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Palestine Economic Policy Research Institute (MAS)

## نحو تأسيس هيئة المنافسة الفلسطينية

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## Towards Establishing the Palestinian Competition Commission

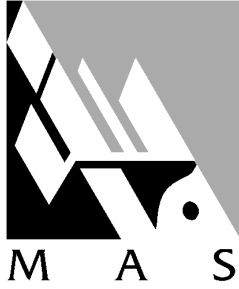
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## **Towards Establishing the Palestinian Competition Commission**

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**The Palestine Economic Policy Research Institute (MAS)**

Founded in Jerusalem in 1994 as an independent, non-profit institution to contribute to the policy-making process by conducting economic and social policy research. MAS is governed by a Board of Trustees consisting of prominent academics, businessmen and distinguished personalities from Palestine and the Arab Countries.

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MAS is dedicated to producing sound and innovative policy research, relevant to economic and social development in Palestine, with the aim of assisting policy-makers and fostering public participation in the formulation of economic and social policies.

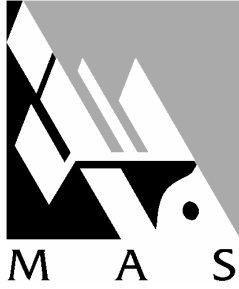
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- ♦ Evaluating economic and social policies and their impact at different levels for correction and review of existing policies.
- ♦ Providing a forum for free, open and democratic public debate among all stakeholders on the socio-economic policy-making process.
- ♦ Disseminating up-to-date socio-economic information and research results.
- ♦ Providing technical support and expert advice to PNA bodies, the private sector, and NGOs to enhance their engagement and participation in policy formulation.
- ♦ Strengthening economic and social policy research capabilities and resources in Palestine.

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P.O. Box 19111, Jerusalem and P.O. Box 2426, Ramallah  
Tel: ++972-2-2987053/4, Fax: ++972-2-2987055, e-mail: [info@mas.ps](mailto:info@mas.ps)  
Web Site: [www.mas.ps](http://www.mas.ps)



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# **Towards Establishing the Palestinian Competition Commission**

**Feras Milhem**

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**Towards Establishing the Palestinian Competition Commission**

**Researcher:** Feras Milhem

**Research Assistants:** Barbara Sabitzer  
Fuad Al Khatib

**Reviewers:** Jamal Abu Farha, Ministry of National Economy  
Mohammad Al Qaisi, Birziet University

**Layout:** Lina Abdallah

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## **Foreword**

This study aims to enhance the legal, regulatory, and institutional frameworks in order to secure the existence of a competitive environment in the Palestinian economy. The study provides realistic and applicable recommendations for the establishment of such a legal body in Palestine, which will be modeled according to recommendations of international institutions, such as the UNCTAD, as well the experiences of different countries.

Protecting competition is currently one of the major goals for all governments that adopt the free market system and depend on private enterprises. This is because competition is a prerequisite for increasing productivity and technological progress. It is also a driver for quality improvement of goods and services, as well as cost reduction for consumers. This means that competition protection laws are for the benefit of producers and consumers alike. The competitive environment also encourages investment and the efficient utilization of resources and increases the competitiveness of national products in global market.

The Palestine Economic Policy Research Institute (MAS) presents this timely study while discussions and debates pertaining crafting new competition protection legislations are taking place. We are certain that the recommendations and the conclusions of this study will contribute immensely to the policy making process and ensure that the new policies will satisfy the interests of major stakeholders.

I would like to take this opportunity to thank the senior researcher and his assistants. I would also like to thank the external anonymous peer reviewers for their valuable comments as well as the discussants and participants of the open workshop which MAS had arranged for discussing the paper and disseminating its recommendations. The discussions and constructive feedback helped refine the study and its recommendations.

Finally, I would like to express my thanks and gratitude for the International Development Research Center (IDRC) for their support to this study, which is a part of the “Enhancing the framework for entrepreneurship in the West Bank and Gaza” project for 2012-2013.

**Dr. Samir Abdullah**  
**Director General**



## **Executive Summary**

This study seeks to identify the most conspicuous international standards for the establishment of a commission that regulates and ensures healthy competition between businesses. Such a commission is mainly tasked with making sure that the laws of competition are duly observed. The commission particularly seeks to prevent activities that have adverse effects on competition, especially with regard to blocs and alliance groups, price manipulation, violating the standards and norms of mergers, as well as abusing of dominant positions. Because this study coincides with the release of the Palestinian draft law on the protection of competition, it examines this draft law against international standards and the comparative law.

In order to come up with reliable results, the study utilized a number of research methods. First, it drew comparisons between different international legislation and between various analytical studies carried out by international or regional institutions on competition issues, especially the regulations contained in the United Nations Conference on Trade and Development (UNCTAD); the studies and consultations of OECD; the European Union; and the International Competition Network. Second, the author interviewed a number of people and representatives of concerned institutions to identify the local accumulated expertise and to seek advice from people involved. Finally, the study analyzed the Palestinian draft law on the protection of competition and compared it to the comparative law and best practices, especially with regard to the structure and role of the proposed Competition Commission.

In the first section of the study, we tackled the purposes of the Competition Commission and the relevance of this body in terms of its oversight and steering role, as well as its injunctive measures when competition laws are flouted. Having defined competition, the study then examined international standards and the comparative law, particularly analyzing the UNCTAD Model Law on Competition 2003 and its amendments of 2010 and 2012 in terms of the objectives of the law and its scope of application; the restrictive agreements; the abuse of dominant positions; reports of dominant positions or agreements between businesses; mergers between enterprises; the relationship between economic sectors regulators and competition commissions; consumer protection; and penalties and fines. The study then moved to screen the economic role of competition commissions, particularly the corporate mergers; poverty reduction driven

by economic growth; the relationship between economic sectors regulators and competition commissions; curbing prices rise; encouraging small and medium-sized enterprises; and the adverse effects of the Israeli occupation policies on the achievement of legitimate competition. After that, the study drew an analytical comparison between different competition commissions in terms of how to conceptualize and create a competition commission, whether through the UNCTAD Model Law or through comparative laws regarding membership and independence issues, as well as skills of affiliated members and their terms of office. The study then reviewed the functions of the commission, especially enforcing penalties and indemnities.

The last section of the study analyzes the makeup and structure of the Palestinian Competition Commission vis-à-vis the Palestinian draft law on the protection of competition. By comparison, the study found that the draft law is a modern, well-crafted one; however it still has some minor blemishes, including:

- ✧ It does not specify its objectives. The sound wording of laws requires stating goals or objectives in the introductory part of the legislation.
- ✧ It seems that Palestinian lawmakers are highly influenced by their Egyptian counterparts (who granted the Competition Authority the power to exclude public utilities- that are run by companies that are subject to the provisions of the private law-from the scope of the prohibitions set forth in the articles regulating agreements and dominant position if this achieves the public interest or brings about consumer benefits that outweigh the effects of constraining competition). This has been criticized in line with the French jurisprudence which establishes that public companies fall under the scope of competition laws. The study, thus, asks Palestinian lawmakers to revisit the text of the draft law in accordance with UNCTAD Model Law, as well as with most comparative legislation.
- ✧ The draft law does not define what is meant by agreements or alliances, and as such it involves horizontal as well as vertical agreements no matter how they are concluded, whether in writing, orally or even by implication. The study believes that the ban should include not only agreements between competing companies, but also companies that are expected to compete, as stated in Article III of the Model Law of UNCTAD.
- ✧ UNCTAD Model Law proposed regulating the process of licensing activities that are not ex-ante proscribed by competition authorities, especially with regard to notifications of a dominant position. The

study found that the Palestinian law-makers did not delegate such a power to the Competition Commission (though it is very important), especially that the tasks of the competition commissions do not only involve controlling companies, but also providing advice and guidance.

- ✧ Palestinian law-makers panned out when they shunned setting fixed standards for mergers or acquisitions, citing only two cases as examples. However, the two examples were not felicitous. The fifty million dollars cited as an example is unrealistic since most of the companies in Palestine are either small or medium-sized. Upon reviewing the comparative law, we found that the Egyptian competition law has set 25% or higher in order for mergers to enjoy a dominant position, while in Jordan and Tunisia the ratios are 40% and 30%, respectively. The ratio in the United Kingdom and Australia is 25%. Perhaps there is a need to conduct a study of the national economy before setting ratios in the draft law.
- ✧ The draft law does not regulate the relationship between the Competition Commission and regulators of economic sectors. Such a relationship should have been accounted for in the draft law, since when this relationship is not regulated, conflicts / disputes might arise over authority, particularly when setting standards for services pricing and merger policies.

As for establishing a Competition Authority, the study outlined three forms of commissions, namely:

First: The Competition Commission does not have the right to investigate actions that have adverse effects on competition; rather it only files the case to the competent court. Decisions may be appealed to a higher court, according to the existing judicial organization.

Second: The Competition Commission has the powers to investigate actions that have adverse effects on competition, and the case is filed to an internal tribunal (a special judicial body that examines competition issues). However, the rulings of this judicial body can be reviewed by ordinary courts.

Third: This form is a combination of the two models above: the competition commission has the powers to investigate and impose sanctions, but applying to the ordinary court remains an option. The administrative tribunals and the ordinary courts, however, can still undertake or see any case of infringement. In some systems that adopt this

combinatory model, the Competition Commission has the powers to investigate and impose sanctions on actions related to mergers and economic concentration, where a sit only carries out investigation with no powers to issue ruling son actions related to abusing dominant position or manipulating prices.

The Palestinian draft law is very much analogous with the third model, but it gave the competition commission the powers to investigate and impose fines not only on infringements of mergers and economic concentration, but also on abusing dominant position and manipulating prices. Arguably, setting up the commission, setting its tasks, and the appointment of its members and staff is adequate and in line with international standards set by the Model Law and OECD.

The study also highlighted a number of explanatory notes:

- ✧ It is highly preferable for the Competition Commission not to be a subsidiary body of the cabinet; rather it should be only attached to the Ministry of National Economy, with guarantees of financial and administrative independence.
- ✧ With regard to setting up the Board of Directors, we have noticed that some national systems give some other authorities the right to take part in the appointment of members of the Competition Commission. However, it is advisable to exclude the judiciary system in favor of a legal expert from the academia in order to avoid conflicts of interest in the future since the judiciary system is the body that is relegated to decide appeals filed against the decisions of the Competition Commission. The law-makers did a good job when they specified the members' term of office.
- ✧ The draft law adequately identified the ways to terminate board membership, which ensures independence. It would, however, be more expedient if the draft law explicitly deterred the termination of the membership of the board of directors prior to the end of the term of office except for the reasons stated in the law.

On the other hand, while the proposed sanctions are adequate, two main observations are still of concern:

- ✧ The draft law does not explicitly name the body tasked with investigating anti- competition actions.
- ✧ Entrusting the Board of Directors with the power to impose sanctions is incommensurate with its role as a developer of policies, standards

and regulations. Universally, as far as imposing sanctions is concerned, there are two options to choose from. First, the task of imposing sanctions is often incumbent on the executive council which nominates a judicial body (of two members: one jurist and one economist). This body proposes sanctions and submits them to the Board of Directors for approval. Second, concerned authorities send the files against companies to a competent chamber within the regular judiciary to decide on cases related to the violation of competition regulations (e.g. the competition chamber in Jordan). In this case, the draft law has to set the litigation period and regards breaches of competition as urgent matters.