

## **Valuing the Role of Soft-Law Rules in Arab Competition Laws: A Forward-Looking Legal Vision Inspired by the European Model**

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### **Abstract**

The European experience has provided a valuable lesson in the use of soft-law instruments to harmonise competition laws. In this regard, the Greater Arab Free Trade Area sought to build upon such instruments. This initiative, which spanned two decades, culminated in the publication of the Arab Competition Soft Law at the beginning of 2023. This coincided with an increase in intra-regional trade and significant voluntary engagement by the member states of this regional grouping. Going forward, there is potential for further value creation in the near future, and perhaps even the unification of Arab competition laws in the longer term.

**Keywords:** valuing soft-law rules, competition laws, European experience, Arab free trade area, non-binding ('soft') laws.

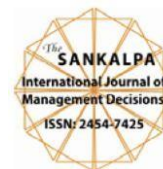
### **Introduction**

Arab states have recognised that activating the Greater Arab Free Trade Area depends on having a legislative environment suited to the specifics of regional trade. Most notably, this requires shared soft-law rules aimed at protecting competition and increasing commercial exchange among the members of this fledgling grouping.

Fortunately, this endeavour has coincided with the maturation of the European experience and the realisation of its outcomes in the sphere of harmonising competition laws. This convergence has given rise to a distinctive model for investing in non-binding ('soft') law within competition law. Given the presence of factors of imitation and inspiration, the Arab experience has shaped its legal framework based on lessons learned from European sources.

This harmonization path has extended over two decades, culminating in its destination in 2023, within a shared Arab understanding that the idea of Arab union still requires more time, and that the most realistic approach is the creation of a set of shared, guidance-oriented rules that states may draw upon when drafting competition laws or when amending them—without giving up the hope of unifying these systems, a hope that remains on the horizon and continues to sustain the aspirations and hopes of the peoples of this region.

It is also worth noting that addressing this topic in your most esteemed scientific forum is of undeniable importance because it offers a perspective that has been overlooked by us. The available information is superficial and not well developed. Furthermore, it has recently become apparent that this is a promising new research direction connected to emerging sources of commercial law and, above all, a new way of achieving Arab regional integration.



In this context, our study falls within the framework of regional international commercial law. From a comparative perspective, our study seeks to build upon the successful European experience of applying soft-law instruments as a basis for the future alignment of competition laws within the framework of the Greater Arab Free Trade Area.

Our research aims to address the central issue of the value placed on soft-law rules within the Arab experience of competition law and the extent to which this process is influenced by the successes of the European experience in employing non-binding law.

Accordingly, we propose first addressing the concept of soft-law instruments and their application within the competition law domain of the European Union. We will then examine how soft-law instruments are valued in the Greater Arab Free Trade Area, before concluding with an exploration of how the role of Arab soft-law instruments in the field of competition can be enhanced.

As our research focuses on two key concepts — soft-law instruments and the reasons for drawing inspiration from the European model of competition law — we have begun our study with an introductory preamble to prepare the reader for our approach.

### **Introductory preamble: Submissions in favour of the legal imitation of the European experience in the field of soft-law instruments.**

Soft-law instruments express a non-rigid legal component characterised by a lower degree of obligation and reflecting a model of freedom to be followed by competing institutions<sup>1</sup>. The debate on renewing the sources of commercial law has long been intertwined with their content and dimensions. This concept requires robust theoretical principles to argue for it and cohesive theoretical foundations to explain its details. In the field of international trade, these instruments have been adopted as a coordination mechanism for national rules. This precisely describes the European experience, which served as a source of inspiration for the Arab experience with soft-law instruments. Consequently, the justifications for legal imitation between the two models have become intertwined.

### **First: A Theoretical Reference for Soft-Law Instruments in International Trade**

Those who advocate soft-law instruments base their arguments on legal insights and reflections that permeate the world of commerce and professional practice. They invoke a Latin legal principle around which commercial law rules have long been organised: *lex mercatoria*<sup>2</sup>.

Perhaps most importantly, these practices lead us towards what may be regarded as a shared professional code of conduct among those working<sup>3</sup> in international trade in all its various forms, even though they are not legally binding<sup>4</sup>. For this reason, it was by no means

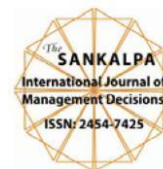
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<sup>1</sup>- Julien CAZALA, *Le Soft Law international entre inspiration et aspiration*, Revue interdisciplinaire d'études juridiques, Université Saint-Louis – Bruxelles, V° 66, 2011, p45.

<sup>2</sup>- Matthias Reimann; Reinhard Zimmermann; *Kriegsforum for Comparative Law*(Comparative Law Forum), translation by Abd al-Aziz al-Qasim; Félix Wued; The Arab Network for Research and Publishing; 1st edition, Beirut, Lebanon, 2010, p. 120.

<sup>3</sup>- Jean Calais-Auloy & Frank Steinmetz, *Droit de la consommation* (Consumer Law), 5th edition, Dalloz, 2000, p. 20.

<sup>4</sup>- Qadda chahida (or “Martyrs’ Leaders”): ‘The idea of balancing the interests of the carrier and the passenger through the compensation system for victims of international air transport accidents’, papers from the 20<sup>th</sup>(th) International Annual Conference: Civil Aviation under National Legislation and International Agreements, Part



surprising that this concept was revived in other areas: Maritime trade (*lex maritima*), financial law (*lex fin ancia*) in the financial sphere<sup>5</sup>, and finally *lex sportiva* in the realm of sports services commerce<sup>6</sup>.

This has paved the way for the concept of legal pluralism, which views the renewal of the sources of commercial law as a positive development<sup>7</sup>. As advocated by the Italian scholar Romano, this idea is no longer prohibited in international commercial legal thought<sup>8</sup>, but rather welcomed. New visions are beginning to emerge around it regarding the possibilities of complementing national legislation and international agreements with non-binding regulatory instruments<sup>9</sup>.

The elevation of these new sources of commercial law has not arisen in a vacuum. It reflects the desire of international trade professionals to rely on them, which has given these instruments a higher standing. This is because professionals have recognised the flexibility they offer and their ability to adapt to the evolving circumstances of international trade<sup>10</sup>. More importantly, adherence to these rules stems from the professionals' own wishes and will rather than an obligation imposed by a superior authority, as is the case with legislation and international treaties<sup>11</sup>.

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Two, Faculty of Law, United Arab Emirates University, 2012, p. 936. In a similar vein, see Hisham Ali Sadiq, 'The problem of arbitration agreements lacking the appointment of arbitrators in private international relations', Dar Al-Fani for Publishing and Printing, 1987, p. 4.

<sup>5</sup>- *Mélanges en l'honneur de Jean-Jacques Daigre: 'Autour du droit bancaire et financier et au-delà'*, Joly Edition, 2017, p. 421.

<sup>6</sup>- Frédéric Buy (et al.), *Droit du sport (Sports Law)*, 4th edition, L.G.D.J, 2018, p. 34.

<sup>7</sup>- The call to renew the sources of law has gained supporters, who promote legal pluralism in terms of sources. This means that law reflects several components and formations, including what the legislator issues through laws, as well as other components, such as 'soft law' instruments, which express a new legal thought and direction. This targets a departure from the classic view of the sources of law, especially at a time when the world of commerce is moving away from it. For more details, see:

- Filippa Chatzistavrou, 'L'usage du soft law dans le système juridique international et ses implications sémantiques et pratiques sur la notion de règle de droit', *Revue de philosophie et de sciences humaines*, France, 01/09/2005, p. 2.

Julien Cazala, 'Le soft law international entre inspiration et aspiration', *Revue interdisciplinaire d'études juridiques*, Université Saint-Louis – Bruxelles, vol. 66, 2011.

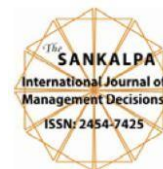
<sup>8</sup>- From the outset, international unification of laws was considered a fundamental duty for the science of comparative law. This impetus—though only after the end of the Second World War and under the umbrella of the League of Nations—led to the creation of the International Institute for the Unification of Private Law (UNIDROIT) in Rome. It was the second organization, established in the 1960s, for the unification of law, after it was set up as the United Nations Commission on International Trade Law (UNCITRAL). Among their most significant achievements was the drafting of the Convention on Contracts for the International Sale of Goods. See: Matthias Reimann; Reinhard Zimmermann; *Comparative Law Forum (Comparative Law Forum)*, translation by Abd al-Aziz al-Qasim; Félix Wued; The Arab Network for Research and Publishing, Vol. 1, 1st edition, Beirut, Lebanon, 2010, p. 803.

<sup>9</sup>- Frédéric Buy, "et al." *ibis* 2018, p. 34.

<sup>10</sup>- In this way, the "model rules" technique (soft law) was highly valuable in establishing the foundations of successful international cooperation. For more details:

Mubārakī Tofīq Milūd, 'The contribution of the United Nations Commission on International Trade Law to the drafting of international trade law rules', *Doctoral Thesis, Faculty of Law and Political Science, University of Oran 2*, 2019, p. 164.

<sup>11</sup>- David M. Trubek, Patrick Cottrell and Mark Nance, 'Soft Law, Hard Law and European Integration: Towards a Theory of Hybridity', *Legal Studies Research Paper Series, Paper No. 1002*, NYU University of Wisconsin Law School, November 2005, p. 6.



Needless to say, there should be little difficulty in accepting this new conviction, especially since it aligns with the broader desired trend in international trade of freeing itself from the burden of rigidity and the immobilising nature of national commercial legal rules<sup>12</sup>.

**Secondly, why the European model? A reading of the legal and logical justifications for inspiration.**

Today, we believe that relying solely on the conviction that the European Union's experience has become the most attractive among all regional experiences in the field of competition is no longer sufficient. Instead, the issue requires real, civilisational and commercial justifications. Furthermore, legal reference frameworks are required to enable cooperation and coordination between the European Union and the Arab Free Trade Area.

**1. Historical, civilisational and demographic dimensions**

This form of interaction naturally gives rise to a complex historical legacy marked by multiple shades and colours. The long history of the relationship between Europe and the Arab world contains elements of closeness and communication, as well as elements of conflict. The geo-historical dimension has contributed to the formation of this relationship, and today it remains a solid foundation for the movement of people and goods. Additionally, a significant Arab population has settled in Europe<sup>13</sup> over the decades as a result of substantial migration<sup>14</sup>.

**2. Economic and Commercial Dimensions**

Mutual economic capabilities — namely technology and management expertise on the European side and raw materials and consumer markets on the Arab side — have encouraged both parties to develop economic relations for decades. These ties endure to this day. Evidence of this can be seen in indicators of commercial exchange, which have been facilitated by geographical proximity<sup>15</sup>.

Furthermore, in 2021, the European Union accounted for 22.2% of Arab countries' exports<sup>16</sup>. The EU has also maintained special relationships with Maghreb countries since 1957<sup>17</sup>, when these countries became a market exclusive to the EU<sup>18</sup>.

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<sup>12</sup>- See: François Touboul/Trieffé (or François Treize?), *Americanization of Law (Américanisation du droit)*, translated by Muhammad Wafi, The University Studies Foundation for Publishing and Distribution, Beirut, 1st edition, 2008, p. 186.

- Al-Tayeb Zarouti, 'What is the internationalisation of the international contract?', *International Conference on: 'Sources of Law between National Sovereignty and New Requirements'*, Yearbooks of the University of Algiers, Vol. 1, No. 35, Special Issue, 2021, p. 134.

Ahmad Baji, 'Economic regulation: What role in preparing the legal rule?', same conference, p. 85.

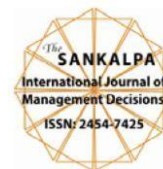
<sup>13</sup>- The number of Arabs living in the 28 EU member states was 25.8 million as of mid-2016. See the article on the Al-Mirsal website (online) via the provided link: <https://www.almrsal.com/post/1186514>

<sup>14</sup>- The traditions of migration date back to the period of European reconstruction, and to the major services provided by Arab labor after the war in various jobs (public works, steel production, and mechanical products). See: Samir Amin and others, *Arab-European Relations: A Critical Reading*, Arab and African Research Center, Cairo, 2001, p. 57.

<sup>15</sup>- The value of Arab exports of goods to the European Union was about €116 billion in 2015, while imports of goods from the EU were about €206 billion.

- In 2015, the EU accounted for 15.6% of Arab goods exports, whereas imports of goods from EU countries accounted for 27.6% of total Arab goods imports. Furthermore, Arab-European trade is approximately double Arab intra-trade. For more information, see the study prepared by the Department of Studies and Research at the General Secretariat of the Union of Arab Banks on the trade partnership between Europe and the Arab world (2016).

<sup>16</sup>- See The Unified Arab Economic Report 2022, issued by the Arab Monetary Fund, p. 193.



Meanwhile, despite the ruptures that have occurred in their relations, the total trade in goods between the European Union and the Gulf Cooperation<sup>19</sup> Council states increased from US\$164.2 billion in 2017 to US\$182 billion in 2018, representing an increase of approximately 10.8%<sup>20</sup>. This figure is expected to rise in the coming years, especially following the unveiling of a framework agreement between these two strategic blocs in 2022<sup>21</sup>.

### **3. Academic backgrounds**

Several French professors who taught at Arab universities, such as Maunoury in Alexandria, Edward Lambey, a colleague of Al-Sanhouri at the University of Cairo, Santilliana, an Italian lawyer in Tunisia, and Josserand at the Lebanese University, played a pioneering role in laying the foundations for French law codification projects within the curricula of the University of Cairo, as well as in Lebanon<sup>22</sup>, Baghdad, and Algeria. These codifications replaced provisions of Islamic sharia law.

Not to be overlooked is the academic training of the early generations of Arab legal elite in European institutes and universities (such as the Sorbonne, Rome and Naples)<sup>23</sup>, which had a far-reaching effect in implanting European legal culture in the newly established Arab universities. More recently, there has been an active movement of promising academic endeavour in the Gulf states. This is evident in the mutual desire of the European Union and the Gulf Cooperation Council countries to emphasise the legal education component in the Gulf region<sup>24</sup>.

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<sup>17</sup>- Bishara Khudr, translation: Akram Ali Hammad, *Europe and the Arab World: A Critical Reading of European Policy from 1957 to 2014*, Al-Arabiya Publishing House for Science, 1st edition, 2016, p. 195.

<sup>18</sup>- It is the top export destination by share, accounting for 66.5% of Moroccan exports, and the top goods supplier by share, representing 56.9% in 2017. Trade between Morocco and the European Union increased to 414 billion dirhams in 2017, up from 229 billion dirhams in 2007. See the monthly session on general policy of the Council of Advisers for the answer of the Head of Government of the Kingdom of Morocco, Saadeddine El Othmani, to the first principal question on free trade agreements and their impact on the trade balance and the competitiveness of small and medium-sized enterprises on 19 July 2018. Algeria is also the third-largest supplier of gas to the European Union, representing approximately 12% of the EU's total gas imports. The European Union is also Algeria's leading trading partner, with total trade volume reaching \$37.3 billion in 2021 versus \$28.2 billion in 2020. Visit the website of the Algerian Ministry of Foreign Affairs and the National Community Abroad online under 'Multilateral relations / Other international organisations'.

<sup>19</sup>- The Cooperation Agreement between the European Union and the Gulf Cooperation Council was signed in 1988, but it was suspended in 2008 due to certain disagreements.

<sup>20</sup>- See the Statistical Summary on Trade between the GCC and the European Union, Special Statistical Bulletin, Statistical Center of the Cooperation Council for the Arab States of the Gulf, September 2019.

<sup>21</sup>- Joint Communication to the European Parliament and the Council: A strategic partnership with the Gulf, European Commission, Brussels, 18 May 2022.

<sup>22</sup>- Qudat Shahida (or 'Martyrs' Leaders'), 'The Impact of the Cultivation of Foreign Laws on National Legal Culture', International Conference on: 'Sources of Law between National Sovereignty and New Requirements', Al-Hawliyat (Yearbooks) of the University of Algiers, Vol. 1, Special Issue 2021, p. 23.

<sup>23</sup>- At the forefront is the renowned legal scholar and icon of the judiciary, Dr Abd al-Razzaq al-Sanhuri, who left Egypt to study in France in 1921. He had a clear impact on most Arab legislation.

<sup>24</sup>- Joint Communication to the European Parliament and the Council: A strategic partnership with the Gulf, European Commission, Brussels, 18 May 2022.



#### **4. Legal Motives**

The path toward economic and commercial rapprochement between the European Union and the Maghreb countries has been linked to the conclusion of partnership agreements<sup>25</sup>. These agreements embedded within them cooperation and coordination across all fields, while affirming the need to reconcile their respective systems and approximate them<sup>26</sup>.

This ambition expanded from the European partner, which encouraged Arab parties outside this grouping—such as Egypt and Jordan—to engage in a serious European partnership approach in 2004<sup>27</sup>.

This ambition was also embraced by the European Union with the Gulf Cooperation Council states, having been pursued since 1988 through the signing of a cooperation agreement between the two blocs. That agreement aimed at reaching a free trade agreement<sup>28</sup>. Those efforts then stalled in 2008, before regaining momentum strongly again in light of the conclusion of a new agreement between the two blocs<sup>29</sup>.

#### **I) The Engineering of Soft-Law Rules: Lessons from the European Achievement in the Codification of Competition Law**

Amidst the reconstruction efforts following the Second World War, politicians and experts in Europe came to a consensus: the desired economic and social welfare of its population hinges on a dynamic market fuelled by fair and effective competition<sup>30</sup>. In this context, competition protection and anti-monopoly systems must not diverge substantially<sup>31</sup>.

At the same time, international efforts to unify global trade emerged, and merchants and professionals expressed dissatisfaction with the rigidity of market-regulating rules<sup>32</sup>. Calls grew louder to invest in soft-law instruments to overcome this impasse. Inspired by the early founders of the European Union, a ‘saving thread’ emerged, and they fashioned a legal model

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<sup>25</sup>- Among them are the partnership agreement with Tunisia signed in 1995, which entered into force in 1998, the partnership agreement with Morocco signed in 1996, which entered into force in 2000, as well as the partnership agreement with Algeria signed in 2002, which entered into force by virtue of Presidential Decree 05-159 dated 04/27/2005, which includes the ratification of the Euro-Mediterranean Agreement establishing an association between the People's Democratic Republic of Algeria on the one hand and the European Community and its Member States on the other hand. Official Gazette No. 31, dated 04/30/2005.

<sup>26</sup>- For example, the Partnership Agreement between Algeria and the European Union states in Article 56 that this cooperation aims at bringing Algerian legislation closer to the legislation of the Group (EU). For details, see Professor Qudat Shahida Qada, “The Algerian Experience in Consumer Protection: Between the Aspiration and the Development of Texts, and the Lack of Mechanisms for Their Implementation,” Algerian Journal of Comparative Law, Faculty of Law and Political Science, University of Tlemcen, Issue 01, 2014, p. 19.

<sup>27</sup>- By this, we mean the Agadir Agreement signed in Rabat in 2004 between Jordan, Egypt, Tunisia, Morocco, and the European Union. Its Article 2 provides for approximating the legislation of the States Parties in economic fields, in order to create a favorable environment for the conditions for integration among the States Parties.

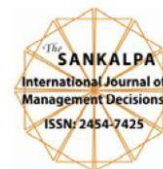
<sup>28</sup>- The Cooperation Agreement between the European Union and the Gulf Cooperation Council, concluded in 1988, which is considered a turning point in Arab–European relations.

<sup>29</sup>- Joint Communication to the European Parliament and the Council: A strategic partnership with the Gulf, European Commission, Brussels, 18.5.2022.

<sup>30</sup>- Ahmad Ibrahim al-Baz, “The Historical Conditions that Contributed to the Emergence and Establishment of the European Union,” Proceedings of Historical Events, Faculty of Arts, Cairo University, Issue 36, January 2022, p. 525.

<sup>31</sup>- Frédéric Berrod, 'The Use of Soft Law as a Method for Designing European Competition Law', Revue de l'Union Européenne, No. 588, May 2015, p. 1.

<sup>32</sup>- See: Matthias Reimann and Reinhard Zimmermann, previous reference, p. 120.



around which other regional systems seeking coordination or the development of their own competition rules came to converge.

The distinctive features of the European experience provided inspiration for the Arab approach to soft-law instruments. Consider the advantage of cumulative experience and the reasoned manner in which soft law is applied. Secondly comes institutionalisation as a supporting and integrating factor for European coordination efforts. Around this endeavour, a new European legal framework emerged that is permanent, continually adaptable and evolving. Therefore, it was unsurprising that this process would yield convergent, consensual rules incorporated into the national laws of EU member states.

### **First: Between Accumulation and Realistic Application**

#### **1. Accumulation**

The European approach to valuing soft-law instruments is notable for its consideration of time as a factor, which is consistent with the evolution of the European Union's structure and the stages it has passed through<sup>33</sup>. Under the umbrella of cooperation and coordination between European competition laws, academics openly challenged the culture of hard law in this field within an 'interregional' or regional objective, emphasising the role of soft law and its effects on national systems. This endeavour first took shape in the Federal Republic of Germany before spreading to two groups of legal scholars: Italian and French<sup>34</sup>. From the 1970s until the end of the 1990s, universities and research centres organised international conferences on this topic<sup>35</sup>.

During this period, European legal experts developed ideas that all revolved around the goal of approximating competition laws. At that time, they concluded that the significant disparities between them posed the greatest challenge to the construction of the European 'house' in its economic dimension<sup>36</sup>.

Therefore, it was not surprising that there was a gradual progression in the literature serving this idea, moving from cooperation to coordination, then approximation, harmonisation and

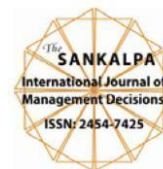
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<sup>33</sup>- See: Maghawari Shilbi Ali, 'The European Union and Lessons Learned by Arabs', Arab Center for Studies and Research, Lebanon, 1st edition, 2004, p. 272.

<sup>34</sup>- Regarding German legal scholarship, its role in European coordination efforts is significant. In particular, we may mention the jurists Hen Kötz and Peter Schlechtriem/Schlechthum, who used comparison and legal simulation to bring European laws closer together. Their projects helped to drive legal reasoning towards coordination, with Italian and French jurists joining them later. See: Matthias Reimann and Reinhard Zimmermann, *Comparative Law Forum*, translated by Abd al-Aziz al-Qasim, Felix Wüthrich, Arab Network for Research and Publishing, 1<sup>st</sup> edition, Beirut, Lebanon, 2010, p. 181.

<sup>35</sup>- Within this framework, we also cite the international conference on the responsibility of manufacturers and distributors, organised by the University of Paris and chaired by the jurist André Tunc on 30–31 January 1975. We also mention the international conference on the responsibility of producers in the Member States of the Common Market, organised by the University of Aix-Marseille in 1974. Not to be forgotten are the international conference on the international sale of goods, organised by the University of Aix-en-Provence in 1980, and the international conference entitled 'Consumer Safety and Liability for Acts of Dangerous Products', held in Paris in 1986 under the chairmanship of the jurist Jacques Ghestin.

<sup>36</sup>- Simon Taylor, *L'harmonisation communautaire de la responsabilité du fait des produits défectueux: une étude comparative du droit anglais et du droit français* (L.G.D.J, 1999), p. 280.



integration. All of these concepts align with the aims of soft-law instruments<sup>37</sup>. This cumulative logic was also evident in the broader effort to establish the economic union, progressing from the Coal and Steel Community to the European Union<sup>38</sup>.

## **2. The Realism of Implementation**

European law is characterised by a newfound legal rationality, evident in its willingness to utilise the latest economic insights to drive the evolution of European law, link it to market dynamics and intra-system competition, and address its shortcomings<sup>39</sup>. Consequently, law becomes a tool for economic logic, emphasising the effectiveness of intervention through competition law in the market<sup>40</sup>. This development marks a departure from older visions centred on textual uniformity within a textual hierarchy (i.e. ‘hard law’), shifting the focus to the economic impact of the instrument’s application. This conviction likely coincided with an awareness of the pioneering role of framework/aspirational (‘instructive’) laws as an optimal mechanism for approximating national laws, bringing about a qualitative shift in the pace of approximation by relying on successful, pragmatic legal solutions<sup>41</sup>.

This is particularly pertinent given that those responsible for European unification policy adopt legal realism, which involves reconciling the common European public interest with the differing interests of the Member States. This is achieved by allowing for national efforts and interpretive discretion in a way that does not disrupt the regional integration process<sup>42</sup>. This outcome may serve as a guiding beacon for the Arab experience in valuing framework and aspirational laws, moving away from the utopianism of the old Arab Union project, in the hope of achieving the aims of the Greater Arab Free Trade Area<sup>43</sup>.

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<sup>37</sup>- “Gradualism” was one of the important factors in the development of European competition law and in the process of European integration. For more details, see Matthias Reimann and Reinhard Zimmermann, previous reference, p. 1781.

<sup>38</sup>- As Professor Hasan Nafea explains: “from the creation of a free trade area, to a customs union, then a common market, and then unification—ultimately, the unification of economic and financial policies.” See Hasan Nafea, *The European Union and Lessons Learned by Arabs*, previous reference, p. 259.

<sup>39</sup>- Marie Malaurie-Vignal, *Logique économique et logique juridique*, *Revue mensuelle LexisNexis*, November 2005, pp. 21–22.

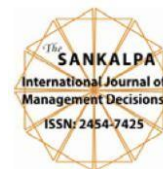
<sup>40</sup>- European law adopted this approach, influenced by American legal culture, which is based on using law as an instrument to adapt to changing economic and social conditions. This approach remained at odds with the logic of Latin (Roman) law, which confines legal rules to what the legislator lays down in written, binding provisions. Once that view no longer kept pace with economic developments, European competition law began to treat this approach as an effective way to modernize competition policy, adapt it, and ensure its implementation by EU Member States. See Qadda Shahida Qada, “Economic Analysis of Law and its Impact on Latin Laws in the Field of Competition and Consumer Protection: France and Some Arab Countries as a Model,” in *Proceedings of the Fourth Scientific Conference: Law and Economic Social Transformations*, 22–23 April 2017, Faculty of Law, Qaboos University, Sultanate of Oman, p. 156.

<sup>41</sup>- European competition authorities did not hesitate to instruct competition bodies and national courts to apply competition rules. This involved requiring them to examine the economic purpose of mergers and to apply the concepts used in this field, even if this sometimes meant deviating from their legal meaning in order to achieve a successful, pragmatic legal solution. See the following for more detail:

Siranat Wittayatatamat, *Les autorités de la concurrence et de la consommation, comparative study between Thai law*, PhD thesis, University of Toulouse, France, 2015, p. 64.

<sup>42</sup>- Mireille Delmas-Marty and Marie-Laure Izorche, ‘Marge nationale d’appréciation et internationalisation du droit’, *RIDC*, No. 54 (4), 2000, p. 754. *Réflexions sur la validité formelle d’un droit commun pluraliste*, *RIDC*, No. 54 (4), 2000, p. 754.

<sup>43</sup>- We will discuss this in detail in Section Two, starting from page 16.



## **Secondly, efforts should be organised through influential institutions.**

It is fitting to acknowledge the effective institutional efforts of distinguished European bodies that matured over time into a regulatory mechanism governing European coordination work within the context of the single market. This is the outcome of consultations and agreements between states, derived from the will of the people. It also accepts the introduction of reforms in response to new economic challenges. While there are many institutions forming the European Union, our inquiry will necessarily focus on the most influential bodies whose actions impact the efforts to value framework/aspirational laws within this economic bloc. The Court of Justice of the European Union is the most prominent example in this regard.

### **1. The Court of Justice of the European Union**

Many experts consider it to be a foundational and central pillar in the establishment of the integration and incorporation of European competition law into national legal systems. This is because it ensures the consistent interpretation of European framework and aspirational ('instructive') laws<sup>44</sup>. The institution's historical and present credibility explains why economic actors dissatisfied with national competition authorities seek its support and protection. Consequently, the Court's coordinating activism has yielded numerous landmark decisions that now serve as judicial evidence of its creative legal efforts<sup>45, 46</sup>.

In the 1970s, the European Court of Justice surprised the legal community by endorsing the principle of direct effect in relation to directives, granting individuals the right to take action in national courts against a Member State to enforce their rights under directives<sup>47</sup>. In one of its decisions, the Court held that directives addressed to Member States could be invoked before national courts once the deadline for their implementation had passed<sup>48</sup>.

Similarly, national courts in the Member States today readily adhere to the bold interpretations advanced by this Court<sup>49</sup>. This is not surprising, since from its inception, this

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<sup>44</sup>- The Court issued approximately nine thousand (9,000) decisions up to 2015, with intellectual property cases and competition policy accounting for the largest share of those rulings. See in more detail:

Jon Binder and Simon Ashwood, trans. Khaled Gharib Ali, *The European Union: A Very Short Introduction\**, Hindawi Foundation for Education and Culture, Cairo, Egypt, first edition, 2015, p. 57.

<sup>45</sup>- One of the most important examples is the judgment issued by the Court on 20 February 1979 in the *Cassis de Dijon* case, which established a unified market programme. Through this judgment, the principle of mutual recognition was established regarding the product safety standards of the Member States. Mentioned in:

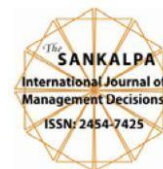
Jon Binder and Simon Ashwood, trans. Khaled Gharib Ali, *The European Union: A Very Short Introduction\**, previously cited reference, p. 26.

<sup>46</sup>- Cited in: John Pinder and Simon Ashwood, translated by Khaled Gharib Ali, *The European Union: A Very Short Introduction*, previous reference, p. 26.

<sup>47</sup>- Robert Scarborough, "Directives and the Doctrine of Direct Effect: A Critique of *Marshall v. Southampton Area Health Authority*," *University of Chicago Legal Forum*. Vol. 1992, Iss. 1, Article 13, *Legal Forum* 316, available at: <http://chicagounbound.uchicago.edu/uclf/vol1992/iss1/13>.

<sup>48</sup>- The French Council of State recognized the importance of European "directives." In its 2013 annual report, it addressed this new instrument by describing it as a "set of legal tools" whose content and form include a measure of legal formality, but which does not compel its addressees; rather, it seeks to guide their conduct and positions by persuading them and encouraging them to take part in its objectives. The report also focused on the instrument's "corrective" and "interpretive" roles. For more details on the report, see: [https://www.conseil-etat.fr/content/download/150889/file/droit\\_souple\\_1-resume\\_021013.pdf](https://www.conseil-etat.fr/content/download/150889/file/droit_souple_1-resume_021013.pdf).

<sup>49</sup>- The Court of Justice made steady progress in establishing the primacy of EU law. In judgments issued in 1963 and 1964, it set out the principle of the supremacy of EU law and its direct effect, applying it consistently



Court has represented the supremacy and primacy of European law. This is one of the secrets behind the success of the European experience in implementing flexible (framework) laws<sup>50</sup>.

## **2. The European Commission**

This institution is responsible for implementing and applying the principles of fair and effective competition in cooperation with the national authorities of the Member States. It also assists states in granting exceptional authorisations in the field of competition, provided that such measures do not contradict the general policy on competition within the European Union, and in preventing anti-competitive conduct and monopolistic practices<sup>51</sup>.

If there is evidence that a Member State has infringed these principles, the Commission issues a reasoned opinion addressed to that state. If the state fails to comply, the Commission may take legal action against it<sup>52</sup>. This has enabled the Commission to maintain a strong and respectable track record in managing competition policy.

## **3. The European Committee (the 'European Council' in competition oversight).**

This European body is sometimes referred to, somewhat colloquially, as a 'watchdog', as it ensures that the Treaty of the European Union and its laws are applied. However, in its current form, some view it as being more than just the secretariat of a regional organisation<sup>53</sup>. The Treaty of Rome empowers it to counteract any actions that undermine freedom of competition or monopolistic practices, with the ultimate goal of integrating national markets into a single European market. Furthermore, it has been granted the authority to impose severe sanctions on non-compliant institutions<sup>54</sup>.

It also plays a key role in launching numerous consultations, discussions and requests for information from Member States, with the aim of unifying and harmonising European Union laws<sup>55</sup>. It is also credited with rationalising the implementation of non-binding competition

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across all member states. See: John Binder and Simon Ashwood, trans. Khaled Gharib Ali, *The European Union: A Very Short Introduction*, previously cited reference, p. 26.

<sup>50</sup>- Marie Malaurie-Vignal, *Droit interne de la concurrence*, Armand Colin, 1996, p. 31.

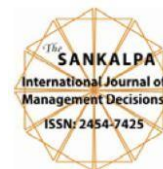
<sup>51</sup>- In addition to the powers granted to the Commission, it has another role: the right of legislative initiative. This means that it can propose draft laws to Parliament and the Council. The aim is to ensure that legislation is grounded in the public interest of the community and its citizens, as opposed to initiatives that might arise from governments and states. In its early days, the Commission was sometimes called the 'motor of the Community' because of this power. See: John Binder and Simon Ashwood, trans. Khaled Gharib Ali, *The European Union: A Very Short Introduction*, previously cited reference, p. 52).

<sup>52</sup>- This actually happened in 1999 when the French government refused to accept the Commission's decision regarding the safety of British beef. The decision required that imports be permitted, but in late 2001, the court ruled in favour of the United Kingdom. The Commission then imposed fines on France totalling more than 10 million euros. See: John Binder and Simon Ashwood, trans. Khaled Gharib Ali, *The European Union: A Very Short Introduction*, previously cited reference, p. 53.

<sup>53</sup>- See: John Binder and Simon Ashwood, the same reference, p. 52.

<sup>54</sup>- Marie Malaurie-Vignal, *\*Droit interne de la concurrence* Armand Colin, France, 1996, p. 12.

<sup>55</sup>- One of the most important of these is the statement issued by the Commission in 2001. It aimed to launch consultations and discussions among the interested parties about whether the European Union should take broad steps toward harmonising European contract law. The Commission also asked for information on whether the proper functioning of the internal European market could be hindered by differences between national contract laws, and whether different national contract laws would increase the transaction costs of cross-border dealings. The Commission proposed four solutions, the most prominent of which was to support the development of common, non-binding principles of contract law. See in more detail: Matthias Reimann and Reinhard Zimmermann, the previously cited reference, p. 1404.



rules by clearly defining their threefold purpose, thereby preventing exaggeration and error<sup>56</sup> while reaffirming the overarching objective of supporting coherence and harmonisation among the components of European competition policy<sup>57</sup>.

Other institutions also participate in coordination efforts alongside these principal bodies. To avoid prolonging the discussion, we will only mention them briefly here, rather than presenting them in detail<sup>58</sup>. The most important of these are the Council of Ministers and the European Parliament<sup>59</sup>. One fortunate aspect of this integrated system is that it has constitutional legitimacy, which makes the process of legal coordination in the field of competition particularly important<sup>60</sup>.

### **Third: the dynamics of European competition law — paths of incorporation and integration into national legislative systems.**

Perhaps the most defining feature of European competition law, which has an instructive/framework origin, is its interaction with European reality: sometimes influenced by it and sometimes actively transforming it. The legal realism embedded in this approach has helped persuade Member States to gradually align their laws with European competition

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<sup>56</sup>- See: Qadda Shahida Qadda, 'Economic Analysis of Law and Its Impact on Latin Laws in the Field of Competition and Consumer Protection: France and some Arab countries as a model', in the previously cited reference, p. 157.

<sup>57</sup>- To promote the adoption of soft law and its variability, the European Commission swiftly defined three key functions for this approach. In the field of European competition law, the first role is to ensure consistency and alignment between the various components of European competition policy. The second is to ensure that competition rules reflect the outcomes of economic analysis. The third is to provide legal certainty for European economic institutions. Strategic tasks were formed regarding these roles for soft-law rules and for implementing them within the European framework supporting the single market. These include:

1) the 'diffinitionnelle' soft law approach, which aims to provide a unified and consistent interpretation of certain institutions within the national legal systems of the 28 EU Member States;

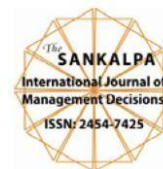
The second approach is known as 'soft law didactique', meaning soft or supplementary guiding rules to legal texts.

The third approach is known as the 'soft law perspective', which looks towards a unified future application of competition policy by authorities, institutions and states. For more details, see: Frédérique Berrod, 'L'utilisation de la soft law comme méthode de conception du droit européen de la concurrence', *Revue de l'Union Européenne*, No. 588, May 2015, pp. 284–286.

<sup>58</sup>- This is a very important mechanism in decision-making within this bloc. Its main function is to set the general lines of the EU's integration policy and to provide general guidance to the other EU institutions. It has also played an important role in directing and encouraging EU Member States in coordinating and harmonising economic laws.

<sup>59</sup>- European unity efforts initially came mainly from Western democracies. This created a pressing need for a representative body that would reflect the will of Europe's peoples and express their objective of the economic and social well-being expected from the Union. At that point, the European Parliament—through its representative role—played a crucial part in drafting the laws relating to competition in the European Union and in giving its opinion on major economic decisions related to the unity of the European single market. Although this was not necessarily in the minds of the designers of this economic project, over time it gained a leading position because it is now a genuine legislative and supervisory institution in the field of competition. See: Hasan Nafea, previously cited reference, p. 207.

<sup>60</sup>- The first draft of the Constitution was announced in 2003. Following negotiations between the Member States, the content of the draft was approved in 2004 and it came into force in 2006. Article 13 of the document stated that coordinating the economic policies of the Member States was one of the EU's main tasks. For more details, see: Sadrafi, Abd al-Rahim. 'The Problem of Arab Integration within the Framework of the League of Arab States in Light of Successful Global Experiences: The European Union as a Model'. PhD thesis. Faculty of Political Science and International Relations, University of Algiers 03, 2022, p. 143.



law<sup>61</sup>. As a result, most states eventually complied voluntarily, encouraged by beneficial economic considerations<sup>62</sup>.

The outcome is that European guidelines have become the governing framework for legislative and judicial institutions across different European countries. Once issued, they are quickly incorporated into national competition law through a variety of legal techniques<sup>63</sup>. There is a strong commitment to applying them, except insofar as national discretion is concerned. Indeed, this has progressed to the extent that a French expert in the field has acknowledged that French competition law provisions are now very close to European law<sup>64</sup>.

Grand result!

The main outcome is that the European Union's model has become both replicable and worthy of emulation. It is well positioned to serve as an important source for other nascent regional experiences, as can be seen in the Arab world's adoption of framework and aspirational laws. In this respect, the approach is similar to Daniel Cohen-Bendit's view in 1999 that 'Americans will imitate us in the future'<sup>65</sup>.

Having identified the lessons and insights drawn from the productive European experience, we must ask: will it serve as a guiding light for our Arab experience? Or do we need time to achieve these goals, as some Arab scholars have emphasised? The announcement of the

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<sup>61</sup>- This approach became a general rule that accompanied European efforts, even though exceptions where coercion was applied did occur — for example, in France — when the European Directive 85/374 on product liability granted the European Member States until 30 July 1988 to transpose it into their domestic laws. As French legislation took a long time to engage with this new direction in product liability, EU bodies imposed financial penalties on France. After lengthy negotiations and significant debate, French legislation responded by adopting and incorporating this directive into law 98-389, in book three, titled "Liability for Acts of Products". See Shahida Qadda, previously cited reference, p. 166.

<sup>62</sup>- Because European bodies began using directives, recommendations, and Green Papers, the countries sought to transfer some principles related to group actions in the field of competition into their domestic laws. This approach was an important entry point for applying this mechanism to the competition-related rules in France, which was in urgent need of a flexible—rather than rigid—legal framework that could reflect the relative and changing nature of economic concepts heavily used in the law of the single market. For more details:

Les Autorités de la concurrence et de la consommation, comparative study between Thai law, PhD thesis, University of Toulouse, France, 2015, p. 64.

<sup>63</sup>- This mix is reflected in non-binding instruments, such as Green Papers and similar documents. These are sets of papers published by the European Commission to stimulate debate on specific topics within the European Union. They function as an invitation for interested parties to participate in the consultation and discussion process based on the proposals presented. These debates may then lead to legislative developments, which are set out in White Papers. For instance, the Green Paper on consumer protection in the European Union (2001) set out the reasons for reforming EU consumer protection legislation. Similarly, White Papers are documents containing proposals for what the European Union should do in a particular field, sometimes following earlier Green Papers. The purpose is to initiate the consultation process at a European level. When positive responses are received from the Council of the EU, this can result in an EU work programme. See: Muhammad Šāliḥ Abū Furj, 'Towards Effective Consumer Protection under EU Directive on Unfair Commercial Practices No. 29 of 2005 and Subsequent Legislative Developments', *Journal of Law and Economics*, Faculty of Law, Cairo University, Issue 92, March 2019, p. 420.

<sup>64</sup>- Laurence Idot, 'Les limites et le contrôle de la concurrence dans la perspective d'une harmonisation', *Revue Internationale de Droit Comparé*, No. 2, April–June 2002, p. 374.

<sup>65</sup>- François Tricèthe, *America of Law*, translated by Muhammad Wāfi 'a, 1st edn, Beirut: University Institution for Studies, Publishing and Distribution, 2008, p. 189.



Arab<sup>66</sup> framework/aspirational Competition Law for 2023 may perhaps open up new possibilities and broaden our outlook.

## **II) Towards Activating Framework/Aspirational Rules in Arab Systems: Development Paths and Application Challenges**

While the rest of the world is moving towards blocs and integration, the Arab world is experiencing market disruptions and political fracture. This striking paradox has prompted policymakers and experts in the Arab region to consider establishing a Greater Arab Free Trade Area to maximise intra-Arab trade. However, they have been hindered by a lack of the most appropriate legislative framework capable of absorbing the specificities of commercial life and its requirements.

This process began in 2002 with an agreement on a set of framework/aspirational rules aimed at protecting competition and monitoring monopolistic practices to enhance economic efficiency. Then, in 2023, the Competition Law framework was issued. This two-decade process has passed through milestones and has been overseen by institutions showing signs of being guided by the European experience. Judgments on the extent of emulation can only be made by examining the outcome produced and the expected prospects (second).

### **First: Efforts:**

#### **A. Early indications of coordination and unifying laws**

The Arab League has long been interested in unifying the general framework of Arab legislation. It has always believed that one of the most important areas of shared Arab cooperation is reconciling the different legal systems adopted by Arab states. In this context, the Sana'a Conference of 1981 was the first step in this process, establishing a plan for unifying Arab legislation<sup>67</sup>. Since then, the Arab Center for Legal and Judicial Research has produced several model laws in various fields<sup>68</sup>.

However, it is notable that the focus of this effort was on unifying provisions in general areas, while a vital and pivotal field related to competition law was overlooked<sup>69</sup>. This field came to the fore with the establishment of the Greater Arab Free Trade Area in 1997<sup>70</sup>. At that time, Arab states expressed their desire to provide a legislative framework better suited to achieving convergence among the regulatory systems governing the market.

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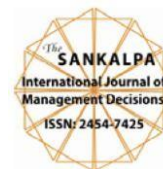
<sup>66</sup>- See: The Martyred Leaders: The Economic Analysis of Law and Its Impact on Latin Laws in the Field of Competition and Consumer Protection. France and Some Arab Countries as a Model', the above-mentioned reference, p. 158.

<sup>67</sup>- Akram 'Abd al-Razzāq al-Mashhadānī, 'The Journey of Legal Integration Among the Member States of the Cooperation Council for the Arab States of the Gulf', Cooperation Magazine, General Secretariat of the Cooperation Council for the Arab States of the Gulf, Issue No. 74, 2011, p. 24.

<sup>68</sup>- The regulatory provisions of this centre, whose headquarters are currently in Lebanon, were approved during the Second Conference of Arab Ministers of Justice, held in Sana'a from 23 to 25 February 1981. The centre operates under the supervision of the Council of Arab Ministers of Justice.

<sup>69</sup>- It is not surprising that addressing 'guiding' laws in the field of competition has come to represent one of the stages in the adaptation process undertaken by states adopting a liberal economic approach. Indeed, this impetus has extended to many institutions of private law, most notably the Law of Civil Liability and Company Law, which are now opening doors that were previously closed to them against the backdrop of competition rules after the success of the European experience in this field became apparent.

<sup>70</sup>- The Greater Arab Free Trade Area was announced pursuant to Decision No. 1317 of the Economic and Social Council at its 59<sup>th</sup> session on 19 February 1997, held at the General Secretariat of the Arab League in Cairo.



Alongside these Arab coordination efforts, the experience of the Gulf Cooperation Council (GCC) states is notable as a distinctive model. They have pursued the framework/aspirational approach in a committed and systematic manner. Recognising the importance of this approach, the GCC has for a number of years treated it as a tool for approximating and unifying legal solutions among its member states, while laying down a phased roadmap to gradually transform it into binding laws<sup>71</sup>.

### **B. The 2002 Arab Framework/Aspirational Competition Law Project**

The growing conviction that increasing trade within the Arab Free Trade Area requires legislative support led the Arab states to adopt a set of unified framework/aspirational rules through an agreement in 2002. The rules were intended to protect competition and monitor monopolistic practices. The rules were drafted as a model law for Member States to take into account when formulating or amending their national legislation<sup>72</sup>.

However, momentum for implementing this project slowed down due to major political developments that shook the Arab world. These events prevented the project from advancing to the levels originally hoped for. It was therefore necessary to wait until the Economic Summit in Riyadh in 2013<sup>73</sup>, which apparently marked a turning point and renewed impetus for the idea of an Arab competition law framework. This is evident from the outcomes of the summit:<sup>74</sup> policymakers concluded that there was no alternative but to accelerate the adoption of the framework law and accordingly moved to a faster pace in order to make the region more appealing to investors<sup>75</sup>.

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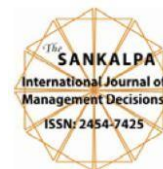
<sup>71</sup>- As a result, this bloc has prevented 'guiding/recommendatory' laws with a binding character from being issued, thereby giving states the opportunity to be guided by their provisions if they deem it appropriate. The same Council usually grants member states a four- to five-year trial period, which may be extended by the Council if deemed appropriate. Before the end of the trial period, the Council invites member states to submit an assessment to the General Secretariat of the extent to which they have benefited from the advisory law, together with their observations and proposals regarding it. The matter is then referred to the Committee of Experts, who examine whether it is possible to recommend adopting it as uniform legislation for all Council states, which would make it binding on member states. See: Akram Abd al-Razzaq al-Mashhadani, *The Economic Integration Journey Among the States of the Gulf Cooperation Council*, the above-mentioned reference, p. 26. See also: Jamal Mahmoud Abd al-'Aziz, *Towards a Unified Law on Trademarks for the Gulf Cooperation Council States in Accordance with International Agreements and Gulf Trademark Laws*, Dar al-Nahda al-'Arabiyya, Cairo, 2nd edition, 2008, p. 16.

<sup>72</sup>- These Arab rules were introduced as a recommendatory guide comprising six (06) chapters and containing 19 articles, most of which were devoted to Chapter Four on the competition authority and the prevention of monopolies, while overlooking many aspects—particularly situations of conflict between national laws and the recommendatory rules. For more detail, see: hala Abu al-hilo, *Public Order in the Field of Competition and Consumer Protection* 'Journal of Legal Studies, Faculty of Law, Abu Bakr Belgaid University in Tlemcen, Issue No. 05, 2008, pp. 50–51.

<sup>73</sup>- At the Arab Development Summit: Economic and Social, Third Session, held in Riyadh on 21–22 January 2013.

<sup>74</sup>- The Summit Resolution stated that it would 'unify the systems, legislation and commercial policies relating to competition and monopoly among Arab states', as reflected in the preamble of the 2023 Arab recommendatory Competition Law.

<sup>75</sup>- Alongside this, the Cooperation Council states progressed from coordination efforts to tangible outcomes. One notable study analysed the size of intra-GCC trade from 1993 to 2004 to compare trade flows among member states before and after the customs union was established. Surprisingly, the study found that the volume of intra-trade among the GCC states increased significantly—beyond expectations—after the customs union began on 1 January 2003. The total volume of trade between GCC states therefore rose from USD 10 billion in 1993 to USD 15 billion in 2002, representing an annual growth rate of 6%. After the customs union began, this



### **C. Adoption of the Arab Competition Law (2023).**

After a difficult period, the Arab framework process in the field of competition continued to search for its 'birth'. Agreement on common rules was not reached until 2016<sup>76</sup>. Thereafter, momentum increased through intensive rounds of work<sup>77</sup>. This process culminated in the submission of the draft for approval in 2019. However, the specialised committees did not approve it, arguing that the law was incomplete and did not align with the most prominent experience in this regard, namely the European experience<sup>78</sup>.

To continue the efforts and enrich the law

Efforts were sustained and the law was supplemented further. It was submitted again for discussion towards the end of 2022<sup>79</sup>, after Member States had provided comments. It was finally adopted on 9 February 2023<sup>80</sup>.

#### **Second: the outcome of the preliminary assessment.**

It appears that the Arab framework/aspirational Competition Law of 2023 draws on regional comparisons in this field, most notably the European experience, for the previously discussed considerations<sup>81</sup>. While we are aware that our contribution to this Arab instrument is limited to legal reflections and viewpoints, given that it is still in its early stages and requires sufficient time for evaluation, we are nevertheless able to provide an initial assessment. Such an assessment will enable us to later render a judgment on the valuation of framework/aspirational rules in Arab states.

This will be done through three indicators: first, at the level of competition laws; second, at the level of the relevant institutions/bodies; and third, at the level of intra-Arab trade.

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figure increased to an annual growth rate of 24% between 2003 and 2013. See the Gulf Cooperation Council website for more information. It was almost as though the coordination efforts had reached their peak (the union stage). Then, in 2013, this momentum stalled.

<sup>76</sup>- At the Sixth Meeting of the Task Team, held at the headquarters of the General Secretariat of the Arab States from 1–4 February 2016, the Arab competition rules (as a recommendatory guide) were adopted. The text of the resolution stated the following in its first item: 'Adopt the Arab Rules as a non-binding guide and instruct the General Secretariat to submit them to the Executive and Follow-up Committee for adoption by the Economic and Social Council.

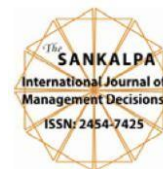
<sup>77</sup>- This is evidenced by the holding of ten (10) meetings during the period from 2016 to 2023.

<sup>78</sup>- At the Ninth Meeting of the Expert Team on Competition and the Monitoring of Monopolies in the Arab States, held at the headquarters of the General Secretariat of the Arab League in April 2019, and after reviewing the Arab recommendatory guide in the field of competition and making observations on it, it was recommended that: "it is greatly condensed and does not cover all aspects of competition and the monitoring of monopolies." Consequently, the member states in the Competition and Monopolies Monitoring Team were requested to re-examine this guide in order to prepare a version that is consistent with what is applied in similar regional groupings, as well as with international developments. See the report of the Ninth Meeting of the Expert Team on Competition and the Monitoring of Monopolies in the Arab States, held at the headquarters of the General Secretariat of the Arab League on 14 and 15 April 2019.

<sup>79</sup>- Accordingly, the law was amended to include 29 articles, having previously contained 19. See the report and recommendations of Meeting No. 54 of the Executive and Follow-up Committee on the Greater Arab Free Trade Area. This meeting was held at the headquarters of the General Secretariat of the Arab League in Cairo from 6 to 8 December 2022. The report is available on the official website of the Arab League.

<sup>80</sup>- The final form of the Arab Recommendatory Competition Law was adopted within the framework of the Greater Arab Free Trade Area by the Economic and Social Council during its 111<sup>th</sup> session, pursuant to Resolution No. 2366 dated 09/02/2023.

<sup>81</sup>- See the opening annex entitled 'Justification for drawing inspiration from the experience of the European Union as a model for the Arab context'.



### **A. Level of National Legislative Compliance with the Arab Guidance Guidelines in the Field of Competition.**

The Arab advisory path has been characterised by incremental development; therefore, time has affected its outcomes. Nevertheless, it is fair to acknowledge that the impact of this model law in the field of competition appears to be limited to this day. Furthermore, the progress achieved by some states in this region is primarily due to their commitment to their European<sup>82</sup> partners rather than any Arab alignment. Nevertheless, this has not entirely prevented certain harmonisations and adjustments from emerging in some Arab laws, influenced by the Arab advisory competition framework. The most prominent example is Tunisia<sup>83</sup>. Additionally, the recent enactment of competition laws in Gulf Cooperation Council (GCC) countries signals these states' entry into this group of jurisdictions one by one<sup>84</sup>.

### **B. Its degree of influence on the level of coordination among authorities.**

Indicators suggest the beginning of a new dynamism in coordination between Arab and national competition authorities. This dynamism has become apparent in recent years, as evidenced by the launch of the Arab Competition Network in 2022<sup>85</sup>. The network strengthens channels of communication and cooperation regarding competition-related matters and works towards the effective implementation of competition laws in the Arab<sup>86</sup> region. For the first time, it has moved in a direction that many leading experiments — foremost among them the European experience — have been pursuing<sup>87</sup>.

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<sup>82</sup>- Within this framework, the Algerian–EU Partnership Agreement, concluded in 2002 and effective pursuant to Presidential Decree No. 195-05, stipulated the necessity of cooperation between the two parties in harmonising legislation in Article 56. Similarly, the EU–Tunisia Partnership Agreement explicitly provides for recourse to EU competition legislation in Chapter 36. This became particularly evident after the 2005 amendment. The national report on competition policy and law in Tunisia, issued in 2010 by the Arab Center for the Development of Rule of Law and Integrity, noted that European law in general, and French law in particular, constituted an important source of reference during the drafting of domestic competition legislation, adapted in accordance with national specificity. The partnership agreement with the European Union also included an explicit provision for recourse to EU competition legislation in Chapter 36.

The National Report on Competition Policy and Law in Tunisia (issued in 2010), p. 60.

<sup>83</sup>- The National Report on Competition Policy and Law in Tunisia (issued in 2010), p. 60.

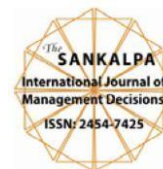
<sup>84</sup>- Among the Gulf Cooperation Council states, the Kingdom of Saudi Arabia led the way by adopting the first competition law in 2004. It was followed by the State of Qatar, which issued its competition law in 2006, in line with the Competition Law of the European Union. Next came Kuwait in 2007, followed by the United Arab Emirates in 2013 and the Sultanate of Oman in 2014. For more detail:

Abdullah Alkandari, 'The Emergence of Competition Law in the Gulf Cooperation Council Countries and the Need for Common Competition Law and Policy', *Kilaw Journal*, Vol. 7, Iss. 2, Ser. No. 26, June 2019, p. 129.

<sup>85</sup>- This network was established in response to the decisions made at the Sixteenth Meeting of the Arab Expert Team on Competition and the Monitoring of Monopolies on 1 December 2021. Furthermore, the Seventeenth Meeting of this Team resulted in the selection of the Competition Protection and Monopolies Monitoring Authority in the Arab Republic of Egypt to chair the network for the period 2022–2024, thus contributing to its establishment.

<sup>86</sup>- The network comprises three working groups, with member states rotating every two years.

<sup>87</sup>- The European Competition Network is one of the most successful arrangements for dealing with cross-border anti-competitive practices. It operates within the mandate conferred by Articles 101 and 102 of the Treaty on the Functioning of the European Union. Within the framework of the European Competition Network, the European Commission and the national competition authorities of the member states cooperate in areas such as notification of new cases, coordination and investigations, exchange of information, and other related matters. The Network also serves as a forum that brings together experts from various sectors to exchange ideas, experience, and best



We are now addressing the contribution of the authorities to advisory efforts. In this context, it is important to consider the freedom of valuation initiative, which involves reconsidering the role of the Arab Parliament, which has been marginalised in this process<sup>88</sup>, firstly in terms of its election<sup>89</sup> and secondly in terms of activating the functions assigned to it within advisory efforts<sup>90</sup>.

### **C. The Role of Advisory Rules in Enhancing Intra-Arab Trade Flows.**

It is evident that advisory rules in the Arab region have had a positive impact on the level of intra-Arab trade among their member states<sup>91</sup>. This is reflected in the performance of intra-regional trade following the establishment of the Arab Trade Area. Specifically, the value of trade exchanges increased from 26 billion USD in 1998 to 107 billion USD by 2006<sup>92</sup>. While some experts argue that the increase in intra-regional trade is limited to neighbouring countries due to the relative ease of transportation between them<sup>93</sup>, this trend is indicative of the role played by the regulatory framework.

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practices. For more details on the operation of this Network, see: the United Nations Conference on Trade and Development (UNCTAD) Memorandum on methods and procedures for international cooperation in competition matters involving more than one country, 13th session, Geneva, Switzerland, 26 April 2013.

<sup>88</sup>- The idea of setting up a popular representative institution within the Arab League dates back to the mid-1950s. In 1955, the Arab League General Secretariat put forward proposals to amend the League's charter. Among these was a proposal to establish a new body in the form of a popular association. Although this proposal was not acted upon at the time, discussions about establishing an Arab Parliament continued, and the idea did not disappear from reform initiatives relating to the Arab League's institutional system. It attracted considerable attention from the Arab Parliamentary Union, whose objectives were similar to those of the Arab League. Together, they cooperated in developing common rules for the proposal. These rules formed the basis of the subsequent decisions adopted by the Arab Summits regarding the establishment of the Arab Parliament. The Arab Parliament was created pursuant to Decision No. (292), issued by the 17th Ordinary Session of the Council of the Arab League, held in Algeria on 23 March 2005. At this summit, several amendments were introduced to the Arab League Charter, the most significant of which was the addition of Article 19. This article was added to the charter pursuant to the decision of the summit and, by virtue of decision 290, stipulated: 'An Arab Parliament shall be established within the framework of the Arab League; its basic regulations, composition, duties and powers shall be determined.' Further information can be found on the Arab League website.

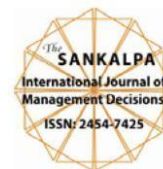
<sup>89</sup>- Observe: Abdel Salam Dib, 'Unifying Arab Legislation by the League of Arab States: A Promising Venture or a Lost Hope?' Paper presented at the International Colloquium 'The Coexistence of Legal Systems in Algerian Law and Regional Approaches to Law', organised by the University of Algiers 1 – Benyoucef Ben Khedda, 24–25 November 2015. Published in *Annals of the University of Algiers 1*, special issue, 2015, p. 126.

<sup>90</sup>- Despite its significance in regional experiences, in the Arab context, in its current form, this institution does not fulfil the expectations of Arab peoples or the academic elite. Moreover, it would appear that it is still far from playing its legislative role. The President of the Arab Parliament expressed this view before the meeting of the Council of Ministers of Arab Justice: 'Due to the absence of cooperation between the Arab Parliament and the Council of Ministers of Arab Justice, relying on Article 4 of the Council's Internal Regulations, which provides that the Arab Parliament's approval of draft uniform laws and collective agreements is required before they are adopted by the Council of the League's University.' He also noted that no uniform Arab law or agreement has been referred to the Parliament by the Council of Ministers of Arab Justice. See the text of the speech in *Journal of the Arab Parliament*, Issue Three, January 2019, p. 16.

<sup>91</sup>- Although the Unified Arab Economic Report for 2022 indicated that this trade exchange is largely carried out between neighboring countries and is mainly concentrated in goods, see the report, p. 205.

<sup>92</sup>- In this regard, see: Hiffa'a Abd al-Rahman Yasin al-Takriti, *The Future Role of the Greater Arab Free Trade Area in Achieving Arab Economic Integration*, *Tikrit Journal for Administrative and Economic Sciences*, College of Administration and Economics, University of Tikrit, Iraq, Vol. 07, No. 22, 2011.

<sup>93</sup>- Similar information regarding the size of the United Arab Emirates' exports to Saudi Arabia and the Sultanate of Oman, as well as Algeria's exports to Tunisia, Morocco and Egypt, can be found in the 2022 Unified Arab Economic Report, p. 205.



An increase in intra-exports was also recorded for the Greater Arab Free Trade Area, at a rate of 15.3% compared to 2020. According to the 2022<sup>94</sup> Unified Arab Economic Report, this occurred even though some countries continued to express dissatisfaction regarding the difficulty of the flexible flow of certain products in other Arab countries<sup>95</sup>.

### **III) Prospects for the Future of Advisory Rules in Arab Competition Laws.**

The previous section has enabled us to answer the question of what has been done with regard to advisory laws in the field of competition in the Arab world. While motivated by the successes of the European experience in using ‘soft law’ to harmonise the legal framework of that regional grouping, we must nevertheless recognise that these soft instruments follow a prospective path when applied. This is because they will provide a framework for a significant number of cases involving anti-competitive behaviour that undermines the freedom to compete (including the law’s complementary efficiency in relation to actual competitive conditions)<sup>96</sup>.

The most recent advisory texts represent a possible threshold for Arab convergence. While they are currently commendable, they urgently require a future intellectual vision supported by careful, methodical planning.

Nevertheless, this task is not easily achievable given the novelty of soft law in Arab legal studies. This necessitates delineating and fencing off this future-oriented conception from the outset, based on guiding principles and initial premises, especially since it is confronted with numerous political, legal, economic and regulatory obstacles.

Nevertheless, this will not prevent us from planning a phased, prospective methodology that takes into account current economic and social capacities in the Arab world and forthcoming changes affecting intra-Arab trade in this region.

#### **First: Foundational principles and premises for valuing (promoting) Arab advisory laws.**

The future vision for the valuation of this domain is to “fence in” the knowledge and perceptions that underpin the coordinated effort of Arab competition laws. This requires the

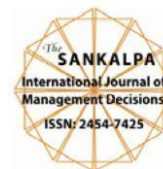
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<sup>94</sup>- See the same report, p. 201.

<sup>95</sup>- This was also reflected in the discussion of the obstacles states face in implementing the provisions of the Greater Arab Free Trade Area. During the session, the representative of the Kingdom of Saudi Arabia raised a complaint about obstacles hindering the Kingdom’s exports to Algeria. He claimed that a decision prohibiting the import of pharmaceutical products prevented Saudi medical products from entering Algeria. The Algerian representative stated that the ministerial decision issued on 14 February 2021 had repealed the prohibition on importing pharmaceutical products issued on 30 October 2008. He emphasised Algeria's commitment to the provisions of the Greater Arab Free Trade Area, stating that there are no obstacles to importing pharmaceutical products. He also indicated that contact would be made with the Kingdom of Saudi Arabia to resolve any issues preventing Saudi products from entering Algeria.

See: Item Two of the Report and Recommendations of the 55<sup>th</sup> Meeting of the Executive and Follow-up Committee of the Greater Arab Free Trade Area, held at the Headquarters of the General Secretariat of the League of Arab States on 21–22 June 2023. It is inferred from the foregoing that there are communication difficulties between member states, which led to a proposal initiated by the Kingdom of Saudi Arabia to establish a platform for addressing obstacles related to the Greater Arab Free Trade Area. See Item Four of the same report.

<sup>96</sup>- Muotacim Billah al-Ghariani, 'The Role of the Legal Rule in Light of the Principles of the Economic Analysis School of Law', *Journal of Legal Studies*, University of Tlemcen, No. 04, 2007, p. 44.



establishment of basic principles to guide the researchers and experts of Arab committees responsible for producing and implementing advisory laws.

1. It must be recognised that competition law is an economic law that pursues economic objectives beyond noble legal ends. This means that any attempt at coordination must be based on pragmatic legal experience that goes beyond our conventional academic frameworks and sometimes rigid formal legal references<sup>97</sup>. The process should begin with a culture of 'soft' law, which Arab legal professionals have not yet fully embraced<sup>98</sup>.

2. Because the advisory effort in the field of competition protection is linked to regional, supranational forms of trade, aiming in the long term to increase intra-trade in the Arab Free Trade Area, it urgently requires a multidisciplinary legal understanding. Such an understanding should combine the tools of comparative law with knowledge of international law. These are undoubtedly fertile legal fields for fostering and developing new, flexible sources of commercial law.

3. Legal realism requires us, as Arab legal experts, to determine our current position. This inevitably corresponds to the stage of coordinating laws. As the scholar Al-Sanahhuri described it, this may be viewed as a phase of 'closely aligned foundations'<sup>99</sup>. Therefore, advisory efforts should prioritise establishing general standards and overarching rules that can serve as guiding reference points in Arab regional legislation, while taking into account the legal affiliations of the major legal families and the differences among states<sup>100</sup>.

4. A recognition of what is common among member states in terms of interests and an effort to preserve and maximise those interests must not overlook the margin of permissible national discretion. This pragmatic, conciliatory dimension is one of the secrets behind the success of the European group<sup>101</sup>, and it is fitting that it receives significant attention<sup>102</sup>.

5. Recalling the strong elements of the European experience of soft law in the Arab advisory context, where progress is slow, requires further Arab innovation and smart, productive borrowing from the European model. This must be done without excess or neglect, while considering local readiness for applying this composite approach<sup>103</sup>.

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<sup>97</sup>- Muhammad Tiawarsi, *Legal Controls of Freedom of Competition in Algeria*, Dar Houma, Algeria, 2015, p. 42.

<sup>98</sup>- Ahmad Muhraz, *The Right to Lawful Competition*, Dar al-Nahda al-'Arabiyya, Cairo, 2002, p. 41.

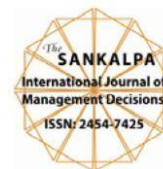
<sup>99</sup>- Akram Abd al-Razzaq al-Mashhadani, 'Unifying Arab Legislation: Importance, Dimensions and Challenges', *The Arab Researcher Journal*, Arab Center for Legal and Judicial Research, Beirut, Lebanon, Vol. 1, No. 2, 2020, p. 11.

<sup>100</sup>- The Fifth Meeting of Heads of Legislation in Arab States called for this, namely the need to establish general standards and overarching provisions suitable for domestic legislation in Arab states, while leaving detailed matters to each state separately. See the report issued by the Fifth Meeting of Officials of Legislative Administrations in Arab States, Cairo, 7–10 September 2004.

<sup>101</sup>- See the text of Article 288 of the Treaty on the Functioning of the European Union: 'A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods'.

<sup>102</sup>- Mireille Delmas-Marty and Marie-Laure Izorche, 'National Margin of Appreciation and the Internationalisation of Law', *Revue Internationale de Droit Comparé (RIDC)*, Vol. 52, No. 4, 2000, p. 780.

<sup>103</sup>- See: Matthias Reimann and Reinhard Zimmermann, *The Oxford Handbook of Comparative Law*, cited reference above, p. 180.



6. Valuing the role of advisory laws requires data and information about the current approach to competition law in each member state. It is also necessary to conduct a periodic survey to determine the extent to which national laws have benefited from advisory laws<sup>104</sup>.

### **Second: the problem of alignment (harmonisation).**

A review of efforts to value and promote Arab advisory laws in the field of competition over an extended period, characterised by a slow coordinated approach, reveals a troubling contradiction. It is striking that our senior public officials and official experts view the passage of half a century since the project's inception as evidence of wisdom and rationality. For instance, they point to the fact that in 2023, this 'wise' approach resulted in an advisory law that was in line with the level of stakes of the Arab Free Trade Area.

However, they may be reinforcing the assumptions of 'trusted experts', who have criticised those following this course. These experts argue that those following this course completely disregard the lessons of past Arab history and the present reality, which is full of political, economic and legal obstacles capable of jeopardising the future of this advisory effort. From their perspective, such obstacles could render the lessons drawn from the European experience irrelevant in the Arab context.

### **1. Disparities in economic indicators and the legislative framework**

Although Arab states broadly fall within the category of developing countries, elements of the economic environment vary depending on indicators such as the degree of economic liberalisation, state intervention, market protection and tariff protection<sup>105</sup>.

Added to this is the divergence in the suitability of the legislative structure in the field of competition from one country to another. Some states were pioneers in issuing competition laws, while others did so more recently. Together, these two factors may pose a significant challenge to the effective implementation of advisory laws in the Arab market.

### **2. Obstacles related to alignment and weighting**

There are many practical problems that arise when applying these laws. Courts do not sufficiently define the solutions that should be taken when a jurisdictional conflict occurs between Arab and national bodies in the field of competition. Nor do they clarify how their obligations towards the Arab Free Trade Area and other regional spaces, including their relationship with European partners such as COMESA or the World Trade Organization, should be coordinated.<sup>106</sup>

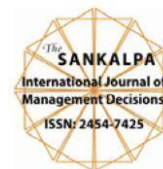
### **3. The Idea of Advisory Laws Stemming from Government Intentions**

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<sup>104</sup>- The survey's importance lies in providing data on the extent to which Arab states benefit from the guiding rules, while also clarifying the extent to which these legislative instruments have been implemented and ignored. See: Sari Mahmoud Siyam, 'Legislation in the Arab World and Confronting the Challenges of Globalisation', in A Collection of Laws and Regulations of the Legislative Authority in Some Arab Legal Systems, available at: <http://www.abhatoo.net.ma/content/download/25438/554447/version/1>. The article was accessed and its content reviewed on 16/07/2023.

<sup>105</sup>- Magawri Shalabi Ali, cited reference above, p. 285.

<sup>106</sup>- The current texts do not specify coordination mechanisms between member states and other regional organizations, leaving each country free to conclude international agreements even if they conflict with the interests of the Arab trade area. See, in this regard, Haji Fatima, Merghad Lakhdar, The extent to which Arab countries benefit from the integration experience in the European Union, Journal of Economic Integration, Ahmed Draia University, Adrar, Algeria, Volume 03, Issue 03, 2015, p. 25.



Only a few specialists in our region pay serious attention to this idea. Unlike in Europe, where such advisory frameworks originated in parliaments and were shaped by prominent academics, this obstacle is significant. It could limit the impact of these mechanisms in Arab law and relegate the idea of harmonising Arab laws in this area to an intellectual and legal luxury that provides no real value<sup>107</sup>.

#### **4. These laws are produced by ‘trusted’ elites, not experts.**

These advisory laws are the outcome of the thinking of ‘trustworthy’ figures rather than juristic ‘expertise’. The judges in question, who are endorsed by ministers of justice who are members of the Arab Free Trade Area, are not usually sufficiently familiar with comparative legal culture. Consequently, they are not in a position to contribute meaningfully to efforts to coordinate Arab competition laws<sup>108</sup>.

Meanwhile, the successes of our European neighbours in unifying market laws emerged from the ideas of distinguished legal scholars of their era, such as André Tunc, Guido Alpa and Jacques Ghestin.

#### **5. A lack of established federal mechanisms behind Arab coordination**

The Arab coordination effort lacks stable, dignified federal bodies comparable to European Union institutions, which have strong, influential and sometimes exclusive competencies. Furthermore, the Arab experience has not produced an effective enforcement mechanism to compel non-compliant institutions or states to adhere to its guidance<sup>109</sup>.

#### **6. The problem of divergent legal terminology in competition law**

This is connected to historical considerations. Some states adhere to general-law notions grounded in Sharia, such as Sudan, while others use Latin-Germanic terminology, such as Algeria, Tunisia and Morocco. We must also not forget states that apply Islamic Sharia law, such as Saudi Arabia and Yemen.

This variability and divergence in the tools used to operate competition law—especially in terms of terminology—is likely to confuse unified Arab efforts and impede their progress<sup>110</sup>.

#### **7. A deficit of trust among the parties of the Greater Arab Free Trade Area**

This is because political disputes are not absent among the member states of this grouping. These disputes result from the leadership claims of certain Arab leaders. This has hindered the acceleration of the adoption of advisory laws. It is as though the lesson learned from the European experience — namely the separation of politics and economic interests — has not been sufficiently internalised within this Arab regional framework<sup>111</sup>.

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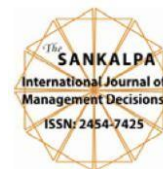
<sup>107</sup>- See: Abdel Salam Dib, cited reference, p. 126.

<sup>108</sup>- Qadda Shahida, *Civil Liability of the Producer: A Comparative Study*,\* Dar al-Jami'a al-Jadida, Egypt, 2007, p. 127. Also see: Akram Abd al-Razzaq al-Mashhadani, *The Problematic Nature of Concepts and Their Impact on Delineating the Legal Framework of Product Liability: A Study in Algerian Law and Comparative Law*, Journal of Legal Studies, Laboratory of Fundamental Private Law, Faculty of Law and Political Science, Abu Bakr Belgaïd University of Tlemcen, Algeria, No. 08–2011, p. 62.

<sup>109</sup>- See: Haji Fatima and Marghad Lkhder (cited reference, p. 30).

<sup>110</sup>- See: Akram Abd al-Razzaq al-Mashhadani, 'Unifying Arab Legislation: The Importance, Dimensions and Challenges', *The Arab Researcher Journal*, Arab Center for Legal and Judicial Research, Beirut, Lebanon, Vol. 1, No. 2, 2020, p. 15.

<sup>111</sup>- See: Haji Fatima and Marghad Lkhder, same reference, p. 31.



Does this mean surrendering to the ‘catastrophist’ view that treats these challenges as an inevitable fate for advisory law? What use are agreements and laws adopted in this regard if substantial obstacles prevent their successful implementation?<sup>112</sup> Of course, this is not a self-evident conclusion in all cases. The European experience is evidence of this, as it has overcome all obstacles and now disseminates competition laws to other regions. This is attributed to the successful deployment of ‘soft’ (non-coercive) legal mechanisms<sup>113</sup>.

### **Third: The Expected Path for Valuing Arab Advisory Laws in the Field of Competition**

In 1960, the eminent scholar al-Sanhuri set out a roadmap for unifying Arab laws, envisioning a future in which this objective would be realised. He proposed that commercial law should drive this regional effort. He also suggested adopting model laws in the market sector, proposing that the focus of this coordination phase should be on establishing legislation based on a single set of principles — or at least ones that are closely aligned — postponing the goal of complete unification until the necessary conditions are in place<sup>114</sup>.

However, at the time, Arab senior politicians disregarded this vision and later politicised the idea, framing it as temporary, contingent political reactions. Consequently, it ultimately had little impact on improving the economic and social situation of Arab citizens, especially given that international trade is currently shaped by unprecedented competitive globalisation<sup>115</sup>.

The theoretical framework of the expected role of Arab advisory laws requires a methodical approach, based on legal thought and strategy, to forecast future actions through a phased vision. This begins with the short term, and then extends to the long term by moving current advisory laws towards becoming binding, as was achieved in the European experience some time ago.

#### **1. The near term**

Following the publication of the Arab Advisory Law for 2023 and its associated framework, it became clear that the drafters had agreed on the need to postpone the implementation of unified normative rules until a later stage. It also seems that “legal alignment” is the most compatible form with the conditions of Arab states. Additionally, a touch of legal realism now seems to be intermingling with the advisory effort.

Furthermore, even this modest level of unification of Arab competition laws appears to have convinced Arab leaders to disentangle it from the political animosities with which it was previously associated. The call today is therefore to encircle this effort with a sound environment and cooperative atmosphere, sustained by trust and good faith among members of this regional grouping.

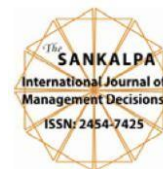
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<sup>112</sup>- See: 'The United Nations Conference on Trade and Development (UNCTAD) memorandum/report on methods and procedures for international cooperation in competition matters involving more than one country', 13th session, Geneva, Switzerland, 26 April 2013.

<sup>113</sup>- Matthias Reimann and Reinhard Zimmermann, cited reference, p. 120.

<sup>114</sup>- See: Akram Abd al-Razzaq al-Mashhadani, 'Unifying Arab Legislation: Importance, Dimensions and Challenges', *The Arab Researcher Journal*, Arab Center for Legal and Judicial Research, Beirut, Lebanon, Vol. 1, No. 2, 2020, p. 11.

<sup>115</sup>- Adel al-Khasas, 'Competition Contemplated between Competitive Legal Systems', *Moroccan Journal of Enterprises and Business*, Faculty of Law, Rabat, Morocco, No. 2, 2008, p. 104.



Some pages of the near future appear to have already been written in the ink of the most recent advisory texts. However, the important pages remain to be written. These should start with this modest vision, outlining a plan to activate the provisions of these model laws, along with the mechanisms for proceeding in phases towards the objective of unifying Arab laws in the market domain. The European experience provides an apt model here, and it is worth presenting these tools.

Focusing on the common, agreed-upon provisions among member states, working to enhance them and ensure their implementation, while disregarding certain differences that do not significantly affect the Arab coordination effort.

Identify the best and most effective courses of action that institutions should voluntarily follow, based on a consensual, incentive-based approach, such as the model adopted in European competition law.

Unify legal and judicial terminology to facilitate convergence and coordination among institutions operating in the market and promote consistency in judicial rulings within this grouping.

- Democratising this advisory effort by embedding it in the culture of Arab societies, opening public discussions about it and encouraging constructive engagement from civil society in this coordination process<sup>116</sup>.

- Harnessing digitalisation and information technologies in service of this advisory effort to gather accurate information and data on the level and degree of Arab states' participation and to identify gaps and deficiencies in this area.

### **The Furthest Horizon**

Many Arab experts insist that we should not allow our foresight to lead to hasty action. In this domain, the most that can be hoped for is the establishment of mechanisms for implementing guiding (advisory) rules — considered as common principles that Arab legal rules may use as references. Accordingly, today's situation is the best we can hope for, while disregarding the important pedagogical lesson offered by the European experience: unifying legislation is an ongoing process until federal laws are integrated into the national legal framework<sup>117</sup>.

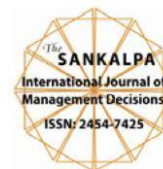
Furthermore, we believe that since 2016, the Arab Trade Area has been sending serious and deliberate messages about the real future challenges that this group will face<sup>118</sup>. Furthermore,

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<sup>116</sup>- See: Riyad Fakhri, 'The Experience of Arab States in the Field of Unifying Arab Laws: A Reading in the Religious Impact of the Unification Approach', a paper presented at the International Colloquium 'The Coexistence of Legal Systems in Algerian Law and Regional Approaches to Law', organised by the University of Algiers 1 – Benyoucef Ben Khedda, 24–25 November 2015. Published in *Annals of the University of Algiers* 1, special issue, 2015, p. 134.

<sup>117</sup>- This noble aspiration was first expressed by the scholar al-Sanhuri in a statement to the Kuwaiti newspaper al-Ra'y in 1960. For further details, see: Akram Abd al-Razzaq al-Mashhadani, 'Unifying Arab Legislation: Importance, Dimensions, and Challenges', cited reference, p. 11.

<sup>118</sup>- It is inferred from the outputs of the following regular meetings: the Sixth Meeting of the Expert Team on Competition and Monitoring Anticompetitive Practices in Arab States, held from 1 to 4 February 2016, at the headquarters of the General Secretariat of the Arab States; the Ninth Meeting of the Expert Team on Competition and Monitoring Anticompetitive Practices in Arab States, held at the headquarters of the General Secretariat of the League of Arab States on 14–15 April 2019; the report of the Economic and Social Council of the League of Arab States in its regular session (111), dated 9 February 2023; the (43rd) Meeting of the Directors of Customs in Arab States at the headquarters of the General Secretariat of the League of Arab States



the level of engagement of states in efforts to enhance and value the guiding rules has reached a substantial level. It is therefore time to provide the most appropriate environment for moving to the second phase of unifying Arab competition laws — by securing the necessary conditions to attain this noble goal through the following mechanisms:

1. Preparing for the establishment of a directly elected Arab Parliament by Arab citizens, as in the European model. This alone would legitimise the idea of unifying market laws, as well as securing the acceptance of members of the grouping by this project. This supreme legislative body would then issue unified texts representing the highest level of regulation in the field of competition, superseding national legislation<sup>119</sup>.
2. Creating a superior Arab judicial body, responsible for adjudicating disputes and ensuring compliance with federal legal texts, while also contributing to the uniform interpretation of these unifying provisions<sup>120</sup>.
3. Adopting Arab model texts in substance with regard to the protection of competition and the suppression of monopolies and anti-competitive practices.
4. Supporting and activating non-formal cooperation networks (competition networks and the exchange of information and opinions).
5. Involving universities and research centres in the unification effort by promoting the idea within university curricula through training opportunities in Master's and PhD programmes, and by establishing specialised research centres with substantial funding and expertise<sup>121</sup>.

### **Conclusion:**

My legal-philosophical article by the two eminent legal scholars, David<sup>122</sup> Trubek and Julien CAZALA<sup>123</sup>, on the appreciation and valorization of guiding (advisory) rules in the field of competition, expresses—on behalf of international commercial law experts—the current (and future) trajectory of this pioneering model. That trajectory appears to unfold within a dual movement: borrowing from other experiences, coupled with an increasing desire to adapt what is inspired to the prevailing economic and social realities. This is precisely what we have observed while tracking the process of valorizing guiding rules in the Arab experience, which—based on our assessment—has not yet reached its endpoint.

In any case, what we have presented are not definitive teachings, but rather legal considerations and thoughtful observations. We hope that further studies will emerge from

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on 28 February 2023; the Eighteenth Meeting of the Arab Expert Team on Competition and the Monitoring of Anticompetitive Practices on 20 June 2023. It is also expected that the 14<sup>th</sup> Meeting of the Committee for Trade Facilitation within the framework of the Greater Arab Free Trade Area will be held on 16–17 August 2023.

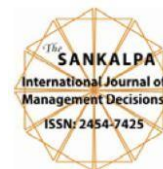
<sup>119</sup>- See: Abdel Salam Dib, cited reference, p. 126.

<sup>120</sup>- The idea of establishing an Arab Court of Justice has long been considered by the founders of the League of Arab States. See: Sadaṭī 'Abd al-Rahīm, *The Problematic Nature of Arab Integration within the Framework of the League of Arab States in Light of Successful Global Experiences: The European Union as a Model*, cited reference, p. 90. See also: Akram Abd al-Razzaq al-Mashhadani, 'Unifying Arab Legislation: Importance, Dimensions and Challenges', cited reference, p. 18.

<sup>121</sup>- See: Riyadh Fakhrī, cited reference, p. 136.

<sup>122</sup>- David M. Trubek, Patrick Cottrell and Mark Nance, 'The Discovery of Soft Law in International Relations Theory', in 'Soft Law, Hard Law and European Integration: Towards a Theory of Hybridity', Legal Studies Research Paper Series, Paper No. 1002, NYU/University of Wisconsin Law School, November 2005, p. 2.

<sup>123</sup>- Julien Cazala, *Le Soft Law international entre inspiration et aspiration*.



this research that identify errors, address shortcomings and build upon what is sound. Through such cumulative scholarship, our Arab researchers will be able to engage in the international coordination process for the benefit of their peoples.

As an additional step, we consider it useful to set out certain results drawn from the study.

The Arab experience's valorisation of guiding principles in competition law, informed by European experience, has led to Arab states converging around a reduced form of unification of competition laws. This threshold may not satisfy certain parties, but it is the most feasible option currently available.

- Legal replication of the European model by the Arab experience should be treated as a lesson to be learned, not as an end in itself. Acknowledgement must be made of the economic and social differences between the European grouping and the Arab region.

- Obstacles fall within the remit of Arab reality, and time alone is likely to help overcome them. Our task is to calibrate our vision and our aspirations for the future, as this is the way in which our hopes can be realised.

Reflecting on the international context, with its globalisation, blocs and digitisation, makes us more vigilant in avoiding political disputes.

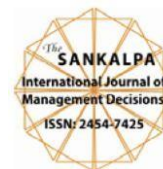
In light of the foregoing, it is appropriate to propose the following recommendations for those responsible for drafting guiding rules in the future:

1. Enhance the role of Arab legal expertise in the development of guiding principles, rather than limiting participation to 'trusted' official experts.
2. Establish a database to assess the extent to which national laws of member states respond to and benefit from the guiding rules.
3. Involving universities and research centres in this coordination effort.

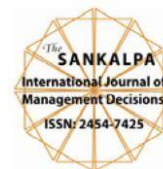
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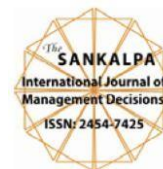
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