Towards a Proper Legal Framework for Regulating Abuse of Dominant Position in the Occupied Palestinian Territory

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Abstract

Since its establishment in 1993, the Palestinian Authority (PA) embraced its own economic policies to develop the Palestinian economy as a main pillar for establishment of the Palestinian State in line with free market economy principles. The adopted policies have required reforming legal frameworks for regulating economic activities including competition matters since competition law is a fundamental tool in any free market economy. The PA drafted a law in 2003, which was not passed, nonetheless, in 2012, the PA prepared a new draft law, and it has been working to issue such law (hereinafter: the Draft Law).

The Draft Law proposes to regulate three issues: restrictive agreements or arrangements, abuse of dominant position in markets, and anticompetitive mergers. This research concentrates on abuse of dominant position within the Palestinian context for several reasons as explained below.

The study seeks to explain and propose recommendations on the foundation of an appropriate legal framework to regulate abuse of dominant position. The importance of this study refers to that conducting this study coincides with the endeavour of the PA to establish a legal framework to regulate abuse of dominant position in the Occupied Palestinian Territory (OPT) as a part of a comprehensive competition policy.

This study seeks to answer the following question: What are the most appropriate legal norms that should be adopted in the draft law on competition to regulate abuse of dominant position in the OPT? In order to answer the above question, the study tackles several issues such as the political situation of the OPT, the main economic activities of the Palestinian market, the ‘dominant position’ and abusive practices. In order to reach its appropriate conclusions, the study analyses the experience of two jurisdictions the European Union and Jordan comparatively. Nonetheless, the study considers the special needs and situations of the OPT. The selection of the EU refers to several reasons.

This study includes four main chapters. The first chapter considers the political and economic aspects in the OPT. The second chapter deals with a theoretical background of competition policy. The third chapter analyses the position of dominance in market. Finally, the fourth chapter deals with abuse of dominance. The study has found that, in general, the draft law has adopted and is in line with the main stream of the best practices adopted in the EU and Jordan. However, contrary to the EU, the Jordanian competition law and the Palestinian Draft Law have provided a definition for the dominant position. The definition of dominant position cited in the current Draft Law suffers from inaccuracy as it has been built on several overlapping and contradicting standards (market share, control of prices and affecting market). In addition, contrary to the EU and Jordanian competition laws, the Palestinian Draft Law has excluded the state (public undertakings) from being subject to its provisions. Furthermore, competition authorities assess dominance through defining the so-called relevant market. From legal perspectives, the definition relies on assessment of substitutability of products from consumer’s view. The Palestinian draft law has adopted a definition of relevant market based on economics understanding (merely a place of exchange goods and products) rather than in a legal context. Additionally, the European, Jordanian and the Palestinian Draft Law have not provided a definition for the concept ‘abuse of dominance’. Instead, the mentioned laws have provided a list of
examples of abusive practices as it has provided in article (16) thereof where it covers abusive practices (such as excessive price, price discrimination, rebate schemes, predatory price, refusal to deal, and tying of products) directly or indirectly. In light of the mentioned findings, the study has proposed recommendations, for example, the Draft Law should regulate the objectives of the competition policy. The Draft Law has adopted a definition of relevant market based on substitutability of products from consumer perspectives. The definition of dominant position cited in the current Draft Law of competition relies on several overlapping standards, thus, the Palestinian legislature should reform it by considering that dominance means substantial market power rather than merely market power. Article 16 of the Draft Law needs reforming through deleting some paragraphs such as 1, redrafting the examples laid down in the article (excessive prices, and predatory prices), avoiding repetition and duplication in the provisions laid down in article (16) such as paragraphs 6, 8, and 9.