

## RECENT DEVELOPMENT

# The Independence of Morocco's Competition Council

Rachid El Bazzim\*

Ibn Zohr University, Agadir, Morocco

Email: [r.elbazzim@uiz.ac.ma](mailto:r.elbazzim@uiz.ac.ma)

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### Abstract

Morocco's Competition Council has undergone major reform since 2011. New legislation has elevated the Council from its former role as a consultative authority to an independent, financially autonomous, decision-making authority. Despite these changes, however, many questions have been raised with regard to the Council's independence, and its duty to monitor and enforce free and fair competition, as well as the sufficiency of the guarantees concerning the statutory impartiality and powers that enable the Council to fulfil its mandate independently. The Council's independence merits discussion in the debate on the optimal implementation of a competition authority, as it is relevant to good governance and the rule of law. To regulate competition effectively, it is essential that the competition regulator remains independent. However, within a democratic framework, the Council's independence must be balanced by parliamentary accountability and budgetary control.

**Keywords:** Competition Council; independent authority; legitimacy; Morocco; regulation

### Introduction

Morocco's economy is characterized by significant regulatory and economic obstacles to entry and to the proper functioning of its markets, which new, innovative and competitive actors seek. Existing laws and regulations (such as licensing restrictions and trade rules that affect one's ability to open markets and exploit new business opportunities) act as non-tariff barriers, which limit entry and economic exchange. Bureaucratic practices have long crippled the spirit of free enterprise, often giving rentier concessions<sup>1</sup> to specific elites to control access points to the economy.<sup>2</sup> By distorting the nature of competition, these barriers act as obstacles to a free market. Thus, the adoption of antitrust legislation in Morocco has encouraged a transition from central planning to a market economy.<sup>3</sup> The prevailing belief that competition is a driving force behind increased economic performance has strengthened the necessary elements of this economic transition and promoted a competitively structured market.

In 2019, the World Bank stated that the absence of fair competition impedes the development of the private sector in the Middle East and North African region. It called for stronger laws to protect

\* Professor of public law, Faculty of Juridical, Economic and Social Sciences, Ibn Zohr University, Morocco.

1 A rentier is any natural or legal person who holds a limited quantity of property, goods or services, the use of which is transferred, without competition, in return for a fee. This remuneration, beyond the various names given to it, is an income, legitimized by law, fact or violence, which does not compensate for any immediate or future work, nor the organization or implementation of any work.

2 "Moroccan cronymism: Facts, mechanisms and impact" (Economic Research Paper Forum working paper no 1063, November 2016).

3 In a market economy, supply and demand through free competition should determine prices. In contrast, in a centrally planned economy the government, not consumers and businesses, makes decisions. Most countries today are a combination of planned and market economies.

competition and policies for enforcement bodies (covering both legal and institutional aspects) to encourage competition in the region.<sup>4</sup> In the context of an economy in the process of opening up competition, the monitoring and regulation of economic sectors aim to bring former monopoly markets into free competition. This general trend can be witnessed throughout Morocco, which, starting in the early 1990s, has made a clear commitment to the gradual liberalization of entire sectors of the national economy. Regulatory institutions were created in Morocco during the 1990s as part of the Washington Consensus,<sup>5</sup> at a time when privatization and liberalization programmes were dominant. The purpose of these institutions is to combine professional skills and decision-making, independent from political considerations.

Independence is generally understood to be the “situation of a public body whose statutes ensure the possibility of making decisions freely and without any instructions and pressures”<sup>6</sup> and, as a regulatory concept, it is synonymous with autonomy. In public law, the independent administrative authority of Morocco’s Competition Council (the Council) is highlighted by the fact that “nobody has hierarchical power or trusteeship over it”.<sup>7</sup>

Morocco’s constitution of 29 July 2011 (the Constitution) was ratified at a time when the global economic crisis was impeding the growth of the Moroccan economy.<sup>8</sup> Under title XII, “Of good governance”, within the subsection “The instances of good governance and of regulation”, article 166 states:

“The Competition Council [Conseil de la Concurrence] is an independent institution charged, within the framework of the organization of free and fair competition, to assure the transparency and equity of economic relations, notably through the analysis and regulation of competition in the markets, the control of anti-competitive practices and unfair commercial practices, and of the operations of economic concentration and monopoly.”

This express constitutional consecration of the regulatory authorities strengthens their legitimacy and increases their accountability.<sup>9</sup> To support these considerations, the Council’s legal arsenal has been reinforced by the publication of two laws relating to competition, promulgated and adopted in 2014. The first, Law No 104-12, addresses the freedom of pricing and competition; the second, Law No 20-13, specifically grants authority to the Council.<sup>10</sup> This new legislation elevated the Council from its consultative origins to an independent decision-making authority with sufficient legal power and financial autonomy to organize free and fair competition. Thus, the Council is autonomous, insofar as it is neither subject to the power of a superior, nor under the control of a supervisory authority.

The establishment of the Council was laborious. In June 2000, Law No 06-99 recognized pricing freedom and competition as essential for a market economy, and provided for the creation of an institution to address these issues. The Council was established in 2008; however, its powers were

4 See R Arezki *Reaching New Heights: Promoting Fair Competition in the Middle East and North Africa* (2019, World Bank Publications).

5 This is followed in the ninth recommendation of the Washington Consensus, which called for the lifting of regulatory controls. It stems from the transfer of the US experience, initiated by the Carter administration, deepened by the Reagan administration and deemed positive for developing countries. The objective is therefore to eliminate or reduce barriers to market entry and exit, thereby removing barriers to economic initiative and free competition.

6 G Cornu *Vocabulaire Juridique* [Legal vocabulary] (7th ed, 2005, Presses Universitaires de France) at 472.

7 C Teitgen Colly “Les instances de régulation et la Constitution” [Regulatory bodies and the Constitution] (1990) 1 *Revue du Droit Public et de la Science Politique en France et à l’Etranger* 153 at 243.

8 F Abdelmoumni “Le Maroc et le Printemps Arabe” [Morocco and the Arab Spring] (2013) 2 *Pouvoirs* 123 at 128.

9 P de Montalivet “Constitution et autorités de régulation” [Constitution and regulatory authorities] (2014) 2 *Revue du Droit Public et de la Science Politique en France et à l’Etranger* 316 at 318.

10 R El Bazzim “Le Conseil de la Concurrence Marocain” [The Moroccan Competition Council] (2016) 1/2 *International Business Law Journal* 73 at 74.

limited, and its actions were constrained for most of the following decade. The Arab Spring in 2011<sup>11</sup> saw this body stir, but the energy was short-lived; the Council resumed its previous role in August 2014. In November 2018, a few weeks before the appointment of the Council's new president and the nomination of its members, the Council's activities became the focus of Moroccan public opinion.<sup>12</sup> The public, hungry for tangible market changes, looked to this institution to fulfil its mandate and to regulate the market and economic relations with transparency and equity.<sup>13</sup> The public's interest and involvement, as well as the resulting debate and concern in the media regarding economic law, were unprecedented in Morocco. Reports of the practices of illegal cartels, revealed in a ground-breaking campaign, were alarming. Consumers, previously sceptical or afraid of the Council's authority, became even more afraid of the absence of competition and demanded new pricing policies across the board.<sup>14</sup>

Despite the pitfalls of the then current economic and social atmosphere, the revitalization of the Council as a regulator of competition<sup>15</sup> fulfilled the public's legitimate expectations. In its early years, the Council, struggling to be recognized as legitimate, was characterized by behind-the-scenes practices and influence.<sup>16</sup> The principle of independence that appears to guide the new provisions was introduced by a wave of reforms designed to enforce rather than merely suggest the rules of competition. The newest directives are designed to: ensure collegiality, as a system of organization in which decisions are in principle taken after joint deliberation by several members who are appointed to exercise a five-year mandate; reduce the influence of executive power; and, through the establishment of an efficient system of "incompatibilities", limit the risk of the Council becoming controlled by interest groups.<sup>17</sup> Despite noble intentions and the strong mandate for independence, when drafting competition legislation, the Council has inevitably faced cognitive, socio-cultural and administrative obstacles. These impediments were expected, as there is a difference between formal and de facto independence.<sup>18</sup>

Questions remain at this point in the Council's evolution, including what independence means in this context, what the advantages of the independent administrative model of competition are, and how the Council's continuing independence can be ensured. The Council's independence is an essential characteristic and a distinctive sign of its unique authority, and can be analysed from two perspectives: organic and functional. Organic independence flows from the Council's mandate and rules governing its composition. Thus, the organization enjoys significant independence due to the statutory guarantees afforded to its members: they are appointed for relatively long terms (five years), and member appointments are renewable and irrevocable. The members are also

11 During the 2011 protests, citizens called for economic reform and a fight against rents, breaking with hybrid visions of governance and the intertwining of power and money.

12 On 17 November 2018, at the Royal Palace of Rabat, King Mohammed VI appointed economist Driss Guerraoui to serve as president of the Council, and Mohamed Abouelaziz was appointed as the Council's secretary general.

13 Recorded in *Official Bulletin* No 6,734 (13 December 2018), a decree appointed each of the 12 members of the Council for a term of five years, renewable once. Each member operates according to their different complementary specialties to fulfil the Council's mission.

14 On 20 April 2018, a highly successful campaign designed both to inform and to inflame public opinion was launched on social media, drawing and holding the attention of consumers and observers while calling for change.

15 The function of the original Council was largely consultative. There was a "strong 'government' presence in the Council with the Prime Minister and the administration in general being placed at the heart of the competition law regime of Morocco": M Dabbah *Competition Law and Policy in the Middle East* (2007, Cambridge University Press) at 141.

16 During the presentation of its programme in 2012, the government emphasized the supporting role of the Council to enable it to fulfil its role as guarantor of free competition in the economic field. However, in reality, the Council has for several years remained or has been forced to remain in abeyance.

17 R El Bazzim *Le Conseil de la Concurrence au Maroc: De la Recherche de l'Indépendance à la Régulation du Marché* [The Competition Council in Morocco: From the quest for independence to market regulation] (2019, l'Harmattan) at 30.

18 WPJ Wils "Independence of competition authorities: The example of the EU and its member states" (2019) 42/2 *World Competition* 149 at 166.

subject to rules of incompatibility<sup>19</sup> and impartiality<sup>20</sup> to isolate them from conflicts of interest that would impinge on their independence. Alternatively, functional (or operational) independence refers to the Council's opportunity to fulfil its mission freely, when it comes to financial issues, human resources and the impartiality of the decision-making process.

Indeed, the establishment of an independent council is an important achievement in building a modern state in Morocco. The economic dimension of democracy is fundamental to this process. Independence in a society embracing a democratic transition is synonymous with responsibility and, as the institution in charge of enforcing competition rules in Morocco, the Council should have a substantial degree of autonomy and independence. The Council has been entrusted with a clear mandate, and the decisions of its members should be guided solely by the criteria expressed in their charter and the expertise that brought them to their posts. In other words, members should be free to act without fear of or influence from political or interest groups. Although strengthened, the Council's independence remains vulnerable to political and budgetary controls, justifying and even promoting conciliation between the requirements of the rule of law and the regulatory imperatives desired by the public authorities.<sup>21</sup> To this extent, controls and balances must be designed to protect independence without insulating the institution and its members from responsibility for their actions and decisions.

### The independence of the Competition Council

Independence is best conceptualized as "a necessity for a regulator to keep an equal distance from all possible interests".<sup>22</sup> 20 years ago, most delegates on the Competition Committee of the Organisation for Economic Co-operation and Development (OECD) were ministry representatives. Today, the committee mainly comprises representatives of independent administrative agencies that are not directly part of an executive branch. It is now considered appropriate to protect a competition authority from government interference in its enforcement activities.<sup>23</sup> Current wisdom also suggests that competition authorities must be independent from business interests to protect the integrity of their law / regulatory enforcement authority.<sup>24</sup>

The question of the Council's independence has been raised by foreign investors wary of councils that internally defer to national governments or dominant national companies. According to regulatory theory, a competition authority should have a clear mandate regarding its mission and objectives. The Council's mission is essentially technical and, ultimately, its decisions should not be subjected to political interference.

The Council's independence is described as independence in applying the tools to achieve the objectives of competition policy, or operational independence through the correct application of legislation, not independence in defining the objectives of competition policy. The division of tasks between the government and the Council indicates the need for the Council to have a high degree of independence in the management of competition cases from a technical standpoint. Furthermore, no one can have the right to interfere in this work, provided that the government determines the objectives of competition policy. Indeed, competition policy, as with any economic

19 The president and vice presidents of the Council must, during their term of office, suspend all commercial professional activities in the private sector. They must also suspend their administration of private or public companies.

20 The impartiality must guarantee separation of the prosecuting and judicial authorities.

21 JL Autin "Le devenir des autorités administratives indépendantes" [The future of independent administrative authorities] (2010) 5 *Revue Française de Droit Administratif* 875 at 886.

22 T Lamanauskas "The key features of independence of national telecommunication regulatory authorities and securing them in law" (2006) 61 *Teisé* 71 at 79.

23 C Gorris "The Spanish National Commission on Markets and Competition" (2014) 37/3 *World Competition* 349 at 356.

24 F Jenny "The institutional design of competition authorities: Debates and trends" in F Jenny and Y Katsoulacos (eds) *Competition Law Enforcement in the BRICS and in Developing Countries* (2016, Springer) 1 at 31.

policy, is primarily an act subject to political accountability. The government must consequently play a role in determining the objectives of competition policy.

Competition authorities assume a variety of organizational forms; they may consist of a single commissioner, as in Canada or in the Antitrust Division of the US Department of Justice, or they may consist of a coordinating body with shared responsibility among a group of colleagues, such as the US Federal Trade Commission, which appears to promote a strong element of independence.<sup>25</sup> The commission satisfies the requirements of balancing the influence of members' affiliations and ensuring collective deliberation on sensitive subjects or complex issues to enhance objectivity. Hence, the citizenry is provided with measured decisions endowed with a greater authority that is not influenced by bias.

### *Organic and functional independence*

Law No 20-13 regarding the Council states that the Council's 12 members are drawn from five groups or categories: two magistrates;<sup>26</sup> four members competent in economic matters or competition;<sup>27</sup> two legally qualified members;<sup>28</sup> three professional members practising or having carried out significant activities in the production, distribution or service sectors;<sup>29</sup> and one member who is competent in the field of consumer protection.<sup>30</sup>

The collegial model's decision-making board allows for internal expert input across different areas of expertise (such as economics, business, consumer affairs and law), enhancing the apparent legitimacy of competition decisions that require considerations based on a variety of skills. The Council's collegial composition may also strengthen it against becoming controlled by economic or political interests more than would be the case with an individual authority. As the number of members increases, the risk of them being influenced by the same interests decreases. Indeed, a mixed panel is an expression of the Council's liberalization, as prejudices and conflicts of interest are neutralized. However, since four members are jurists, including the two magistrates, and two thirds of the members belong to the economic sphere, the Council's composition reflects a traditionally conservative tactic of coupling the law and the economy in the implementation of the rules of competition law.

The utility of collegiality does, however, have limits. Decisions are invariably the result of compromise; responsibility is diffused and accountability undermined, which leads to advocacy for alternative structures. Arguments against the current model suggest that a smaller alternative model could reduce costs, enhance decision-making and improve positive accountability. Another criticism of the current council model is that the role of the chairperson is not sufficiently defined. Unlike French law, which provides that "[t]he chairperson of the competition authority is appointed because of their expertise in the legal field and economics",<sup>31</sup> the Moroccan text merely provides that the chairperson shall be appointed by the king, and is silent regarding any necessary skills and competences.

The term of office, in terms of both its length and irrevocability, represents significant protection against the influence of executive power and preserves the independence of Council members. This is the same principle employed for the Constitutional Court, which is also composed of 12 members

25 WE Kovacic and M Winerman "The Federal Trade Commission as an independent agency: Autonomy, legitimacy, and effectiveness" (2015) 100 *Iowa Law Review* 2085 at 2096.

26 The vice president judges are currently Abdelghani Asnina and Jihane Ben Youssef.

27 Experts in economics and the field of competition are currently Abdellatif Lamqaddem, Vice President Benyoussef Sabouni, Abdelaziz Talbi, and Abdelkhalek Thami.

28 Vice President Hassan Abou Abdelmajid and Abdellatif Hatimi sit as legal experts.

29 Salwa Karkari Belkiz, Rachid Benali and Laid Mahssoussi represent the production, distribution and services sectors.

30 This is currently Bouazza El Kharrati.

31 French Commercial Code, art L 461-1.

appointed for non-renewable terms of nine years. A long term, but a finite appointment is an important hallmark of independence. Additionally, during the exercise of their mandate, members cannot be subject to arbitrary dismissal. This is an important condition for the independence of the Council's authorities, as the power to discipline and disassemble Council members is, in principle, beyond hierarchical power.

In the case of the Council, the irrevocability of appointment seems to be guaranteed. The criteria for automatic resignation are outlined by an exhaustive list of cases, and the conditions of implementation are well defined by Law No 20-13, with the possibility of appealing arbitrary decisions to an administrative judge. However, organic guarantees alone are not enough to make the Council an independent institution. Functional incompatibilities of Council members can be identified and codified through protective rules to strengthen the commitment to impartiality. For example, according to article 11(4) of Law No 20-13, "[e]very member of the council must inform the chairman of the interests that they hold or come to acquire and the functions they carry out in an economic activity". Regarding functional guarantees, the adversarial principle is a modern democratic guarantee of due process: "[e]ach of the parties must be able to make their voices heard in order to state their point of view and discuss the elements that can be used to reach a solution".<sup>32</sup> On freedom of prices and competition, article 29 of Law No 104-12 explicitly states that, "[t]he investigation and the procedure before the board are adversarial", thus establishing a cardinal principle in respect of procedures before the Council.<sup>33</sup>

As is the case in all proceedings (whether civil, criminal, administrative or disciplinary), defence guarantees are expressly recognized before the Council. Nevertheless, the Council is not a court. Indeed, each of the opposing parties must be able to be heard. However, the implementation of this adversarial principle may prolong the procedure.

Moreover, and without going so far as to constitute an infringement of the Council's autonomy, article 12(1) of Law No 20-13 provides for the presence of the government commissioner in the Council.<sup>34</sup> Ostensibly, guaranteeing the participation of a government representative is an innovative technique for integrating government control into the decisions and acts of the otherwise independent Council and appears to translate into an exercise of administrative control over Council activities. Giving the executive branch the benefit of its own witness to Council proceedings maintains the administration's influence within what is otherwise presumed to be an autonomous system. However, the influence may be minor. It appears that, while the representative has significant influence, and while they may ask for an item to be placed on the Council's agenda, their presence is limited to mere representation. The representative has neither the ability to vote nor the authority to veto the Council's deliberations. Despite some criticism,<sup>35</sup> many authors believe that this mechanism is appropriate insofar as the regulatory authorities participate, widely and parallel to the government, in economic regulation. The advisory mission of the government representative tends to neutralize any perceived reduction in the Council's autonomy or independence. It simply reflects a necessary and moderate interface between an independent administrative authority and

32 M-A Frison-Roche *Généralités sur le Principe du Contradictoire* [Generalities on the principle of adversarial proceedings] (2014, Librairie Générale de Droit et de Jurisprudence) at 11.

33 The adversarial principle is undoubtedly the fundamental principle of procedure. It is one of the main concrete expressions of the concept of a fair trial. The adversarial principle guarantees that the parties will not be judged without having been heard or at least called. It also guarantees each party the right to be informed of the factual, legal and evidential arguments on which they will be judged.

34 This states: "The government is represented on the Council by a government commissioner, appointed by decree."

35 "Although personally opposed to the presence of this Trojan horse that will sit on the Council during the deliberations", the former chairperson of the Council, Abdelali Benamor, is accommodating and seeks to be positive, saying that the government commissioner shall participate in the meetings of the Council without the right to vote. See "Conseil de la concurrence: Enfin de vrais pouvoirs!" [Competition Council: Real powers at last!] *Finances News Hebdo* (16 October 2014), available at: <<https://www.maghress.com/fr/financesnews/22429>> (last accessed 30 August 2022).



executive power, and independence does not demand absolute removal from any mechanism of democratic control.

Fundamentally, the Council has two essential functions: to enforce the rules governing anticompetitive practices; and to control undue concentrations of power within the markets. Thus, its mission is technical and, ultimately, beyond political interference. This mandate should not be interpreted narrowly; decisions that, at first glance, would not affect society (because they are simply part of enforcing competition policy) may take on additional societal import as key elements of a government programme. However, if the government formulates competition policy, in general, the Council will be responsible for its implementation. Therein lies one of the Council's trickiest obligations: it must implement government policies without allowing its decisions to fall prey to political agendas or follow the political cycle.

Economic operators and businesses engaged in the market are subject to Council oversight. To run their operations effectively, they need a degree of certainty regarding the application of the laws that affect them directly. To ensure legal certainty, it is appropriate to reduce regulatory uncertainty and transform it into a manageable regulatory risk. These decisions should emanate from an independent regulator with a specific mandate and process and predictable decision-making.

In fact, independence is a long process that is established over time. Beyond improving the efficiency of its interventions, another challenge facing the Council lies in building its reputation and credibility, which requires significant time and effort. For example, to expand its engagement with stakeholders, the Council has published policy guidelines on topics of interest in antitrust enforcement. To dissuade companies from behaving illegally, the Council must acquire a reputation that underpins its credibility. However, as always, reputations are difficult to build and easy to ruin; maintaining credibility is almost as difficult as gaining it. A perceived lack of transparency in decision-making can undermine efforts to establish the Council's integrity. So, reputation, credibility and transparency are virtues that the Council must display every day in every act and decision.

In Morocco, the state has traditionally played a major role in the economy. Competition laws are applied to state-owned enterprises when they operate in markets in which they do not have a legal monopoly. Accordingly, both legislation and case law have developed the so-called functionalist approach (that is, an examination of the type of economic activity engaged in, not the entity engaging in it) to determine the scope of application. In fact, there is still no justification for the presence of the state in the production of animal vaccines (a branch of activity in which the private sector is already strongly present) or in the marketing of seeds (a sector that has been liberalized since 1988). State intervention in these fields may have a deleterious effect on competition. Moroccan law reserves the state's right to fix the price of certain goods if supply conditions so require, which allows for the complete elimination of competition if deemed necessary to achieve social goals.

The perception of regulatory fairness, consistency and overall integrity is an essential component to deter inappropriate competitive behaviours. Monitoring cartels or any concerted practices that have the object or effect of preventing or distorting competition requires considerable investigative effort by the Council. If it refrains from imposing maximum coercive measures on the most serious violations of antitrust laws, it undermines its own credibility and reduces the deterrent effects of its own regulations. The Council plays a vital role in restructuring economic relations and contributing to the emergence of the newly emerging wave of Moroccan consumerism. By embracing this perspective, economic and political actors will be able to craft their strategies and implement their plans.

The following question consequently arises: why does the activation of the Council in Morocco appear to be insufficient, despite the changes that are taking place in the national economy?

### *The Competition Council: Between institutional deadlock and interference*

Structural delays in activating the Council are detrimental to liberalizing Morocco's economy. While, in 2011, the first Council only exercised an advisory role, the new constitutionalized body

has been granted real decision-making power after the strengthening of the legal framework for competition. However, a certain lethargy prevailed from 2013 to 2018. The institutional deadlock is tantamount to suspending the regulator's activity, blocking it at any level or stage. Freezing such an institution expresses a political will to control its rhythms and workings.<sup>36</sup> For example, the Moroccan government used the freeze imposed on the Council to authorize proposed mergers by removing the Council's prerogatives in terms of controlling economic mergers. The stakes are sometimes high, especially when the operation involves giant companies.<sup>37</sup>

Despite a broad consensus on the narrow definition of the Council's independence, this did not prevent clashes between the Council, whose independent status was conferred on it by law, and influential parties in power, leading to intervention by the king. For example, 2020 was marked by interesting developments concerning hydrocarbons. Morocco imports all its petroleum products. After having subsidized fuels for a long time, the country liberalized the sector in 2015, leaving importers free to set the price of fuel at the pump: the fact that pricing is based solely on the market tended to encourage the appearance of fraudulent practices, such as price agreements.<sup>38</sup> Since then, fuel importers have increased their margins considerably, according to a parliamentary report published in 2018.<sup>39</sup> Most importantly, prices remain largely unchanged from station to station, raising criticism and suspicions of price collusion. In 2018, an unprecedented boycotting campaign targeted, among others, the leader of the hydrocarbons market, Afriquia, which is owned by the current minister of agriculture, wealthy businessman Aziz Akhannouch.<sup>40</sup> This campaign accelerated the Council's work on the issue of hydrocarbons and, on 23 July 2020, the Council concluded that a cartel of oil companies existed and informed the Royal Palace of its decision to impose sanctions of 9 per cent of the turnover of the three market leaders: Afriquia, Total and Shell Morocco. On 28 July 2020, the Council presented a new note with sanctions equivalent to 8 per cent of annual turnover for all distributors. However, "several members of the council" have reported "procedural transgressions" in the management of this file by disavowing their president, according to the Palace.<sup>41</sup>

Given the confusion, King Mohammed VI decided to establish an ad hoc commission to investigate the situation, according to a statement by the royal cabinet. The issues at stake are not only the verdict in the case of hydrocarbons but also the Council's credibility and de facto independence. Members' allegations appear to be confirmed by the ad hoc commission appointed by the sovereign. In its report, the commission concludes that "the process of dealing with this case was marred by numerous procedural irregularities" and "the climate of the deliberations deteriorated significantly".<sup>42</sup> The commission recommended further changes to the Council's legal framework to strengthen its

36 R El Bazzim "Les enjeux de la libéralisation et les autorités de régulation économique au Maroc" [The issues of liberalization and economic regulation authorities in Morocco] (2020) 3 *Confluences Méditerranée* 109 at 112.

37 In 2016, concentration increased significantly in the cement sector, with the merger of the Lafarge group and Holcim; these two operators now control 78.5% of sales in the cement market.

38 *Morocco Strengthening Integrity in The Energy, Transportation and Health Sectors* (2018, OECD Publications) at 38.

39 EM Berrada "Maroc: Le Parlement rend public un rapport sur les prix des carburants sur fond de boycott commercial" [Morocco: Parliament publishes a report on fuel prices against the backdrop of a trade boycott] (17 May 2018) *Jeune Afrique*, available at: <<https://www.jeuneafrique.com/560340/economie/maroc-le-parlement-rend-public-un-rapport-sur-les-prix-des-carburants-sur-fond-de-boycott-commercial/>> (last accessed 30 August 2022).

40 M Masbah "'Let it spoil!' Morocco's boycott and the empowerment of 'regular' citizen" (14 November 2018) *Al Jazeera Centre for Studies*, available at: <<https://studies.aljazeera.net/en/reports/2018/11/181114115931285.html>> (last accessed 30 August 2022).

41 S Kasraoui "King Mohammed VI orders probe on sanctions against hydrocarbon companies" (28 July 2020) *Morocco World News*, available at: <<https://www.morocoworldnews.com/2020/07/312791/king-mohammed-vi-orders-probe-on-sanctions-against-hydrocarbon-companies>> (last accessed 30 August 2022).

42 "Statement by Royal Office" (22 March 2021) *Maroc.ma*, available at: <<https://www.maroc.ma/en/royal-activities/statement-royal-office-56>> (last accessed 30 August 2022).



impartiality.<sup>43</sup> Taking account of the legislative machinery and its slowness, the revision and adoption of the two laws are likely to take time and have consequences for the consumer, who continues to suffer the full force of rising prices at the pump. Furthermore, it is believed that certain leading figures in the Council and in government can play an important role in either preserving or allowing the loss of the Council's independence, regardless of the legal requirements of independence.

The Council president is still appointed by the authorities, who can formally dismiss the president whenever they wish. This leads to a distinction between *de jure* and *de facto* independence. In some countries, the competition authorities demonstrate a high degree of *de jure* independence but are not *de facto* independent. By comparison, the legal framework for competition in Morocco is in line with international practices, and therefore generally solid for promoting a competition culture, but the law needs to be properly implemented; while formal independence is enshrined in the law, the Council does not have a high degree of independence in practice. The assessment of independence is also fraught with controversial assumptions, interpretation of legislation, and imprecise and questionable practices. Furthermore, the influence of power on the Council is not always transparent but may be exercised covertly or at unannounced meetings, the results of which are not made public. This makes it difficult to assess the Council's actual independence accurately.

Independence is governed not only by legal rules but also by social standards and non-normative practices. The extent to which a competition authority is genuinely independent cannot, therefore, be determined simply by assessing the legal framework. It is also necessary to assess the culture of independence, ie the pattern of formal and informal social norms and practices prevailing in a particular society as a whole.

### Accountability of the Competition Council

It is generally accepted that independence should go hand in hand with accountability.<sup>44</sup> The concept of accountability is not easy to define concisely; however, at its essence, to be accountable is to answer for one's responsibilities, to assume obligations and to submit to outside or external judgment.

### Parliamentary oversight

Accountability requires oversight and control. Parliament exercises the first level of control over the Council's activity. The establishment of communication and control mechanisms between Parliament and the Council is part of the broader phenomenon of upgrading the parliamentary institution, which has been underway since the last constitutional reforms in 2011.<sup>45</sup> The Council is, above all, an institution created by the Constitution. However, Parliament, through its legislative work, defines the rules of form and substance for the Council's operations. While there are mechanisms by which Parliament could significantly interfere with the Council's independence, in practice Parliament's role appears to be limited by a decision of the Constitutional Council. By enacting collaboration and control measures, the Constitution expressly sanctioned a new, evaluative mission for parliamentary public policies; all the institutions and authorities specified in articles 161–70 of the Constitution must report on their activities at least once a year. Thus, according to article 24 of Law No 20-13, “[i]n accordance with Article 160 of the Constitution, the

43 “Free pricing and competition: Government will make necessary revisions (head of gov’t)” (1 April 2021) *Moroccan Press Agency*, available at: <<https://www.mapnews.ma/en/actualites/economy/free-pricing-and-competition-government-will-make-necessary-revisions-head-govt>> (last accessed 30 August 2022).

44 See A Ottow *Market and Competition Authorities: Good Agency Principles* (2015, Oxford University Press).

45 O Bendourou “La nouvelle Constitution Marocaine du 29 juillet 2011” [The new Moroccan Constitution of 29 July 2011] (2012) 3 *Revue Française de Droit Constitutionnel* 511 at 526.

activity report of the Council is presented by the chairman of the Council to the Houses of Parliament". These reports are then debated in Parliament.

The process for submitting reports has not been specified within the Council's procedures. Usually, reports are presented separately before each House of Parliament. Requiring the Council to prepare and deliver an annual report at each of the two meetings would embody a problematic form of accountability. Such reports would be too long to follow, and the only tangible effects would appear to be negative. Submitting a record of its use of resources, the exercise of its powers, the ethical rules implemented internally, and the legal corpus developed and practised by the Council in the performance of its mission would open all these areas to examination and debate, each inviting interference with the Council's autonomy.

Oversight is, however, a positive element for the proper functioning of institutions. Therefore, a novel form of evaluation that is continuous and interactive, and that provides an opportunity to propose or suggest modification of practices or texts, should be developed to review the Council's activities. Such assessments will be most effective if the Council has the exclusive authority to draw conclusions and institute a process to modify the texts that integrates external evaluation. In doing so, the Council's autonomy would be undisturbed, while its credibility and public perception would be enhanced by its responsiveness to external critique. As discussed below, periodic hearings with the chairpersons of the independent regulatory agencies and the relevant parliamentary committees would also be effective. Indeed, the principles of good governance and accountability have already been incorporated into the Constitution through article 102, which states, "[t]he committees concerned in each of the two Chambers may ask to hear the heads of the administrations and public institutions and enterprises, in the presence and under the responsibility of the ministers concerned".

Based on these principles, the House of Representatives inserted the following into its rules of procedure: the right of its Committee on Justice, Law and Human Rights to hear the heads of the councils and institutions mentioned in the Constitution. This includes the institutions and government bodies charged with protecting rights and freedoms, good governance, human and sustainable development, and participatory democracy, as outlined in articles 161–70 of the Constitution. However, the Constitutional Court ruled that these institutions are considered independent bodies and not public administrations, institutions or enterprises. They are, therefore, not subject to the authority or guardianship of a particular ministry.<sup>46</sup> It follows that the heads of these independent institutions, unlike the heads of the institutions mentioned in article 102, cannot be convened as proposed by the standing committee of the House of Representatives. It is also important to point out, in this regard, that the Constitutional Court's decisions have followed a broad interpretation of the regulatory authorities' independence, not only from the government but also from Parliament.

In fact, the Constitution does not expressly provide for the convening of good governance institution heads before the standing committee of the House of Representatives, but the authority to summon can be inferred from several references to "responsibility and accountability" and insinuations of "good governance" contained within the document. Furthermore, the Constitution expressly provides that institutions such as the Council submit at least one report of their activities per year, which appears to be an argument in favour of voluntary presentations before Parliament. In this context, the Constitutional Court has affirmed that the regulatory authorities are only obliged to submit annual activity reports; these reports can be discussed in Parliament,<sup>47</sup> but it cannot in any case hear the heads of these authorities; this position of the constitutional judge has considerably limited the controlling power of the parliamentary institution.

46 Council decision No 924/13 (22 August 2013) on the constitutionality of the rules of procedure of the House of Representatives, published in *Official Bulletin* 6/185 (9 September 2013) (Arabic version).

47 Council decision No 829/12 (4 February 2012).

### Issues of budgetary control

The budget is the second means by which accountability can be exercised over the Council, in terms of how the Council uses its allocated funds and administers budgetary procedures and rules. Regulatory agency control is traditionally exercised by the Court of Auditors; however, the legislator in charge of defining the exercise modalities sought to equip the Council with sufficient financial resources to insulate it from external influences. Article 1 of Law No 20-13 states, “[t]he Council is endowed with legal personality and financial autonomy”. The potential for it to obtain its own resources gives the Council its legal personality and puts it in a most radical position of financial autonomy. This legal endowment distinguishes the Council within the state budget, but the Council has not yet provided its own resources, which are derived from collected royalties or other sources, perhaps because another layer of uncertainty remains regarding the Council’s control and ultimate financial autonomy: the Council’s activity, which is based on the general regulation of competition, does not permit the collection of duties or taxes. This leaves unanswered questions concerning the Council’s permissible means for achieving financial autonomy.

One may question the contribution of the “own resources” mechanism in strengthening the independence of the regulatory entity. While resource allocation is generally perceived as financial contributions to the authority’s overall budget, symbolic and non-monetary contributions are also acknowledged. Thus, organizations often receive financial resources that are independent from their actual contributions. This unusual allocation of financial authority to the Council is probably unnecessary for independence. The financial means available to the Council will largely depend on the generosity of the general budget initially established by the executive office, which retains relative control of the growth of this institution.

In addition to the administrative phase of the budget provided by the president as the authorizing officer for revenue and expenditure, the law provides that the government must second an accountant to the Council. This requirement reflects the principle of separating authorizing officers and treasury accountants, which founded public accounting in Morocco.<sup>48</sup>

Control over the Council budget has been assigned to the Court of Auditors, as the supreme audit institution that produces reports aimed at guaranteeing good governance, rationalizing public management and moralizing public life. The Constitution gave the court a title that defines its attributes, delimits its fields of activity and action, and reinforces its independence. The last paragraph of article 15 of Law No 20-13 provides that “[t]he execution of the budget of the Council is subject to the control of the Court of Auditors”. Thus, the Court of Auditors has been explicitly designated to play a major oversight role as an independent authority responding to citizens’ expectations for information and ensuring, through the various powers assigned to it by law, the transparency and accountability of the Council.

In conclusion, the desire to create an independent Competition Council with all the necessary guarantees and means was insufficient. Independence is acquired and not given, and removing oversight of any government agency is either impossible or invites corruption. The degree of independence can best be measured in the exercise of the Council’s powers in the area of merger control and the repression of anti-competitive practices.

### Regulators and the Competition Council

Economic regulation reforms in Morocco in recent decades have raised questions about the relationships between sector regulators and the Council, including which of the two is more important and whether the competition authority should play the main role, cooperate with sector regulators or keep its distance. Analysing the relationships between the sector regulators and the Council is not

<sup>48</sup> Authorizing officers are responsible for implementing the budget. They commit expenses and issue orders to pay, which are executed by the treasury accountants.

an easy task. Beyond the standards that organize their relations, the exercise of their activities and the behaviours of the regulators concerned must be probed to identify their connections, agreements and disagreements. This involves determining the parameters that influence the interface between competition law and sectoral regulation. Conflicts between regulatory authorities are rarely made public.

Sectoral regulatory authorities are characterized by their independence from both political and economic power, and they carry out a mission of economic regulation or protecting individuals. However, in the absence of a general legislative framework, they differ considerably, which leads to substantial heterogeneity in their composition, status and powers.

Some special authorities are responsible for sectoral regulation, such as: the National Telecommunications Regulatory Agency (NART) for telecommunications; the High Authority for Audiovisual Communication in the audio-visual sector; and the National Authority for Electricity, which is another legal entity with financial autonomy responsible for ensuring the proper functioning of the market “under construction” for electricity.<sup>49</sup>

Morocco is still exploring the appropriate relationship between regulators and solid conclusions remain out of reach. The Council has been given the mandate to regulate competition in all sectors of the economy (transversal competence); to do so, the Council applies the rules of competition law through a general competition law regime. There is no valid argument for exempting a given sector, or private, public, cooperative or professional association from competition oversight and regulation. Alternatively, sectoral regulators apply technical or economic regulation to a specific sector, sometimes substituting themselves for the managers of regulated entities, to set standards for the prices, quantity or quality of products on the market. Both categories of regulators are needed. However, regulation is a derogation from the application of competition rules. If we consider the market as the best mechanism for allocating resources, regulation should stop where competition is sufficient.

These principles indicate that both types of regulators are essential and that they should be specialized in their respective fields. It is a mistake to entrust a competition regulatory authority with the regulation of a particular sector. Furthermore, since competition rules should apply across all sectors of the economy, sectoral regulators should not be responsible for their application in narrow fields. However, conflicts of competency between sectoral regulators and the Council are illustrated in the relationship between NART and the Council. Indeed, the telecommunications sector is most inclined to experience jurisdictional tensions with because the Council and NART have competing mandates regarding the application of competition rules in the sector. On the one hand, competition authorities are naturally competent to act in the sector because of their transversal nature, which covers all sectors of economic activity. On the other hand, NART has seized control over competition within the sector and, given the nature of utilities, may implement anticompetitive policies at odds with the Council’s competitive priorities. Additionally, the disputed area is sometimes knowledge-based; sector regulators claim to know more about the sector in question and are technically better equipped to analyse merger transactions. However, there are strong counterarguments. The methodology for analysing the impact of mergers is similar in all sectors, and the sector regulator can easily be controlled by economic entities.

Despite institutional arrangements or labour divisions between regulators, the need for close cooperation remains a priority. Sectoral regulators should offer their opinion and, after consideration of that opinion, the final decision should rest with the Council. In the era of globalization, it is generally agreed that the regulation and control of certain activities should be attributed to independent agencies because the decision-making mechanisms of political authorities are not considered appropriate for macroeconomic decision-making. In addition, some socio-economic sectors

49 R El Bazzim “Reinventing the Moroccan state and the implementation of the independent regulatory agencies (IRAs)” (2020) 4/1 *Católica Law Review* 32 at 33.

remain particularly sensitive to political change. Regulatory agencies exist to ensure the proper functioning of markets outside and beyond the vagaries of political life. However, it is important to remain vigilant and not view the endowment of independent regulatory agencies as a kind of “magic formula” that can solve the most diverse legal and political problems.

The regulatory authorities have gained more competence than independence since the mid-2000s. Nevertheless, a number of elements specific to Morocco have been identified. The existence of economic regulatory authorities is justified by their role in economic governance, in an environment of contradictory logics: a rentier and productive economy, an administered and liberalized economy. This is a hybrid system that allows the creation of independent authorities, combined with adapting them to the Moroccan political and administrative tradition, for example through the dominant presence of the centralized power.

## Conclusion

In a transitional economy such as that of Morocco, competition law must prevent large companies from adopting abusive tactics that aim to eliminate small, effective competitors. Additionally, businesses must be prohibited from fixing prices, sharing markets and employing other tactics that harm consumers. The process of liberalization and the establishment of a new market economy require the application of competition policy and law to control and regulate the power of the markets and fortify vulnerabilities before they are irretrievably exploited to the detriment of the economy. The privatization of economic entities has created private monopolies, the market power of which must be regulated similarly to that of natural monopolies and other free-market failures. Regulation is, therefore, essential to the functioning of an economy in transition. Decisions relating to these functions are typically either of a quasi-judicial nature (such as administrative decisions imposing a fine on a cartel) or of a highly technical nature (such as the assessment of the market effect of energy sector consolidation). Thus, they should be entrusted to an independent regulator. This transfer of oversight and management reduces corporate uncertainty and minimizes the harmful effects of the discretionary nature of political decision-making. Furthermore, to be effective, independent regulators should have a clear mandate, have the freedom to enforce the rules and be held accountable for their decisions. Accountability and incentives remain the greatest obstacles to the Council fulfilling its mission. These issues are rarely addressed in regulation theory, which is surprising given the potential for decisions, whether positive or negative, to have profound, long-term effects on social welfare.

This analysis appears to indicate that the Council should have the power to apply the rules of competition in all sectors of the national economy. It must cooperate with sectoral regulators. However, an economic ship can only have one captain and the Council must wield the ultimate decision-making power in cases of anti-competitive behaviour and mergers. The establishment of the truly free market and fair competition to which Morocco aspires has come up against the weakness of the rule of law, corruption and the limited independence of the judiciary. Political reforms are necessary, and policymakers should encourage legislative institutions to build on the well-established foundations of a fair competition regime and appoint the heads of the relevant bodies. Furthermore, the Council must acquire a reputation for competence and independence, and the Council’s prestige must be established such that the political power will agree to fulfil its assigned role and not seek to overturn decisions for particular reasons.

Indeed, if the decisions taken by the Council are frequently paralysed, it will never have the opportunity to assert itself as an independent competition authority. Furthermore, the rise of the “competence elite” (legal and economic professionals), which illustrates the symbiotic relationship between expertise and independence, must not be achieved by excluding citizens from public affairs. It would be useful for competition regulators to establish communication and consultation mechanisms.

This article has also indicated that the course of competition policy must be corrected from its current track. The Council requires sufficient human and financial resources to carry out the missions entrusted to it successfully. This involves proving to economic actors that the Council is independent, credible and accountable.

**Conflicts of interest.** None