levels of institutional endowment, the process of establishing such regimes should be carried out with care and following a gradual approach. In contrast, the arguments advanced against adoption and implementation of competition rules fail to convince. As they are sometimes shared by government officials and industry interests in developing countries, there is a risk that the setting up of competition regimes might not be an easy process.

Chapter 4: Competition Law and Infrastructure Industries

One sector in which the absence of an effective competition law regime could create considerable difficulties are “infrastructure industries”—industries that operate on the basis of a physical infrastructure, such as a network. These industries, which include telecommunications networks and services, energy and gas, rail and air transport, and water, are major factors of economic development as they provide key inputs to the other sectors of the economy. This chapter seeks to illustrate that this cannot be achieved without the introduction of competition law regimes.

Infrastructure industries worldwide have been traditionally dominated by public or private monopolies. In recent years, however, many nations, including some MPs, have engaged in major regulatory reforms seeking to promote competition in network industries markets. There are a number of reasons why several MPs decided to liberalize network industries. First, in most MPs, the performance of monopoly undertakings is generally not satisfactory. Second, the globalization of the economy forces companies to be competitive. Third, liberalization of infrastructure industries may also be triggered by external pressures. A number of MPs, including Cyprus, Egypt, Israel, Jordan, Malta, Tunisia, and Turkey, are members of the WTO and, during the last round of multilateral negotiations, committed themselves to progressively opening some of their infrastructure industries markets to competition. As far as the MPs that are candidate to join the EU are concerned, efforts to open infrastructure sectors to competition were made necessary by the transposition of EC liberalization directives. Finally, several MPs have come to realize that regulatory reforms in infrastructure industries could provide many benefits.

While there is a solid case for liberalization, market opening reforms have often met considerable resistance in the MPs. First, incumbents have generally opposed the removal of their monopoly rights. Second, MP governments engaged in privatization of some of their incumbents might be tempted to delay the liberalization process in order to obtain a higher sum of money from foreign investors. Third, frequent changes of leadership in some governments and lack of vision for the future of infrastructure industries may prove considerable obstacles for ambitious market opening reforms in these industries.
In spite of these obstacles, a number of MPs have engaged in the liberalization of infrastructure industries. This is, however, a complex process in which a great deal of public intervention is required. It is generally admitted that creating competition in these industries relies on three main pillars. First, governments need to remove the exclusive rights granted to incumbent operators. Second, in all industries partially or totally opened to competition, governments need to adopt a sector-specific regulatory framework, as well as to create specialized regulatory institutions. Finally, market opening reforms in infrastructure industries require that competition rules be applied to such sectors. Even in industries where sector-specific rules have been adopted, competition rules remain essential for a number of reasons. In particular, competition rules are needed—and indeed best suited—to deal with a range of economic regulation issues that are not addressed by the sector-specific rules described above. Moreover, competition rules may have a residual role and fill gaps that might exist in sector-specific regulatory regimes. Finally, when there is competition in the market, competition rules will often be needed to prevent collusion between market players.

For these reasons the failure to establish effective competition law regimes may be an obstacle to regulatory reforms in infrastructure industries in the MPs. In the absence of such regimes, there is a serious risk that liberalization efforts may not lead to competitive network industries markets, but instead to markets that remain dominated by incumbent operators or that are fraught with anticompetitive practices. This could in turn deprive consumers and undertakings from the benefits, in terms of lower prices, better quality of service, and greater innovation that could be brought by liberalization. More generally, the whole economy will suffer as infrastructure industries provide essential services for a large number of undertakings.

Chapter 5: Rules of Competition in the Association and Cooperation Agreements

This chapter explores: (i) the rationales for inserting competition provisions in the Association Agreements concluded with the MPs; (ii) the content of these provisions; (iii) the effectiveness of these provisions; and (iv) proposals for improving the effectiveness of these provisions.

The first bilateral agreements between the EC and the MPs essentially focused on the removal of some tariff and nontariff barriers and did not provide for any competition rules. The insertion of such rules within the Association Agreements took a long time. It was initiated, on the one hand, with the launching of the accession process with the “eligible” candidates of the Euro-Mediterranean area (Cyprus, Malta and Turkey) and, on the other hand, with the opening of negotiations on a new generation of agreements (the “Euromed Agreements”) with the other countries engaged in the Barcelona Process. This new generation of agreements now provides for competition rules. Three main reasons explain this evolution. A first reason is related to the discussions engaged in the WTO framework, as well as in other multilateral forums, on the global adoption of competition rules. Not surprisingly, this issue has also penetrated the negotiation of regional trade agreements and competition rules are now an essential component of such agreements, including those involving developing countries. A second reason lies in the accession process and the Association Agreements previously concluded with the Central and Eastern European Countries (CEECs). These agreements (the “Europe Agreements”) already provided for competition rules similar to those of the EC Treaty. The replication of such rules in the Euromed Agreements shows a form of spill over effect of the Europe Agreements. Finally, this evolution takes place within a process of increasing economic integration between the EC and the MPs. In order to prevent that trade between the EC and its Euromed partners be restricted by such practices, competition rules are enacted so as to complement the classic trade provisions.

The competition provisions of the Euromed Agreements can be found in the Title related to “payments, capital, competition and other provisions”. These provisions, which are based on the equivalent provisions in the EC Treaty, declare incompatible all: (i) restrictive agreements between undertakings, (ii) abuses of a dominant position by one or more undertakings, and (iii) State aids that distort, restrict or prevent competition. However, the Association Agreements do not provide
for an exemption system comparable to the one put in place by Article 81(3) of the EC Treaty. Moreover, the Association Agreements do not provide for rules dealing with mergers. It is thus likely that the European Commission will apply its merger control rules to operations carried out by undertakings from associated countries, which have an impact on the EC market. The scope of application of the EC Merger Control Regulation is indeed very large. It is sufficient that the thresholds provided for in that regulation be met, in order to authorize the European Commission to examine a transaction, even if it takes place outside the scope of the EC.

The effectiveness of the competition provisions inserted in the Association Agreements is limited by two factors. First, the insertion of competition rules within an Association Agreement implies the enactment of implementation measures by the Council of Association. Unlike the Europe Agreements where these implementation measures were quickly adopted, no such measures have so far been adopted in the context of the Association Agreements with the MPs. However, the European Commission has recently issued a proposal for a Council Decision on a Community position in the Association Council on the implementation of the competition provisions of the EC-Morocco agreement pursuant to which the implementation of the agreement is entrusted to national institutions on the basis of national rules. This study argues that such decentralized enforcement could lead to an asymmetric application of these rules and thus to an unequal level of protection among the Parties. Indeed, the level of protection offered by the national competition legislation varies considerably from one country to another and will generally be lower than what is offered by EC competition law. There might therefore be divergence among MPs in the effectiveness of the implementation of their competition law.

Another limit to the effectiveness of the competition rules contained in the Association Agreements relates to the fact these agreements contain a provision that allows the Parties to exclude the application of the competition rules contained in the agreement to the benefit of a unilateral application of their national legislation. The study argues that this provision, which is often presented as a “safeguard clause,” can be criticized as it opens the door to a selective and unilateral application of the agreement by a Party that would consider that the implementation measures are not adequate. It is, however, subject to question whether the Parties, which are engaged in a cooperation agreement, will take the risk of relying on this provision to act unilaterally. This is particularly true for the MPs whose trade relationships with the EC are key to the success of their economy.

Chapter 5 concludes that the main steps to be taken to give greater effectiveness to the competition rules that are found in the Association Agreements consist in encouraging a rapid adoption of implementation measures of these rules, combined with a major effort to strengthen the competition law regimes and institutions of the MPs. There are, however, limits to what a decentralized system can offer, especially when it comes to preventing anticompetitive practices affecting regional trade. In the long-run, a more centralized enforcement approach such as the system found in the European Economic Area (EEA), which involves the presence of a supranational enforcement authority operating on the basis of a common set of rules and procedures, may be the way to go for the Mediterranean region. Such an approach would require the EU and the non-candidate countries to move from a bilateral to a regional model operating with common rules for the entire Euromed market and with common institutions for the MPs.

**Chapter 6: Competition Rules and the Accession Process**

Among the partner countries, three States (Cyprus, Malta, and Turkey) are engaged in the accession process to the European Union. Two of them will become Members of the European Union on 1 May 2004. This chapter analyses the obligations imposed on these candidate countries in the context of their Association Agreement and the accession process. These obligations are much stronger than the obligations imposed on non-candidate countries and guarantee a relatively high level of effectiveness of the domestic competition regimes of the candidate countries.

Cyprus, Malta and Turkey are linked with the EC by Association Agreements of the first generation, signed during the 1960s and the 1970s, and whose objective was to create a Customs
Union between these countries and the EC. Originally, these agreements did not contain competition rules. Such rules were only subsequently included through a series of additional obligations. The difference between these countries and the other MPs became larger when the former were formally recognized as candidates for accession to the EU and, in that capacity, benefited from the accession process. Their entry to the EU involves compliance with the second “Copenhagen” criteria that requires, among other things, that candidate countries put in place a viable, open and competitive market economy. New obligations were thus imposed on these countries and, in particular, the integral absorption of the *acquis communautaire* in the area of competition law.

This chapter argues that it is important to analyze the actions undertaken by the EC vis-à-vis the Central and Eastern European Countries (CEECs) in the competition field. This is relevant because the candidate MPs are going through a process that is similar to that of CEECs. The analysis of the obligations imposed on the CEECs must combine a review of the provisions contained in the Europe Agreements with the two main types of obligations that the accession process imposes on candidate countries: the alignment of their law on EC law and the implementation of an effective enforcement system. At the substantive level, the bilateral agreements concluded with the CEECs entirely reproduce the competition provisions of the EC Treaty. These agreements prohibit restrictive agreements, abuses of a dominant position and State aids. Another central provision of the Europe Agreements requires that the associated countries adopt competition law regimes that converge around EC competition law. This obligation of convergence, through a transposition of EC competition rules, also applies to the candidate MPs.

At the institutional level, the accession process requires that the CEECs implement an effective system of control of anticompetitive practices. A certain degree of flexibility is conceded to the candidate countries since they are left entirely free to design the structures to be put into place according to their preferences. On the other hand, there is a requirement that enforcement authorities be independent and enjoy a sufficient level of resources and expertise so as to offer credible mechanisms of control on which individuals can rely to have their rights protected.

In parallel with these obligations, the European Commission provides technical assistance to the candidate countries with a view to stimulating the creation of a “competition culture.” The evaluation reports prepared by the European Commission suggest that the various substantive and institutional obligations imposed on the CEECs induced these countries to adopt effective competition law regimes, although some problems remain. This chapter thus concludes that the obligations contained in the Europe Agreements, combined with the requirement of alignment and transposition of the *acquis* has led candidate countries to progressively adopt modern competition laws. Although progress remains to be made in some of these countries, one should not lose sight of the fact that accession is a progressive mechanism and that the negotiations on Chapter VI (the chapter dealing with competition law) have only been recently initiated with some of the CEECs. It therefore seems fair to say that the mechanism of convergence provided for in the Europe Agreements, combined with the accession process, is very effective as it translates significant substantive and institutional amendments within a very short period of time.

### Chapter 7: Domestic Competition Regimes in the Mediterranean Partners

This chapter analyzes the domestic competition rules of the MPs and makes a distinction between two groups of countries.

The first group consists of the three countries engaged in the accession process (Cyprus, Malta, and Turkey), which are accordingly submitted to strong domestic obligations. Their candidate status requires that they transpose in their domestic legal order the entirety of EC competition law. The chapter argues that the these candidate countries have successfully implemented the EC competition law *acquis*, although some problems remain, in particular at the enforcement level.

The second group of countries is composed of the rest of the MPs that are linked to the EC by an Association Agreement that does not specifically impose domestic obligations. These countries are neither obliged to have an EC-compatible domestic competition law, nor to have a competi-
tion law. As a result, these MPs have followed different options at the domestic level. Depending on such options, these countries can be divided in four categories.

The first category is composed of Israel that has had a modern set of competition rules since 1988. The Israeli Law on Restrictive Trade Practices sets up a modern competition regime, which shares analogies with the EC competition law regime. For instance, the section dealing with agreements in restraint of trade contains a system of block exemptions. However, this law also relies on concepts that appear derived from U.S. law, such as the concept of “monopolist.” The Israeli competition law is subject to a high degree of enforcement by the Israeli Antitrust Authority (the “IAA”), which has adopted a large number of decisions prohibiting anticompetitive practices. Moreover, the IAA has played an important role in promoting pro-competitive reforms in a variety of fields, such as telecommunications and natural gas.

The second category includes the Maghreb countries (Algeria, Morocco, and Tunisia) that have adopted national competition laws that are patterned on the French Ordinance of 1 December 1986. Given the conceptual proximity between this ordinance and EC competition law, one can say that the competition laws adopted by the Maghreb countries are in line with EC law. The main problem in these MPs is the relatively low enforcement of competition rules. Data gathered on the enforcement record of the Tunisian Competition Council shows that the latter has been relatively passive since its creation, although enforcement efforts seem to have picked up recently. The poor enforcement in these countries is due to a variety of factors, such as lack of resources, the inability for the competition authorities to attract sufficient expertise, the weak professional associations and consumer groups, the presence of deficient judicial systems, the granting of inadequate powers to the competition authorities, strong opposition to domestic reforms, and insufficient access to business data.

A third category of MPs is composed of countries that have just adopted or are in the process of adopting domestic competition legislation. Jordan adopted a competition law in 2002 and established a competition authority. Over the last ten years, Egypt has made several attempts to develop and adopt a competition law regime. Many drafts were circulated, but none of them managed to be adopted into law. A new draft is now being discussed in the government and there is hope among experts that the law will soon be submitted to the Parliament. Interestingly, Egypt has been more willing to commit to regional competition rules than to domestic competition rules. Egypt is a member of the Common Market for Southern and Eastern Africa (COMESA), a regional organization, which has been developing common competition rules for its member countries. Regulatory reforms designed to increase the competitiveness of the economy are also in the legislative pipeline in Lebanon. Among planned legislative measures is the adoption of a competition law and the setting up of a competition authority. The process of elaboration of the competition law is, however, still in a preliminary stage and there is little prospect of seeing such a law adopted in the near future.

Finally, Syria and the Palestinian Authority have not yet expressed any interest in adopting a competition law.

Chapter 8: Implementation and Enforcement of Domestic Competition Laws

This chapter discusses the record of enforcement of the competition authorities in the Mediterranean Partner countries and makes a distinction between the candidate countries, Israel, and the Maghreb countries. The study of the relevant data shows that competition law enforcement is reasonably satisfactory in Turkey, Malta, and Cyprus. For instance, in 2000, the Turkish Competition Authority adopted 262 decisions relating to anticompetitive agreements and abuses of a dominant position, 101 decisions relating to mergers and acquisitions, and 23 decisions granting exemptions or negative clearances. During 2001, Malta’s Office of Fair Competition adopted 21 decisions (10 on restrictive agreements, 9 on abuses of a dominant position, and 2 on mergers). The level of enforcement of competition rules was more modest in Cyprus than in the two prior countries in
2001, but it seems that Cyprus enhanced its capacity of control in 2002. No final conclusion, however, can be drawn from the figures above, because the nature of the decisions (inadmissibility, exemption, or sanction). Their respective proportion must also be considered to evaluate the effectiveness of the competition law regimes. What is encouraging is that these authorities have ruled on some major cases. Such cases are important as they contribute to raise the profile of the authorities and allow them to intervene in major sectors of the economy. The Israeli Antitrust Authority (IAA) also reports a relatively high degree of enforcement activity. The IAA was involved in 19 civil litigation procedures before the Antitrust Tribunal in 2001. It also initiated a range of criminal cases where record fines were imposed on the participants of a cartel in the insurance sector. During 2001, the IAA also examined a hundred and sixty merger notifications among which 83 percent were approved, 15 percent were approved with conditions, and 2 percent were blocked. Finally, the IAA played an important role in promoting pro-competitive reforms in a variety of fields, such as telecommunications and natural gases.

By contrast, the implementation and enforcement of competition rules in the Maghreb countries seems to be much weaker. The paper looked in detail at the Tunisian case. The data collected suggests that enforcement of competition rules has been suboptimal during the first ten years of existence (1992–2001) of the Tunisian Competition Council. However, more recent data suggests a growing level of implementation of competition rules in Tunisia, with twelve cases being examined since the beginning of 2003. For instance, the Competition Council took decisions against cartels in the area of maritime transport, as well as in the land transport of cement and lime. The maritime case involved a price-fixing agreement between companies active in the transshipment of goods. The Council condemned the companies that cooperated during the investigation to fines ranging from 2.5 to 3 percent of their annual turnover. However, it imposed a fine of 5 percent of its turnover to a company, which had refused to cooperate during the investigation. According to the Council, the more aggressive stance taken by the Council in the last few months reflects a political will that anticompetitive practices should be more severely punished.

Nevertheless, in spite of the efforts made by the Tunisian Competition Council to assume its responsibilities under the Tunisian Competition Law, the level of enforcement achieved remains relatively limited. This low level of enforcement activity could, of course, be explained by the deterrent effect the domestic competition laws produce on economic operators, but this does not seem to be the case. A competition law regime may only have a deterrent effect on operators provided certain conditions are met, such as the presence of severe sanctions in the competition laws, the adoption of several high-profile decisions showing the competition authorities are serious about their enforcement missions, etc. These conditions do not appear to be met in the Maghreb countries. Hence, the low enforcement performance of the competition authorities in the Maghreb may be attributed to a variety of reasons that are analyzed in the paper, including resource austerity, inability to attract sufficient expertise, weak professional associations and consumer groups, inadequate powers, strong opposition to reforms, and insufficient access to business data.

Chapter 9: A Convergence of Domestic Competition Rules

Over the last few years, several official documents produced by the EC have evoked a “convergence” of the competition rules of the partner countries towards EC competition rules. More recently, the Communication of the Commission on the “New Neighborhood Policy” makes abundant reference to the concept of “regulatory approximation” and seems to urge the MPs to progressively align their legislation with the EC competition rules.

The first part of this chapter examines the concept of convergence, which can be defined as a process whereby several nations or groups of nations decide to adopt identical, or at least compatible, rules and principles in one or several regulatory areas. Regulatory convergence can be realized by several means, such as through a “regulatory transplant,” whereby one or several countries decide to borrow the rules of another country or through a process of “approximation,” whereby countries negotiate a common set of rules and then adjust their domestic regulatory framework to
make it compatible with the common rules. Convergence may also involve different degrees of intensity. Convergence is sometimes understood as a process whereby one or several nations decide to rely on common principles in one regulatory area, whereas the details on how to achieve compliance with these principles are left to national law. This approach can be referred to as “loose” convergence. On the other hand, convergence may also be understood as a decision by a group of nations to completely harmonize their domestic regimes in one or several regulatory areas. This approach can be referred to as “deep” convergence. This chapter does not seek to respond to the question of whether the EC and the MPs should follow an approach of deep or loose regulatory convergence. As suggested by the Communication of the Commission on New Neighborhood Policy, differentiation should be the preferred strategy. The MPs are at different stages of development in the area of competition law. Thus, while deep convergence might be recommended for some countries, a loose convergence approach might be preferable for others. As regulatory reforms progress, the latter countries could, however, opt for a higher degree of convergence with EC rules. In fact, convergence should be seen as an evolving process rather than a static model of “deep” or “loose” harmonization.

The second part of the chapter discusses the rationales for convergence. The main justification provided by the Commission for encouraging non-candidate countries to engage in a process of convergence is that harmonization would be a pre-requisite for successful market integration. However, while no one can deny the close relationship between trade and competition policies, there is little evidence that harmonization of competition rules is necessary to ensure free trade between nations. Nevertheless, this part of the chapter shows that convergence can raise several kinds of benefits both for the EC and the MPs. As far as the EC is concerned, convergence could offer a strategic interest as it would extend the (already) large critical mass of countries sharing its conceptions, a situation that could be advantageous in the context of multilateral discussions. Second, convergence offers benefits to EC operators willing to invest in MPs, as it reduces transaction costs for these operators and facilitates the initiation of economic activities on the markets that have been made accessible thanks to the trade provisions of the Association Agreements.

Convergence could also bring a certain number of advantages to the MPs. First, convergence would allow these countries to reduce the cost of elaboration of a domestic competition law regime. Second, the adoption of domestic rules that are based on competition rules found in the EC Treaty could give these countries access to a series of additional instruments (secondary legislation) or soft law instrument, such as guidelines that they could transpose in their domestic legal order when they deem it suitable. Third, regulatory convergence would allow these countries to speak a common language among them, but also with the EC. Finally, engaging in a process of regulatory convergence could be a way to benefit from a growing level of technical and financial assistance of the EC.

The third part of the chapter argues that, while there is little doubt that both the EC and the MPs could derive some potential benefits from regulatory convergence, it is also important to evaluate the costs that would be generated by such a process. As far as the EC is concerned, the costs of convergence should be very limited and would only cover the sums spent on technical and financial assistance. By contrast, convergence would impose more significant costs on the MPs. First, most of these countries would have to adopt a competition law regime compatible with the EC regime or, when a competition law regime already exists, amend it if necessary to ensure compliance with EC competition rules. Competition law authorities would also need to be created or strengthened. The costs of building or strengthening institutions would, however, be much more significant. This suggests that a limited package of technical assistance will not be sufficient to ensure a proper level of enforcement of competition rules. Besides the direct costs of adopting legislation and building institutions, reference should also be made to some indirect costs. Such indirect costs could, for instance, include the costs of implementing a system that is not well adjusted to the MPs because it does not sufficiently take local circumstances into account.
The fourth part of the chapter outlines that the approximation of the MPs’ competition rules with EC competition rules is a delicate process, which should be carried out with a great deal of prudence. In practice, two mistakes should be avoided. One would be to transpose rules that leave very large discretionary powers to the competition authorities in the MPs. The second would be to transpose rules the implementation of which require very complex assessments and involve considerable risks of regulatory mistakes. In order to avoid these mistakes, it is suggested that EC competition rules should be exported to the MPs only to the extent: (i) they are sufficiently clear and precise to avoid being wrongly implemented in the MPs, and (ii) they do not involve excessively complex assessments. This approach requires a selection process among EC competition rules to identify those that would appear to be fit for transposition in the MPs.

The fifth part of the chapter argues that, once competition rules have been selected and adopted, it is of considerable importance that the competition authorities establish a set of priorities and develop an enforcement agenda. These authorities will often start their operations in difficult conditions. They will usually have limited financial and human resources and often face the opposition of strong interest groups. Moreover, these institutions will have to gain credibility and make themselves known to businesses and the population. In this context, these authorities have to develop an enforcement agenda that will be manageable, but also produce clearly identifiable economic benefits. First, as far as the categories of anticompetitive measures are concerned, the competition authorities should initially focus on the most significant restrictions of competition, i.e. the so-called hard-core cartels. Second, with respect to the sectors that need to be investigated, the competition authorities of the MPs should try to eliminate the main strategic bottlenecks to competition. Third, besides these enforcement tasks, competition authorities in the MPs should devote resources to competition advocacy, which can be a very effective mode of intervention in developing economies. By contrast, these competition authorities should perhaps refrain during the initial phase of their operations to engage into enforcement action in particularly difficult areas of competition, such as vertical restrictions, except perhaps to prohibit particularly restrictive provisions in distribution agreements, as well as complex abuse cases, which require complex economic analysis and may lead to uncertain outcomes. Similarly, merger control should probably not be a priority for the competition authorities of the MPs unless these authorities are sufficiently well prepared to handle the complex economic analysis required for assessing mergers. Moreover, when the competition authorities of the MPs are authorized to rule on mergers, they should concentrate their efforts on horizontal mergers, which raise major market structure concerns. These authorities should also be very cautious with the type of remedies they impose and primarily choose remedies, which will be easy to enforce.

The final part of this chapter explores whether, instead of converging around the EC model, another option would be for the non-candidate MPs to develop an ad hoc competition law model and converge around that model. This approach would involve the adoption through negotiations taking place at the regional level of a specific model of competition rules that would not necessarily be based on EC competition rules and principles, but could for instance be a mix of rules of principles of different models of competition law. Although this approach may appear theoretically attractive, three main reasons raise doubts as to the opportunity for the MPs to develop an ad hoc model and to converge around it. First, the cost of elaboration of such an ad hoc model could be quite high, as this process would involve substantial search costs. Second, the choice of an ad hoc model involves greater risks than relying on the EC model as there is no guarantee that such an ad hoc model would operate effectively. Finally, the risks of denaturizing (i.e. inadequate use to satisfy vested interests) of an ad hoc model is greater than for well established models (e.g. the EC competition law regime) as given the novelty of this model, few people will be able to determine whether the system is being abused. The opportunity of a convergence around an ad hoc model is thus uncertain. In any event, even if a process of convergence around an ad hoc model were desirable, it seems unlikely that such a regional model could be negotiated and implemented as the MPs have so far shown little interest in harmonizing their standards and rules on a regional basis.
Chapter 10: Summary and Policy Proposals

The final chapter of this study suggests ten steps that could be taken by the EC and other institutional donors to stimulate the development of effective competition policies in the MPs.

First, efforts should be made at both EC and MP levels to ensure that the Councils of Association of the Association Agreements adopt the necessary measures to implement the competition provisions contained in these agreements. The absence of implementation measures deprives these provisions of any real effectiveness and fails to provide EC and MP economic operators from protection against anticompetitive practices affecting market access.

Second, the EC could adopt a communication making a clear statement on the scope and objective of the process of regulatory convergence it seeks to promote in the competition law field. While the Communication of the Communication on New Neighborhood Policy provides useful information on the way the European Commission envisages future regulatory cooperation with its neighboring countries, there is still some uncertainty as to the degree of intensity of convergence the EC is seeking to promote, as well as the speed with which this process should take place. A clear document from the Commission could contain a calendar of the initiatives that will be taken by the Commission to promote convergence.

Third, additional research should be launched to analyze the contribution of the development of competition law regimes on economic development, as well as the identification of the factors that play a critical role in the development of successful competition law regimes in the emerging economies. Little is known on the impact of competition law regimes on the development of a market economy in countries, such as the MPs, and a greater understanding of this impact is needed to make a compelling case to convince MPs to devote resources to the development, and subsequent implementation of such regimes.

Fourth, based on this research, the European Commission and the non-candidate MPs should be invited to explore the possibility of dividing the convergence process into two or several phases. A first phase would, for instance, encourage MPs to transpose Articles 81 and 82 of the EC Treaty into their domestic legal orders, as well as to create or strengthen the authorities that will be entrusted with the implementation and enforcement of such bodies. A second phase would encourage MPs to adopt a State aid regime and transpose the Merger Control Regulation, or more realistically, to adopt a merger control procedure that is compatible with this Regulation. This second phase would only be triggered when there is sufficient evidence that the enforcement bodies in the MPs have the capacity to make complex economic assessments. The first and second phases could follow different schedules for the MPs as the ability of these countries to implement competition policies may vary. When a merger control regime already exists advice should be provided to the MPs on how to implement this regime effectively.

Fifth, a strategy should be developed by the MPs with the support of the European Commission and other institutional donors to determine which components of EC secondary competition legislation could be usefully transposed in their countries. The development of an effective competition law regime goes beyond the adoption of the rules preventing anticompetitive behavior, such as Articles 81 and 82 of the EC Treaty. It also requires the adoption of rules of procedures. Efforts should also be made to inform the MPs on the growing amount of soft law instruments, which are adopted by the European Commission (communications, guidelines, etc.).

Sixth, a strategy should be developed by the MPs with the support of the European Commission and other donors to determine which additional legislative reforms should be undertaken to facilitate the implementation of a successful competition law regime. Legislative charges may be required in areas, such as the regulation of accounting practices, bankruptcy, contracts, and so forth. Reforms over such matters are generally being implemented in several of the MPs, but special efforts should be made to ensure that such reforms correspond to the needs of a well-functioning competition policy. Other reforms may also be required to allow for greater autonomy of newly created administrative authorities, such as the competition authorities, in terms of hiring qualified candidates at market prices, and collecting fees from market actors.
Seventh, resources should be invested in compiling data about the output of competitive authorities in the MPs. The data collected should have both quantitative and qualitative aspects and allow some benchmarking between the competition authorities.

Eighth, the convergence process should be accompanied by substantial financial and technical assistance by the European Commission and other donors, such as the World Bank. This assistance should be well-targeted to the needs of the MPs, and should cover a period of time that is sufficient to ensure the successful implementation and enforcement of the transposed competition rules.

Ninth, a dissemination strategy should be developed to inform all stakeholders of the benefits that can be derived from successful implementation of a competition law regime. This strategy should comprise activities at the regional, national, and local levels. Special efforts should be made to involve professional organizations (chamber of commerce, local bars) as well as consumer organizations.

Finally, a substantial effort should be made to encourage the development of academic programs, including courses, seminars, workshops, etc., in the area of competition law and economics. Most MPs suffer from a lack of qualified experts in competition law and economics, which is partly due to the short supply of graduates in these areas. Moreover, competition law reforms are unlikely to produce effects before a sufficient mass of professionals have adequate knowledge of competition law principles and processes.
It is generally accepted that competition between firms is the best way to provide for an optimal allocation of resources, impose pressure on costs and stimulate innovation and consumer satisfaction (Gellhorn and Kovacic 1994). It is, however, possible that firms try to eliminate competition by adopting anticompetitive practices. For this reason, the adoption and implementation of competition rules is necessary. By preventing anticompetitive practices, the application of these rules contributes to economic efficiency, as well as to welfare maximization. Competition rules may also pursue other objectives. This is, for instance, the case in the European Community (EC) where one of the major objectives of competition law is to contribute to the creation of a single market.\footnote{See Article 3(g) and Article (2) of the EC Treaty. See also ECJ, 21 February 1973, Europemballage and Continental Can v. Commission, C-6/72, ECR p. 215.}

While competition law regimes have for a long period of time only been present in industrialized countries, a large number of emerging economies have now adopted domestic competition rules. It is estimated that, in 2002, more than 90 countries had enacted competition law regimes (Devellennes and Kiriazis 2002). The adoption of such regimes in emerging economies can be explained by a number of factors. First, some emerging economies have enacted competition rules in the framework of free trade agreements. Efforts to strengthen competition rules have thus been undertaken in the context of NAFTA and Mercosur.\footnote{Many regional trade agreements provide for competition rules. See OECD (2002b).} As will be seen below, the Association Agreements concluded between the EC and some Mediterranean countries also contain competition provisions. Second, institutional donors, such as the World Bank or regional development banks, generally encourage emerging economies to adopt competition law regimes and provide assistance to these countries in order to help them establish such regimes (Rodriguez and Coate 1996). Finally, a number of emerging economies realized that the implementation of fundamental economic reforms, such as the liberalization of State monopolies, had to be accompanied by the adoption of rules preventing anticompetitive practices (Jenny 2001).
The development of competition laws in developing and emerging economies has received considerable academic attention. A large number of legal and economic studies have been written on the establishment of competition laws and institutions in countries of Central and Eastern Europe (CEECs) (Fingleton et al. 1996), Latin America (Bomchil and Den Toon 1996, Vieira and Aquino 1996, Fernandez 1996, De Leon 1999, and Oliveira 1998), and Asia (Yun 1999 and Abir 1996). This paper looks at the development of competition law regimes in Northern Africa and the Middle East, an issue which is still relatively unexplored. Specifically, it examines the state of adoption and implementation of competition rules in the 12 Mediterranean countries engaged in partnership agreements with the EC in the framework of the Barcelona Process, also called the “Mediterranean Partners” or the “MPs.” This partnership process places economic transition, as well as free trade, at the core of the cooperation between the EC and the Mediterranean region. The legal mechanisms organizing this partnership take the form of international cooperation or Association Agreements. These agreements contain provisions regarding the free movement of goods, services and the freedom of establishment, public procurement, payments, economic and financial cooperation, etc. They have also copied the competition rules contained in the Treaty of Rome (the “EC Treaty”). Independently of these agreements, some MPs have adopted domestic competition law regimes. For the MPs that are candidate countries the adoption of regimes patterned on EC competition law was a pre-condition for joining the European Union (EU). In other cases, the development of competition rules was the result of a spontaneous process, although it was generally supported by industrialized countries and their competition authorities, as well as by institutional donors.

Against this background, this paper seeks to achieve three main objectives. First, it seeks to clarify the content and the overall effectiveness of the competition provisions found in the Association Agreements signed between the EC and the MPs, as well as in the domestic legislation of the MPs. Second, it critically reviews the project of the European Commission to encourage MPs to engage in a process of regulatory convergence whereby they would progressively approximate their competition rules with EC competition rules. Third, it contains a number of policy proposals offering an agenda for further action by the EC and other relevant international organizations in the field of competition law in the Mediterranean region.

The paper does not address the issue of whether competition (rivalry among firms) should be encouraged in emerging economies, such as the MPs (Laffont 1998 and Rey 1997). The paper assumes competition provides many benefits in these countries and should thus be encouraged, except in some limited circumstances (for example, the existence of a natural monopoly). In addition, the paper does not discuss the various strategies that can be used to stimulate competition in

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**Box 1.1: The Euro-Mediterranean Partnership**

The Euro-Mediterranean Partnership (EMP) was launched at the Barcelona Conference in 1995 between the 15 countries of the European Union and their 12 Mediterranean Partners. Its economic centerpiece is the establishment of a free-trade area (FTA) for goods by 2010. The implementation mechanism for the FTA is a series of bilateral Association Agreements between the EU and each of the MPs, combined with South-South agreements between MPs. All MPs (except Syria) have successfully completed negotiations with the EU and the Association Agreements are now at different stages of the ratification and implementation process.


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3. See the Barcelona Declaration (1995). Twelve countries are engaged in the Euromed Partnership: these are Algeria, Morocco, Tunisia, Egypt, Israel, Jordan, the Palestinian Authority, Lebanon, Syria, Cyprus, and Malta (who will be joining the EU in 2004) and Turkey (applicant to the EU). See [http://europa.eu.int/comm/external_relations/eurome/med/htm](http://europa.eu.int/comm/external_relations/eurome/med/htm).

4. The Euromed Partnership is financially supported by the MEDA program.

5. This is the case of the MPs that are candidates for accession to the EU—Cyprus, Malta and Turkey. This will be discussed further in Chapter 4.
emerging economies. As often pointed out in the literature, a distinction has to be made between the concept of competition policy, which refers to the strategies that can be used to promote competition in the market (such as the removal of barriers to trade), and the concept of competition law, which refers to the various rules and institutions designed to prevent anticompetitive practices (collusion, abuses of a dominant position, and so forth; Hoekman, 1998). The paper exclusively focuses on the second aspect by examining competition rules in the Association Agreements, as well as in domestic legislation.

Following this introduction, Chapter 2 discusses the objectives and instruments of competition law. This discussion is essential to clarify, from the very start, what competition rules are about and the way they are implemented and enforced. Chapter 3 analyses two issues. The first is the relationship between competition law and free trade policies. As will be seen below, competition rules are now part of bilateral and regional trade agreements and are playing an important role towards the elimination of private barriers to trade. The second is whether the adoption of competition law regimes is desirable in developing economies. Although this is a controversial issue, powerful arguments suggest that developing economies will often benefit from the adoption of a competition law regime. Chapter 4 discusses the importance of adopting a competition regime in support of market opening reforms in infrastructure sectors. The liberalization of infrastructure sectors is of considerable significance for economic development in the MPs, and the European Commission and other institutional donors have invested considerable resources to help MPs implement liberalization initiatives. Chapter 5 analyses the competition rules inserted in the Association Agreements concluded between the EC and its MPs. As will be shown, in the absence of implementation measures, these rules fail to provide adequate protection against anticompetitive measures affecting trade between the EC and the Member States. Chapter 6 examines competition rules implemented by the EC in the context of the accession process. The accession process has been successful in having candidate countries transpose EC competition rules in their domestic legal order, although some difficulties remain at the enforcement level. Chapter 7 reviews the domestic competition laws of the MPs and provides an assessment of their effectiveness. Several MPs have adopted modern competition law regimes and have started creating institutions to enforce them. With the exception of the candidate countries and Israel, the competition authorities of these countries have a weak enforcement record. Chapter 8 explores the value-added that would result from a growing degree of convergence between EC competition rules and the MPs domestic competition legislation. Convergence is likely to bring benefits to both the EC and the MPs. However, this process will also involve costs, including the costs of transposing regimes that do not sufficiently take into account the specific characteristics of the MPs. In this context, it is suggested that the MPs should follow a prudent approach, whereby EC competition rules would be transposed in several phases. Moreover, emphasis is placed on the need for the competition authorities of the MPs to establish priorities, as well as an enforcement agenda. Finally, Chapter 9 contains a series of policy proposals.

Reliance is also made on prior reports prepared by the Programme on Private Participation in Mediterranean Infrastructure (PPMI), on a detailed study of the competition law framework in Tunisia drafted by PPMI consultant Mohamed Lahouel (2003), and in the early days of this research a questionnaire sent to the competition authorities of the MPs. In addition, some sections of this study draw on the academic literature on the relationship between competition law and trade, as well as on the literature between competition law and economic development. A detailed bibliography is provided under References. Finally, and perhaps most importantly, most of the sections of this paper have been strengthened by travels and visits to the MPs and extensive discussions with competition officials, as well as competition policy experts (academics, government officials, lawyers, consultants) of the MPs.
Competition is the best way to allocate resources and the most efficient means of providing technological and commercial innovation, as well as consumer satisfaction. In economic terms, perfectly competitive markets maximize consumer welfare by promoting allocative efficiency (making the goods consumers want in the quantities valued by society) and productive efficiency (producing goods at the lowest possible costs), as well as giving rise to dynamic efficiency (stimulating innovation and technological change) (Gellhorn and Kovacic 1994). Though competition is beneficial for society as a whole, firms have incentives to acquire market power, that is, to be in a position to influence prices and other factors determining business transactions (Bishop and Walker 1999). Market power can be acquired by a single firm or by several firms, which engage into collusive practices (Pepperkorn and Mehta 1999). When firms exercise market power, this leads to inefficient results.

This suggests that the purpose of competition law is to control market power in order to promote economic efficiency (World Bank and OECD 1998). It is, however, sometimes argued that competition law should pursue other goals than economic efficiency, such as, for instance, the protection of small businesses or employment or, as in the case of the EC, the promotion of market integration. It is also sometimes argued that the use of competition rules to preserve competitive markets may also contribute to upholding the foundations of liberal democracy, by precluding the creation of excessive private power (Amato, 1997). Many competition experts criticize this view on the ground that such objectives are ill-defined and loaded with subjective value judgments, and therefore may lead to inconsistency in the implementation of competition rules (World Bank and OECD, 1998). Moreover, there is a risk that implementation of such other objectives may lead to inefficiency. For instance, preventing a merger that would result in large cost savings and other efficiencies in order to save jobs in the short term will hurt consumer welfare (Jones and Sufrin, 2001). Competition is a tool to protect competition, but not to protect competitors.

Even if there is large consensus that the core objective of competition law is to achieve economic efficiency, there is little agreement on how competition rules can best achieve such efficiency. Competition law is strongly influenced by economic theory and different schools of
thought have emerged among economists about how competition rules should be implemented to promote economic efficiency. For instance, the so-called Harvard School, which emerged after the second World War, gave great importance to placing limits on the degree of concentration in industry, as concentration would lead to monopoly profits.\footnote{The main result of the Harvard School is the Structure-Conduct-Performance paradigm. According to this paradigm, market structures determine companies’ market behavior, which in turn determines market performance. Market structure was thus of central importance.} Competition law should thus concentrate on structural remedies. This approach was subsequently questioned by a group of economists, known as the Chicago School,\footnote{The main proponents of that school were Stigler, Demsetz, Posner, and Bork. Perhaps the main illustration of this school of thought can be found in Bork (1978).} who argued that concentration will often lead to more efficient firms, without, however, allowing such firms to gain monopoly profits. Such profits were unlikely, as entry barriers in most markets are not generally high and can be overcome over time.\footnote{For a good discussion of the main aspects of the Chicago School approach, see Hovenkamp (1985).} According to the Chicago School, competition law intervention should be kept to a minimum. The Chicago School has in turn been questioned by some economists (generally known as the post-Chicago School) on the grounds that markets are far more varied and complex than the Chicago School was willing to admit, and that certain market structures and certain types of agreements are much more likely to have anticompetitive consequences than the Chicago economists imagined.

Competition rules are applicable to most economic activities, unless specific exemptions are granted.\footnote{On the main characteristics of competition rules and institutions, see Geradin and Kerf (2003, p. 11 and 14).} They fall broadly into three categories. The first type of rules prevent the conclusion of anticompetitive agreements between operators. Prohibited behaviors will usually include agreements aimed at fixing purchase or selling prices, limiting or controlling production or investments, sharing markets or sources of supply or bid rigging. Such rules usually recognize, however, that some agreements between operators might be competitively beneficial: they may foster efficiencies, help create new products or services or methods of distribution, or improve information flow and, thus, facilitate the functioning of the market (World Bank and OECD 1998). This might be the case, for example, when competitors conduct research and development together that none could have carried out independently, jointly purchase supplies or distribute products and thereby reduce their costs, or form a trade association that gathers statistics and other data that each can use to make their operations more efficient. In some legal systems, a notification mechanism has been set up to enable operators to obtain authorizations from antitrust authorities prior to concluding or implementing an agreement. In others, controls are exercised \textit{ex post} only.

The second type of rules deals with firms which enjoy substantial market power.\footnote{For a good discussion of the concept of market power, see Bishop and Walker (1999), paragraph 2.25 onwards.} Their objective is to prevent those firms from abusing their dominant or monopoly position vis-à-vis end users or other operators. Examples of prohibited behaviors might include, for instance, limiting production, refusing to deal with particular buyers or sellers, imposing excessive or predatory prices, raising rivals’ costs, imposing discriminatory prices to different buyers for the provision of similar services under similar conditions, conditioning the sale of a product to the purchase of another unrelated one (tying).

The third type of rules prohibit mergers which would “substantially lessen competition.” Given the difficulty of unscrambling merged companies once they have operated together, most legal systems, which contain rules in this regard, provide for \textit{ex ante} controls of proposed agreements. At the end of their enquiry, competition authorities will have to take one of the following decisions: clearing the merger in its entirety, prohibiting the merger in its entirety, requiring a partial divestiture of assets or operations sufficient to eliminate the anticompetitive effects while allowing the underlying
transaction to proceed, or imposing a range of conditions designed to regulate the conduct of the merged firm so as to prevent anticompetitive effects (World Bank and OECD 1998).

Given their wide scope of application, competition rules tend to be relatively general: they prohibit or impose broad categories of behaviors defined in relatively general terms (Geradin and Kerf 2003). At the same time, and precisely because they are expressed in relatively general terms, competition rules tend to leave a wide degree of discretion to enforcing authorities. This in turn can be a problem when there are reasons to believe that the regulator may use this discretionary power unwisely. Finally, while competition rules are often expressed in rather simple terms, their application in practice may, in some cases at least, be far less than straightforward. To take but one example, determining whether a merger will have a negative impact on competition involves sophisticated economic analysis, as it requires that relevant markets be defined and the structure of the affected markets, and the impact of the merger on these markets be identified (Geradin and Kerf 2003).

As far as institutions are concerned, the picture can be somewhat more complex. A plurality of entities can indeed potentially play a role in the implementation of the competition rules described above, including the courts and ministerial departments. However, given the complexity of the issues to be addressed, an increasing number of countries have opted to rely on specialized institutions to play a major role in implementing some or all of these rules (hereafter, the “competition authorities”).

The specific characteristics of each type of institution vary from country to country and the description presented below only focuses on the main features of these institutions i.e. those features which antitrust authorities tend to exhibit in most contexts.

Competition authorities are generally competent to intervene in all or in most sectors of the economy. They can be entrusted with various types of responsibilities including: (i) initiating investigations of, or reviewing, potentially anticompetitive behaviors or transactions; (ii) prosecuting such behaviors; and (iii) in some cases, passing judgment and imposing sanctions upon parties convicted of having committed anticompetitive actions. As one of the main objectives pursued through the establishment of a competition authority is to ensure that an entity possesses the technical capacity required to decide complex matters in the competition field, competition authorities will usually seek to attract highly qualified professionals in the legal and economic spheres.

Competition authorities must monitor the behavior of a large number of firms, and tend for that reason, to act on a case by case basis, when needed, rather than to closely regulate enterprises on a permanent basis. There are, however, several important areas where competition authorities seem to act on a more permanent, regulatory mode rather than on a case-by-case basis. This is notably the case where such authorities adopt self-binding guidelines, which function much like regulations, supervise access to certain essential facilities, monitor prices that are found to be so high or so low that they amount to abuses of a dominant position, and resort to negotiated consent agreements. This may help these authorities to maintain their independence vis-à-vis specific sector ministries as well as vis-à-vis individual enterprises. In addition, specific measures are often adopted to protect competition authorities against political interventions in their day to day activities and to ensure their independence from the enterprises which come under their scrutiny. Thus, for example, competition authorities are often set up by law as autonomous or independent entities, appointment processes might be designed to prevent partisan nominations at the top echelons of the entity, and measures might be adopted to prevent arbitrary removals. Competition regulators are also commonly required to refrain from intervening in cases involving firms with which they have financial or other links.

11. A list of national Competition Authorities can be found on the OECD competition policy homepage. See http://www.oecd.org/department/0,2688,en_2649_34685_1_1_1_1_1,00.html
12. In some countries, some sectors (for example, companies providing public services) are exempt from the application of competition rules.
Competition and Trade

Opening domestic markets to international trade is one of the key policy reforms in which the MPs have engaged these last few years under the impulsion of Association Agreements with the EC, as well as free trade agreements with other countries. Freer trade generates large benefits and is a factor stimulating economic growth in developing and emerging economies. Yet, most of the MPs have so far failed to integrate in the global economy and their share of global trade and investments are significantly lower than in other regions. This suggests that all instruments that contribute to facilitating free trade, including the application of competition rules, should be welcome in these countries.

Since the end of the Second World War, the interface between trade and competition policies has received considerable attention from policy-makers, practitioners, and academics. The point of connection between these policies is that it is widely believed that free trade among nations does not only require the removal of public barriers to trade (for example, quotas, custom duties), but also a series of obstacles originating in private restraints, such as abuses of dominance, import cartels, and vertical restraints (Fox 1997). Competition law would thus be a necessary complement to trade policy.

The importance of competition law as a tool to promote market integration has long been understood in the EC (Ehlermann 1992). Promoting the creation of a single market has always been seen as one of the major objectives of EC competition law (Bellamy and Child 2001). Com-

14. The World Bank’s definition of the Middle East and North Africa (MENA) region does include the eight Arab MPs and Malta but not Turkey and Cyprus. It also extends to several countries that are not part of the Euromed Partnership, such as Iran, Iraq, Libya, Mauritania, Djibouti, and the countries of the Arab peninsula.

15. See the discussions on trade and competition policies that have taken place in the context of the WTO. See Wood (1992) p. 277.
petition rules have been applied, for instance, to prevent vertical restrictions, which would contribute to dividing markets along national lines. The European Commission is also taking an increasingly tough stance against cartels involving companies from different Member States, as such cartels generally have a market partitioning effect (Monti 2002).

More recently, competition rules have been inserted in a series of regional or bilateral trade agreements concluded by the EC, such as the European Economic Area (EEA) or the Association Agreements concluded by the EC with a variety of third countries. A similar approach can also be found in agreements concluded in other parts of the world. For instance, the Protocol for the Defense of Competition in Mercosur contains an ambitious agenda whereby member countries are called to harmonize their domestic competition laws and institutions are created to prevent anti-competitive behaviors that affect trade among the member countries (Tavares de Araujo, Jr. and Tineo 1998).

The relationship between trade and competition policies is also a major issue at the WTO level (Tarullo 1999; Fox 1999). Since the beginning of the 1990s, the EC has pressed its trading partners for the adoption of a competition law framework in the context of the WTO (Fox 1997).

**Source:** Müller-Jentsch, Daniel. Forthcoming. “Deeper Integration and Trade in Services In the Euro-Mediterranean Region.”

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1996, the WTO Ministerial Meeting held in Singapore created a Working Group on the Interaction between Trade and Competition Policy. The mission of this Working Group was to “study issues raised by Members relating to the interaction between trade and competition law, including anticompetitive practices, in order to identify any areas that may merit further consideration in the WTO framework.” This Working Group has produced several reports, which provide support to further WTO initiatives in the competition field. In this regard, the recent Doha Ministerial Declaration represented another major step as it provided that negotiations over competition rules would take place after the first WTO Ministerial Meeting based on modalities to be decided at the time. However, the ministerial meeting that took place in Cancun in 2003 failed to come up with an agenda for the negotiations to take place in the Doha Round (in part due to developing countries’ hostility to the so-called Singapore issues, including the adoption of rules on investments, competition, government procurement and trade facilitation), it is too early to say whether negotiations will take place on competition rules anytime soon and whether they will lead to the adoption of a WTO competition framework.

**Competition and Developing Economies**

These last two decades have seen a large number of developing economies adopt competition law regimes. The development of such regimes in developing economies, however, remains a controversial matter.

On the one hand, many authors argue that adoption of competition law regimes will be beneficial for emerging economies (Anderson and Holmes 2002). First, it is argued that the existence of a competition law regime is a factor contributing to economic development. Competition law seeks to protect a competitive market structure, which is in turn necessary to improve the competitiveness of domestic producers. For instance, a competitive market in the transport sector will reduce the price of exports and thus help boost competitiveness on export markets.

Second, some also argue that the adoption of a competition law and the setting up of an enforcement authority will be beneficial to investments “by providing rules that define boundaries of competitive conduct and thus inspire confidence in the stability of the business environment.” Although one cannot exclude the risk that competition authorities can be captured by domestic rent-seeking groups, competition rules may be a useful tool to protect foreign investors against anticompetitive practices designed to prevent them from entering the domestic market, as well as putting them at a competitive disadvantage once they have entered the market (Rodriguez and Coate 1996).

Third, it is argued that developing countries are particularly vulnerable to international cartels involving firms based in the developed world. For instance, according to one study examining the impact of sixteen “cartelized” products on developing countries, such countries overpaid for their imports of such products a total of $16–32 billion as a result of international cartels (Levenstein and Suslow 2001). The vulnerability of such countries would be in great part due to their inability to identify and prosecute these practices effectively. It is thus claimed by some that the best way for these countries to protect themselves against these practices is to adopt effective competition law regimes and institutions (Anderson and Holmes 2002). As prosecuting international cartels will often require actions being taken in several countries, strengthening cooperation with foreign competition authorities is also of central importance for emerging economies.

Fourth, at the domestic level, the high degree of concentration and the barriers to entry that often characterizes developing economies increases the risk of collusion, as well as abuses of a dom-

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21. On the link between competitive transport sectors and economic growth, see Müller-Jentsch (2002).
inant position (Rey 1997). As is well known, oligopolistic markets are a fertile ground for anticompetitive practices, as the presence of a small number of market players facilitates collusion (Faull and Nikpay 1999). Adopting a competition law regime and setting up an enforcement authority might be an essential step to fighting anticompetitive conducts, which are likely to arise given the concentrated market structure.

Finally, some authors argue that one of the benefits of creating effective competition law institutions in developing economies is that such institutions could engage in “competition advocacy” (Rodriguez and Coate 1997). For instance, even when these authorities lack sufficient resources to engage in significant enforcement initiatives, they could still play a useful role in promoting competition by making the case for removal of regulatory or other restrictions so as to allow entry in certain sectors of the economy, which have traditionally been sheltered from competition (World Bank and OECD 1998).

On the other hand, arguments are sometimes raised that developing economies do not need a competition law framework. First, it is sometimes argued that free trade would by itself be sufficient to protect the competitive process. It is certainly true that opening borders contributes to disciplining firms, as imported products will compete with the local products. This argument, however, does not take into account the fact that there are non-tradable products and services, the providers of which will not be disciplined by import competition. Moreover, while the removal of State-induced barriers to trade, such as tariffs or quotas, allows entry of foreign competitors, such an entry can be made difficult and sometimes impossible by anticompetitive measures (Fox 1997). As we have seen above, restrictive agreements, such as vertical restraints and cross-border cartels, may have the effect of isolating national markets.

Second, some argue, that because of the complexity of competition law analysis, combined with the weak institutional endowment of most emerging economies, adoption of a competition law regime might produce more harm than good, as the risk of mistaken decisions would be particularly high (Rodriguez and Coate 1997). This problem is very serious and should not be underestimated. However, several strategies can be used to address it. First, this problem can be addressed through capacity-building initiatives. Such initiatives may, however, fail to produce significant

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23. This argument is often referred to as the “Threat of Imports” argument, see Williams (1994).
24. Some authors argue that in sectors that are not subject to international trade competition rules are desirable. See Boner and Krueger (1991), p. 20, and Friberg and Thomas (1991).

### Box 3.2: Poor Cooperation Between Developing Countries with Foreign Competition Authorities in Competition Law Enforcement

The European Commission and developing countries have rarely cooperated in the enforcement of competition law. For example, there was no consultation between the African nations concerned and the European Commission before the latter’s cartel or exclusionary abuses decision in the French/West African Ship-owners’ Committees case. The case involved Liner conferences or ship-owners’ committees holding a dominant position in traffic between Europe and 11 West African States, whose shipping authorities authorized the cargo reservations by the shipping companies in question. This lack of cooperation may have stemmed from the fact that the African nations in question had no competition laws or institutions at the time. Similar circumstances could be found in the CEWAL Liner Conference case involving traffic between Northern Europe and Zaire (now Congo). Nevertheless, it would seem that an effort towards increased cooperation would lead to more effective and efficient enforcement of competition law. Data could be gathered more swiftly and the foundations of a future framework for comity could be laid.

Source: UNCTAD, “Experiences gained so far on international cooperation on competition policy issues and the mechanisms used,” 25 April 2003.
Box 3.3: Examples of Successful Applications of Competition Rules in Developing Countries

Brazil: Steel Cartel Case
A cartel investigation was launched by the Brazilian competition authorities after they were informed that the price for common flat steel would be fixed by two steel producers (Cosipa and Usiminas) at a meeting called by the representatives of the industry association Instituto brasileiro de metalurgia (IBS) on 30 July 1996. The agreement was to take effect as of 1 August 1996.

On 31 July, the companies involved in the alleged cartel were informed that their conduct could be a violation of Brazilian competition law. Cosipa and Usiminas, on 5 and 8 August respectively, set new prices for their steel. On 11 June 1997 the Brazilian competition authority announced that such behaviour was tantamount to a cartel. It was, however, denied by Usiminas and Cosipa that they ever took part in the meeting of 30 July 1996. In order to substantiate their allegations, the Brazilian competition authority turned to the IBS, which duly verified the presence of the employees of Usiminas and Cosipa at the meeting. Later, these two firms admitted that their employees were present but stated, in their defence, that the price changes were the consequence of the process of price leadership and that their employees were at the meeting in an unofficial capacity.

The Brazilian competition authorities had been issued with a technical opinion, which held that there was no economic rationale for the parallel price adjustments and therefore concluded that there had been cartel conduct. The factors alluded to by the technical opinion, which indicated that cartelisation had taken place, were that the common flat steel industry was an oligopoly producing homogenous products, there was strong market concentration, inelastic demand and similar costs. Perhaps more importantly, at no time was there an adjustment of prices in this industry which had not been followed by all other manufacturers.

The Brazilian competition authorities concluded that the evidence before them (the meeting and the parallel price behavior) pointed to cartel conduct and was therefore a violation of the economic order. The sanctions imposed by the competition authorities were inter alia: (i) each firm had to pay fines amounting to 10 percent of their gross turnover before proceedings, which resulted in Usiminas paying R$ 16,180,000 and Cosipa paying R$ 13,150,000; Usiminas and Cosipa had to pay fines of R$ 3,512,315 and R$ 3,487,890 respectively for attempting to deceive the competition authority about the meeting held on the 30 July 1996; and, (ii) an abstract of the authority’s decision had to be published, at the expense of the firms, in the largest newspaper of the Brazilian state in which the firms were established.

Zimbabwe: Anti-Competitive Practices in the Health Sector
Zisco Medical Benefit Society (ZMBS) of Zimbabwe was charged in 2003 by the Competition and Tariff Commission (CTC) of Zimbabwe with engaging in restrictive practices in the retail pharmaceutical services sector over a period of three years. The CTC held that ZMBS had abused its dominant position in the health delivery sector by arbitrarily closing its accounts with a number of community pharmacies in the Kwekwe/Redcliff area of the country and informing its members that they must deal with Jenita Pharmaceuticals when buying prescribed medicines. There was also evidence of anticompetitive agreements and violations of the merger control provisions.

As a result of the identified infringements, a number of remedies were ordered. The CTC ordered ZMBS to refrain from directing its members to enter into exclusive arrangements with Jenita Pharmaceuticals or anyone else as a condition for membership. ZMBS was further required to remove the restrictive provisions from its rules, which made it mandatory for all employees of the Zimbabwe Iron and Steel Company and associate companies to join the society. The CTC also recommended that the Medical Control Authority of Zimbabwe and the Ministry of Health and Child Welfare ensure enforcement of the regulations in the future.

results in the short-term, as newly created competition authorities need time to become fully operational and in a position to handle complex cases. In this context, another approach might be to encourage countries to focus on the main anticompetitive conducts (such as cartels), while temporarily leaving aside competition law aspects, such as merger control, which require particularly complex assessments for uncertain benefits. We will revert to this problem below.

Third, the argument is made by some observers that competition law would be a luxury for rich countries, and that developing economies have other more pressing priorities. While it is true that adoption and implementation of a competition law might not be the most pressing reform for a country that has engaged on the path of a market economy, this does not imply that such a law would not be useful. It is widely recognized that a sound competition law generally helps transition economies to ensure that the benefits brought about by “first generation” reforms, such as trade liberalization or privatization, are not being impaired by anticompetitive practices (Kovacic 2001). In this regard, one of the great values of competition law is that it has an economy-wide effect. It will thus help consolidate reforms not only in one sector, but in all sectors which have been opened to competition.

Finally, a number of commentators do not oppose the adoption and implementation of competition laws in developing economies, such as the majority of the MPs, but argue that such laws, as well as the way they are enforced, should take into account the specific characteristics of these countries. For instance, the presence of barriers to entry and market concentration that characterizes such markets should facilitate collusion. It is indeed easier to collude when there are few competitors and when supra-competitive prices do not necessarily trigger entry. According to Rey, this suggests that when addressing horizontal issues, such as mergers, one should place greater attention on the risk of collusion, taking into account a dynamic perspective “where firm’s strategic interaction has to be analyzed in a long-run framework” (Rey 1997). Other commentators point to the need to take into account the specific circumstances of “small economies.” For instance, Gal argues that “small economies need a specially tailored competition policy, because they face different welfare maximization issues than large ones” (Gal 2000). More specifically, she claims that, given the importance of allowing producers in these countries to realize economies of scale, competition law should focus exclusively on the promotion of economic efficiency, which should be given primacy over other goals sometimes promoted by competition regimes, such as the dispersion of economic power and the protection of small businesses.

In sum, powerful arguments suggest that adopting and implementing competition law regimes should be beneficial to emerging economies and that attention should be paid to the specific characteristics of these countries, such as the high degree of concentration in some industries, their limited institutional endowment, and so forth. By contrast, the arguments advanced against adoption and implementation of competition rules fail to convince. As they are sometimes shared by government officials and industry interests in developing countries, there is a risk that the setting up of competition regimes might not be an easy process. Because developed and developing countries have different market structures and levels of institutional endowment, the process of establishing such regimes should be carried out with care and follow a gradual approach.

25. As Jenny (1999) reports, “a number of developing countries are not convinced that the adoption of a competition law or policy is appropriate during the first phase of economic development.”
26. Not all MPs qualify as developing countries, see Rey (1997).
27. According to the definition provided by Gal (2001), a small economy is “an independent sovereign economy that can support only a small number of competitors in most of its industries when catering to demand.”
The absence of an effective competition law regime may create considerable difficulties for “infrastructure industries”, industries that generally operate on the basis of a physical infrastructure, such as a network (Newbery 2000). These industries, which include telecommunications networks and services, energy and gas, rail and air transport, and water, are fundamental for economic development, as they provide key inputs to other sectors of the economy. Recent studies (Müller-Jentsch 2001 and 2002b) identified the poor performance of these industries in the MPs as one of the factors delaying economic development and argued that the main factor explaining the poor performance of these industries in the MPs relates to the lack of a competitive market structure. Introducing competition in the telecommunications, energy and transport sectors could substantially contribute to economic development in the MPs. As the economies of the MPs have largely remained stagnant and failed to fully integrate into global markets, reforms are particularly urgent. This section seeks to illustrate that economic development in the MPs will not be achieved without the introduction of competition law regimes. Although introducing competition, as well as setting competition law regimes, is desirable in all infrastructure sectors, this section will draw most of its illustrations from the telecommunications sector. This is where market opening reforms have progressed the most so far and where such reforms have already produced some concrete results.

In all parts of the world, infrastructure industries were traditionally dominated by public or private monopolies. In recent years, however, many nations, including some MPs, engaged in major regulatory reforms seeking to promote competition in network industries markets. There are a number of reasons why several MPs decided to liberalize network industries.

First, in most MPs, the performance of monopoly undertakings is generally not satisfactory (see Table 4.1). For instance, in the telecommunications sector, teledensity and other relevant indicators remain low in most MPs. In 2001, only 6 percent of the Algerian population had access to a fixed telephone line, while 0.5 percent had a mobile line (Goldstein 2003). In addition, a large section of the population remains unserved, as waiting lists for telephone connections are long. In 2000, in Egypt, 1,275,000 persons or businesses were on a waiting list for a fixed telephone line...
The productivity of the incumbent telecommunications operator is generally low. For example, the number of lines per employee in Algeria, Egypt, Morocco, and Tunisia respectively ranged between 74 and 117.

Second, the globalization of the economy forces companies to be competitive (Reich 1992). This is especially true in export-oriented economies. In order to remain competitive, companies need to develop strategies to lower their costs and among such strategies is to seek for cheaper inputs. This calls for market opening reforms in infrastructure industries. Competition among suppliers is expected to lower the prices of essential inputs, such as telecommunications services and electricity.

Third, liberalization of infrastructure industries may also be triggered by external pressures. A number of MPs, including Cyprus, Egypt, Israel, Jordan, Malta, Tunisia, and Turkey, are members of the WTO, and during the last round of multilateral negotiations committed themselves to progressively open some of their infrastructure markets to competition. As far as Malta, Cyprus, and Turkey are concerned, efforts to open infrastructure sectors to competition were made necessary by the transposition of EC liberalization directives. Donors, such as the World Bank, also encourage MPs to liberalize these markets as part of a package of structural reforms.

Finally, several MPs have come to realize that regulatory reforms in infrastructure industries could provide many benefits. The liberalization of the telecommunications sector in Chile, for instance, is generally cited as an example of a successful opening of the market in a transition economy (Kerf and Geradin 2000). Prices went down, quality of service improved, and access to telecommunications services largely increased. Inspired by these experiences, some MP governments became convinced of the necessity to engage into regulatory reforms in infrastructure industries.

While there is a solid case for liberalization, market opening reforms have often met considerable resistance in the MPs. First, incumbents have generally opposed the removal of their monopoly rights. This phenomenon is not specific to the MPs, as it can be observed in all countries engaged into market opening reforms. Given their proximity to the government, incumbents have a powerful voice and their arguments against liberalization will often be taken into consideration. Second, MP governments engaged in privatization of some of their incumbents might be tempted to delay the liberalization process in order to obtain a higher sum of money from foreign investors.

In spite of these obstacles, a number of MPs have engaged in the liberalization of infrastructure industries. This is a complex process in which a great deal of public intervention is required.

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### Table 4.1: Telecommunications Indicators in a Sample of 5 Mediterranean Partners

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<thead>
<tr>
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</thead>
<tbody>
<tr>
<td>Algeria</td>
<td>6.03</td>
<td>0.5</td>
<td>730 000</td>
<td>81</td>
</tr>
<tr>
<td>Egypt</td>
<td>10.09</td>
<td>4.24</td>
<td>1 275 000</td>
<td>74</td>
</tr>
<tr>
<td>Morocco</td>
<td>4.03</td>
<td>16.13</td>
<td>17 896</td>
<td>107</td>
</tr>
<tr>
<td>Tunisia</td>
<td>10.72</td>
<td>3.95</td>
<td>80 731</td>
<td>117</td>
</tr>
<tr>
<td>Turkey</td>
<td>27.23</td>
<td>28.82</td>
<td>418 000</td>
<td>254</td>
</tr>
</tbody>
</table>

*Sources: ITU (2000), Arab States Telecommunication Indicators and MEDA Telecom Statistical Overview 2000–2002, ENCIPI/DATE.*
<table>
<thead>
<tr>
<th>Country</th>
<th>Current Market Structure</th>
<th>Expected Liberalization Date</th>
<th>State of Completion</th>
<th>Expected Liberalization Date</th>
<th>State of Completion</th>
<th>Expected Liberalization Date</th>
<th>State of Completion</th>
<th>Expected Liberalization Date</th>
<th>State of Completion</th>
</tr>
</thead>
<tbody>
<tr>
<td>Algeria</td>
<td>Monopoly</td>
<td>2004</td>
<td>Local</td>
<td>2004</td>
<td>Long Distance</td>
<td>2003</td>
<td>International</td>
<td>2002</td>
<td>Mobile</td>
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<tr>
<td>Egypt</td>
<td>Monopoly</td>
<td>Expected 2005</td>
<td></td>
<td></td>
<td>Monopoly</td>
<td></td>
<td>Monopoly</td>
<td></td>
<td>Monopoly</td>
</tr>
<tr>
<td>Israel</td>
<td>Monopoly</td>
<td>Initially planned for 2002 then postponed</td>
<td></td>
<td></td>
<td>Competition</td>
<td>Competition</td>
<td>Competition</td>
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<td>Competition</td>
</tr>
<tr>
<td>Jordan</td>
<td>Monopoly</td>
<td>2005</td>
<td></td>
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<td>Monopoly</td>
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<td>Monopoly</td>
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<tr>
<td>Lebanon</td>
<td>Monopoly</td>
<td>2004</td>
<td></td>
<td></td>
<td>Monopoly</td>
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<td>Monopoly</td>
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<td>Monopoly</td>
</tr>
<tr>
<td>Malta</td>
<td>Monopoly</td>
<td>2003</td>
<td></td>
<td></td>
<td>Monopoly</td>
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<td>Monopoly</td>
<td></td>
<td>Monopoly</td>
</tr>
<tr>
<td>Morocco</td>
<td>Monopoly</td>
<td>Failure in 2001</td>
<td></td>
<td></td>
<td>Monopoly</td>
<td></td>
<td>Monopoly</td>
<td></td>
<td>Monopoly</td>
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<tr>
<td>Palestinian Authority</td>
<td>Monopoly</td>
<td></td>
<td></td>
<td></td>
<td>Monopoly</td>
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<td></td>
<td></td>
<td>Mobile</td>
</tr>
<tr>
<td>Tunisia</td>
<td>Monopoly</td>
<td>2005</td>
<td></td>
<td></td>
<td>Monopoly</td>
<td></td>
<td>Monopoly</td>
<td></td>
<td>Mobile</td>
</tr>
<tr>
<td>Turkey</td>
<td>Monopoly</td>
<td>2004</td>
<td></td>
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<td>Monopoly</td>
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<td>Mobile</td>
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</tbody>
</table>

Infrastructure industries hold certain features that make the creation of competitive markets difficult (for example, the natural monopoly feature of the network that is owned by the incumbent; Geradin 1999). The analysis that follows shows that the adoption and implementation of competition rules is an essential component of successful market opening reforms in network industries. Absence of competition rules could make the arrival of competition difficult and deprive undertakings and consumers of much of the benefits liberalization could produce.

It is generally admitted that creating competition in these industries relies on three main pillars. First, governments need to remove the exclusive rights granted to incumbent operators. In most nations, the complete removal of such rights takes several years.31 Liberalization also tends to be easier to promote in some industries than in others. Generally, the first sector to be opened to competition is telecommunications, while market opening reforms in other sectors generally follow several years later. These features can also be found in the MPs. First, those MPs that have engaged in liberalization measures have generally done so progressively. For instance, in Egypt, in the telecommunications sector all value-added services (Internet, Mobile, Audio-Text, Data) have been liberalized, while the incumbent will retain its monopoly on fixed telephony lines until December 2005 (Goldstein 2003). At present, ten MPs (Algeria, Cyprus, Egypt, Israel, Jordan, Lebanon, Malta, Morocco, Tunisia, and Turkey) are engaged in some form of telecommunications liberalization. Fewer market opening initiatives have so far been taken in other network industries.32 See the table below for a list of bodies in charge of telecommunication regulations.

Second, in all industries partially or totally opened to competition, governments need to adopt a sector-specific regulatory framework, as well as to create specialized regulatory institutions (Kerf and Geradin 1999).

One central objective of such a regulatory framework is to prevent incumbents from abusing their market power. During a number of years following liberalization, incumbent operators will usually retain a high market share, as well as the control of essential infrastructures. It will thus be generally easy for them to leverage their market power in order to prevent entry of new competitors, for instance by cross-subsidizing competitive services with services that remain under monopoly control or by refusing access to essential infrastructures. Rules need to be adopted to prevent such

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31. In the EU, for instance, it took ten years to completely liberalize the telecommunications sector.

32. For a discussion of market reforms undertaken in the postal services and energy sectors, see Andress (2002) and Müller-Jentsch (2002).
behavior, as well as to create a level playing field between incumbents and new entrants. The MPs that have engaged in market opening reforms have generally adopted sector-specific regulatory frameworks. In the telecommunications sector, for instance, several MPs have enacted legislation aiming to regulate the provision of telecommunications services. For instance, in Algeria, Law N°2000–03 regulates a range of issues such as licensing, the allocation of radio-electric spectrum, as well as establish a regime of penalties applicable to operators that violate the law. In addition, all the MPs that have engaged in telecommunications liberalization have created regulatory institutions.

Finally, market opening reforms in infrastructure industries require that competition rules be applied to such sectors. Even in industries where sector-specific rules have been adopted, competition rules remain essential for a number of reasons (Geradin and Kerf 2003). First, competition rules are needed, and indeed best suited, to dealing with a range of economic regulation issues that are not addressed by the sector-specific rules described above. Second, competition rules may have a residual role and fill gaps that might exist in sector-specific regulatory regimes. For instance, when interconnection rules are insufficiently clear, competition rules preventing abuses of a dominant position can be relied upon by new entrants to obtain access to essential infrastructures. Third, when there is competition in the market, competition rules will often be needed to prevent collusion between market players. In the EU, for instance, competition rules have been used to prevent anticompetitive agreements among operators active in the telecommunications, energy, and transport fields.

### Box 4.1: Examples of Successful Applications of Competition Rules in the Telecommunications Sector

#### Venezuela: Abuse of a Dominant Position by Compañía Anonima Nacional de Telefonos de Venezuela (CANTV)

CANTV was a company with a monopoly position in the provision of basic telecommunications services. A complaint was filed with the Venezuelan competition authority stating that CANTV had acted unfairly towards other value-added services Internet providers by imposing discriminatory conditions upon them compared to those conditions which it imposed on its subsidiary CANTV Servicios. It was found by the competition authority that as a result of its dominant position in the interconnection market, CANTV was able to offer and did offer favorable conditions to CANTV Servicios. During the investigation it also came to light that CANTV had refused access to its local loop in Venezuelan towns other than Caracas, at local call rates. It was therefore held that CANTV infringed Article 13 of the Venezuelan competition law, which prohibited abuses of a dominant position. CANTV was fined 1.3 percent of its revenues for the year 1999. CANTV was also required to offer similar conditions to both its own subsidiary and other Internet service providers and afford them the opportunity to access local loops at local call rates.

#### Jamaica: Abuse of a Dominant Position by Telecommunications of Jamaica Limited (TOJ)

TOJ and the Fair Trading Commission (FTC) negotiated an agreement whereby residential customers were permitted, at a fair price, to connect compatible equipment to the network. Prior to the negotiations, connection to the network was not possible. The consumer was under the obligation to exclusively buy equipment from TOJ. If the consumer purchased elsewhere, because the particular piece of equipment was not available, the customer was still obliged to pay a rental charge to TOJ. The Commission came to the conclusion that TOJ had abused its position in the market for telecommunications services. TOJ, as a result of the negotiations with the FTC, agreed to allow connection of other pieces of equipment but did not admit liability in this case.

Source: UNCTAD, “Recent Competition Cases in Developing Countries,” 18 April 2002.

34. For a discussion on the important role played by competition in the telecommunications sector in Europe, see Larouche (2000).
35. For a recent review of the “essential facilities” doctrine, see Lipsky and Sidak (1999) and Areeda (1990).
For these reasons, the failure to establish effective competition law regimes may be an obstacle to regulatory reforms in infrastructure industries in the MPs. In the absence of such regimes, there is a serious risk that liberalization efforts may not lead to competitive network industries markets, but instead to markets that remain dominated by incumbent operators or that are fraught with anticompetitive practices. As indicated above, this could in turn deprive consumers and undertakings from the benefits, in terms of lower prices, better quality of service, and greater innovation that could be brought by liberalization. More generally, the whole economy will suffer as infrastructure industries provide essential services for a large number of undertakings.
Competition Rules in the Agreements Concluded with the Mediterranean Partners

The first bilateral agreements between the EC and the Mediterranean Partners (MPs) essentially focused on the removal of some tariff and nontariff barriers and did not provide for any competition rules. The insertion of such rules within the Association Agreements took a long time. It was initiated, on the one hand, with the launching of the accession process with the candidates of the Euro-Mediterranean area (Cyprus, Malta, and Turkey) and, on the other hand, with the opening of negotiations on a new generation of agreements (the “Euromed Agreements”) with the other countries engaged in the Barcelona Process. This new generation of agreements now provides for competition rules. Three main reasons explain this evolution.

A first reason is related to the impact of the discussions engaged in the WTO framework, as well as in other multilateral forums. As we have seen above, the link between free trade and competition policy is a very hot issue and is increasingly being discussed at the international level.

36. This chapter is partly based on Geradin and Petit (2003).
37. Only a few agreements referred to competition policy. They simply encouraged the Parties to provide for fair conditions of competition. See, for instance, the Association Agreement between the European Economic Community and the Cyprus Republic, 19 December 1972, O.J. L135/2, 21 May 1973. The Association Agreement with Turkey, which has been presented as more ambitious, does not in reality provide for stricter obligations in the field of competition law. The Parties merely acknowledged that the competition principles contained in the EC Treaty should be made applicable to their relationships without providing any implementation mechanism. See Article 16 of the Ankara Agreement (64/733/EEC), available at http://www.gumruk.gov.tr.
38. We will see below that among these agreements, some have a wider scope of application.
39. See, for instance, the Singapore Ministerial Declaration, 15 December 1996, INT/MIN(96)/DEC, Paragraph 20, Annex I of the WTO Agreement. Following this declaration, a working group on the interaction between trade policy and competition policy was instituted within the WTO and was given the task to analyze the links between trade and competition. See Report (1999) of the Working Group on the Interaction Between Trade and Competition to the General Council of the World Trade Organization, WT/WGTCP/3; Report (1998) of the Working Group on the Interaction Between Trade and Competition Policy to the General Council of the World Trade Organization, WT/WGTCP/2. See also the Doha Ministerial Declaration, 14 November 2001, WT/MIN(01)/DEC/1.
surprisingly, this issue has also penetrated the negotiation of regional trade agreements (Idot 2002). Competition rules are now an essential component of such agreements, including those involving developing countries.

A second reason lies in the accession process and the Association Agreements previously concluded with the CEECs. These agreements (the “Europe Agreements”) already provided for com-

**Box 5.1: Examples of Regional Trade Agreements Comprising Competition Rules**

**Central Africa**

Competition law and policy is addressed quite extensively in African sub-regional agreements, which include competition rules often based on the Treaty of Rome. The 1964 Brazzaville Treaty, which established the Central African Customs and Economic Union (UDEAC), had stated that restrictive business practices (RBPs) in trade between the member states should be abolished. Two regulations are currently being drafted within the framework of the Treaty Establishing the Economic and Monetary Community of Central Africa (CEMAC), which lay down principles for common competition provisions to keep both RBPs and Government activities under control. This Treaty will replace the UDEAC Treaty. It is also proposed, in pursuance of the Treaty on the Harmonisation of Business law in Africa, that a uniform act covering competition law should be adopted. This act would have direct legal effect in its 16 Member States which stretch from West to Central Africa. Pursuant to the Treaty establishing the Common Market for Eastern and Southern Africa (COMESA), member states agree that RBPs, which have as their object or effect the prevention, restriction or distortion of competition within the common market, should be prohibited. The COMESA Council will have the task of elaborating competition law regulations. Subsidies that distort competition and affect trade between Member States will also infringe the law, with some exceptions to this rule. In order to harmonize national competition policy, a regional competition policy will be put into force. Changes are also on the horizon in Southern Africa. The Southern African Development Community (SADC) has stated that measures shall be taken that render unfair business practices unlawful and at the same time enhance competition.

**Latin America and the Caribbean**

In Latin America and the Caribbean, Protocol VIII of the 1973 Treaty Establishing the Caribbean Community (CARICOM) states that the Community is to establish appropriate norms and institutional arrangements to prohibit and sanction anticompetitive behavior, and that Member States should adopt a competition law, create institutions and procedures for the enforcement of the law and make sure that access to enforcement authorities by nationals of other member states is catered for. Regarding anticompetitive cross-border business conduct, a Competition Commission is established at the regional level to enforce the competition rules. The Commission is also mandated to promote competition within the Community. In coordinating the implementation of Community competition policy, the Commission will work alongside national competition authorities in the enforcement of the law. Recently, MERCOSUR has adopted a protocol covering individual conduct or concerted agreements impeding, restricting, or distorting competition or free access to markets, or abusing a dominant position in a relevant regional market within MERCOSUR and affecting trade between its Member States. The enforcement of these norms can be ordered by the MERCOSUR Technical Committee on Competition Policy and Commerce Commission. National agencies of the Member States would then implement them. Common norms controlling anticompetitive behavior are on the horizon and national competition agencies are urged to promote cooperation in areas such as information exchange. Anti-dumping is also to be reviewed by MERCOSUR. The control of RBPs is also provided for by Decision 285 of the Commission of the Cartagena Agreement (established under the Andean Pact). Andean Pact institutions, unlike MERCOSUR, have supranational powers. Companies with a legitimate interest or Member States can request the Board of the Cartagena Agreement to apply measures which prevent or correct injury to production or exports which are the consequences of RBPs. The regulation of antidumping action or countervailing duties is also covered.

Source: UNCTAD, “Experiences gained so far on international cooperation on competition policy issues and the mechanisms used," 25 April 2003.
petition rules similar to those of the EC Treaty. The replication of such rules in the Euromed Agreements shows a form of spill over effect of the Europe Agreements (Idot 2002). This effect is particularly significant, as the first new generation Euromed Agreements were concluded just after the adoption of the latest Europe Agreements. It thus seems that the EC institutions sought to achieve a certain degree of standardization of the competition law provisions inserted in their external Association Agreements.

Finally, this evolution takes place within a process of increasing economic integration between the EC and the MPs. The first generation agreements have contributed to dismantle tariff and nontariff barriers (although many such barriers remain) and have increased market access to foreign operators. As a result, the MPs have become important trading partners of the EC. Market access could, however, still be impeded by anticompetitive behaviors from private operators. In order to prevent that trade between the EC and its Euromed partners be restricted by such practices, competition rules were enacted so as to complement the classic trade provisions (Lahouel 2000).

The Competition Rules in the New Euromed Agreements

The competition provisions of the Euromed Agreements can be found in the title related to “payments, capital, competition and other provisions.” It can be reasonably inferred from this that the competition rules of these agreements have to be considered as rules designed to complement the main trade provisions (such as provisions on tariffs, customs).

As far as competition rules are concerned, the MPs are subject to a differentiated treatment. A first group of countries are bound by a complete set of competition rules equivalent to articles 81, 82, 86, and 87 of the EC Treaty. This is, for instance, the case of the agreements concluded with Morocco and Tunisia. It must also be noted that these agreements contain a provision on State commercial monopolies, similar to Article 31 of the EC Treaty. A second group of countries, whose agreements with the EC are more recent, are bound by a more limited set of competition rules since these agreements do not include provisions on State aids. This is the case for Algeria and Lebanon. Moreover, the wording of the competition rules of these agreements is slightly different. Notwithstanding this distinction, the competition provisions of the Association Agreements will be analyzed altogether.

First, it is important to note that the competition rules contained in these agreements will only be applicable to situations where trade between the EC and the associate countries is hampered.

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40. This is not the case of the Association Agreements concluded with non-CEEC candidate countries (Cyprus, Malta, and Turkey). The old Association Agreements concluded with these countries are still in force and do not directly provide for competition policies. Some of these agreements have subsequently been completed and the accession procedure led to the enforcement of stringent requirements in the field of competition policy.

41. The new generation of Association Agreements is composed of the agreements concluded following the initiation of the Barcelona process. They replace the former association and cooperation agreements that regulated the trade relationships between the EC and a majority of countries located in the Mediterranean region. The vast majority of Association Agreements concluded by the EC during these last five years include competition provisions.

42. Between 1990 and 2000, EU imports from the MPs increased from €27,844 million to €33,805 million. During the same period, EU exports to MPs increased from €7,161 million to €9,473 Million. See European Commission, DG Trade in “The Barcelona Process—The Euro-Mediterranean Partnership—Synthesis 2001.”

43. Such as, for instance, the refusal to provide access to an essential facility, a boycott cartel on foreign products, the creation of dominant positions or oligopolies that may impede imports (Fox 1999).

44. The agreements between the EC and the candidate countries follow a different pattern that will be briefly described in Chapter 6 of this study.

45. The analysis that follows is based on the provisions of the Association Agreement between the EC and Morocco, 26 February 1996, O.J. L70, 12 March 2000. See Articles 36 to 41.

46. See Article 36-1 of the Association Agreement between the EC and Morocco. Such a criterion is classic. The EEA Agreement contains a similar provision. Many non-EC regional trade agreements use similar criteria. This is, for instance, the case of the MERCOSUR, where the competition rules contained in the agreement will only apply provided that the anticompetitive practices in question “affect trade between States” (Tavares de Araújo Jr. 2000).
This measure is comparable to the criterion that triggers the application of EC competition rules inside the EC legal order, which requires that trade between Member States be affected. As in the EC, it is also not exclusive of the application of national laws.47

The competition rules declare incompatible all (i) restrictive agreements between undertakings, (ii) abuses of a dominant position by one or more undertakings, and (iii) State aids that distort, restrict, or prevent competition.48 The first agreements of the new generation also provide for rules with regard to State monopolies having a commercial character, as well as public undertakings and undertakings enjoying special or exclusive rights. These provisions must be applied according to the criteria of interpretation flowing from the provisions of the EC Treaty. In other words, the competition rules found in the Euromed Agreements have to be interpreted in conformity with the EC secondary legislation, the decision-making practice of the European Commission and the case law of the European Court of Justice (ECJ) and of the Court of First Instance (CFI).49 It is expected that each agreement will be progressively implemented by the Council of Association that should adopt the necessary regulations during a transition period of a variable length.50

These provisions call for three remarks. First, the Association Agreements do not provide for an exemption system comparable to the one put in place by Article 81(3) of the EC Treaty.51 Some authors argue that until a rule providing for an exemption procedure comparable to the one found in Article 81(3) of the Treaty is adopted, exemptions to behaviors prohibited by an Association Agreement cannot be granted jointly by the EC and the associated country. In practice, the power to grant exemptions will remain the exclusive competence of the European Commission acting on the basis of Article 81(3) of the EC Treaty (Bourgeois 1993).

Second, the Association Agreements do not provide for rules dealing with mergers. It is thus likely that the European Commission will apply its merger control rules to operations carried out by undertakings from associated countries, which have an impact on the EC market. The scope of application of the EC Merger Control Regulation is indeed very large. It is sufficient that the thresholds provided for in that regulation be met to authorize the European Commission to examine a transaction, even if it takes place outside the scope of the EC.52

Third, the rules on State aids contained in the Association Agreements have several specific features that distinguish them from the other competition provisions. In the first place, the rules with procedural aspects are more detailed and provide for requirements of notification and exchange of information.53 Unlike for the provisions dealing with restrictive agreements and abuses of a dominant position, the Association Agreements provide for a transitory mechanism designed to ensure an immediate application of the State aid rules. In the absence of implementation measures, the Parties to the Association Agreements thus commit themselves to comply with the provisions of the Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement

47. The European Commission has long interpreted this provision in a broad manner. The ECJ recently put an end to this extensive approach. See Case Javico International and Javico AG v. Yves St Laurent.
48. See Article 36-1 a), b) and c) of the Agreement between the EC and Morocco.
49. See Article 36-2 of the Agreement between the EC and Morocco. The criteria of application of the EC Treaty are expressly mentioned in the Agreement. See also Fingleton etal. (1996), p. 55.
50. The Council of Association is generally entrusted with the implementation of the agreements. Note that the agreement with Lebanon refers to a Joint Committee. A Committee of Association is also instituted and is competent for particular matters.
51. By contrast, the free-trade agreement between the EC and South-Africa also provides for an original exemption mechanism, based on a “rule of reason” approach. See Article 35 of the Trade, Development and Co-operation Agreement between, the European Community and the Republic of South-Africa. O.J. L311, 4 December 1999.
53. See Article 36-4 (b) of the Agreement between the EC and Morocco.
on Tariffs and Trade (GATT). There is, however, a qualification. The agreements provide that during a period of five years the provisions of the agreements dealing with State aids will be implemented in such a way that the partner country should be considered as one of the areas referred to in Article 87(3) of the EC Treaty. This qualification provides for a non-reciprocal mechanism that can only play to the benefit of the associated countries. A large part of the subsidies granted by the associated countries will thus be tolerated (Bourgeois 1993). Export subsidies will, however, remain prohibited as Article 11 of the Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the GATT does not allow them.

Two reasons explain the existence of this non-reciprocal mechanism. First, the general objective of development that is at the core of the Euro-Mediterranean Partnership probably contributed to a relaxation of the principle of incompatibility of State aids. The development of some sectors or regions may require the distribution of subsidies and prohibiting these would maintain these sectors and regions in a state of underdevelopment. Second, emerging economies often have a solid tradition of funding their economies through public resources and in these countries, the political stakes that involve public subsidies are so high that a certain tolerance had to be admitted.

The Effectiveness of the Competition Rules of the Association Agreements

Association Agreements are considered as key instruments for facilitating trade between the EC and partner countries. It is true that they contain a large set of provisions aiming to remove obstacles to trade, as well as to provide protection to traders. Yet, it is important to analyze the extent to which these provisions are effective in attaining their objectives. This section analyzes whether the competition law provisions of the Association Agreements have been effectively implemented, thus allowing the EC and the MPs to be protected against anticompetitive practices affecting their trade relations. This depends on two elements. First, the implementation mechanisms instituted by the agreements, and second, the degree of protection granted to individuals in the absence of implementation.

The Implementation by the Council of Association

The insertion of competition rules within an Association Agreement implies the enactment of implementation measures by the Council of Association. Unlike the Europe Agreements where these implementation measures were quickly adopted, no such measures have been so far adopted in the context of the Association Agreements with the MPs.

This situation can be explained by the existence of a flexible calendar of implementation. The Association Agreements provide that implementation measures must be adopted by the Council of Association within a given period of time, which varies depending on each agreement. It seems,

54. See Article 36-3 of the Agreement between the EC and Morocco. The Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade enacts, *inter alia*, the rules applicable to State subsidies within the framework of the GATT. See http://www.wto.org/english/docs_e/legal_e/prewto_legal_e.htm. This is submitted to the condition that the partner countries be member of the WTO and bound by the GATT provisions. This is the case of most of the MPs, with the exception of the Palestinian Authority and Syria. It should be noted that Algeria and Lebanon are only observers within the organization.

55. See Article 36-4 (a) of the Agreement between the EC and Morocco.

56. This is also in line with the GATT provisions, since Article 11 of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the GATT explicitly allows aids which aim is to ensure “the elimination of industrial, economic and social disadvantages of specific regions.”

57. This is also true in the EC where the highly political aspect of State subsidies is regularly brought under light.

58. See Article 36-2 of the Agreement between the EC and Morocco. It is highly probable that the political conditionality and the accession objective of the CEECs has played an important role in the rapid implementation of the agreements. See for instance EC (1996), p. 21.

59. The period provided for by the agreements is generally five years. Some agreements, however, provide for shorter periods. See, for instance, the Association Agreement with Israel that provides for a period of three years.
however, that these implementation periods only have an indicative value. For instance, the Association Agreement between the EC and Tunisia provided for an implementation period of five years (by 2002). However, recent European Commission reports indicate that, in 2002, nothing had yet been done, in spite of requests by the Commission to open the dialogue on the competition provisions.

However, the Commission issued a proposal for a Council Decision on the position to be adopted by the Community within the EC-Turkey Association concerning a Decision of the EC-Turkey Association Council adopting the implementing rules necessary for the application of the provisions on competition policy referred to in Article 37 of Decision 1/95 of the EC-Turkey Association Council.\textsuperscript{60} In addition, the Commission has recently issued a proposal for a Council Decision on a Community position in the Association Council on the implementation of the competition provisions of the EC-Morocco agreement.\textsuperscript{61} The rest of this section will focus on the latter proposal (hereafter, the “Proposal”). As has been explained above, article 36 of the EC-Morocco agreement provides for rules against anti-competitive practices and, for these rules to be effective requires that implementation measures be adopted by the Association Council before the year 2005.\textsuperscript{62}

The recitals of the Proposal outline the circumstances, which allow the adoption of measures of implementation of the competition rules of the EC-Morocco agreement. Emphasis is put on the fact that Morocco has adopted a competition regime and has set up a competition authority.\textsuperscript{63} This seems to imply that, to a certain extent, the competition rules of the agreement will not be implemented as long as the partner countries have not adopted competition regimes and established effective institutions.

The implementation provisions are to be found in the annex to the Proposal, which contains the proposed draft decision of the Association Council (hereafter, the “proposed decision”). Two aspects require particular attention. On the one hand, the Commission proposes a decentralized approach to competition enforcement. Article 1 of the annex to the proposed decision provides that the cases relating to practices contrary to article 36(1) a) and b) of the agreement shall be dealt with by applying appropriate legislation (i.e. the domestic competition legislation of the respective parties) by competent institutions under national law (i.e. the domestic competition authorities of the respective parties).\textsuperscript{64} This is confirmed in Article 2, which provides that the applicable competition laws are, for the EC, Article 81 and 82, secondary legislation and the Merger Control Regulation (MCR), and, for Morocco, the Price Liberalisation and Free Competition Act (passed in the year 2000) as well as secondary legislation.\textsuperscript{65} It should be noted that unlike the Proposal of Decision of the Council of Association EC-Turkey, the annex to the proposed decision does not provide that the competition laws of the Parties must be interpreted in compliance with the “criteria arising from the application of the rules” of competition of the EC Treaty.

On the other hand, in the absence of a developed institutional framework such as, for instance, the one found in the EEA, as well as in absence of a case allocation mechanism, the annex to the proposed decision details several cooperation provisions. First, a notification mechanism is instituted pursuant to which parties agree to notify, in a detailed manner, their respective competition enforcement activities and commit themselves to do so in the initial phase of procedures.\textsuperscript{66} Second, the

\textsuperscript{60} 7 November 1991, COM(2001), 632 final.

\textsuperscript{61} See Proposal for a Council Decision on a Community position in the Association Council on the implementation of the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, on the one hand, and the Kingdom of Morocco, on the other, 26 June 2003, COM(2003) 365 final.

\textsuperscript{62} From an EC standpoint, the first step towards implementation is therefore the definition of a position with respect to the implementation measures. Such a position is to be decided by the Council upon proposal by the Commission.

\textsuperscript{63} The Moroccan Competition authority was supposed to be effective as of 2003.

\textsuperscript{64} The competence of the parties’ competition authorities is determined on the basis of the domestic competition rules including situations where these rules apply to undertakings outside their respective territories.

\textsuperscript{65} See paragraph 2 of the annex to the proposed decision.

\textsuperscript{66} See paragraph 3 of the annex to the proposed decision.
competition authorities commit themselves to exchanging information in order to facilitate their respective enforcement activities.\textsuperscript{67} Third, coordination of enforcement activities of the two competition authorities is made possible. A competition authority may, for instance, notify the other party of its willingness to coordinate enforcement activities with respect to a specific case.\textsuperscript{68} Fourth, mechanisms of comity are laid down.\textsuperscript{69} Fifth, provisions on technical cooperation are made.\textsuperscript{70}

It is therefore clear that the implementation of the agreement is entrusted to national institutions on the basis of national rules.\textsuperscript{71} It seems likely that the decentralized approach will be applied to the other Euromed Agreements.\textsuperscript{72} In spite of the degree of protection conferred by the competition rules of the agreement, it is submitted that such decentralized enforcement could lead to an asymmetric application of these rules and thus to an unequal level of protection among the Parties. As will be seen below, the level of protection offered by the national competition legislation varies a lot from one country to another and will generally be lower than what is offered by EC competition law. There might thus be divergences among MPs in the effectiveness of the implementation of their competition law.

The Euromed Agreements contain a provision that allows the Parties to exclude the application of the competition rules contained in the agreement to the benefit of a unilateral application of their national legislation. The provision in question is generally written as follows:

If the Community or (. . .) considers that a particular practice is incompatible with the terms of paragraph 1, and,

(i) is not adequately dealt with under the implementing rules referred to in paragraph 3,

(ii) or in the absence of such rules, and if such practice causes or threatens to cause serious prejudice to the interest of the other Party or material injury to its domestic industry, including its services industry,

it may take appropriate measures after consultation within the Association Committee or after 30 working days following referral to that Committee.\textsuperscript{73}

\textsuperscript{67} Nonetheless, the exchange of confidential information is subject to the law of each party. While it is not prohibited in theory, potential exchange of confidential information is strictly framed. The dissemination of confidential information is not allowed if prohibited or harmful to the interests of a party unless it has been consented to by the source. In addition, each competition authority endeavours to maintain the confidentiality of information provided to it and shall refuse to disclose information. See paragraph 4.2 of the annex to the proposed decision.

\textsuperscript{68} The criteria for assessing the opportunity of such coordination are explicated in the decision. See paragraph 5.2 of the annex to the proposed decision.

\textsuperscript{69} The comity mechanisms are as follows. First, it is provided that each party’s competition authorities shall take into account the important interests of the other party in the course of its enforcement activities (“negative comity”). See paragraph 6.1 of the annex to the proposed decision. Second, parties considering that its important interests are being affected may transmit its view on the matter to the other competition authority or request consultation with the other party. The requested party may take remedial action. This latter mechanism relates to the mechanism known as “positive comity.” See paragraph 6.2 of the annex to the proposed decision.

\textsuperscript{70} The annex to the proposed decision encourages parties to strengthen the implementation of their competition law and policies. In this respect, a reference is made to the program backing the implementation of the Association Agreement (which includes training procedures and in seminars). See paragraph 7.1 of the annex to the proposed decision.

\textsuperscript{71} The management of the implementing rules is nonetheless placed under supervision of the Internal Market Subcommittee of the Association Agreement. See paragraph 8 of the annex to the proposed decision.

\textsuperscript{72} As explained in the recital of the proposal, the Commission intends to favor a standardized approach to implementation measures. See paragraph 4 of the Explanatory Memorandum. The implementation measures for the competition rules adopted in the context of the Europe Agreements followed a standardized approach applicable to every candidate country.

\textsuperscript{73} See Article 36-6 of the Agreement between the EC and Tunisia, O.J. L97; 30 March 1998. The wording of this provision has slightly changed in the more recent Agreements.
The provision could be applied when a conduct incompatible with the competition rules contained in the agreement is taking place, for instance, if one of the Parties considers that the implementation measures are not sufficiently strict to properly sanction an anticompetitive conduct. This could also be the case if, in the absence of implementation measures, the government of an associated country granted a subsidy to a domestic undertaking, which created a prejudice to the interests of the other Party (Bourgeois 1993). In such a case, the Party in question would be authorized not to apply the competition provisions of the Agreement and instead rely on unilateral measures to defend its interests. This would allow the EC to rely on antidumping or other measures of retaliation (Evans 1996). This would also allow the Parties to rely on national rules that are not normally designed to sanction anticompetitive practices but are adopted to sanction the anticompetitive conduct in question.

This provision, which is often presented as a “safeguard clause,” can be criticized as it opens the door to a selective and unilateral application of the agreement by a Party that would consider that the implementation measures are not adequate. It is, however, subject to question whether the Parties, which are engaged in a cooperation agreement, will take the risk of relying on this provision to act unilaterally. This is particularly true for the MPs whose trade relationships with the EC are key to the success of their economy.

The Degree of Protection Enjoyed by Individuals

As seen above, none of the competition provisions contained in the existing Euromed Agreements have so far been completed by measures of implementation, although proposals for the adoption of such measures were made in 2001 with respect to the Association Agreement with Turkey and in 2003 with respect to the Association Agreement with Morocco. It is generally considered that, in the absence of such measures, the competition rules of the agreements are not applicable. It is, however, subject to question whether alternative mechanisms could be used to offer a certain degree of protection to the individuals that are victims of an anticompetitive behavior. Two approaches can be explored.

A first approach is to determine whether the competition provisions included in the Association Agreements have direct effect, thereby allowing individuals to invoke them before national courts. It is now largely admitted that the provisions of international agreements that meet the conditions for having a direct effect can be invoked by any individual before the national courts. The existence of a direct effect can legitimately be raised in the context of the Euromed Agree-

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74. When this situation occurs, the Parties must find an agreement on how to deal with this practice within the Association Committee. This body is entrusted with the power to formulate an opinion in case of a disagreement between the Parties on the application of the Association Agreement. This opinion is, however, of a consultative nature and does not bind the Parties to the agreement.
75. About the Europe Agreements, see also Evans (1996), p. 133.
77. The author considers that Parties may make recourse to this safeguard clause in order to apply other kinds of laws such as criminal laws.
78. See the comments of Bourgeois (1993), p.132.
79. This observation seems to be supported by practical evidence. To the author’s knowledge, no dispute has so far been settled through this procedure.
80. The question of the direct effect of provisions of international agreements concluded by the EC has been clarified by ECJ case law. It is admitted that an international agreement concluded on the basis of Article 310 of the EC Treaty belongs to the EC legal order since its conclusion. See ECJ, 30 April 1974, R. & V. Haegeman v. Belgian State, C-181/73, ECR p.449. Such agreements thus enjoy primacy over national law and, under conditions, direct effect. Indeed, the ECJ held that the provisions of international agreements can be directly invoked by individuals before national courts provided that the act contains a clear, precise and unconditional obligation. See ECJ, 30 September 1987, Demirel v. Stadt Schwäbisch Gmünd, C-12/86, ECR p. 3719. In addition, the formulation, nature and goals of the agreement are taken into consideration to determine whether it can be granted direct effect. See ECJ, 1 July 1993, Metalsa, C-312-91, ECR I p. 3751.
ments. Indeed, those agreements replicate the competition rules of the EC Treaty, which enjoy direct effect within the EC legal order. Similarly worded norms contained in an international agreement could therefore be considered directly effective, even in the absence of implementation measures. A minimum degree of protection could accordingly be afforded to individuals through the application of the direct effect doctrine.

Two elements seem, however, to exclude that competition rules found in the Association Agreements be granted direct effect. First, as pointed out by several authors, no rule comparable to Protocol 35 of the EEA Agreement explicitly provides that the competition rules shall be “directly applicable.”81 Second, as seen above, the Association Agreements mandate the Councils of Association to adopt measures to implement their competition law provisions. Because the implementation measures make the competition rules applicable, it must be logically presumed that until such measures are adopted, the provisions of the agreements are not effective.82 It results from the above analysis that the degree of protection enjoyed by individuals on the basis of the Association Agreements is extremely limited, at least until the agreement is implemented.

A second approach is to explore whether, in the absence of implementation measures and of direct effect, individuals could directly rely on the provisions of the EC Treaty to have anticompetitive practices carried out in the EC or in the MPs sanctioned. The relevant criterion here is to determine whether the practices in question have an impact within the EC. Indeed, the “Wood-pulp” case law of the ECJ, according to which articles 23 and 27 of the EEA Agreement do not exclude the applicability of Article 81 of the EC Treaty, confers a minimal protection to economic agents (Bourgeois 1993). This mechanism, however, only protects individuals located within the EC. To benefit from a similar protection, the economic agents of the MPs would have to rely on their national rules of competition. As will be seen below, the effectiveness of such rules is in some of these countries rather limited. For this reason, there is an asymmetric protection of individuals between the EC and the partner countries.

In sum, while the insertion of competition rules in the Association Agreements with the MPs is currently desirable (if only because it shows the importance of such rules to the MPs), it is not clear whether these rules will offer great relief to the undertakings active in trade between the EC and the MPs, which suffer from anticompetitive practices. As we have seen above, the measures of implementation of these provisions have not yet been adopted, although such adoption should be imminent in the case of Morocco. Moreover, it is not clear whether measures of implementation, which depend on a decentralized enforcement approach relying on national competition rules and national enforcement bodies will always allow undertakings that are victims of anticompetitive measures to obtain relief. In particular there is a risk of asymmetric application of the competition provisions of the agreements due to the weakness of most competition regimes currently in place in the MPs.

The Way Ahead

The main steps to be taken to give greater effectiveness to the competition rules that are found in the Association Agreements thus consist in encouraging a rapid adoption of measures of implementation of these rules, combined with a major effort to strengthen the competition law regimes and institutions of the MPs. There are, however, limits to what a decentralized system can offer especially when it comes to prevent anticompetitive practices affecting regional trade. In the long-run, a more centralized enforcement approach such as the system found in the EEA, which involves the presence of a supranational enforcement authority operating on the basis of a common set of rules and procedures may be the way to go for the Mediterranean region. Such an approach

82. This is confirmed in the case law of the ECJ. See Case C-12/86 “Demirel.”
would, however, require the EU and non-candidate countries to move from a bilateral to a regional model operating with common rules for the entire Euromed market and common institutions for the MPs. While it is not clear whether the non-candidate MPs would be prepared at some stage to opt for a centralized enforcement model, this is an approach, which should not be ruled out in advance. Much of the success of EC competition policy comes from the fact it has been primarily enforced by a supranational body, although the recent focus on this policy has been on decentralization. The EEA institutional model seems particularly attractive and adapted to the model of growing integration, which is anticipated in the Communication of the Commission on the New Neighborhood Policy.83

**Box 5.2: Enforcement of Competition Rules in the EEA**

The EEA is an international agreement signed on 2 May 1992 between the EU and the EU Member States, on the one hand, and the three EFTA States (Iceland, Norway, and Liechtenstein), on the other hand, with the objective of creating a deep economic integration between the two blocks.

The EEA contains competition rules that are identical to the competition rules of the EC Treaty. As far as enforcement of these rules is concerned, a two-pillar system is being created. On the one hand, anticompetitive practices having an effect on trade between EC Member States will be investigated by the European Commission. On the other hand, anticompetitive practices having an effect on trade between the EFTA Member States will be dealt with by the EFTA Surveillance Authority. Cases affecting trade between the EU and EFTA will be allocated to either the European Commission or the EFTA Surveillance Authority. The uniformity of the interpretation of the competition provisions of the EEA is guaranteed by the rule that the enforcement authorities of the two blocks have to interpret these provisions in accordance with the case-law of the European Court of Justice.


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Among the partner countries, three States (Cyprus, Malta, and Turkey) are engaged in the accession process to the European Union. Two of them will become Members of the European Union on May 1, 2004. This chapter analyses the obligations imposed on these candidate countries in the context of their Association Agreement and the accession process. These obligations are much stronger than the obligations imposed on non-candidate countries and guarantee a relatively high level of effectiveness of the domestic competition regimes of the candidate countries.

Cyprus, Malta, and Turkey are linked with the EC through first generation Association Agreements signed during the 1960s and the 1970s. The objective of the agreements was to create a Customs Union between these countries and the EC. Originally, these agreements did not contain competition rules. Such rules were only subsequently included. The Agreement with Cyprus was thus amended in 1987, among other things, to integrate competition provisions identical to those included in the EC Treaty. As far as Turkey is concerned, the insertion of EC competition law provisions was achieved through a decision of the EC-Turkey Council of Association (EC 1996b). The objective of creating a Customs Union, and the perspective of a possible accession to the EC, required a higher degree of cooperation than with the other partners. This integration of EC competition law provisions imposed on these countries a series of additional obligations.

84. See http://europa.eu.int/comm/external_relations/euromed/med_asss_agreements.htm
85. See Protocol laying down the conditions and procedures for the implementation of the second stage of the Agreement, establishing an association between the European Economic Community and the Republic of Cyprus and adapting certain provisions of the Agreement, Council Decision of 21 December 1987 (87/607/EEC).
86. It can also be presumed that such complementary rules were already adopted in light of the accession objective. See Kabaalioglu (1997), p. 133.
87. For instance, Turkey was submitted to the obligation of adopting a domestic competition legislation and creating an enforcement authority. Regarding Cyprus, Article 27 of the abovementioned Decision, explicitly refers to Article 94 of the EC Treaty, which deals with approximation of national laws. Malta has not benefited from such complementary rules.
The difference between these countries and the other MPs became larger when the former were formally recognized as candidates for accession to the EU, and in that capacity, benefited from the accession process.\textsuperscript{88} Their entry into the EU involves compliance with the second “Copenhagen” criteria that requires, among other things, that candidate countries put in place a viable, open, and competitive market economy.\textsuperscript{89} New obligations were thus imposed on these countries and, in particular, the integral absorption of the \textit{acquis communautaire} (body of EU laws) in the area of competition law.\textsuperscript{90} To make sure that the candidate countries would comply with this requirement, a link of conditionality was established between the transposition of EC competition rules in the domestic legal order and the accession to the European Union. It was indeed considered essential that, before they become members, candidate countries be accustomed to a competitive discipline equivalent to the one existing in the EC. The absence of such a discipline would involve two risks. On the one hand, the undertakings of these countries would not be able to survive in the competitive environment of the EC. On the other hand, if candidate countries could gain access to the internal market at conditions different to those imposed on the current member countries, this could prejudice the “level playing field” existing in the EC.\textsuperscript{91}

The distinction between candidate MPs and non-candidate MPs having been established, it is now important to reflect on the extent of the obligations imposed on the former. In this respect, an analysis of the actions undertaken by the EC vis-à-vis the CEECs in the competition field is particularly relevant. The candidate MPs are indeed going through a process that is in many ways similar to the accession process imposed on the CEECs.\textsuperscript{92} Relying on the experience of the CEECs, the following sections will seek to identify the extent of the obligations imposed on the candidate countries, as well as the mechanisms used to help them achieve these obligations.

\textbf{The Obligations Imposed to Candidate Countries in the Competition Field}

The analysis of the obligations imposed on the CEECs must combine a review of the provisions contained in the Europe Agreements with the two main types of obligations that the accession process imposes on candidate countries: the alignment of their law on EC law, and the implementation of an effective enforcement system.\textsuperscript{93}

At the substantive level, the bilateral agreements concluded with the CEECs entirely reproduce the competition provisions of the EC Treaty. These agreements prohibit restrictive agreements, abuses of a dominant position and State aids.\textsuperscript{94} Such types of conduct are declared

\textsuperscript{88} Pre-accession strategies are designed to help candidate countries to prepare for their future membership by aligning with the \textit{acquis} before accession. It typically relies on the implementation of the Association Agreements, the design of national programmes for the adoption of the \textit{acquis}, and the participation in EC programmes, agencies and committees. See http://europa.eu.int/comm/enlargement/pas/.


\textsuperscript{90} Competition policy is one of the areas where the candidate countries need to harmonize their rules with EC legislation. Negotiations over implementation of the \textit{acquis} are divided into 31 chapters. Competition policy is Chapter 4. http://europa.eu.int/comm/enlargement/negotiations/chapters/chap6/

With respect to competition law, the \textit{acquis communautaire} contains Article 31, Articles 81 to 89 of the EC Treaty, the Merger Control Regulation, the secondary and sector-specific legislation (i.e. telecommunications as well as energy, postal services, transports etc.).

\textsuperscript{91} See speech of the EC Competition Commissioner, Mario Monti (2001).

\textsuperscript{92} Unlike the Europe Agreements, the agreements with Cyprus, Malta, and Turkey did not originally provide for competition rules.

\textsuperscript{93} The European Commission generally considers that: (i) “these countries must show that the necessary legal framework, for both antitrust and State aid, has been created; (ii) an efficient administrative capacity must be in place to apply the competition rules and (iii), finally, and most decisively, the candidate countries need to show a concrete State aid and antitrust enforcement record.” See speech of Mr. Monti (2001).

\textsuperscript{94} The implementation measures of these agreements have been adopted by the Council of Association. On this point, see our comments above. The decisions for implementation do not seem to be very far-reaching. See also the comments made by Idot (2000), p. 33.
incompatible with the Association Agreement. A requirement of consistent interpretation is
inserted in the agreements pursuant to which their provisions must be applied and interpreted in
conformity with the decisional practice of the European Commission and the case law of the ECJ
and the CFI. These agreements also provide for obligations of exchange of information between
the authorities of each of the parties. The candidate MPs have committed to comply with similar
obligations. These obligations do not, however, result from the agreements but have been set up
by a different mechanism (EC 1996b).

Another central provision of the Europe agreements requires that the associated countries
adopt competition law regimes that converge around EC competition law (Van Miert 1998, Pons
1999). The scope of this provision is not entirely clear (Fingleton et al. 1996). On the one hand,
some argued in favor of a minimalist approach whereby convergence should be understood as a
“bringing into general harmony” of national law on EC law.95 On the other hand, others, includ-
ing the European Commission, argue that this provision should be interpreted in a more extensive
manner. The rationale for this wider interpretation can be found in the Commission’s White Paper
on Enlargement.96 In this document, the Commission observes that as the direct effect doctrine
does not apply to the candidate countries during the association period, individuals cannot invoke
EC competition law before their national courts.97 Similarly, during this period, nothing forces, the
national courts of the associated countries to apply the provisions that are contained in the Europe
Agreements. They may instead decide to apply their national law.98 A detailed transposition of EC
competition rules in the domestic legislation of the candidate countries is thus essential to ensure
the effectiveness of the provisions of the agreements.

This obligation of convergence, through a transposition of EC competition rules, also applies
to the candidate MPs. Article 39 of the 1/95 Decision of the EC-Turkey Council of Association
imposes a similar obligation. Specifically, this decision imposes on Turkey an obligation to adopt a
law prohibiting the practices referred to in Articles 81 and 82 of the EC Treaty, as well as trans-
posing all the principles contained in the block exemption regulations applicable in the EC.99

At the institutional level, the accession process requires that the CEECs implement an effec-
tive system of control of anticompetitive practices. A certain degree of flexibility is conceded to
the candidate countries since they are left entirely free to design the structures to be put into place
according to their preferences.100 On the other hand, a strong emphasis is placed on the require-
ment that enforcement authorities be independent and enjoy a sufficient level of resources and
expertise so as to offer credible mechanisms of control on which individuals can rely to have their
rights protected.

The Mechanisms of Accompaniment and Evaluation in the
Competition Law Field
In order to stimulate the creation of a “competition culture,” the European Commission provides
technical assistance to the candidate countries (Monti 2000). It is indeed considered essential that
competition rules “be largely known and well accepted so that it can be expected that they will be

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95. Pursuant to this interpretation, domestic law should simply be in conformity with the general prin-
97. As seen in Chapter 5, it is unlikely that the provisions of the Association Agreements enjoy direct
effect.
98. This depends on the national constitutional mechanisms of each partner country.
99. This obligation of convergence has been criticized. It can even be considered that the obligation
imposed on an associated country to adopt a competition law is in many regards excessive when Italy, found-
ing member of the EC, did not have a national competition law until 1990. See Kabalioglu (1999), p. 133.
effectively implemented.”101 Efforts are, for instance, made to provide training to the officials of these countries.

To ensure a certain degree of coordination between the Competition Directorate of the European Commission and the competent authorities in the candidate countries, annual conferences are organized where these authorities can meet to exchange information on the instruments used to implement the requirements imposed on candidate countries, and to prepare these countries to the accession to the European Union. In the long term, this coordination effort will contribute to prevent the risk of conflicting decisions and disagreements among these authorities (Pons, 1999).102

The evaluation reports prepared by the European Commission suggest that the various substantive and institutional obligations imposed on the CEECs induced these countries to adopt effective competition law regimes.103 First, it appears that the transposition of the acquis communautaire in the area of competition law is satisfactory in the majority of the CEECs. Recurring criticisms relate, however, to the weakness of the enforcement mechanisms set up by the authorities of the candidate countries, which would not provide for a sufficient level of deterrence, as well as to the lack of awareness of the public, and in particular, of undertakings to competition rules.104 The Commission also criticizes the insufficiently effective implementation of State aid rules, the quality of the decisions rendered, and the persistence of incompatible aid regimes.105

At the institutional level, the CEECs did set up competition authorities. The evaluations of these authorities performed by the Commission are at the same time quantitative (number of decisions rendered) and qualitative (quality of the decisions rendered). The evaluation reports reveal that in spite of encouraging progresses, institutional issues often create more difficulties than the substantive issues examined above. More specifically, recurring problems relate to the authorities of control for State aids. Commission reports indicate that there is an insufficient administrative capacity to tackle State aids in Bulgaria, an insufficient level of enforcement for certain categories of aid in Poland, and a lack of firmness and dynamism in Romania.

It results from the above analysis that the obligations contained in the Europe Agreements, combined with the requirement of alignment and transposition of the acquis have led candidate countries to progressively adopt modern competition laws. Although progress remains to be made in some of these countries, one should not lose sight of the fact that accession is a progressive mechanism and that the negotiations on Chapter VI (dealing with competition law) have only recently been initiated with some of the CEECs.106 It thus seems fair to say that the mechanism of convergence provided for in the Europe Agreements, combined with the accession process, is very effective as it translates significant substantive and institutional amendments within a very short period of time.

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102. Cooperation for the avoidance of conflicting decisions is very important for the candidate countries. At the time of their accession, the incoming countries will have to apply the new rules governing the implementation of Articles 81 and 82. See Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, O.J. L1/1 of 4 January 2003. This regulation implements a decentralized approach to enforcement of competition rules based on a network of national competition authorities.
104. This is the case of most candidate countries. In this respect, Bulgaria and Romania are still far from a sufficient transposition of the acquis. Countries such as the Czech Republic, show satisfactory performance as regards Chapter 6, but still face considerable difficulties to adopt efficient and complete State aid control regimes.
105. See, for instance, Poland and Bulgaria.
106. At the time being, negotiations on Chapter 6 have been provisionally closed with four CEECs (Estonia, Latvia, Lithuania, and Slovenia). See Lowe (2002), p. 1. It will, however, be remarked that the negotiations on this Chapter have not been opened simultaneously with all the candidate countries. For instance, the negotiations with Bulgaria were only opened in 2001.
The analysis contained in Chapter 6 showed that one of the major requirements imposed on the CEECs is that these countries are submitted to an obligation of convergence of the domestic legislation around EC competition law, through a transposition of the acquis communautaire. The Mediterranean Partners (MPs) that are candidate countries (Cyprus, Malta, and Turkey) have to comply with a similar obligation. By contrast, non-candidate MPs are not submitted to an obligation of convergence of their competition rules around EC competition law, although, as will be seen below, the Commission is encouraging these countries through a variety of means to engage into a convergence process.

This chapter analyzes the domestic competition rules of the MPs. It is divided into three sections. After examining the state of adoption of domestic competition rules in the partner countries, it briefly summarizes their content and provides an evaluation of the effectiveness of these rules.

State of Adoption of Domestic Competition Laws in the Mediterranean Partners

A preliminary distinction has to be made between two groups of countries. The first consists of the three countries engaged in the accession process (Cyprus, Malta, and Turkey), two of which will join in May 2004, and which are accordingly submitted to strong domestic obligations. Their candidate status requires that they transpose in their domestic legal order the entirety of EC competition law. The second group of countries is composed of the rest of the MPs that are linked to the EC by an association agreement, that does not specifically impose domestic obligations.

107. This chapter is partly based on Geradin and Petit (2003).
108. This can be explained by two reasons. First, candidate countries are compelled to exhaustively transpose the acquis in their domestic legal orders and to set up efficient enforcement authorities. Second, Decision 1/95 already submitted Turkey to a compulsory convergence of its competition rules.
These countries are neither obliged to have an EC-compatible domestic competition law, nor even to have a competition law. As a result, MPs have followed different options at the domestic level. Depending on such options, we have divided these countries in four categories. The first category is composed of Israel that has had a modern set of competition rules since 1988, offering a high level of protection to economic operators. The second category includes the Maghreb countries (Algeria, Morocco, and Tunisia) that have adopted national competition laws that are patterned on the French Ordinance of 1 December 1986. A third group is composed of countries that have just adopted or are in the process of adopting domestic competition legislation. This is the case of Jordan, Egypt, and Lebanon. The novelty of such rules makes it difficult to evaluate their effectiveness. Finally, a last group is composed of the countries (Syria, and the West Bank and Gaza) that have not yet adopted domestic competition laws and are not in the process of doing so.

Content of Domestic Competition Laws

The candidate countries

Candidate countries have to implement the **acquis communautaire** in the competition field and are receiving assistance from the European Commission in doing so. The annual reports on the progress of the candidate countries towards accession provide useful and accurate information on the actual content of the national competition laws of these countries.

Cyprus enacted a national competition law in 1989. This legislation is built on the principles of EC competition law. As regards institutional features, a Commission for the Protection of Competition (CPC) has been created to inquire, decide, and sanction the violations of Articles 4 and 48.


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111. For Jordan, see Provisional Law N°49 of the Year 2002. For Egypt, see Draft Presidential Decree for 2001 for Draft Law Organizing Competition and Prohibition of Monopolistic Practices. No document is currently available for Lebanon.
6 of the Law. All interested individuals can introduce an action before the CPC. The institution can also self-initiate proceedings. Already in 1993, the European Commission declared that the Cyprus competition law was very close to EC competition standards. The accession procedure, however, required a range of improvements, such as a better transposition of secondary community legislation, a higher level of enforcement, and the adoption of measures designed to strengthen the administrative capacity of the CPC. Cyprus has therefore progressively gone further, so as to meet the compliance requirements imposed by the EC, and has adopted both merger and State aids control Laws.

The latest regular report produced by the European Commission showed very satisfactory results. Cyprus has made steady progress in the adoption of competition rules equivalent to EC competition law and now enjoys an efficient State aid law and authority. At the institutional level, however, further improvements remain possible and desirable. For instance, the Commission considers that the CPC should adopt an enforcement policy that provides a greater degree of deterrence and focuses on hardcore infringements. The CPC is also encouraged to enhance competition advocacy among the economic and judicial spheres. Notwithstanding these points, the European Commission has come to the conclusion that Cyprus’ domestic competition legislation

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**Table 7.1: Competition Law in the MEDA Countries**

<table>
<thead>
<tr>
<th>Country</th>
<th>Law</th>
<th>Date of Approval</th>
</tr>
</thead>
<tbody>
<tr>
<td>Algeria</td>
<td>Law no. 2000–03</td>
<td>August 5, 2000</td>
</tr>
<tr>
<td>Cyprus</td>
<td>Protection of Competition Law 207/89</td>
<td>November 30, 1989</td>
</tr>
<tr>
<td>Jordan</td>
<td>The Competition Law no. 49 for Year 2002</td>
<td>August 15, 2002</td>
</tr>
<tr>
<td>Malta</td>
<td>Competition Act</td>
<td>February 1, 1995</td>
</tr>
<tr>
<td>Morocco</td>
<td>Price Liberalization and Free Competition Act</td>
<td>July 5, 2000</td>
</tr>
<tr>
<td>Turkey</td>
<td>Law on the Protection of Competition (Law No. 4054)</td>
<td>December 13, 1994</td>
</tr>
</tbody>
</table>

Notes:

In Egypt there have been several attempts to develop and adopt a competition law, but none have yet managed to be adopted into law.

In Lebanon, regulatory reforms designed to increase the competitiveness of the economy are in the legislative pipeline, but have not yet been adopted.

No Competition Laws have been adopted in Syria and West Bank and Gaza.
sufficiently complied with EC competition law, and that accession negotiations in this field could be provisionally closed.

The evaluation of Malta by the EC is also satisfactory. Malta adopted a “Competition Act” in 1995.118 In substance, this legislation prohibits restrictive agreements and abuses of a dominant position in terms equivalent to those of Articles 81 and 82 of the EC Treaty. Malta has also recently adopted a national merger control regulation. As regards State aids, a Business Promotion Act was passed in 2001 that details the requirements to be met, in order to grant aid to industry. In its latest report towards accession, the Commission considers the situation satisfactory, although it regrets: (i) a persistent lack of transparency in the field of State aids; (ii) possible further improvements regarding, among other things, fiscal aids; and (iii) a partial exclusion of public undertakings from the scope of application of the antitrust legislation. This legislation was adopted in June 2002. The control of mergers was previously realized through the application of Section 9 of the Competition Act that provides for a prohibition of the abuse of a dominant position.

At the institutional level, further work is still required concerning the enforcement, administrative capacity, and the level of independence of the various competent authorities (Office of Fair Competition, Commission for Fair Trading, Commissioner to State Aid and the State Aid Monitoring Board) and the judiciary. Like Cyprus, Malta has been asked to develop a stronger deterrent enforcement policy and to enhance competition advocacy in the economic and judicial spheres. For these reasons, the Commission considers that negotiations on the Competition Policy Chapter must continue.

Turkey adopted a law on the Protection of Competition in 1994 that replicates the provisions of the EC Treaty regarding anticompetitive agreements and abuses of a dominant position.119 The law also prohibits mergers between undertakings that may create or strengthen a dominant position.120 The law also created a competition authority.121

The latest report122 on the progress towards accession reveals that Turkey is the MP that has performed least satisfactorily in the transposition and implementation of the acquis communautaire. The alignment of national competition rules is still incomplete. This is, for instance, the case in the field of vertical restraints where national legislation is still based on the old EC approach, or in the

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120. See Article 7(1) of the law on the Protection of Competition.
121. See Article 7(1) at Article 20. See part III, Chapter I for the rules governing the composition, functioning, and prerogatives and processing of the competition authority. The authority is placed under the direction of a President who enjoys wide powers of management, representation and advice.
field of agreements of minor importance for which no rules exist. Furthermore, requirements in
the field of State monopolies and undertakings enjoying exclusive rights have not been met, as
several important public undertakings remain outside the scope of the competition legislation.

At the institutional level, it appears that the judiciary works inefficiently, as the slow processing
of appeals against the decisions of the Competition Authority by the Supreme Administrative Court
delays effective implementation of the competition rules. In addition, the administrative fines to
ensure compliance with competition rules and procedures fail to have a sufficient deterrent effect
because of the high inflation. Lastly, as regards State aids, Turkey has still not adopted a legislation
based on the Community principles and criteria. Thus, the negotiation chapter devoted to competi-
tion cannot be closed, and the Commission encourages Turkey to sign the above-mentioned
Proposal for a Decision of the Council of Association to accelerate the alignment of its law.

In sum, the candidate MPs have made substantial progress in aligning their competition rules
on EC competition law, as well as in creating enforcement institutions. This shows the effectiveness
of the accession process, which relies on two essential elements. First, there is an element of condi-
tionality whereby the implementation of EC competition rules is a prerequisite for candidate coun-
tries to enter into the EU. Second, as part of the accession process, candidate countries receive a
large amount of technical assistance, which ensures that once transposed into domestic law, EC
competition rules will be effectively implemented by these countries. This suggests that countries,
which did not originally have a competition regime, can make rapid progress in this area provided
that they see this is in their best interest and receive sufficient support from the EC.

The above analysis shows, however, that, although the candidate countries have generally
developed effective competition regimes, there remain some problematic issues, such as the lack of
resources invested in the enforcement agencies, the lack of efficiency of domestic courts and the
difficulty of dealing with highly “political” issues, such as State aids. The lessons learned from the
accession process should be taken into account by the Commission in its efforts to stimulate com-
petition law regimes in non-candidate countries.

The non-candidate countries

Israel. The Israeli Law on Restrictive Trade Practices sets up a modern competition regime and
shares analogies with the EC competition law regime. For instance, the section dealing with
agreements in restraint of trade contains a system of block exemptions, which is based on the
“old” EC model (i.e. before these block exemptions were modified in the areas of horizontal and
vertical restraints). However, this law also relies on concepts that appear derived from U.S. Law.
For instance, while the law contains a provision on “Abuse of Position” that looks based on Article
82 of the EC Treaty, this provision refers to the concept of “monopolist,” which is constituted
when one operator controls more than 50 percent of a given relevant market, rather than on the
concept of “dominance” that is used in EC competition law.

At the substantive level, the Israeli Law apprehends three types of practices. First, it prohibits
all restrictive agreements. These agreements have to be notified to the “Court for Trade Restric-
tions” (hereafter “Antitrust Court”) and to the Director of the Antitrust Authority. An exemp-
tion can be granted for a duration to be determined by the Court if the agreement is covered in the
list of exceptions relating to “public good,” or if the agreement does not have a significant effect
on competition according to a decision of the Director of the Authority.

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123. It must also be noted that no implementing legislation exists concerning horizontal restraints, in
particular technology transfer as well as and research and development agreements.
124. The decisions of the Competition Authority can be challenged before the Council of State.
128. A list of exemptions is provided for by the Law. See Chapter B, Part C, Article 10. Concerning the
agreements that do not have a significant effect, see Chapter B, Part C, Article 14.
Second, the Israeli Law imposes a series of obligations regarding monopolies.\textsuperscript{129} These obligations are quite intrusive as monopolists are placed under scrutiny. Every six months, the Director of the Authority must provide a list of all the monopolists to a parliamentary committee. In addition, the law provides that monopolists shall not behave so as “to reduce” competition or “harm the public.” It also provides an indicative list of instances of abuse.\textsuperscript{130} Moreover, even when no case of abuse has been identified, the Court can regulate the monopoly if, as a result of its existence, the public is being harmed. The Court can thus deliver instructions to monopolists and, under exceptional circumstances, can order measures of de-monopolization, upon request of the Director of the Authority.\textsuperscript{131}

Finally, mergers between companies are submitted to preliminary authorization.\textsuperscript{132} The Director of the Authority can prohibit operations that significantly harm competition or the “public”.\textsuperscript{133} The latter can also deliver unconditional decisions, conditional decisions (including corrective measures), or opposition decisions.\textsuperscript{134}

The institutional provisions of the Israeli Law are interesting because they set up a hierarchical system comprising several specialized organizations. An Antitrust Court with a wide range of powers for addressing anticompetitive practices (injunctions, provisional measures, etc) has been established.\textsuperscript{135} Its decisions can be challenged before the Supreme Court of Israel. A competition authority known as the “Trade Restrictions Authority” (hereafter, the “Israeli Antitrust Authority” or “IAA”) has also been established under Israeli Law. This authority enjoys important powers,\textsuperscript{136} and is directly subordinate to the Ministry of Commerce. Several measures are, however, designed to reduce the political influence in competition law proceedings (Gal 2001). First, the Director of the Authority is chosen by a special committee, presided by a judge, which selects the Director amongst the contenders to a public tender in accordance with their personal qualifications. Moreover, only one of the members of this committee is appointed by the Minister. Second, as the IAA is under the responsibility of the Minister of Commerce, the law allows it to only consider competition issues in competition cases. By contrast, the Antitrust Court, which enjoys complete independence, as it is part of the Israeli court system, is empowered to consider broader public good considerations.

\textit{The Maghreb Countries.} Algeria, Morocco, and Tunisia have all adopted domestic competition laws and set up authorities of control. These laws are modeled on the French Ordinance of 1 December 1986.\textsuperscript{137}

\begin{footnotesize}
\textsuperscript{129} A Chapter of the Law is especially dedicated to the “Monopoly.” See Chapter D, Sections 26 to 31 of the Restrictive Trade Practices Law, 5748-1988. A monopoly is constituted when one person or operator controls more than 50 percent of a given relevant market.
\textsuperscript{130} Restrictive Trade Practices Law, 5748-1988, Chapter D, Sections 29(A) and followings.
\textsuperscript{131} Restrictive Trade Practices Law, 5748-1988, Chapter D, Section 30.
\textsuperscript{132} Only the mergers that exceed the thresholds set by Chapter C, Part A, Section 17 of the Law have to be notified. The notification is compulsory and has a suspension effect. A merger operation must be notified within one month following its initiation.
\textsuperscript{133} See Chapter C, Part B, Section 21(a) of the Restrictive Trade Practices Law, 5748-1988, as amended on 31 March 2000. The text of the law is available at http://www.antitrust.gov.il/fram_e_set.html The criterion used for the assessment of mergers is closer to the American test than to the one currently used in the EC.
\textsuperscript{134} The Director has to consult an “Advisory Committee for Company Mergers” and his/her decision can be appealed before the Court of Commercial Restrictions, See Chapter C, Part B, Sections 22 and 23 of the Restrictive Trade Practices Law, 5748-1988, as amended on 31 March 2000. The text of the law is available at http://www.antitrust.gov.il/fram_e_set.html
\textsuperscript{135} The members of the Court are chosen among consumer organizations, economic organizations and civil servants. They are appointed for a two years period which may be renewed three times. The law also sets up rules to prevent conflicts of interests.
\textsuperscript{136} Restrictive Trade Practices Law, Chapter F.
\textsuperscript{137} The competition provisions of this Ordinance are patterned on the EC competition rules. It can therefore be assumed that the Maghreb competition laws will be compatible with the obligations stemming from the Association Agreements.
\end{footnotesize}
At the substantive level, the competition laws of the Maghreb countries prohibit all agreements, concerted practices and collusions that may have for object or effect to prevent or restrict free competition and, on the other hand, all abuses of a dominant position.138 All three laws provide for an exemption mechanism according to which the two above-mentioned kinds of practices can be authorized when they ensure a certain technical or economic progress. The assessment of such progress is made in accordance with the principle of the “bilan économique” (economic assessment) known in French competition law, as well as in EC competition law.139 These competition laws also provide that mergers between undertakings are submitted to an authorization procedure. The assessment criterion for such operations is the creation or strengthening of a dominant position as understood under EC competition law.140 Lastly, it should be noted, that in all three countries, public authorities are entitled to control the prices of certain products. The implementation of such price controls is strictly limited, as it is only authorized when competition does not exist for structural reasons or in the event of significant economic disturbances (such as natural disasters or exceptional circumstances).141

At the institutional level, the three Maghreb countries instituted a competition authority known as the “Competition Council.” In Algeria and Tunisia, these authorities are given a wide range of functions such as carrying out studies, drafting regulatory proposals, and engaging in cooperation with other authorities. They also have powers of investigation, injunction and sanction. These powers are, however, weaker than those granted to the competition authorities of the EC Member States. For instance, the Tunisian Competition Council has only very limited powers to self-initiate cases.142 The 1991 Competition Law did not provide the Competition Council with any such powers. However, following an amendment of the law in 1999, the Council is now allowed to initiate the prosecution of cases, but only in limited circumstances.143 In addition, the Tunisian Competition Council has only an advisory role on mergers where the Minister of Trade can ask its opinion, but has no obligation to do so.

Morocco has created an even less powerful competition authority. The Moroccan Competition Council does not enjoy a real decision-making power. Its attributions are purely advisory and its opinion does not bind the Prime Minister who is the only authority qualified to rule on anticompetitive practices.144 In addition, the filing of complaints before the Competition Council is even more restrictive than in Tunisia. Indeed, only the administration is qualified to seize the Council, after having decided on the opportunity to further support the complaint of an operator. The control of competition is thus primarily political and doubts can be raised regarding its neutrality.

138. As regards agreements, the three laws provide a list of prohibited practices. The listed restrictions are classic: limits on or control of production, investment, markets or technical development, market partitioning, direct or indirect price fixing, and so forth. The prohibition of restrictive agreements requires the existence of a joint intention. The form the agreement takes is irrelevant. Concerning the prohibition of the abuse of a dominant position, the laws also provide a list of examples, which follows the practices quoted in the EC Treaty.

139. It is, however, interesting to note that the Tunisian law contains a per se rule with respect to exclusive distribution agreements. See Lahouel El Hédi (2003), p. 3.

140. The control thresholds vary but the principle of preliminary notification exists in each of these laws. The competent authority for such operations is not the same. In Algeria, the Competition Council is competent, whereas this power is given to the Minister of General Government Affairs in Morocco, and the Ministry of Trade, in Tunisia.

141. The wording of these conditions varies. The three laws also provide for rules on unfair trading practices, on price transparency and the information of consumers.

142. According to the 1991 Law, complaints can be filed to the Council for investigation by the Minister of Trade, as well as by firms, trade or business associations, consumer associations or chambers of commerce, industry, or agriculture.

143. These circumstances are: (i) once an complaint has been filed but subsequently withdrawn, and (ii) when the Competition Council suspects in the course of an investigation the existence of anticompetitive practices in markets directly adjacent to those subject to the initially filed case.

144. The decision of the Minister is challengeable before an administrative court.
Jordan. The recent Jordanian Law on competition presents a formulation somewhat different from EC competition law, but rests on a similar construction.\textsuperscript{145} The characteristic of this law lies in its high degree of detail.

First, the Jordanian Law refers to the principles of free prices, free competition and a market economy.\textsuperscript{146} Its scope of application is rather broad. The law applies to all products and services, as well as to all practices having an effect in Jordan, even those taking place out of Jordan. The Jordanian Law provides, however, for some exceptions, first for certain products and raw materials that may be exempted by the Industry and Trade Minister and second in the event of exceptional circumstances or a natural disaster, by a resolution of the Council of Ministers.\textsuperscript{147}

The Jordanian Law deals with the three types of traditional practices known under EC competition law. First, all agreements, practices and alliances that prejudice, contravene, limit or prevent competition are prohibited.\textsuperscript{148} Second, abuses of a dominant position are also prohibited.\textsuperscript{149} These two prohibitions can be exempted (i) in the event of a natural disaster, exceptional circumstances or an emergency, or (ii) when the practice leads to positive results, such as the improvement of the competitiveness of the undertakings in question, the amelioration of their production or distribution systems, or the creation of certain benefits to the consumer.\textsuperscript{150} The third type of practices apprehended by the Jordanian Law relates to mergers.\textsuperscript{151} All mergers that may allow an operator to control more than 40 percent of the market must automatically be notified. Similarly to the EC merger rules, the Jordanian Law defines an operation of concentration with reference to the acquisition of “control.” The Law deals in great detail with the notification requirements and the information to provide. The decisionmaking power on such matters lies in the hands of the Minister of Industry and Trade.\textsuperscript{152}

At the institutional level, the Jordanian Law provides for the creation of a Directorate dealing with competition matters within the Ministry of Industry and Trade. The Directorate was established on 18 December 2002. It consists of three units: the competition investigation units, the research and studies unit, and the general competition policy unit. It has a broad range of duties. It shall propose legislative measures, promote the development of a competition culture, centralize information on the economy, investigate, formulate advises to the Court and to the Minister, receive merger notifications, and ensure cooperation with other competition authorities. The Minister enjoys the power to exempt agreements, decide on mergers, and intervene in any related legal proceedings. The Minister is assisted by a Committee for Competition Matters entitled to provide advice on legislative proposals, as well as on the attribution of special rights to certain companies. This Committee was officially formed and its members were named in May 2003. The Minister presides this Committee, which is composed of representatives of the regulators, commercial organizations, consumer organizations, and several experts of the subject matter. The Court of First Instance of Amman is given a special jurisdiction to rule on competition matters. This special jurisdiction is only temporary. After a two year period, the competent ordinary Courts will be entitled to apply the law. Any individual who shows legitimate interest can bring an action before the Court. The Minister is also entitled to initiate proceedings before the Court. The Law requires that specially trained judges and a specialized prosecutor be appointed to this Court.\textsuperscript{153}

\textsuperscript{145} See Competition Law of the year 2002, Provisional Law no\textsuperscript{49} of the Year 2002.
\textsuperscript{146} See Competition Law of the year 2002, Provisional Law no\textsuperscript{49} of the Year 2002, Article 1.
\textsuperscript{147} The latter exception can only be implemented temporarily. The exemption decision is reviewed after 6 months.
\textsuperscript{148} See Article 5 of the Competition Law of the year 2002, Provisional Law no\textsuperscript{49} of the Year 2002. An illustrative list is provided and a “\textit{de minimis}” clause exempts practices that only affect 10 percent of a relevant market.
\textsuperscript{149} See Competition Law of the year 2002, Provisional Law no\textsuperscript{49} of the Year 2002, Article 6.
\textsuperscript{150} See Competition Law of the year 2002, Provisional Law no\textsuperscript{49} of the Year 2002, Article 7. The Minister can grant individual exemptions. He can also adopt block exemption decisions. In any event, exemptions are granted for a given period of time. See Article 7B and C.
\textsuperscript{151} See Competition Law of the year 2002, Provisional Law no\textsuperscript{49} of the Year 2002, Article 9.
\textsuperscript{152} See Competition Law of the year 2002, Provisional Law no\textsuperscript{49} of the Year 2002, Article 11.
\textsuperscript{153} See Competition Law of the year 2002, Provisional Law no\textsuperscript{49} of the Year 2002, Article 16 D and E.
the power to enquire and take decisions on violations of competition law, as well as to take injunctions and sanctions. Its decisions can be challenged before the Supreme Court. In spite of its precision and its modernity on paper, it is not yet possible to assess the effectiveness of this legislation.

In sum, the various countries surveyed above, seem to possess with some limited exceptions, well-drafted and modern competition laws. The value of a competition law regime, however, should not only be determined by the quality of its rules, but also by the quality of their implementation and enforcement.

**Egypt.** Although Egypt and Lebanon have not yet adopted a competition law, it is interesting to discuss various initiatives that have so far been taken by these countries in the competition field, as well as to identify the various bottlenecks that have prevented adoption of a competition law regime.

Over the last ten years, Egypt has made several attempts to develop and adopt a competition law regime. Many drafts were circulated, but none of them were adopted into law. A new draft is now being discussed and there is hope among experts that the law will soon be submitted to Parliament. Various reasons are generally mentioned by experts to explain the delay in the adoption of a competition law in Egypt. First, it seems that the legislative process was delayed by political conflicts over which Ministry would oversee the elaboration of the law. Moreover, business interests have generally been opposed to the law. The Egyptian economy is highly concentrated and some powerful businessmen reportedly used their political influence to prevent the adoption of a competition law. Ali el Dean and Mohieldin (2001) point to various motives, which were invoked by industry to delay the adoption of the law. First, it was argued that the adoption of a competition law would stifle economic dynamism by adding another layer of bureaucracy. Second, there would be a risk of possible abuse of the law by particular firms, which could use it to charge their competitors with anticompetitive conduct. Third, such a law would be unfair in that it would not cover the informal segment of the Egyptian economy (the many enterprises which operate in the informal segment of the economy would not be subject of any government control as they have no formal existence). Fourth, it was argued that those in charge of implementing the law may not have sufficient knowledge of the specificities of certain segments of the market with the resulting risk that they could adopt mistaken decisions. Finally, the implementation of the law may be hindered by corruption and profiteering.

Interestingly, Egypt has been more willing to commit to regional competition rules than to domestic competition rules. Egypt is a member of the Common Market for Southern and Eastern Africa (COMESA), a regional organization, which has been developing common competition rules for its member countries. According to one expert, the COMESA draft competition regulations

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**Box 7.3: The COMESA Draft Competition Regulations**

At the substantive level, the COMESA regulations apply to “all economic activity whether conducted by private or public entities within, or having an effect within the Common Market”, except for a limited number of arrangements mentioned in the regulations. The COMESA regulations contain provisions prohibiting restrictive agreements, as well as abuses of a dominant position. The language of these provisions is strongly inspired from Articles 81 and 82 of the EC Treaty and other EC competition law instruments. As far as restrictive agreements are concerned, the draft regulations also provide for an authorization process, which resembles the notification system comprised in EC Regulation 17/62. The COMESA regulations also provide for a merger control procedure pursuant to which parties to a merger that fit the criteria laid out in the regulations should notify the transaction to the Commission. The latter should generally prohibit mergers which “substantially prevent or lessen competition” unless the transactions generate efficiencies sufficiently large to offset its anticompetitive effects or can be justified on public interest grounds.


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154. It is explained by the Law that the Court will delegate its investigation powers to the Competition Directorate. See Article 17 C of the Competition Law of the year 2002, Provisional Law nº49 of the Year 2002.
(hereafter, the “COMESA regulations”), are based on the EC competition law regime, but also on the domestic competition rules already existing in some member countries, such as Zimbabwe, Kenya, Zambia, and Malawi.\textsuperscript{155}

One of the most interesting aspects of the COMESA regulations is that they set up a centralized enforcement mechanism analogue to what is found in the EC. The mechanism relies on the creation of a COMESA Competition Commission whose mission is to “apply the provisions of [the] Regulations with regard to trade between Member States and be responsible for promoting competition within the Common Market.” In order to accomplish this, the Competition Commission enjoys a large set of powers, including the power of conducting investigations, as well as adopting remedies against anticompetitive practices and imposing up to 10 percent of their annual turnover against firms guilty of committing such practices. The Competition Commission is to be headed by a board of commissioners composed of no less than nine and not more than thirteen members appointed for fixed terms of three to five years on the basis of their qualifications.

\textbf{Lebanon.} Regulatory reforms designed to increase the competitiveness of the economy are in the legislative pipeline in Lebanon.\textsuperscript{156} Among planned legislative measures is the adoption of a competition law and the setting up of a competition authority. The process of elaboration of the competition law is, however, still in a preliminary stage and there is little prospect of seeing such a law adopted in the near future. In the medium term, competition in the distribution sector will be strengthened by the entry into force in 2005 of a law abolishing State protection of exclusive import agencies. The consumers should thus benefit from the expected competition, which will take place among importers of foreign goods and services.

Table 7.2 provides summary information on the establishment of competition authorities in the MEDA countries.

<table>
<thead>
<tr>
<th>Country</th>
<th>Authority</th>
<th>Responsible Ministry/Agency</th>
<th>Date Established</th>
</tr>
</thead>
<tbody>
<tr>
<td>Algeria</td>
<td>Conseil de la Concurrence</td>
<td>Ministère du Commerce</td>
<td>January 1995</td>
</tr>
<tr>
<td>Cyprus</td>
<td>Commission for the Protection of Competition (CPC)</td>
<td>No reporting agency</td>
<td>June 1990</td>
</tr>
<tr>
<td>Israel</td>
<td>Antitrust Authority</td>
<td>Ministry of Trade and Industry</td>
<td>January 1994</td>
</tr>
<tr>
<td>Jordan</td>
<td>Competition Directorate</td>
<td>Ministry of Industry and Trade</td>
<td>December 2002</td>
</tr>
<tr>
<td>Malta</td>
<td>Consumer and Competition Division</td>
<td>Ministry of Finance and Economic Affairs</td>
<td>January 2001</td>
</tr>
<tr>
<td>Tunisia</td>
<td>Conseil de la Concurrence</td>
<td>Ministère du Commerce</td>
<td>July 1991</td>
</tr>
<tr>
<td>Turkey</td>
<td>Competition Authority</td>
<td>No reporting agency</td>
<td>December 1994</td>
</tr>
</tbody>
</table>

No Competition Bodies have been established in Egypt, Lebanon, Syria and the West Bank and Gaza, at the time this research was conducted.

\textsuperscript{155} Interview with Bahaa Ali el Dean, COMESA expert, on 20 October 2003.
\textsuperscript{156} Exchange of e-mails with Joey Ghaleb, Lebanese Ministry of the Economy, 6–7 November 2003.
Evaluating the quality of implementation and enforcement in the Mediterranean Partners (MPs) is no easy task. The decisions adopted by the competition authorities of the MPs are generally not published, and many of these authorities are not bound to produce annual reports accessible to the public. The analysis that follows is thus based on data gathered from European Commission reports and from the specialized literature.

Implementation and Enforcement in the Candidate Countries

Competition law enforcement appears reasonably satisfactory in Turkey, Malta, and Cyprus. For instance, in 2000, the Turkish Competition Authority adopted 262 decisions relating to anticompetitive agreements and abuses of a dominant position, 101 decisions relating to mergers and acquisitions, and 23 decisions granting exemptions or negative clearances (Mumcu and Zengibonuz 2002). During 2001, Malta’s Office of Fair Competition adopted 21 decisions (10 on restrictive agreements, 9 on abuses of a dominant position, and 2 on mergers).\(^{157}\) The level of enforcement of competition rules was more modest in Cyprus than in the two prior countries in 2001, but it seems that Cyprus enhanced its capacity of control in 2002.\(^{158}\)

No final conclusion can, however, be drawn from these figures, since the nature of the decisions (inadmissibility, exemption, or sanction), and their respective proportion must also be considered to evaluate the effectiveness of the competition law regimes. What is encouraging is that these authorities have ruled on some major cases. Such cases are important as they contribute to raise the profile of the authorities and allow them to intervene in major sectors of the economy. For instance, the OECD’s 2001 competition policy country report for Turkey indicates that the Turkish Competition Authority decided cases in a variety of key economic sectors, including...
Box 8.1: The Turkish Competition Authority Ruling on GSM Operators

The recent ruling made by the Turkish Competition Authority in the mobile telephone sector is a good case to show the importance of certain decisions taken. In May 2003, the Turkish Competition Authority imposed administrative fines on Turkcell and Telsim amounting to 1 percent of their net sales for the year 2001, for abusing their dominant position in the telecommunications market by refusing to comply with their obligation to make roaming agreements with Aria, the third leading Turkish mobile operator.

Aria, the GSM operator owned by IS Bank and Telecom Italia Mobile (IS-TIM), had filed a complaint with the Competition Authority on the grounds that Turkcell and Telsim did not execute a national roaming agreement with Aria and thus abused their dominant position in the market. The Competition Authority ruled that Turkcell and Telsim were in a dominant position in the telecommunications market and their rejection of executing a national roaming agreement with IS-TIM was not based on objective grounds and constituted an abuse of a dominant position. The amount of the fine on both operators was nearly TL 30 trillion (US$21.5 million). This penalty amount was the highest fine imposed by the Competition Authority since its creation in 1997.


Implementation and Enforcement in Israel

The 2001 annual report of the Israeli Antitrust Authority (IAA) shows a relatively high degree of enforcement activity. The IAA was involved in 19 civil litigation procedures before the Antitrust Tribunal. It also initiated a range of criminal cases where record fines were imposed on the participants of a cartel in the insurance sector and record imprisonment terms of up to nine months in jail for floor tile cartel members.

During 2001, the IAA also examined a hundred and sixty merger notifications among which 83 percent were approved, 15 percent were approved with conditions, and 2 percent were blocked. Finally, the IAA played an important role in promoting pro-competitive reforms in a variety of fields, such as, for instance, telecommunications, and natural gases.

Implementation and Enforcement in the Maghreb Countries

The analysis of the implementation and enforcement of competition rules in the Maghreb countries is of considerable interest for two main reasons. First, unlike the candidate MPs, the Maghreb countries have not received substantial financial and technical assistance from the EC in the area of competition law. The degree of enforcement of competition law in these countries largely reflects what they have been able to achieve on their own. Second, absent significant support from the EC, the enforcement performance of these countries is likely to reflect what other countries that have recently adopted or been planning to adopt a competition law probably will be able to achieve (Jordan and Egypt, for example). As the Moroccan competition authority is not yet operative, and there is only limited data on Algeria, the analysis that follows focuses on the Tunisian case.

During its first ten years of activity (1992–2001), the Tunisia Competition Council was seized 40 times by the various organizations that are entitled to take cases to the Council (see Table 8.2).

160. See paragraph 18 of the Annual Report.
162. See paragraph 36 of the Annual Report.
163. The following analysis draws substantially from a background paper prepared by M. Lahouel in 2003.
Box 8.2: Enforcement of Antitrust Rules in Israel—Example of a Significant Cartel Case

The Jerusalem District Court (i.e., the court having jurisdiction for criminal antitrust proceedings) convicted two insurance companies that took part in a cartel that included the leading insurance companies in Israel. The companies had agreed to coordinate rates, restrict and coordinate discounts, coordinate reduction of policy components and insurance liability and allocated markets in the automobile and housing insurance branches. The action was initiated in 1997, concerning arrangements performed in 1991–1993. Six companies and their directors were convicted within plea bargains in 1997. Two remaining companies that did not reach such arrangement were convicted in December 2001. The sentence given at the beginning of 2002 imposed record fines of 12 Million NIS (New Israeli Shekels, equal to US$2.73 Million) and 9.5 Million NIS (US$2.16 Million) for the companies, as well as individual imprisonment (to be served as public work) and fines for the directors. The Court observed that it refrained from handing down harsher punishment (actual prison terms for the directors involved) due to the fact that at the time the violations took place the Antitrust Law was not sufficiently enforced (the enforcement level changed substantially after the Israeli Antitrust Authority was established in 1994).


Table 8.1: Involvement of the Israeli Antitrust Authority (IAA) in the Promotion of Competitive Reforms and Competition Advocacy

<table>
<thead>
<tr>
<th>Sector</th>
<th>Actions Taken for the Promotion of Competition in 2001</th>
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<tbody>
<tr>
<td>Credit and Banking</td>
<td>The IAA was involved in the legislative proceedings of the Credit Report Act, which is designed to provide for the gathering of information on the credit history of private borrowers and for the establishment of credit data agencies. The IAA believed that the provision of such information and data is essential for the improvement of competition for households over financial services. The banking and credit market in Israel is indeed very concentrated in the household segment. In addition, the inaccessibility of information on credit risks plays as high barriers to entry. IAA representatives therefore presented their views before the government and the parliamentary committees that prepared the law.</td>
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<tr>
<td>Communications</td>
<td>The IAA presented its position towards the Ministry of Communications (which is entrusted with the regulation of interconnection charges) on interconnection charges between cellular networks regarding the need to establish a maximum rate lower than that currently charged. The IAA recommended a significant decrease in the regulated interconnection price, due to concern of mobile termination rates being substantially in excess of their cost. The IAA was involved in the drafting of the 2001 legislation amending the Communication Law. It presented before parliamentary committees its position on the competition aspects of telecommunications issues, such as the opening communications networks for use of competitors (unbundling of the local loop and other access arrangements), revoking exclusive concessions, cross ownership limitations of infrastructure owners in content providers, and licensing policy.</td>
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<tr>
<td>Energy</td>
<td>The IAA was involved in the legislative proceedings of the Natural Gas Law of 2001, which is intended to regulate natural gas transmission, distribution and marketing activity in Israel. With the exception of the transmission segment, the IAA argued that competition was possible in the other segments of the gas industry. The IAA’s influence on the design of this Law was decisive as the propositions of the IAA on (i) the need for full corporate separation between companies engaged in transmission and marketing, (ii) the marketing restrictions imposed on companies associated with the transmitting corporation, and (iii) concerning restrictions on natural gas producers’ ownership of the transmitting pipe, were accepted.</td>
</tr>
</tbody>
</table>

The vast majority of these cases were initiated by firms (31), the rest of the cases being filed by the Minister of Commerce (5), business associations or trade unions (2), and the Council itself (1) (see Table 8.3).

In terms of sectoral distribution, services account for the largest source of cases with 13 of the 40 complaints filed (see Table 8.4). However, none of these complaints concerned infrastructure sectors, such as telecommunications services. Instead, these cases essentially focused on more minor economic activities, such as pricing practices in driving schools. The food sector comes in second position with nine complaints, followed by the mechanical and electrical sector with eight complaints. The remaining 10 complaints deal with a variety of sectors, including chemicals, leather, etc.

The Council investigated and issued decisions in 35 of these cases (see Table 8.5). The vast majority of the decisions (22) declared that such cases were outside the scope of competition law and the Council’s jurisdiction, although the interests of the plaintiffs may have been harmed by the defendant’s actions. Among the remaining 11 cases, 3 dealt with agreements between firms and 8 with abuses of a dominant position. Thus, most of the time and resources of the Council have been spent on cases, which fell outside the 1981 competition law. This suggests many firms still fail to understand the scope of this law, as well as the prerogatives it gives to the Council.

Perhaps the main activity of the Competition Council since its creation has been to advise the government on a variety of competition-related matters, such as mergers (7 cases). The Council also gave its opinion on draft legislation in 18 cases (See Table 8.6).

The above data suggests that enforcement of competition rules has been suboptimal during the first ten years of existence (1992–2001) of the Tunisian Competition Council. However, more recent data suggests a growing level of implementation of competition rules in Tunisia with twelve

<table>
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<tr>
<th>Table 8.2: Cases and Consultations Referred to the Competition Council</th>
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<tbody>
<tr>
<td>Cases</td>
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<tr>
<td>Consultation requests</td>
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<td>Of which concentration</td>
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<td>Total</td>
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Source: Tunisian Competition Council’s report, various issues.

<table>
<thead>
<tr>
<th>Table 8.3: Distribution of Cases Filed According to the Nature of the Plaintiff</th>
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<tbody>
<tr>
<td>Government (Minister of Commerce)</td>
</tr>
<tr>
<td>Firms</td>
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<tr>
<td>Business associations or trade unions</td>
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<tr>
<td>Farm Industrial or commercial chambers</td>
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<td>Consumer protection associations</td>
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<tr>
<td>Initiation by the Council</td>
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<tr>
<td>Total</td>
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Source: Tunisian Competition Council’s report, various issues.
The Competition Council took decisions against cartels in the area of maritime transport, as well as in the land transport of cement and lime. The maritime case involved a price-fixing agreement between companies active in the transshipment of goods. The Council condemned the companies that cooperated during the investigation to fines ranging from 2.5 to 3 percent of their annual turnover. However, it imposed a fine of 5 percent of its turnover to a company, which had refused to cooperate during the investigation. According to the Council, the more aggressive stance taken by the Council in the last few months reflects a political will that anticompetitive practices should be more severely punished.

Nevertheless, in spite of the efforts made by the Tunisian Competition Council to assume its responsibilities under the Tunisian Competition Law, the level of enforcement achieved remains relatively limited. This low level of enforcement activity could be explained by the deterrent effect the domestic competition laws produce on economic operators. We believe, however, that this is not the case. A competition law regime may only have a deterrent effect on operators, provided certain con-

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<td>Food industry</td>
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<td>Energy</td>
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<td>Mechanical and Electrical Industry</td>
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<td>Chemicals</td>
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<tr>
<td>Textiles, Apparel, and Leather</td>
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<td>Services</td>
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<td>Handicrafts</td>
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<td>Textiles and Apparel</td>
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<td>Distribution</td>
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<td></td>
<td>1</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>1</td>
<td>9</td>
<td>4</td>
<td>4</td>
<td>2</td>
<td>1</td>
<td>1</td>
<td>11</td>
<td>4</td>
<td>3</td>
<td>40</td>
</tr>
</tbody>
</table>

Source: Tunisian Competition Council’s report, various issues.

### TABLE 8.5: DECISIONS ISSUED BY THE COUNCIL

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
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<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Withdrawal of the suit</td>
<td>—</td>
<td>—</td>
<td>—</td>
<td>—</td>
<td>—</td>
<td>2</td>
<td>1</td>
<td>—</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Falling outside the Council’s jurisdiction</td>
<td>—</td>
<td>2</td>
<td>—</td>
<td>—</td>
<td>5</td>
<td>4</td>
<td>3</td>
<td>4</td>
<td>2</td>
<td>20</td>
</tr>
<tr>
<td>No ground to continue the procedures</td>
<td>—</td>
<td>—</td>
<td>—</td>
<td>—</td>
<td>—</td>
<td>1</td>
<td>—</td>
<td>1</td>
<td>—</td>
<td>3</td>
</tr>
<tr>
<td>Cases sanctioned for guilt</td>
<td>—</td>
<td>—</td>
<td>1</td>
<td>—</td>
<td>—</td>
<td>—</td>
<td>3</td>
<td>1</td>
<td>1</td>
<td>6</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>—</td>
<td>2</td>
<td>1</td>
<td>—</td>
<td>8</td>
<td>5</td>
<td>7</td>
<td>6</td>
<td>4</td>
<td>33</td>
</tr>
</tbody>
</table>

(1) The 1992–94 report contains two decisions only.

Source: Tunisian Competition Council’s report, various issues.

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164. Interview with the Vice President of the Competition Council, on 23 October 2003.
165. Interview with the Vice President of the Competition Council, on 23 October 2003.
ditions are met, such as the presence of severe sanctions in the competition laws or the adoption of several high-profile decisions showing the competition authorities are serious about their enforcement missions. As far as the Maghreb countries are concerned, none of these conditions appear to be met.

It is thus more reasonable to consider that other factors explain the low enforcement performance of the competition authorities in the Maghreb. Various reasons are generally identified as impeding the emergence of effective competition policy systems in developing economies, which can be summarized as follows:

Resource austerity: A competition authority’s effectiveness is determined largely by the adequacy of its resources. The above analysis seems to corroborate a correlation between the resources spent on competition enforcement and the level of enforcement achieved. The two authorities that are the best funded and staffed (Israel and Turkey) are also those that have the best enforcement record. By contrast, the relatively poorly equipped competition authorities from the Maghreb have not been very productive since their creation. Of course, it would be wrong to assume that giving significant resources will be enough to make an authority work, but it is certainly a prerequisite to ensure its productivity and the quality of its work.

Inability to attract sufficient expertise: The main reason why gathering sufficient resources is important for a competition authority is that such resources will allow it to buy the expertise needed to make it function. Competition policy requires personnel with a mix of skills in such fields as economics, finance, law, etc. People with these qualifications are in scarce supply in many MPs, and those who do have them will generally receive attractive offers in the private sector. Even when competition authorities have sufficient resources, there may still be several obstacles to hiring qualified experts. First, in many MPs, universities offer very few courses which provide the types of skills needed for competition law officials. Lebanon, for instance, possesses several excellent universities, but these universities do not offer competition law courses, nor advanced industrial organization courses. In Tunisia, only one university offers a competition law course. Because of this shortage of training courses in the areas relevant to competition law analysis, there are few qualified applicants on the markets. Second, in many countries, the salary of competition officials is based on the civil service salary scale, i.e. at levels much below the private sector.

Strategies should thus be developed to overcome these obstacles. As far as the first obstacle is concerned, efforts should be made by the MPs to stimulate teaching and research programs in areas such as industrial organization and competition law. As these programs will, however, take several years to produce concrete results, short-term solutions should be explored, such as outsourcing tasks to private firms or consultants. The authority should nevertheless retain responsibility for its decisions in order to ensure its legitimacy. As far as the second obstacle is concerned, exempting

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166. For a good discussion of these factors, see Kovacic (1997).
168. Exchange of emails with Mohamed Lahouel, University of Tunis and Nice.
competition authorities’ employees from the civil service salary scale should be a good first step to help these authorities to meet their staffing needs. However, as the competition authority might still be unable to match the conditions made by the private sector other incentives need to be designed. As we have seen in Box 7.2, many young professionals will be attracted by the quality of the training they expect to receive. An effective recruitment strategy for competition authorities should thus place emphasis on the quality of the training it provides to its professionals. Institutional donors could also assist this approach by providing resources for study programmes abroad.

Weak professional associations and consumer groups: Most MPs generally lack strong networks of professional associations and consumer groups, which in developed countries, contribute to disseminating the content of competition rules, as well as raising awareness about the ways these rules can be used to obtain redress against anticompetitive conduct. Where these associations exist, they have also generally refrained from lodging complaints to the competition authorities to denounce anticompetitive practices. For instance, although the Tunisian competition law authorizes consumer groups to lodge complaints, the Tunisian Consumer Defence Organisation (the largest and best known consumer association in Tunisia) has never used this power to initiate competition cases in the Competition Council. Therefore, efforts have to be made to inform existing networks about the workings of the competition regime, as well as to stimulate the creation of such networks where they do not yet exist.

Deficient judicial systems: Courts tend to play an important role in the competition field as they will know the appeals to the decisions of the competition authority. This is, for instance, the case in the MPs, which have adopted a competition legislation. However, the problem that can arise is that judges do not generally possess a sufficient understanding of the legal and economic principles necessary to rule on competition-related matters. One way of overcoming this problem is to set up specialized courts, such as a Competition Tribunal, or at least to appoint specially trained judges and prosecutors to handle competition cases. As seen in Chapter 7, this latter approach has been followed in Jordan. More generally, the regulatory reform programs that are currently pursued by the MPs should be seen as an occasion to improve the judicial system. Corruption and excessive delays are phenomena that plagued many developing countries’ judicial system, and the MPs are no exception. Programs designed to enhance the independence and effectiveness of the judiciary should thus be seen as the necessary complement to the regulatory reforms engaged in the area of competition policy, bankruptcy, etc.

Inadequate powers: The effectiveness of a competition authority often depends on the level of powers it possesses. For instance, authorities that lack the power to self-initiate investigations, as well as to request documents from alleged violators of competition, will often be unable to tackle anticompetitive practices. This in turn may lead to a sense of frustration among the staff of the agency, and a progressive loss of morale. As we have seen in Chapter 7, an illustration of this problem can be seen in Morocco where only the administration is qualified to seize the Competition Council, after having decided on the opportunity to further support the complaint of an operator.

Granting a large set of powers to a competition authority does not mean that this authority should be exempted from widely accepted principles of good governance, such as transparency, participation, and accountability. The processes of the authority should be as clear, simple, and objective as possible. For instance, information about such processes, as well as their outcomes (decisions) should be easily accessible for all stakeholders, through an obligation of publication (transparency). In addition, the processes of the authority should be structured so as to allow formal consultations of all interested parties before decisions are made (participation). Finally, measures should be adopted to ensure that the competition authority is accountable for its actions. Such measures include providing for appeal mechanisms against all the decisions of the authority,

169. Interview with the Vice President of the Competition Council, on 23 October 2003.
170. For an excellent discussion on the negative impact of inefficient judicial systems on the implementation of economic law, see Hillal, (2002) p. 14 onwards.
as well as ensuring that competition authorities publish reports of their activities and of the way in which they use their financial resources.

**Strong opposition to reforms:** Developing economies typically contain forces that strongly oppose reforms that are designed to facilitate the transition to a market economy and progressively dismantle government and business institutions that centralize economic power in the country (Ali El Dean and Mohieldin 2001). Opposition to reforms is generally led by public monopolies and the government ministries that oversee their operations, which may be concerned that their privileges will be challenged by regulatory reforms, such as the adoption of a competition law. Business interests involved in cartels may also fear that the setting up of a competition law regime could trigger enquiries against such practices. Other business groups may oppose the adoption of a competition law regime for the opposite reason—the fear that this regime be captured by incumbents, which may divert these authorities from their mission and instead use them to maintain their grip on the economy.

One way to overcome these obstacles is through education. Policymakers, businesses, consumer groups, and the general public, need to be made aware of the benefits of a competition law regime, so as to dissipate misunderstanding about its scope. However, as these benefits will not be equally distributed, the government unavoidably will need to invest some political capital in the adoption of such a regime. The task of the government, however, might be made easier when adoption of a competition law is imposed as a condition for gaining access to other benefits, such as participation in a free trade agreement. This is where the European Commission, as well as other international partners, may play an essential role in convincing the MPs of the importance of adopting or strengthening a competition law regime.

### Table 8.7: An Analysis of the Domestic Competition Laws of the Mediterranean Partners

<table>
<thead>
<tr>
<th>Country</th>
<th>Material Scope of Application Equivalent to EC Competition Law</th>
<th>State Aid Control Mechanism</th>
<th>Applicability to all Economic Activities</th>
<th>Independent Institutions/Authorities</th>
<th>Effective Institutions Authorities</th>
<th>Alignment on EC Competition Law</th>
</tr>
</thead>
<tbody>
<tr>
<td>Algeria</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Cyprus</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Israel</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Jordan</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Malta</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Morocco</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Tunisia</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Turkey</td>
<td>Yes, but not fully effective</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Explanatory Notes:**

1. The issue highlighted here is whether the domestic competition law covers all the conducts covered by EC competition law (Article 81, Article 82, and EC Merger Regulation).
2. What this highlights is whether some economic activities or some undertakings are explicitly exempted from the application of the competition law. Undertakings will not be considered as exempted when the non-application of competition rules is justified by the fact they provide a service of general economic interest as understood in Article 86(2) of the EC Treaty.
3. The question here is whether the competition authority enjoys a real decision-making power or is submitted to political control when taking a decision.
4. The elements taken into account are the following: number of decisions adopted, type of decisions adopted, average period for review, number of actions brought before the authority, etc.
5. Here reference is made to the three criteria formulated by the European Competition Commissioner Mario Monti (2001).
Insufficient access to business data: Obtaining access to business data, such as business plans, market shares, costs, and revenues is often of essential importance for competition authorities seeking to prosecute cartels, abuses of dominant position, and other anticompetitive practices. For instance, one problem that frequently arises when engaging in market opening reforms is the transfer of resources between competitive and monopolistic services by the incumbent (a process known as “cross-subsidization”). International experience teaches that investigating cross-subsidization cases requires a lot of data, including information about costs, and in particular common costs, transfer of resources within different subsidiaries of the incumbent. Unfortunately, gaining access to such business records may prove particularly difficult (Kovacik 1997). First, incumbents may simply refuse to grant access to business data and due to absent specific regulatory requirements, it could take years of litigation before the competition agency gain access to such data. Second, few enterprises in the MPs, especially State-owned firms or recently privatized firms maintain financial accounts that meet internationally-recognized standards, compile business plans and other data required to provide competition authorities with a clear vision of the activities of the firm. This suggests, once again, that the adoption of a competition law regime needs to be accompanied by a broader set of reforms, which should seek to establish the conditions necessary for the functioning of a market economy.
Chapter 6 referred to the obligation of candidate countries to harmonize their domestic laws on the basis of EC competition law. This process of forced transposition, however, is not imposed on the non-candidate countries (Hakura 1998). Nevertheless, some of these countries have spontaneously adopted domestic legislation that shares common characteristics with EC competition law, but without transposing EC rules to their full extent. Whether deeper harmonization is desirable is an issue that needs to be explored.

This chapter explores the concept of regulatory convergence. First, it discusses the meaning of the concept, as well as the various ways in which convergence can be achieved. Second, it reviews the rationales for harmonization, as well as the benefits that could be generated by this process. Third, since convergence would also impose some costs, it suggests the need to engage in a cost/benefit analysis of convergence before engaging in this process. This section also explores how these costs could be covered, as well as various strategies for reducing such costs. Fourth, because of the costs and the risks generated by a process of transposition of EC competition law in the MPs, the need for caution is suggested, whereby the transposition should be initially limited to EC competition rules prohibiting agreements between competitors and abuses of a dominant position. Fifth, attention is also drawn to the importance for the competition authorities of the MPs to establish priorities as well as an enforcement agenda. Sixth, it examines various alternatives to the convergence model, which is promoted by the EC.

Over the last few years, several official documents produced by the EC institutions have evoked a “convergence” of competition rules of the partner countries towards EC competition rules.171

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More recently, the Communication of the Commission on “Wider Europe—Neighborhood: A New Framework for Relations with our Eastern and Southern Neighbors,” makes abundant reference to the concept of “regulatory approximation” and seems to urge the MPs to progressively align their legislation with the **acquis communautaire**.

What is Convergence?
Convergence can be defined as a process whereby several nations or groups of nations decide to adopt identical, or at least compatible, rules and principles in one or several regulatory areas.

Regulatory convergence can be realized by several means. In some cases, one nation will decide to transpose in its domestic legal order one or several set(s) of rules from another nation. This process is often referred to as a form of regulatory “transplant” (Scheuer 2000, Stein 1977, Watson 1976). The transposition of the **acquis communautaire** by the candidate countries is a clear example of regulatory transplant. In other cases, convergence will be achieved through a process of “approximation,” whereby countries negotiate a common set of rules and then adjust their domestic regulatory framework to make it compatible with the common rules. Among EU Member States, approximation is essentially realized through the negotiation and subsequent adoption of directives based on Article 95 of the EC Treaty.\(^{172}\)

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Box 9.1: The New Neighborhood Policy

The European Commission Communication “Wider Europe—Neighborhood: A New Framework for Relations with our Eastern and Southern Neighbors” of March 2003 defines principles for a proximity policy of an enlarged European Union. It proposes that neighboring countries not on the road to full membership “should be offered the prospect of a stake in the EU’s Internal Market and further integration and liberalization to promote the free movement of persons, goods, services, and capital.” It “recognized that geographic proximity increases the value of developing a comprehensive policy of close association.” It states that the EU **acquis** “could serve as a model for countries undertaking institutional and economic reform,” but does not specify the desirable degree of regulatory convergence. To implement the agenda of deeper integration, the communication calls for “better targeted EU development assistance,” a closer partnership with other donors, and additional financial assistance “conditional on meeting agreed targets for reform.” It proposes the preparation of Action Plans with clear reform benchmarks, and at a later stage possibly new Neighborhood Agreements. With New Neighborhood Policy activities being coordinated by the Commission’s DG Enlargement, the extensive adjustment experience gained in the enlargement process may made available to the MPs.

Following this communication, further implications of the ‘New Neighborhood Policy’ strategy have emerged. One likely consequence for the Barcelona Process is that the EU could offer selected MPs “preferential relations within a differentiated framework which responds to progress made by the partner countries in defined areas, in particular political and economic reform.” The main instrument to implement this policy of differentiation will be the above-mentioned Action Plans. These should set out “clearly the over-arching strategic policy targets, common objectives, political and economic benchmarks used to evaluate progress in key areas, and a timetable for their achievement [. . .]. They should be concise, complemented where necessary by more detailed plans for sector-specific cooperation” and should form the basis for financial assistance to those countries. The next step in the elaboration of the ‘New Neighborhood Policy’ strategy is the proposal of specific Action Plans, starting in 2004 and a further “communication on a new Neighborhood Instrument,” to be deployed from 2006 onwards.


More recently, the Communication of the Commission on “Wider Europe—Neighborhood: A New Framework for Relations with our Eastern and Southern Neighbors,” makes abundant reference to the concept of “regulatory approximation” and seems to urge the MPs to progressively align their legislation with the **acquis communautaire**.

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Convergence may also involve different degrees of intensity. Convergence is sometimes understood as a process whereby one or several nations decide to rely on common principles in one regulatory area, whereas the details on how to achieve compliance with these principles are left to national law. An example of this approach can be found in the OECD recommendations, such as the recommendation on hard-core cartels. OECD members agree on one broad set of principles, but remain free on how to achieve compliance with these principles. This approach can be referred to as “loose” convergence. On the other hand, convergence may also be understood as a decision by a group of nations to completely harmonize their domestic regimes in one or several regulatory areas. This approach, which can be referred to as “deep” convergence, is typically used when nations decide to harmonize various standards in order to facilitate trade (Sykes 1995).

So far, the Commission has not expressed a clear position on the degree of intensity it would seek to achieve with respect to the convergence of competition rules in the context of the Euromed Partnership. While some documents seem to suggest the desirability that MPs transpose EC competition rules in their domestic legal orders, other documents suggest a looser form of harmonization, whereby MPs would progressively converge around the principles of EC competition law. Title V of the Association Agreements (Economic cooperation) contains a provision which envisions the approximation of the domestic rules of the associated country on the rules of the EC in the fields covered by the agreement. The approximation will be negotiated and concerted. Unlike in negotiations over accession, it is likely that the reference to convergence is to be understood as a process of soft harmonization, comparable to the voluntary actions undertaken by EC Member States so as to make their domestic competition rules compatible with EC competition rules. The other documents issued by the EC institutions on this matter are generally very elusive.

While the Communication of the Commission on the New Neighborhood Policy does not specifically address the issue of convergence in competition rules, it contains interesting statements on the desirability of greater regulatory approximation between the Neighboring Countries (hereafter, the “NCs”) and the EU. Hereafter, we quote a few interesting passages of the Communication (EC 2003a), which we subsequently analyze:

While some Association Agreements with the EU still need to be ratified, the Mediterranean Partners are already being encouraged to approximate their legislation to that of the Internal Market.

—p.5

The EU therefore should stand ready to work in close partnership with the neighboring countries who wish to implement further reforms and assist in building their capacity to align with and implement parts of the *acquis communautaire*.

—p.10

The EU *acquis*, which has established a common market based on the free movement of goods, persons, services, and capital, ensuring competition and a level playing field based on shared norms and integrating health, consumer, and environmental protection, could serve as a model for countries undertaking institutional and economic reform.

—p.10

173. These instruments are adopted by the OECD Council and negotiated within the framework of the Organisation. They concern policy and technical issues of concern to Member countries. They are non-binding and mostly provide for wide principles common to the Member countries. See, for instance, The Revised Recommendation of the Council concerning Co-operation between Member Countries on Anticompetitive Practices affecting International Trade, 27 and 28 July 1995—C(95)130/FINAL. See also the Recommendation of the Council concerning Effective Action against Hardcore Cartels, 13 May 1998, C/M(98)7/PROV).

174. For instance, the Commission makes a very extensive interpretation of the agreements when it states that “the provisions on competition [of the agreements] contain clear commitments aimed at bringing the competition policies of the countries concerned into line with the Community arrangements.” See XXVIIIth Report on Competition Policy 1998, SEC (99) 743 Final: 117.
The long term goal of the initiatives set out in Chapter 3 is to move forward an arrangement whereby the Union’s relations with the neighboring countries ultimately resemble the close political and economic links currently enjoyed with the European Economic Area. This implies the partners taking on considerably deeper and broader obligations when it comes to aligning with Community legislation.

—p.15

EU should aim to ensure a more coherent approach, offering the same opportunities across the wider neighborhood, and asking in return the same standards of behavior from each of our neighbors, differentiation between countries would remain the basis for the New Neighborhood Policy.

—p.16

The above statements require some observations. First, although the Commission insists on the importance of ensuring convergence between EC rules and the rules applied in the NCs, regulatory approximation will be carried out on a voluntary basis and with the assistance of the EU. Second, the Commission does not necessarily expect NCs to implement the whole of the *acquis communautaire* at once, but rather seems open to assist in the implementation of parts of the *acquis*. Third, while implementation of all or part of the *acquis communautaire* would be a prime mechanism of regulatory convergence, the Commission also suggests that EC rules could also serve as a “model” to NCs engaging in regulatory reforms. Both deep and loose forms of convergence are thus envisaged by the Commission. Fourth, the Commission provides that the New Neighborhood Policy will be based on a differentiated approach between countries. Finally, the Commission outlines the vision that the New Neighborhood Policy should evolve towards an arrangement whereby the EU relations with the NCs should ultimately resemble the close political and economic ties, which currently link the EU and the European Economic Area. The Commission seems thus to be in favor of a flexible, voluntary, progressive, and differentiated approach to regulatory convergence with the NCs. The ultimate objective is, however, ambitious as it foresees an arrangement comparable to the one existing with the European Economic Area (EEA) which, short of the full institutional integration implied by EU membership, nevertheless encompasses a high degree of regulatory integration.

In light of the above, this paper will not seek to respond to the question of whether the EC and the MPs should follow an approach of deep or loose regulatory convergence. As suggested by the Commission, differentiation should be the preferred strategy. The MPs are at different stages of development in the area of competition law. Thus, while deep convergence might be recommended for some countries, a loose convergence approach might be preferable for others. As regulatory reforms progress, the latter countries could, however, opt for a higher degree of convergence with EC rules. In fact, convergence should be seen as an evolving process rather than a static model of “deep” or “loose” harmonization.

In the rest of this paper, convergence will thus be understood as a voluntary and negotiated process whereby the MPs would agree to progressively approximate their competition law with the rules and principles of EC competition law or, if they do not have a competition law, to adopt a legislation that is compatible with EC competition law.

**Rationales for Convergence**

The main justification provided by the Commission for encouraging non-candidate countries to engage in a process of convergence is that harmonization would be a pre-requisite for successful market integration. The Euro-Mediterranean Partnership is one of the cornerstones of the establishment of a future Euro-Mediterranean free trade zone by 2010. In two Communications of 1998 and

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175. This is explicit in each of the Association Agreements, because the provisions on economic cooperation systematically insist on the objective of regional integration. See Article 43-3 of the Association Agreement between the EC and Tunisia, O.J. L97 30 March 1998: 2. In a series of areas other than competition policy, incentives are being given to accelerate the conclusion of free trade agreements between the associated countries. See, Article 29 of the same agreement where the Community commits itself to reconsider rules of origins if trade agreements are concluded with other partners. See Conclusions of Malta Conference, 1997. Available at http://europa.eu.int/comm/external_relations/euromed/conf/malta/conc_en.htm.
2000, the European Commission thus declares that the effectiveness of the future free trade zone requires the harmonization of a variety of rules, including competition rules (EC 1998c and 2000e).

While, as seen above, no one can deny the close relationship between trade and competition policies, there is little evidence that harmonization of competition rules is necessary to ensure free trade between nations. In fact, if the EC were only concerned about anticompetitive conducts affecting trade and thus impeding the creation of a Euro-Mediterranean market, it should first identify such conducts (essentially horizontal and vertical restraints to foreclose markets on the part of foreign competitors and abuses of a dominant position seeking to exclude such competitors) and then require its trading partners to adopt measures to prevent them. Harmanization of competition rules thus seems to go beyond what is necessary to ensure free trade.

A series of other benefits are, however, often mentioned to justify a progressive approximation of the competition rules of the MPs on EC competition rules, but these benefits might not, be identical for the EC and the MPs.

As far as the EC is concerned, convergence would raise two main kinds of benefits. First, some observers have suggested that convergence could offer a strategic interest. There is a certain degree of rivalry between the main competition law regimes and, by exporting its competition rules, the EC would extend the (already) large critical mass of countries sharing its conceptions, a situation that could be advantageous in the context of multilateral discussions. The exportation of its law to the MPs would also be a remarkable achievement for the EC when we know that emerging countries are generally reluctant to transpose competition rules that would be adopted at the multilateral level. This reluctance can be explained by two reasons. First, emerging economies are not always convinced of the benefits that could flow from adoption of a competition policy. Second, it appears that, in these economies, strong economic forces close to governments tend to consider such reforms as a threat to their privileges and try to influence the political decisions taken in this field. The EC tries to eliminate such resistance by linking the commercial provisions as well as the provision of a financial and technical assistance, with the achievement of a convergence in the competition field.

Second, convergence offers benefits to operators willing to invest in MPs (Tineo 1998). Regulatory convergence reduces transaction costs for EU operators and facilitates the initiation of economic activities on the markets that have been made accessible thanks to the trade provisions of the Association Agreements. This is, for instance, particularly significant as regards distribution agreements. Convergence would allow EU economic operators to apply the same distribution agreements wherever in the Mediterranean region. The setting of a distribution network may prove very costly (Geradin 2002), and this would substantially reduce transaction costs. In addition, convergence would reduce the level of uncertainty that is often a concern for operators having to face an unknown regulatory regime. Regulatory convergence could thus contribute to the implementation of an environment that is more favorable to investment in MPs.

Convergence could also bring a certain number of advantages to the MPs. First, convergence would allow these countries to reduce the cost of elaboration of a domestic competition law regime. Unlike other fields where the elaboration of legislation essentially depends on the local economic circumstances, it is easier in the area of competition law to simply transpose in domestic law a set of imported rules, although, as we will see below, some caution has to be taken when engaging in this process. In addition to reducing the cost of elaboration, the domestic application of EC rules allow these countries to apply a competition regime whose coherence and efficiency has already been tested.

Second, the adoption of domestic rules that are based on competition rules found in the EC Treaty could give these countries access to a series of additional instruments (secondary legislation) or soft law instrument, such as guidelines that they could transpose in their domestic legal order.

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176. In the context of the WTO, several countries share the opinion that trade would be sufficiently protected with the mere requirement that Member countries have or adopt competition rules.

177. The increasing importance of the debates related to the adoption of international standards of competition has already been mentioned above. For a formulation of the idea that the EC is setting the standard for international competition law, see Foster (2001).
when they deem it suitable, such as, the regulations, guidelines and notices adopted by the European Commission in the competition field. The MPs could, for instance, decide to implement some of the Commission’s block exemptions, as well as use the Commission’s guidelines in a variety of sectors (EC 2000c, EC 2000d). Regulatory convergence would thus allow these countries to implement not only basic competition rules, but also a set of additional, and compatible instruments, which often prove essential in applying these rules (Raustiala 2002).

Third, regulatory convergence would allow these countries to speak a common language among them, but also with the EC. This could be a significant benefit considering the growing importance of cooperation between competition authorities as is amply demonstrated by the development of bilateral agreements providing for negative and positive comity regimes, as well as by the development of networks of competition authorities such as the International Competition Network. The convergence of the domestic competition laws of the MPs around EC competition rules would probably give greater credibility to these countries and their competition authorities in international fora.

Finally, engaging in a process of regulatory convergence could be a way to benefit from EC technical and financial assistance. For instance, the Commission has initiated a three-year “Regional Programme for the Promotion of the Euro-Mediterranean Market Instruments and Mechanisms,” also called the Euromed Market Programme, that involves the twelve MPs. This program aims at promoting harmonization of the laws of the MPs with EC law in a variety of sectors, including competition law. In a first step, the Commission intends to provide information and exchange experiences in order to stimulate legislative action in the MPs. In a second step, the program will concentrate on the training and the provision of technical assistance to the officials of the Partner countries.

The Need for Cost/Benefit Analysis
If there is little doubt that both the EC and the MPs could derive some potential benefits from regulatory convergence, it is also important to evaluate the costs that would be generated by such a process. As far as the EC is concerned, the costs of convergence should be very limited and would only cover the sums spent on technical and financial assistance. Such funds could be provided by the MEDA programme.

By contrast, convergence would impose more significant costs on the MPs. Most of these countries would have to adopt a competition law regime compatible with the EC regime or, when a competition law regime already exists, amend it if necessary to ensure compliance with EC competition rules. Competition law authorities would also need to be created or strengthened. Adopting new legislation, or amending new legislation, would probably not involve major financial resources. As the adoption of a competition regime may be opposed by some domestic companies, this process might require governments to spend substantial political capital as they push for such legislation to go through the Parliament. The costs of building or strengthening institutions would, however, be much more significant. In the majority of the MPs, enforcement of competition rules is not sufficiently effective. We have identified several factors explaining the low per-
formance of enforcement authorities in emerging economies. These factors include the lack of resources or expertise of these authorities, but also more fundamental issues, such as the weakness of the judiciary or the lack of business data. This suggests that a limited package of technical assistance will not be sufficient to ensure a proper level of enforcement of competition rules. More fundamental reforms will have to be taken. The costs of these reforms will create political difficulties as they will be highly visible and easy to measure, whereas the benefits of having well-functioning institutions will be diffuse and hard to evaluate.

Besides the direct costs of adopting legislation and building institutions, reference should also be made to more indirect costs. Such indirect costs could, for instance, include the costs of implementing a system that is not well adjusted to the MPs because it does not sufficiently take local circumstances into account. There is a large literature on the risks created by regulatory transplants and some authors take strong positions against the convergence of emerging economies on EC or U.S.-based models. One popular argument in this literature is that because these transplants are not well-adjusted to local circumstances, they might fail to provide adequate solutions to the countries importing them.\(^{184}\) While such a risk is real, it is perhaps more limited in the competition law field than in areas such environmental standards or labor standards. For instance, transposing high labor standards in developing nations does not make much sense, unless, of course, such standards relate to human rights. By contrast, competition law tends to be highly flexible and, thus, exportable to a large range of nations. The experience with the successive waves of accession to the European Union suggests that competition law transplants work.\(^{185}\) One should, however, take a note of caution. As will be seen below, some aspects of EC competition rules, such as the procedural rules required to implement Articles 81 and 82, may not be relevant to the MPs as they are clearly tied to the administrative structure of the EC legal order.

The flexibility of competition rules may also be a liability when such rules are transposed in developing or emerging economies. Broad, flexible rules tend to leave a large degree of discretion to implementation authorities (Geradin and Kerf 2003). While leaving discretionary powers to competition authorities is generally justified in countries where such authorities are strong, it might be less justifiable in countries where competition authorities often lack independence and only have a limited degree of expertise, such as in the MPs (Kovacic 2001). Two strategies may be explored to deal with this problem. One is to strengthen the institutional capacity of the competition authorities in the MPs. This is an aspect on which attention has already been drawn. The second is to limit transposition of competition rules to the rules that are clear and precise and only leave limited discretionary powers to the enforcement institutions (Geradin and Kerf, 2003). However, even when such rules are reasonably clear and precise, the implemented rules may involve complex assessments that may go beyond the capacity of the competition authorities in the MPs. This additional problem can be addressed by limiting the process of transplantation to a limited number of rules, the implementation of which seems within the reach of the institutions of the various importing countries.

The Need for a Prudent Approach

As pointed out above, there are certain regulatory areas, which appear better suited to regulatory transplantations than others. EC competition rules may \textit{prima facie} appear as a good candidate for export as these rules appear less contextual than many other regulatory regimes. However, the approximation of the MPs’ competition rules with EC competition rules is a delicate process, which should be carried out with a great deal of prudence. In practice, two mistakes should be avoided. One would be to transpose rules that leave very large discretionary powers to the competition authorities in

\(^{184}\) It is sometimes considered that “no domestic legal system is perfect or exportable as a whole.” Hence, legal transplants should be carefully and voluntarily selected, so as to assist economic development. See Mistellis (2000).

\(^{185}\) See the very positive assessment made by Fingleton et al. (1996) when discussing approximation of national competition regimes over EC competition rules in the Visegrad Countries (Hungary, Poland, Czech, and Slovak Republic).
the MPs. The second would be to transpose rules, which will be hard to implement and require very complex assessments, hence involve considerable risks of regulatory mistakes. In order to avoid these mistakes, it is suggested that EC competition rules should be exported to the MPs only to the extent: (i) they are sufficiently clear and precise to avoid being wrongly implemented in the MPs; and (ii) they do not involve excessively complex assessments. This approach requires a selection process among EC competition rules to identify the rules that would appear to be fit for transposition in the MPs.

The paragraphs that follow review the main provisions of EC competition law to determine the transposability of these rules in the MPs. Of course, this degree of transposability may vary from one MP to the other. The analysis that follows essentially concentrates on non-candidate countries, which, with the exception of Israel, have a limited institutional endowment and thus may face difficulties in transposing EC law.

EC competition law contains four categories of rules: (i) Articles 81 and 82 of the EC Treaty, which prohibit agreements between competitors that restrict competition, and abuses of a dominant position; (ii) the Merger Control Regulation, which contains a procedure to control mergers between firms with a view to the prevention mergers that would significantly impede competition in the single market; (iii) Article 86 of the EC Treaty, which prevents governments from enacting measures designed to favor public companies or companies enjoying exclusive and special rights in violation of the EC Treaty; and (iv) Article 87 to 89 of the EC Treaty, which contain provisions designed to control State aids to industry.186

Articles 81 and 82 represent the core of EC competition law. Article 81(1) prohibits agreements between undertakings whose object or effect is the prevention, restriction, or distortion of competition within the common market and that may affect trade between Member States. For the prohibition of Article 81(1) to apply, several elements must be established: (i) the existence of a collusion (an agreement, decision, or concerted practice) between two or several undertakings; (ii) the collusion must have as its object or effect the prevention, restriction, or distortion of competition; and (iii) it has an effect on trade between Member States. Article 81(2) states that agreements, decisions, or concerted practices prohibited by Article 81(1) are automatically void.

Article 81(3) provides that the prohibition of Article 81(1) may be declared inapplicable in the case of any agreement, decision or concerted practice that fulfils all of the four following conditions: (i) it contributes to the improvement of the production or distribution of goods or to the promotion of technical or economic progress; (ii) it allows consumers a fair share of the resulting benefits; (iii) it imposes on the undertakings only restrictions that are indispensable to the attainment of those objectives; and (iv) it does not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

While Article 81(1) is a relatively narrow provision, Article 81(3) is much more problematic as the conditions that need to be fulfilled to allow an exemption are broadly drafted and give substantial discretionary powers to the implementing authority.187 It could be argued that to be successfully transposed in the MPs, Article 81 should be simplified and opt for a complete system of per se prohibition (Ali El Dean and Mohieldin 2001). This approach would, however, make Article 81 a very bold instrument. Most regimes operating on the basis of per se rules also provide for justifications of agreements whose economic benefits exceed the restriction they impose on competition. As some exceptions will always be needed, it is probably better to retain Article 81(3) of the EC Treaty. Several reasons support that position. First, if the MPs were to draft comparable exceptions, there would be no guarantee that such exceptions would be more narrowly drafted than Article 81(3). In fact, the drafting of such exceptions could be seized by the government as an opportunity to provide exemptions to some sectors of the economy or even some specific companies.188

186. See Articles 81, 82, 86, 87, 88 and 89 of the EC Treaty. See also Council Regulation No 4064/89 (EC 1989).

187. See on the margin of appreciation left by article 81(3), the comprehensive study by Odudu (2000).

188. This is all the more true since the risks of capture and of corruption of the political institutions are relatively high in emerging economies. See Kovacic (2001), p. 288, 305 and 307, and Sheth (1997), p.468.
Moreover, the advantage of Article 81(3) is that it has been interpreted by a very large body of case-law, which could be used by the competition authorities of the MPs as a useful source of interpretation.

Article 82 prohibits undertakings from committing an abuse of a dominant position held within some substantial part of the common market where that abuse has an effect on trade between Member States. For the prohibition of Article 82 to apply, several elements must be established: (i) the existence of one or more undertakings in a dominant position; (ii) the dominant position must be held within the common market or a substantial part of it; (iii) there is an abusive conduct; and (iv) the conduct has an impact on trade between Member States.

Article 82 appears less problematic than Article 81 as it contains no exemption. However, this provision is not without its own difficulties. First, it may require relatively complex assessments, such as the definition of the relevant market(s) and the identification of one or several dominant operator(s) (Whish 2001, Baker and Wu 1998, Azevedo and Walker 2002). Second, the implementation of this provision by the European Commission has been criticized by commentators, many of whom have argued that the Commission’s decisions as well as the Court’s rulings were not in line with economic theory. Article 82 is thus in a state of flux. On the other hand, the EC experience shows that Article 82 is an extremely useful provision to help open markets that are dominated by one or several operators and, thus, facilitates entry of domestic or foreign market players. Moreover, it is better drafted than equivalent provisions in the domestic legislation of the MPs. For instance, the competition laws of the Mahgreb countries allow abuses of a dominant position to be justified when they ensure a certain technical or economic progress. This formulation is inadequate as it is hard to imagine how an abuse of a dominant position could be justified. Either the measure in question can be explained by an objective reason and there is no abuse, or it cannot be objectively explained and there should be no possible exemption. Transposing Article 82 would thus improve the formulation of the provision dealing with abuse of a dominant position in the non-candidate MPs. On balance, the adoption and implementation of Article 82 is desirable, although some caution might be taken when relying on this provision.

Even if we admit that Articles 81 and 82 should be transposed and implemented in the non-candidate MPs, some technical adaptations would have to be made to this provision. While a measure has to have an impact on trade between Member States to trigger the application of Articles 81 and 82, this criterion should be abandoned in the domestic legislation as it would prevent their application to local situations. This criterion should, however, remain in the Association Agreements since the competition law provisions of these agreements are only designed to govern trade relations between the EC and the associated countries.

The next important provision of the EC Treaty is Article 86, which contains three interrelated provisions (Buendia Sierra 1999, Gardner 1995, Melin-Soucramanien 1994, Lang 1984). Article 86(1) prohibits Member States from enacting and maintaining in force any measure in relation to which they have granted special or exclusive rights which are contrary to the rules of the EC Treaty, and in particular the provisions dealing with nondiscrimination, as well as the competition provisions written in the Treaty. Article 86(2) gives a limited derogation from Treaty rules to undertakings entrusted with services of general economic interest in so far as necessary for carrying out such services. Finally, Article 86(3) provides that the Commission may address decisions to Member States to ensure the observance of Article 86. It also gives the Commission power to issue directives to Member States to ensure the application of this provision.

There seems to be no point transposing Article 86(3) to the non-candidate MPs, as this provision essentially deals with procedural issues. By contrast, it is interesting to discuss whether Articles 86(1) and 86(2) could be usefully transposed and implemented in these countries.

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190. See Chapter 7.
191. See Chapter 5.
As shown by the EC experience, Article 86(1) is an effective tool to prevent governments from protecting public or monopolistic companies from competition.\textsuperscript{192} It is thus particularly helpful in the context of countries trying to liberalize their economy. The downside of this provision is that its formulation is not very clear, and its application could lead to abuses of power or mistaken decisions. In the context of the MPs, a simpler formulation, such as “[T]he government should not be entitled to adopt measures designed to protect or strengthen the competitive position of public companies or companies holding exclusive rights,” might be preferable. It would also be helpful to add that public companies and companies holding exclusive rights should be subject to competition rules. In emerging economies, the companies tend to benefit from exemptions from the application of competition rules, thereby allowing them to engage into anticompetitive practices against new entrants.

In this context, it is not clear whether Article 86(2) should be transposed and implemented in the MPs. As seen above, Article 86(2) allows companies in charge of services of general economic interest to derogate from Treaty rules when the application of such rules would prevent them from carrying out these services. In the EC, this provision has often been invoked to permit operators in charge of public service missions (for example, post, rail) to be exempted from the application of competition rules.\textsuperscript{193} While such an exemption can be justified in limited circumstances, it may also be subject to abuse. In countries, such as the MPs, which are starting the process of liberalizing their economy, there would be a clear danger that such a provision be used to prevent reforms from taking place in a variety of sectors. To the extent exemptions are justified in some sectors, it might be preferable to specify these sectors in a list, which could only been modified by the government and the Parliament.

The control of State aids is another problematic area. Article 87(1) of the Treaty provides that aids granted by Member States or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods and which have an effect on intra-Community trade should be prohibited. Article 87(3) contains a series of exemptions pursuant to which certain categories of aid may be justified, including “aid to promote the economic areas where the standard of living is abnormally low or where there is serious underemployment,” “aid (…) to remedy a serious disturbance in the economy of a Member State,” “aid to facilitate the development of certain economic activities or of certain economic areas,” and “aid to promote culture and heritage conservation.”

Encouraging MPs to transpose EC State aids rules would not be good policy. First, the exemptions contained in Article 87(3) are particularly vague and thus leaves large discretionary powers to the Commission (Geradin 1999). The Commission adopted a large number of notices in which it explains how it intends to interpret these exemptions (EC 1995, 1997, 1998b, 1998e, and 2000b). These notices are, however, often complex and it is not clear whether they would be easily applicable to the MPs. Second, State aid law is a highly politicized field, which requires a high degree of independence on the part of the enforcement authority (Geradin 1999 and Aydin 2002). In the EC, this independence is guaranteed by the fact that, while aid decisions are taken at the national level, the examination of their compatibility with the EC Treaty is carried out at the EC level by the Commission.\textsuperscript{194} Although technically independent, the Commission remains, however, subject to political interferences by the Member States and has often been criticized for being too soft in its State aid decisions. Asking the competition authorities of the MPs to rule on the aid


\textsuperscript{193} See ECJ, 19 May 1993, Criminal proceedings against Paul Corbeau, C-320/91, ECR I-p.02533. See also ECJ, 27 April 1994, Municipality of Almelo and others v. NV Energiebedrijf Ijsselmij, C-393/92, ECR I-p.01477.

\textsuperscript{194} Pursuant to Articles 88(1) and 88(3) of the EC Treaty, the Commission is entrusted with the monitoring and assessment of State aids.
decisions of their government may place them under strong political pressure and may have a negative impact on their independence.

This does not mean, of course, that State aids should not be subject to any form of control in the non-candidate MPs. As has been abundantly documented, many subsidies tend not to achieve their intended objectives and instead generate major distortions of competition. First, MPs should be encouraged to adopt a legislation regarding the granting of State subsidies. This legislation should include procedural steps, but also a number of substantive tests, which should be followed before a subsidy is granted. Although some adaptation to the local circumstances might be needed, the Commission block exemptions on horizontal aids, as well as the various guidelines on regional and sectoral aids, could provide a useful source of reference for the MPs. This legislation should also provide for mechanisms designed to increase the transparency of State subsidies. Such subsidies should be declared and a list of all subsidies granted from State resources should be made available to the public. At the institutional level, the best approach may be to create a State aid monitoring office that would be separated from the competition authority. This would reduce the risks of politization of the latter. This does not mean that the competition authority should have nothing to say in the area of State aids, but in order to reduce the risk of politization, its role should be limited to advocacy aspects.

Besides the issue of whether the MPs should transpose the competition rules contained in the EC Treaty, it is interesting to discuss whether the non-candidate MPs would benefit from transposing the EC Merger Control Regulation (hereafter, the “MCR”) into their domestic legislation. On the one hand, the MCR has been a remarkably effective tool to prevent mergers between firms to create or strengthen a dominant position. The application of such a tool could be useful in the non-candidate MPs since these countries will probably go through a wave of market consolidation as reforms progress. On the other hand, several factors suggest that the MCR may create transposition problems. First, the MCR is a provision that is specifically tailored to the context of the EU. A certain number of provisions, such as the ones establishing thresholds triggering the application of the MCR, would have to be modified to take into account local circumstances. Moreover, the procedural rules regulating the notification process are based on an institutional model that is proper to the EC. Again, different rules would have to be adopted to fit with the institutional framework of the MPs. From that standpoint, it would be easier for the non-candidate countries to implement a merger control regime from one of the EC Member States with which they share administrative traditions (for example, the French regime in the case of the Mahgreb countries). Second, the MCR is currently subject to a review, which is designed to address a series of key aspects of the regulation. Though the outcome of this review is hard to predict, it is likely to lead to substantive modifications. The MCR is thus currently in a state of evolution, which limits its exportability to foreign nations.195

Assuming that the MCR is not easily transposable to non-candidate MPs, there remains the question of whether these countries should adopt a merger control regime at all. On the one hand, some of these countries have already adopted a merger control regime and applied it to a number of transactions. On the other hand, other countries have not yet adopted such a regime and the question remains relevant. Some authors oppose the adoption of a merger control regime in countries that have little experience with the application of competition rules. The main argument is that in order to be properly carried out, merger control requires sophisticated economic analysis to define the relevant markets, examine whether such markets will be affected by the transaction and, in such case, analyze whether there is a risk that the transaction “create or strengthen a dominant position.”196 On the basis of this analysis, the competition authority must then decide whether it

196. See Article 2(3) of the Merger Control Regulation.
will clear the transaction, clear it only provided some remedies are implemented by the parties, or
prohibit it entirely. 197 It is not clear how relatively inexperienced competition authorities, such as
those of the MPs, could properly handle merger control cases.

In this context, it is probably not good policy to encourage the MPs to transpose the Merger
Control Regulation in the current state of development of their competition authorities. This does
not mean, however, that the MPs should never implement a merger control regime, but it is sug-
gested that these countries would be better off following an incremental approach whereby they
would first focus on transposing and then implementing Articles 81 and 82 of the EC Treaty and
then, at a later stage, consider the possibility of adopting a merger control regime. 198 An issue, of
course, is what should be done in the MPs that have already adopted a merger control regime.
While these countries should obviously not dismantle this regime as this would be seen as a step
back in the area of competition law, they should perhaps concentrate on the categories of mergers
that raise the most obvious problems (e.g. horizontal mergers in already concentrated markets) and
whose control might thus not involve particularly complex assessments.

The preceding analysis suggests that the convergence process should primarily focus on certain
categories of rules, leaving the transposition of some EC competition law provisions at a later
stage. Alternatively, the MPs could opt for other models when EC competition law appears inade-
quate. Differentiation should also be a key factor as MPs differ in their market structures and institu-
tional endowment.

The Need to Establish Priorities and Develop an Enforcement Agenda

The preceding section insisted on the importance of adopting competition laws that takes into
account the specific characteristics of the MPs. Once these rules have been adopted, it is of consid-
erable importance that the competition authorities establish a set of priorities and develop an
enforcement agenda (Kovacic 1996). These authorities will often start their operations in difficult
conditions. They will usually have limited financial and human resources and often face the opposi-
tion of strong interest groups. Moreover, these institutions will have to gain credibility and make
themselves known to business and the population. In this context, these authorities have to
develop an enforcement agenda that will be manageable, but also produce clearly identifiable eco-
nomic benefits. The paragraphs that follow contain a list of principles that these authorities should
keep in mind when they start their operations.

| TABLE 9.1: OVERVIEW OF TRANSNATIONAL AGREEMENTS ON COMPETITION LAW ENFORCEMENT |
|--------------------------|--------------------------------------------------|
| **Bilateral Agreements** | Canada: Agreements with Chile, EU, Mexico         |
|                          | China: Agreements with Kazakhstan and Russia      |
|                          | European Union: Agreements with Canada and the USA |
|                          | Taiwan: Agreements with Australia and New Zealand |
|                          | United States: Agreements with Australia, Brazil, Canada, EU, Germany, Israel, Japan, Mexico |
| **Tripartite Agreements** | Canada with Australia and New Zealand             |
|                          | Denmark with Iceland and Norway                  |


197. It should be noted that, over the last few years, the Commission has been criticized for failing to provide convincing economic analysis in support of its merger decisions and some of its recent decisions have been annulled by the Court of First Instance of the European Communities for this reason.

198. See on the sequencing of antitrust reforms the observations made by Oliveira (1998), p. 469.
First, as far as the categories of anticompetitive measures are concerned, the competition authorities should initially focus on the most significant restrictions of competition, the so-called hard-core cartels. As we have seen, such cartels create major harm to developing economies and, in many instances, affect the every day life of the citizen. Domestic cartels in basic goods and services will directly affect poor people as they spend a disproportionately high amount of their income on such goods and services. In addition, discussions over competition policy in major international fora, such as the OECD and the WTO, have placed great importance on transnational cartels and there is general consensus that such practices should be the prime targets of competition law investigations. In this regard, a top item on the work programme of the competition authorities of the MPs should be to engage in international cooperation in the field of enforcement, as given the transnational nature of most cartels cases, these authorities will not be able to do much without the support of foreign enforcement bodies.

### Table 9.2: Intensity of International Cooperation in the Field of Competition Law Enforcement

<table>
<thead>
<tr>
<th>Main Cooperation Features</th>
<th>Content of the Cooperation</th>
<th>Examples</th>
</tr>
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<tbody>
<tr>
<td>Soft Cooperation Mechanisms</td>
<td>Notification of enforcement activities affecting the other party’s important interests; Commitment to take into account the other party’s important interests when investigating or applying remedies against anticompetitive practices (Traditional or Negative Comity); Consultations to resolve conflicts between the parties’ respective laws, policies and national interests; Coordinated action in respect of anticompetitive practices occurring in different countries; request for assistance in investigations when anticompetitive practices on the territory of the party requested are adversely affecting the interests of the requesting party; Request for enforcement of an order by one party in the territory of another party; and Commitments to give serious consideration to the requests for assistance or enforcement, including by providing non confidential information and, in some cases, confidential information.</td>
<td>Range of bilateral or tripartite agreements on competition enforcement (e.g. Memorandum of understanding between Canada and Chile) as well as a number of free trade agreements, (e.g. the agreement EC-Chile)</td>
</tr>
<tr>
<td>Hard Cooperation Mechanisms</td>
<td>Exchange of Confidential Information</td>
<td>Competition authorities agree to exchange commercially sensitive information provided by undertakings falling within their jurisdiction with other competition authorities. States are generally reluctant to conclude such agreements. Indeed, a country’s competition authority may well fear that the confidential information is transmitted by the other competition authorities to national operators that compete with operators located in the first country.</td>
</tr>
<tr>
<td>Enhanced Positive Comity</td>
<td>Presumption that the requesting competition authority will defer or suspend enforcement in favor of the enforcement by the requested competition authority.</td>
<td>EC-U.S. Agreement 1998</td>
</tr>
</tbody>
</table>

Second, with respect to the sectors that need to be investigated, the competition authorities of the MPs should try to eliminate the main strategic bottlenecks to competition. In identifying enforcement targets, they should concentrate on economic sectors, in which the introduction of competition would generate large economic benefits by expanding output in other sectors that consume inputs from the first sector. Such activities comprise infrastructure services (telecommunications, energy, and so forth), as well as financial services. Of course, these sectors might be controlled by vested interests and thus difficult to challenge for new competition authorities. These authorities could, however, initially focus on a limited number of issues, such as access to essential facilities, in cooperation with sector-specific agencies when relevant. Such initiatives will also be important to protect the benefits of liberalization by preventing incumbents from abusing their market power against new entrants.

Besides these enforcement tasks, competition authorities in the MPs should devote resources to competition advocacy, which can be a very effective mode of intervention in developing economies. First, competition advocacy is particularly appropriate in countries undergoing economic transformation as it allows competition authorities to address problems \textit{ex ante}. In the context of privatization and liberalization programs, competition authorities will be well placed to advise the government on issues of market structures, such as the number of competitors that should be allowed on the market, the desirability of breaking up vertically-integrated incumbents. Pro-competitive market structures will often reduce the need for \textit{ex post} enforcement, helping to save the scarce resources of the competition authorities of the MPs. Second, competition advocacy may be a good way for competition authorities to show their usefulness to the government, which may in turn help these authorities gather greater resources than initially allocated to them. Advocacy may also help governments to see competition authorities as allies rather than enemies, although these authorities should keep their independence vis-à-vis the government. Finally, competition advocacy is already one of the most important aspects of the activity of the competition authorities of the MPs, such as, Tunisia. There is thus nothing new to create, but simply a need to increase awareness of the competition authorities and the government of the importance of this task.

By contrast, competition authorities should perhaps refrain, during the initial phase of their operations from engaging into enforcement action in particularly difficult areas of competition, such as vertical restrictions (except perhaps to prohibit particularly restrictive provisions in distributions agreements), as well as difficult abuse cases, which require complex economic analysis and may lead to uncertain outcomes. As previously mentioned, merger control should probably not be a priority for the competition authorities of the MPs unless these authorities are sufficiently well prepared to handle the sophisticated economic analysis required for assessing mergers. When the competition authorities of the MPs are authorized to rule on mergers, they should concentrate their efforts on horizontal mergers, which raise major market structure concerns and should be very cautious with the type of remedies they impose, and primarily choose remedies which will be easy to enforce.

\textbf{Alternatives to Convergence Around EC Rules}

Instead of converging around the EC model, another option would be for the non-candidate MPs to develop an \textit{ad hoc} competition law model and converge around that model. This approach would involve the adoption, through negotiations taking place at the regional level, of a specific model of competition rules not necessarily based on EC competition rules and principles, but on a mix of rules and principles of different existing models of competition law. Such an alternative approach would raise two issues. The first relates to whether it would be good policy for the MPs to develop such an \textit{ad hoc} model and to decide to converge around it. If this alternative option were to be recommended, it would then be useful to examine whether such an option would be practicable.
**Opportunity of Regulatory Convergence Around an ad hoc Model**

An example of this approach can be found in the COMESA, the member countries of which have developed their own set of competition rules. As we have seen, these rules are strongly inspired from the EC model and represent to some extent an example of loose convergence with the EC competition law principles. In theory one could imagine a group of countries which would develop a competition law system composed of the most attractive components of the main competition law systems. Although this approach may appear theoretically attractive, there are doubts that the MPs may not have the necessary resources to develop an ad hoc model. First, the cost of elaboration could be quite high, as the process would involve substantial search costs. Building an ad hoc model may also be a complex exercise. Most competition law regimes have their own coherence and it might not be advisable to mix elements of the EC system with elements of the U.S. system. It would probably be more effective to rely on an existing competition law model (for example, the EC model), and pursue a transposition strategy whereby, as suggested above, “importing” countries select the rules, which once implemented will provide the greatest benefits to their economy.

Second, the choice of an ad hoc model involves greater risks than relying on the EC model, as there is no guarantee that such an ad hoc model would operate effectively. As pointed out above, an advantage of relying on a well-established competition law regime, such as the EC model, is that this regime has been tested in courts and further developed through a range of soft law instruments (guidelines, etc.), all of which could provide very useful guidance to the MPs. In addition, the risks of denaturizing (i.e. inadequate use to satisfy vested interests) of an ad hoc model is greater than for well-established models as, given the novelty of this model, few people will be able to determine whether the system is being abused. The opportunity of a convergence around an ad hoc model is hence uncertain.

**Improbability of a Convergence Around an ad hoc Model**

Even if a process of convergence around an ad hoc model were to be desirable, it seems unlikely that such a regional model could be negotiated and implemented. The main factor driving convergence between the EC and the MPs in various regulatory areas is that the latter’s economies are highly dependent on trade with the EC (see Table 9.3). If the MPs are willing to harmonize their competition laws with EC competition rules, or at least adopt laws that are compatible with such rules, it is because it is in their commercial interest to do so. By contrast, the MPs would have little to benefit from harmonizing their rules on a regional basis. While there are large trade flows between the MPs and the EC, trade among MPs is still very limited, with average growth of intra-regional trade from 1992 to 2000 at eleven per cent for imports and just nine per cent for exports.

**Table 9.3: Overview of Intra-Regional Trade in the Mediterranean Partners**

<table>
<thead>
<tr>
<th>Geographical Area</th>
<th>Imports and Exports in Million $</th>
<th>Variation 95/99 99/00</th>
<th>Relative Share of World Trade with the MPs</th>
</tr>
</thead>
<tbody>
<tr>
<td>World</td>
<td>198,814 224,014 256,062</td>
<td>13% 14%</td>
<td>100.0% 100.0% 100.0%</td>
</tr>
<tr>
<td>Intra-region Trade</td>
<td>8,980 10,622 11,957</td>
<td>18% 13%</td>
<td>4.5% 4.7% 4.7%</td>
</tr>
<tr>
<td>With the EU15</td>
<td>104,121 115,511 127,140</td>
<td>11% 10%</td>
<td>52.4% 51.6% 49.7%</td>
</tr>
</tbody>
</table>


199. For further information see http://www.comesa.int/trade

200. Since the launching of the Barcelona process, intra-regional (South-South) trade has little progressed. In 2000, intra-regional trade exchanges represented less than 6 percent of the total trade exchanges of the Mediterranean partners. See EC (2000c), p. 7. It is also related that intra-zone trade has less progressed in the Mediterranean region than in other regions, (from 4 to 6 percent between 1970 and 1998 for the Euromed region, whereas members of the NAFTA have progressed from 36 to 50 percent and South American trade has increased from 11 to 25 percent).
Several initiatives, such as the “Agadir Declaration”\textsuperscript{201} suggest that a more limited convergence of a sub-regional nature would be possible. This initiative is at a very early stage and the modalities of the envisaged cooperation remain unclear. In addition, it is too early to say whether the convergence of competition rules will be a priority in the development of trade relationships among the partner to this project.

It seems thus unlikely that the MPs will launch a process of regulatory convergence at the regional or sub-regional level. The EC is aware of the shortcomings of cooperation between these countries and is using the Euromed Partnership to develop some forms of regulatory harmonization.\textsuperscript{202}

\textsuperscript{201} The Agadir Declaration lays down the principles of cooperation between Egypt, Jordan, Morocco and Tunisia. In the long run, those states affirm that they want to implement a free-trade area. The EU has manifested strong support to this project (EC 2002b).

\textsuperscript{202} The European Commission today tries to use the Association Agreements to enhance regional cooperation and asks to all its partners to conclude a free-trade agreement with the other MPs that are already associated to the EC. See EC (2000e), p. 14.
Competition law has witnessed an enormous growth these last two decades and today a large number of countries have adopted competition law regimes. Such competition laws have often resulted from regulatory transplants. Through the accession process, as well as the Association Agreements with third countries, the European Commission has managed to extend the sphere of application of EC competition rules to a large number of nations. Some argue that today EC competition law is the dominant model of competition law in the world.

The adoption of competition law regimes can be beneficial to developing and emerging economies. However, such economies generally present characteristics that differentiate them from industrialized countries. The development of competition law regimes in emerging economies is a process that should be engaged into with great care. Because of the limited institutional endowment of these countries, such regimes should avoid provisions giving large discretionary powers to the enforcement authorities or that require these authorities to make extremely complex assessments. An incremental approach whereby emerging economies first apply competition law provisions dealing with the most blatant anticompetitive practices (such as cartels and abuses of a dominant position), while leaving more sophisticated processes (such as merger control) to a later stage, is advisable.

In the Southern Mediterranean countries, competition law has advanced on several fronts. First, countries such as Cyprus, Malta, and Turkey, which are candidates to join the EU, have had to transpose EC competition rules into their domestic legal order as part of the accession process. The transposition of the EC competition law has generally been satisfactorily completed and these candidate countries now have strict and coherent competition laws, and well functioning competition authorities. The accession process has proved a very effective tool in promoting the development of competition law regimes in the candidate countries. Second, the EC signed with non-candidate MPs Association Agreements containing competition law provisions that are patterned on the competition rules of the EC Treaty. Several factors, such as the lack of implementation measures, have, however, limited the effectiveness of such rules in controlling anticompetitive practices affecting trade between the EC and the MPs. Third, some non-candidate MPs have spontaneously adopted
competition laws and created competition authorities. While in some countries, such as in Israel, these laws have proven effective in challenging anticompetitive practices, in many MPs, domestic competition laws have been poorly implemented and have failed to discipline market actors.

In some policy documents, the Commission has expressed its desire to strengthen the competition law regimes of the non-candidate MPs through a process of regulatory convergence. What the Commission seems to encourage is the progressive approximation of the competition rules of the MPs with EC competition rules. Regulatory transplantation has often been criticized in the legal and economic literature as an ineffective way to promote regulatory reforms in developing and emerging economies, and this paper suggests that a careful approach be followed, whereby the MPs would be encouraged to transpose during an initial phase, Articles 81 and 82 of the EC Treaty in their domestic legal orders. These provisions offer powerful tools for addressing the anticompetitive practices, which are the most likely to affect trade, such as vertical and horizontal restraints, and abuses of a dominant position. The paper suggests that Articles 86, as well as 87–89 of the Treaty, should not be transposed in their current form in the non-candidate MPs. It would be preferable that the MPs opt for a simplified and more straightforward version of Article 86(1), and that Article 86(2) should be replaced by a provision exempting in carefully defined circumstances, and subject to constant review, some sectors from the application of the competition law. As far as State aids are concerned, the MPs should not transpose Articles 87–89 of the Treaty, but instead adopt a law which would contain both substantive and procedural rules allowing greater control and transparency (compared with the existing situation) in the area of State subsidies. This law should be tailored to local circumstances and its implementation should be entrusted to a State aid monitoring authority.

As far as merger control is concerned, EC rules should only be transposed in a second phase, to be initiated when there is sufficient evidence that the MPs’ competition authorities have been able to successfully implement Articles 81 and 82. Merger control requires very complex assessments and the risks of mistaken decisions is high, especially when such assessments are made by insufficiently experienced competition authorities. For those MPs that have already adopted a merger control regime, a prudent approach should be taken, pursuant to which only the mergers presenting very significant risks would be prevented and, when remedial actions are needed, preference should be given to simple and easily enforceable remedies. As far as State aids are concerned, an equally prudent approach should be taken, as there is no clear evidence at this stage that the transposition of these rules will be desirable.

Against this background, some steps are suggested below. These actions could be taken by the EC and other institutional donors to stimulate and sustain the development of effective competition policies in the MPs.

First, efforts should be made, at both EC and MP levels, to ensure that the Councils of Association of the Association Agreements adopt the necessary measures to implement the competition provisions contained in these agreements. The absence of implementation measures deprives these provisions of any real effectiveness and fails to provide economic operators in the EU and the MPs from protection against anticompetitive practices affecting market access.

Second, the European Commission should adopt a communication making a clear statement on the scope and objective of the process of regulatory convergence it seeks to promote in the competition law field in the MPs. While the Commission Communication on the New Neighborhood Policy provides useful information on the way the EU envisages future regulatory cooperation with its neighboring countries, there is still some uncertainty as to the degree of intensity of convergence being promoted, as well as the speed with which this process should take place. To the extent possible, a possible the Commission should adopt a Communication containing a calendar of the initiatives that will be taken by the European Commission to promote convergence.

Third, additional research should be promoted to analyze the contribution of the development of competition law regimes on economic development, as well as the identification of the factors that play a critical role in the development of successful competition law regimes in emerging
economies. Little is known on the impact of competition law regimes on the development of a market economy in countries, such as the MPs, and a greater understanding of this impact is needed to make a compelling case to convince MPs to devote resources to the development, and subsequent implementation, of such regimes.

Fourth, as argued in this paper, the EC and the non-candidate MPs should explore the possibility of dividing the convergence process into two or more phases. A first phase could, encourage MPs to transpose Articles 81 and 82 of the EC Treaty into their domestic legal orders and create, or strengthen, the authorities that will be entrusted with the implementation and enforcement of such laws. A second phase would encourage MPs to adopt a State aid regime and transpose the Merger Control Regulation or, more realistically, to adopt a merger control procedure that is compatible with this merger regulation. This second phase would only be triggered when there is sufficient evidence that the enforcement bodies in the MPs have the capacity to make complex economic assessments. The first and second phases could follow different schedules for each MP depending on the ability of these countries to implement competition policies. When a merger control regime already exists, advice should be provided to the MPs on how to implement this regime effectively.

Fifth, a strategy should be developed by the MPs, with the support of the EC and other institutional donors, to determine which components of EC secondary competition legislation could be usefully transposed in their domestic order. The development of an effective competition law regime goes beyond the adoption of the rules preventing anticompetitive behavior, such as Articles 81 and 82. It also requires the adoption of rules of procedures. Efforts should also be made to inform the MPs on the growing amount of soft law instruments which are adopted by the Commission (communications, guidelines, etc.).

Sixth, a strategy should be developed by the MPs, with the support of the EC and other institutional donors, to determine which additional legislative reforms should be undertaken to facilitate the implementation of a successful competition law regime. Legislative changes may be required in areas, such as the regulation of accounting practices, bankruptcy, contracts, etc. Reforms over such matters are generally being engaged in the MPs, but special efforts should be made to ensure that such reforms correspond to the needs of a well-functioning competition policy. Additional changes may also be required to allow for greater autonomy of newly created administrative authorities, such as the competition authorities, in terms of hiring qualified candidates at market prices, collecting fines from market actors, and so forth.

Seventh, resources should be invested in compiling data about the output of competitive authorities in the MPs. The data collected should have both quantitative and qualitative aspects with a view to allow some benchmarking between these competition authorities.

Eight, the convergence process should be accompanied by substantial financial and technical assistance by the EC and other institutional donors. This assistance should be well-targeted to the needs of the MPs, and should cover a period of time that is sufficient to ensure a successful implementation and enforcement of the transposed competition rules. A list of the various components that could be found in such an assistance programme is contained in Box 10.1.

Ninth, a dissemination strategy should be developed to inform all stakeholders of the benefits that can be derived from successful implementation of a competition law regime. This strategy should comprise activities at regional, national, and local levels. Special efforts should be made to involve professional organizations (chamber of commerce, local bars), as well as consumer organizations.

Finally, a substantial effort should be made to encourage the development of academic programs, including courses, seminars, and workshops, in the area of competition law and economics. Most MPs suffer from a lack of qualified experts in competition law and economics, which is partly due to the short supply of graduates in these areas. Moreover, competition law reforms are unlikely to produce effects, before a sufficient mass of professionals have a sufficient knowledge of competition law principles and processes.
The European Commission has expressed its desire to strengthen the competition law regimes of Southern Mediterranean countries. The following suggests possible initiatives that could be undertaken to this end:

a) legislative drafting for the MPs planning to adopt a competition law or to modify their competition law so as to make it compatible with EC competition rules. This drafting should be done by experts who not only have an excellent understanding of competition law issues, but also of the local, economic, and legal circumstances. “Cut and paste” transposition should be avoided.

b) fund projects of “arabization” of competition law concepts. Such concepts have generally no equivalent in the Arabic language and an important step to avoid confusion over the objectives and scope of competition rules, would be to mandate a group of local experts to develop a lexicon of competition law concepts translated in Arabic.

c) help create a competition authority for the MPs that are planning to set up such an authority or that want to strengthen their existing authority. Such support should include help to: (i) the design of the authority (composition of the authority, ways to fund it); (ii) the development of a strategy to hire qualified professionals (elaboration of schemes permitting the competition authority to offer competitive salaries); (iii) the preparation of a work program for the authority, including the development of internal management rules, the development of an enforcement agenda; and (iv) the preparation of a strategy of cooperation between the competition authority and sector-specific regulatory bodies.

d) help develop training programs for competition law officials, including on the job training, but also opportunities to attend educational programs in European universities and work with well established Competition Authorities of the Member States. Training should also be provided to judges who are called to play a role in competition law processes.

e) promote a wide awareness-raising effort, whereby all stakeholders would be informed on the objectives, content, and processes of domestic competition law regimes. Stakeholders include businessmen, industry associations, law firms, consultants, consumer organizations, etc.

f) create partnerships between the competition authorities of the MPs and the EC Member States’ competition authorities.

g) sustain the participation of the competition authorities of the MPs in international competition bodies such as the International Competition Network (ICN).
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**SPEECHES**


Competition Law and Regional Economic Integration is part of the World Bank Working Paper series. These papers are published to communicate the results of the Bank’s ongoing research and to stimulate public discussion.

This study argues that adoption and strengthening of a competition law regime is a key component of the regulatory reforms in the Mediterranean region. It also argues that the competition rules inserted in the Association Agreements signed between the European Union (EU) and the Mediterranean Partners (MPs) currently do not provide adequate protection against anti-competitive practices affecting trade between these blocks. The competition law regimes adopted by the MPs are generally poorly enforced with the consequence that many domestic anti-competitive practices remain unchallenged.

Competition authorities in the MPs should develop a realistic enforcement agenda and ensure that the limited resources of these authorities are used in the most effective manner possible. In addition, this study addresses the issue of regulatory convergence between the EU and the MPs in the field of competition law, that is whether the MPs should align their competition rules with European Community competition rules. It argues that while such convergence would bring a series of benefits to both the EU and the MPs, it would also involve costs. The study thus argues in favor of a prudent approach whereby the transposition of EC competition rules would be based on the local circumstances of each country. In its final part, this study proposes a series of steps that could be taken by the European Union and its Mediterranean Partners to strengthen competition policy in the region, including proposals for technical assistance in the field of competition.

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