

# Dominance

In 35 jurisdictions worldwide

*Contributing editors*

**Thomas Janssens and Thomas Wessely**



2015

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*Contributing editors*

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**Freshfields Bruckhaus Deringer**

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Published by  
Law Business Research Ltd  
87 Lancaster Road  
London, W11 1QQ, UK  
Tel: +44 20 3708 4196  
Fax: +44 20 7229 6910

© Law Business Research Ltd 2014  
No photocopying: copyright licences do not apply.  
First published 2003  
Eleventh edition  
ISSN 1746-5508

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Printed and distributed by  
Encompass Print Solutions  
Tel: 0844 2480 112



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# Morocco

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## General

### 1 Legislation

#### What is the legislation applying specifically to the behaviour of dominant firms?

The Moroccan rules applying to the behaviour of dominant firms are currently set out in Law No. 06-99 of 5 June 2000 (Dahir No. 01-00-225) on free pricing and competition (Current Law) and its enforcement decree No. 2-00-854.

However, a new set of laws relating to competition and dominance has been adopted and published in the Moroccan Official Bulletin: Law No. 20-13 of 30 June 2014 (Dahir No. 1-14-117) relating to the Competition Council and Law No. 104-12 of 30 June 2014 (Dahir No. 1-14-116) on free pricing and competition, which will take effect after the entry into force of the regulations necessary to its full application (Law). A draft enforcement decree No. 2-14-652 was in the process of being adopted at the end of 2014.

Abuses of dominant position are regulated by article 7 of both the Current Law and the Law, which prohibit the abusive exploitation by an undertaking or a group of undertakings of a dominant position on the interior market or a substantial part of it, if the abusive exploitation has as object or may have as effect to prevent, restrict or distort competition.

Under the Current Law, the Moroccan authorities responsible for enforcement are:

- the Chief of Government, who may adopt certain measures or refer the matter to the King's Prosecutor at the relevant first instance court for the purposes of prosecution; and
- the Competition Council, which has a consultative role: it may issue opinions on matters of principle submitted for its assessment or make recommendations that can lead to the issuance of orders or prosecution.

Under the Law, the Moroccan Competition Council will now be granted decision-making power over abuses of dominance cases.

### 2 Non-dominant to dominant firm

#### Does the law cover conduct through which a non-dominant company becomes dominant?

Article 7 applies only to already dominant firms.

However, it should be noted that the transactions through which firms acquire or strengthen a dominant position are, in principle, examined through Moroccan ex ante merger control procedure.

### 3 Object of legislation

#### Is the object of the legislation and the underlying standard a strictly economic one or does it protect other interests?

The Moroccan Competition Council has clearly stated that the Moroccan competition legislation aims at promoting the economic and social development (information letters of the Competition Council of April 2011 and of December 2012), in particular dealing with poverty, as well as furthering competitiveness.

Under article 9 of the Law, the practices, whose perpetrators can prove that they have the effect of ensuring economic or technical progress, including by creating or maintaining jobs, and that they reserve for users a

fair share in the resulting profit without giving the undertakings involved the opportunity to eliminate competition for a substantial part of the products or services in question are not subject to the provisions of article 7. Those practices may impose restrictions on competition only insofar as these are essential to achieve this aim of progress. Certain categories of agreements or certain agreements, in particular when they are intended to improve the management of small or medium-sized undertakings or the marketing of farmers' products, may be recognised as meeting the conditions set out in article 9 by the administration after a favourable opinion from the Competition Council.

### 4 Non-dominant firms

#### Are there any rules applying to the unilateral conduct of non-dominant firms?

Moroccan law provides several rules applying to the unilateral conduct of non-dominant firms.

The abusive exploitation by an undertaking or a group of undertakings of the economic dependence of a client or supplier who does not have equivalent alternative, if the abusive exploitation has as object or may have as effect to prevent, restrict or distort competition is prohibited under article 7 of the Law.

Moreover, article 8 of the Law has introduced a new rule by prohibiting selling price offers or selling price practices to consumers that are abusively low compared with production, transformation and commercialisation costs, if the offer or practice has as its object or potential effect to exclude from the market, or to prevent from entering into a market, an undertaking or its products (these provisions do not apply to goods or services purchased for resale in the same condition).

Finally, articles 58 to 61 of the Law provide rules regarding the unilateral restrictive competition practices of all firms.

In particular, article 60 of the Law forbids the direct or indirect imposition of a minimum resale price to goods or services or of a minimum sales margin.

Moreover, under article 61 of the Law, it is, in particular, forbidden to all producers, importers, wholesalers or service providers:

- to apply to an economic partner, or obtain from an economic partner, discriminatory and unjustified prices, payment deadlines and conditions or terms of sales;
- to refuse to fulfil a buyer's request made in the context of his or her professional activity if the request is not abnormal and is made in good faith; and
- to subordinate the sale of a product or service for professional use to the concomitant purchase of other products, to the purchase of an imposed quantity or to the provision of another service.

### 5 Sector-specific control

#### Is dominance regulated according to sector?

Certain specific sectors are regulated by sectoral regulators who aim notably at helping the sectors reach their competitive maturity.

These sectoral regulators include the National Telecommunications Regulatory Authority (ANRT) for the telecommunications sector, the High Authority for Audio-visual Communication (HACA) for the audio-visual market, the Bank Al Maghrib for banks, the Council for Ethical Standards in the Securities Market for the stock exchange, the Insurance and Social

Security Directorate for insurance and the National Ports Agency (ANP) for ports.

However, there are no sector-specific provisions relating to abuses of dominance and the sectoral regulators usually take into account or apply the provisions of article 7 of the Law.

## 6 Status of sector-specific provisions

### What is the relationship between the sector-specific provisions and the general abuse of dominance legislation?

The Competition Council has jurisdiction over all sectors within the competence of the sectoral regulators, except when the relationship between the Competition Council and the sectoral regulators is ruled by the texts establishing these sectoral regulators (article 108 of the Law). This is particularly the case for the ANRT and the HACA who have powers to settle disputes pursuant to article 7 and must inform the Competition Council of their decisions.

Moreover, article 8 of Law 20-13 relating to the Competition Council states that the Competition Council shall receive the opinion of the sectoral regulators when the matter concerns their sector. The Competition Council is also entitled to call on the skills and expertise of these sectoral regulation authorities for the purpose of the investigation.

Similarly, the Competition Council may also be consulted by the sectoral regulators on any matter of principle concerning competition (article 5 of Law 20-13 relating to the Competition Council).

## 7 Enforcement record

### How frequently is the legislation used in practice?

In recent years, the Competition Council has, on average, issued several opinions and studies each year relating to abusive practices.

## 8 Economics

### What is the role of economics in the application of the dominance provisions?

Economics plays a key role in the application of the dominance provisions.

The Competition Council has underlined that the use of economic tools is decisive to the processing of an anti-competitive case, in particular to determine the relevant markets, to assess the undertakings' positions on the market, to analyse their practices and to evaluate the harm caused by these practices (information letter No. 5 of July 2010).

Article 28 of the Law will entitle the President of the Competition Council to call on expertise requiring special technical skills if necessary for the purpose of the investigation or at a party's request.

## 9 Scope of application of dominance provisions

### To whom do the dominance provisions apply? To what extent do they apply to public entities?

Article 7 of the Law applies (article 1):

- to any natural or legal person, whether or not it has its registered office or establishments in Morocco, if its transactions or behaviour have as an object, or may have an effect on, competition on the Moroccan market or a substantial part of such market; and
- to all production, distribution or services activities, including those carried out by legal public persons when they act as economic operators and not in the exercise of their prerogatives of public power or in the performance of their public service tasks. For instance, in Opinion No. 6/09 of 9 September 2009 relating to marine pilotage, the Council accepted making recommendations about the legality of the commercial activities carried out by the ANP, but refused to examine the measures adopted by the ANP within the framework of its public authority tasks.

## 10 Definition of dominance

### How is dominance defined?

The concept of dominance is not defined under Moroccan law.

However, the Competition Council uses the definition retained by international case law and doctrine and defines dominance as the position enjoyed by an undertaking that affords it the power to evade the market

conditions and to behave independently to an appreciable extent from its competitors and consumers.

The market power depends not only on the market share but can also be inferred from other elements such as belonging to a group, enjoying financial power or being present at all stages of the production process.

## 11 Market definition

### What is the test for market definition?

The test for market definition does not appear to differ from the test for merger control purposes.

The relevant product market is defined as the meeting place of supply and demand of certain products or services that are regarded as substitutable from the demand side perception (nature of the products, prices and use) and from the supply side perception (ability to access the market in the case of price increase) in a determined geographic area (Opinion No. 5/09 of 7 September 2009 of the Competition Council relating to the sector of the scholar book).

## 12 Market-share threshold

### Is there a market-share threshold above which a company will be presumed to be dominant?

The provisions of Moroccan law relating to abuses of dominance do not provide for a market-share threshold above which a company will be presumed to be dominant.

Nevertheless, it follows from the Competition Council's case law that firms that were qualified as dominant all hold market shares above 40 per cent. Moreover, it should be noted that Moroccan merger control rules provide for a 40 per cent market-share notification threshold.

However, the existence of a dominant position is not automatically established when the market share is higher than 40 per cent. For instance, in its Opinion of 22 December 2011, relating to the acquisition of insulin, where two undertakings both had important market shares (around 48 per cent and 47 per cent), the Competition Council considered that there was no individual dominant position, as the existence of a dominant position must be assessed in the light of the competitors' market shares (a collective dominant position was, however, identified by the Competition Council in this case).

## 13 Collective dominance

### Is collective dominance covered by the legislation? If so, how is it defined?

Collective dominance is clearly covered by article 7 of the Law, which prohibits abusive practices by one undertaking or 'a group of undertakings'.

In its Opinion of 22 December 2011 relating to the acquisition of insulin, the Competition Council considered that two undertakings were holding a collective dominant position on the market, by taking into account the following reasons:

- the market had an oligopolistic structure and was split between the two main undertakings (who respectively held around 48 per cent and 47 per cent of market shares);
- the market was transparent, each member of the dominant duopoly knowing the other undertaking's conduct;
- both undertakings had adopted a common course of action to exclude their main competitor from the market; and
- there was no potential competitor on the market after the exclusion of the main competitor.

## 14 Dominant purchasers

### Does the legislation also apply to dominant purchasers? If so, are there any differences compared with the application of the law to dominant suppliers?

Moroccan law relating to abuses of dominance appears to apply to dominant purchasers. It has, for instance, been the case in the Opinion No. 26/10 of 13 November 2012 relating to the market of maritime transport of Casablanca's tramway train sets in which the Competition Council held that an undertaking that was the only buyer in a market, therefore, in a monopsony situation, enjoyed a dominant position.



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**Abuse in general**


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**15 Definition**
**How is abuse defined? Does your law follow an effects-based or a form-based approach to identifying anti-competitive conduct?**

Abuse is not defined by Moroccan law. However, article 7 of the Law specifies that the abusive exploitation of a dominant position is prohibited if the abusive exploitation has 'as an object' or 'may have as an effect' to prevent, restrict or distort competition. Article 7 also provides a non-exhaustive list of examples of abuses such as refusal to sell, tie-in sales, discriminatory selling conditions, termination of an established commercial relationship on the sole ground that the partner refuses to consent to unjustified commercial conditions and direct or indirect imposition of a minimum resale price for goods or services or of a minimum sales margin.

Therefore, it appears that Moroccan law follows both an effects-based and a form-based approach to identify abusive practices.

**16 Exploitative and exclusionary practices**
**Does the concept of abuse cover both exploitative and exclusionary practices?**

The concept of abuse covers both exploitative (eg, tie-in sales to consumers in Opinion No. 22/12 relating to competition between banks and insurance agents and brokers concerning presentation of insurance) and exclusionary practices (eg, refusal to sell in the Opinion relating to the market of the sale of plane tickets and the Opinion relating to competition in the movie sector in Marrakech of 2013).

**17 Link between dominance and abuse**
**What link must be shown between dominance and abuse?**

The holding of a dominant position is needed for the application of article 7 but the decisional practice of the Competition Council still has to clarify whether a causal link must be shown between dominance and abuse.

**18 Defences**
**What defences may be raised to allegations of abuse of dominance? Is it possible to invoke efficiency gains?**

Under article 9 of the Law, the prohibition of abuse of dominance shall not apply:

- when the practices result from the implementation of an act or regulation (see, for instance, Opinion No. 26/10 of 13 November 2012 relating to the market of maritime transport of Casablanca's tramway train sets in which the Competition Council considered that a company, which had issued a call for tenders and had rejected a tender because of the Moroccan nationality of the tenderer, had not abused its dominant position because its selection was made in conformity with agreements between France and Morocco); and
- to the practices whose perpetrators can prove that they have the effect of ensuring economic or technical progress, including by creating or maintaining jobs, and that they reserve for users a fair share in the resulting profit, without giving the undertakings involved the opportunity to eliminate competition for a substantial part of the products or services in question. Those practices may impose restrictions on competition only insofar as these are essential to achieve this aim of progress (see, for instance, the Opinion relating to the movie sector in Marrakech of 2013 in which the Competition Council took into account the fact that a dominant company accused of refusal to sell had made substantial investment for the development of the sector).

Moreover, certain categories of agreement or certain agreements, in particular when they are intended to improve the management of small or medium-sized undertakings or the marketing of farmers' products, may be recognised as meeting the conditions set out in article 9 by the administration after a favourable opinion from the Competition Council.

It is, thus, possible to invoke efficiency gains.

Further, agreements of minor importance that do not appreciably restrict competition (in particular, agreements between small and medium-sized companies) may also fall outside article 7 of the Law (the criteria to identify these agreements of minor importance still have to be defined by regulation).

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**Specific forms of abuse**


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**19 Price and non-price discrimination**

Article 7 of the Law provides that discriminatory selling conditions can be considered as an abuse of dominant position.

**20 Exploitative prices or terms of supply**

Article 7 indicates that an abuse may notably consist in tie-in sales and direct or indirect imposition of a minimum resale price for goods or services, or of a minimum sales margin.

**21 Rebate schemes**

Despite the fact that the provisions of the Law do not expressly refer to them, rebate schemes can be considered as abuses of dominant position. For instance, in a study of 2011 relating to mobile telephony, the Competition Council stated that targeted discounts could be considered as abusive if they restrict market fluidity. Moreover, in its Opinion No. 32/12 relating to a concentration between the SNI group and Danone, the Competition Council underlined the potential anti-competitive behaviour of the Centrale Laitière, which was, despite its dominant position, engaged in an aggressive rebate policy.

**22 Predatory pricing**

According to the Competition Council, predatory pricing is abusive when it has as the object or the effect of eliminating its victim from the market (Opinion of 22 December 2011 relating to the acquisition of insulin).

**23 Price squeezes**

To the best of our knowledge, the Competition Council has not yet rendered an opinion regarding this kind of practice, which we assume should be considered abusive if it has as object or may have as an effect to prevent, restrict or distort competition and, in particular, to exclude a competitor from the market.

**24 Refusals to deal and access to essential facilities**

According to article 7 of the Law, refusals to sell may be prohibited (for applications, see the Opinion relating to the movie distribution market in Marrakech and the Opinion relating to the market of the sale of plane tickets of 2013).

Concerning access to essential facilities, in its information letter No. 3 of March 2010, the Competition Council referred to the essential facilities doctrine of European Union case law and stated that an undertaking occupying a dominant position on an upstream market infringes the prohibition of abuses of dominance if it refuses access, without objective justification, to a facility:

- whose access is essential to carry out an activity on a downstream market, and
- which is impossible to duplicate under reasonable conditions, preventing, consequently, the appearance of a new product or a new technology.

**25 Exclusive dealing, non-compete provisions and single branding**

Though exclusive dealing, non-compete provisions and single branding provisions are not expressly listed among the examples of abusive practices provided by article 7 of the Law, the Competition Council considers that exclusivity obligations may sometimes have as an object or as an effect to prevent, restrict or distort competition.

For instance, according to the Competition Council, if a firm requires exclusivity from a specific distributor while not requiring it from others, such obligation may fall into the category of the abuses of dominance (information letter No. 10 of March 2011)

The Competition Council has also considered that the exclusivity stipulations contained in a dominant supplier's contracts (relating to the fitting out of its products displays) could be seen as an exclusive supply obligation as a result of its broad portfolio of products and, thus, have an anti-competitive effect owing to its dominant position (Opinion No. 23/12 of 15 May 2012 relating to competition on manufactured tobacco).

## 26 Tying and leveraging

Under article 7 of the Law, tie-in sales by a dominant undertaking can be prohibited.

In its study relating to mobile telephony of 2011, the Competition Council indicated that tied-in sales constitute an abuse of dominant position when they restrict the fluidity of the market, unless they produce efficiency gains.

## 27 Limiting production, markets or technical development

These practices are not mentioned by article 7 of the Law.

Although there is no case law regarding this issue yet, we can surmise that the Competition Council will prohibit such practices if they have as an object or may have as an effect to prevent, restrict or distort competition.

## 28 Abuse of intellectual property rights

According to the Competition Council, the protection of intellectual property must reconcile with competition requirements and intellectual property rights may constitute an abuse of monopoly, in particular when the essential facilities doctrine is applicable (see question 24 regarding access to essential facilities and the information letter of the Competition Council No. 3 of March 2010).

## 29 Abuse of government process

Although the Law does not clearly state that an abuse of dominant position can be the consequence of an abuse of government process, it should be noted that, in a study of 2011 relating to competition in the pharmaceutical industry, the Competition Council denounced the 'abusive' use of the proceedings of marketing authorisations by certain multinational groups that hold monopolies awarded by patents in order to prevent the market entry of generics.

## 30 'Structural abuses' - mergers and acquisitions as exclusionary practices

To the best of our knowledge, the Competition Council has not, to date, ruled on whether mergers and acquisitions as exclusionary practices can be regarded as abusive (which could, in particular, potentially be the case when the merger control rules are not applicable).

## 31 Other types of abuse

It should, in particular, be noted that, under article 7, an abuse may also consist in the termination of an established commercial relationship on the sole ground that the partner refuses to consent to unjustified commercial conditions.

Moreover, the list of examples of abuses provided by article 7 is not exhaustive.

## Enforcement proceedings

### 32 Prohibition of abusive practices

**Is there a directly applicable prohibition of abusive practices or does the law only empower the regulatory authorities to take remedial actions against companies abusing their dominant position?**

Article 7 of the Law is a directly applicable prohibition of abusive practices that undertakings may invoke before the Competition Council and the courts.

### 33 Enforcement authorities

**Which authorities are responsible for enforcement and what powers of investigation do they have?**

#### Under the Current Law

The Moroccan authorities responsible for enforcement under the Current Law are:

- the Chief of Government, who may adopt conservatory measures, order the parties to put an end to the abusive practices, impose conditions on them or refer the matter to the King's Prosecutor at the relevant first instance court for criminal sanctions applicable to natural persons (article 67 of the Current Law) or impose the applicable fines provided by article 70 of the Current Law; and

- the Competition Council, which has a consultative role: the Competition Council may issue opinions on matters of principle submitted for its assessment or make recommendations that can lead to the issuance of orders or prosecution.

#### Under the Law

Under the Law, the Competition Council, in addition to its consultative role to the Parliament, the government, the courts and various organisations (article 5 of Law No. 20-13 relating to the Competition Council), will be granted the decision-making power over abuses of dominance cases. The Competition Council may be adopted by the undertakings and will be able to avail itself of practices (articles 3 and 4 of Law No. 20-13 relating to the Competition Council).

The Competition Council will also be granted powers of investigation. The President of the Competition Council will be entitled to ask the administration to carry out any useful investigation and to call on relevant expertise. The investigations will be carried out by inspectors, including case officers of the Competition Council, administrative officials and price controllers. The officers will be entitled to visit any premises, land or transport employed for professional use, to request the communication of all professional documents (including books and bills) and copy them, and to collect any information and justification (article 68 and following of the Law).

If an undertaking or related organisation does not comply with a summons, does not answer within the time limit to an information or a document request of the Competition Council or obstructs the investigation (eg, by providing false or incomplete documents), sanctions will be applicable.

## 34 Sanctions and remedies

### What sanctions and remedies may they impose?

The Competition Council, under the Law, will, in particular, be empowered to:

- adopt conservatory measures (article 35 of the Law);
- order the firm to put an end to its abusive practice or impose specific conditions (article 36 of the Law);
- accept remedies proposed by the firm to remove the competition concerns (article 36 of the Law); and
- impose a fine, either immediately or where the firm does not comply with an order or does not respect an accepted remedy (article 39 of the Law).

If the offender is not a company, the maximum amount of the penalty will be 4 million dirhams. The maximum amount of the penalty for a company will be 10 per cent of the highest worldwide or national (if the firm does not have international activities) turnover, net of tax, achieved in one of the financial years ended after the financial year preceding that in which the practices were implemented. If the accounts of the company concerned have been consolidated or combined by virtue of the texts applicable to its legal form, the turnover taken into account will be that shown in the consolidated or combined accounts of the consolidating or combining company.

The fine will take into consideration the seriousness of the offence, the scale of the damage caused to economy and the situation of the company.

The maximum amount of the applicable fine may be doubled in the event of a subsequent offence within five years.

The maximum amount of this fine may be reduced by half if the company does not contest the facts (article 37 of the Law).

A transaction may also be proposed by the competent governmental authority to undertakings whose abusive practices affect a local market, provided that their turnovers do not exceed thresholds whose amount will be fixed by regulation (article 43 of the Law).

Moreover, the Competition Council may refer the matter to the King's Prosecutor at the relevant first instance court if the facts are likely to justify the application of article 75 of the Law, which provides that a natural person who fraudulently or knowingly takes a personal and decisive part in the conception, organisation or implementation of the practices referred to in article 7 shall be punished by a prison sentence of between two months and one year and a fine of between 10,000 and 500,000 dirhams.

These decisions of the Competition Council may be appealed to the Court of Appeal of Rabat within 30 days from the date of receipt of the notification (articles 44 and 46 of the Law).



Finally, it should be noted that the Competition Council could, in the event of an abuse of a dominant position, enjoin, by a reasoned order, the undertaking or group of undertakings to amend, supplement or cancel, within a specified period, all agreements and all acts by which the concentration of economic power allowing the abuse has been carried out, even if these acts have been subject to the merger control procedure (article 20 of the Law).

### 35 Impact on contracts

#### What are the consequences of an infringement for the validity of contracts entered into by dominant companies?

According to article 10 of the Law, any commitment, agreement or contractual clause referring to a practice prohibited by article 7 shall be null and void. This nullity may be invoked by the parties or by a third party (but may not be raised by the parties against a third party) and may be declared by the courts having jurisdiction (to which the Competition Council's opinion or decision, if any, shall be communicated).

### 36 Private enforcement

#### To what extent is private enforcement possible? Does the legislation provide a basis for a court or authority to order a dominant firm to grant access (to infrastructure or technology), supply goods or services or conclude a contract?

The Law provides a basis upon which the Competition Council may order a dominant firm to grant access to infrastructure or technology, supply goods or services or to conclude a contract, as the Law entitles the Competition Council to impose specific conditions, to accept remedies proposed by the dominant firm to remove the competition concerns (article 36 of the Law) or to enjoin, by a reasoned order, the undertaking or group of undertakings to amend, supplement or cancel, within a specified period, all agreements and all acts by which the concentration of economic power allowing the abuse has been carried out (article 20 of the Law).

Private enforcement is possible before the courts to which the Competition Council's opinion or decision, if any, may be transferred.

### Update and trends

The new Law No. 104-12 of 30 June 2014 on free pricing and competition will take effect after the entry into force of the regulations necessary to its full application. These enforcement decrees, in particular, Decree No. 2-14-652, should be adopted at the beginning of 2015.

Moreover, 2015 will be the first year of application of Law No. 20-13 of 30 June 2014 relating to the Competition Council, which transfers the decision-making power over dominance cases to the Competition Council.

### 37 Availability of damages

#### Do companies harmed by abusive practices have a claim for damages?

Companies harmed by abusive practices have a claim for damages before the courts.

Moreover, it should be noted that, under article 106 of the Law, registered consumers' associations may join a civil action to the criminal proceedings or obtain compensation of the prejudice suffered by the consumers by filing a civil suit.

### 38 Recent enforcement action

#### What is the most recent high-profile dominance case?

In 2013, the Competition Council rendered an Opinion relating to the market of the sale of plane tickets in which the legality of Royal Air Maroc's commercial policy was examined. In this case, travel agencies accused Royal Air Maroc of abusing its dominant position by selling some preferential rate tickets exclusively through its own website. However, the Competition Council considered that this practice did not constitute an abuse of Royal Air Maroc's dominant position.



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