

Morocco



Hajji & Associés - Avocats

Amin Hajji, JD

Relevant authorities and legislation

1 Who is/are the relevant merger authority(ies)?

The competition council ("Conseil de la Concurrence") is the relevant administrative authority which has simple consultative prerogatives towards, among others, the parliament, the government, and the courts.

2 What is the merger legislation?

Merger legislation is included in the new Moroccan competition law dated 5 June 2000 (named "Dahir n° 1-00-225 portant promulgation de la loi n° 06-99 sur la liberté des prix et de la concurrence"). An implementation decree of the aforementioned law has been published in the official gazette (« Bulletin Officiel ») on 17 September 2001 under n° 2-00-854. It should be noted that the "merger" concept (or "fusion" in the French language) is not explicitly referred to in the aforementioned law but beyond dispute, it may be construed in the so called provisions and especially articles 10 to 13 of the law n° 06-99 which refer to economic merger operations ("Des Opérations de Concentration Economique").

3 Is there any other relevant legislation for foreign mergers?

No specific legislation is provided for foreign mergers.

4 Is there any other relevant legislation for mergers in particular sectors?

The finance sector, including banking, securities market and insurance, in which the related operators are liable to governmental licences is subject to restrictive regulation regarding among others merger. More specifically, articles 24 and 48 of the Moroccan bank law dated 6 July 1993 provide (i) for the mandatory disclosure of any control over a bank or similar financial institution with the application for a new licence and (ii) that any direct or indirect participation equal to or above 5% of the capital share of said bank or similar financial institution is to be disclosed to the Moroccan central bank. Also, article 55 of the Moroccan securities market of 21 July 1993 provides for the mandatory disclosure of any direct or indirect participation equal to or above 5% of the capital share to the broking firm. Finally, article 172 of the new Moroccan insurance law dated 3 October 2003 specifies that any majority changing transfer of more than 10 per

cent of the shares or any direct or indirect takeover of 30 per cent of the capital share of insurance companies must obtain preliminary authority approval. It should be noted that some other economic sectors as for example the pharmaceutical or the maritime ones are subject to similar restrictive regulations under which any change in shareholding must be notified to the concerned authorities.

Transactions caught by merger control legislation

5 Which transactions are caught – in particular, how is the concept of "control" defined?

Paragraph 2, Article 10 of the law n° 06-99 provides that: "any concentration project or any concentration which may have adverse effect on the competition, notably by the creation or the strengthening of a dominant position, have to be submitted by the Prime Minister under a notice to the Competition Council". Therefore, any convertible securities or other instruments which may create an entitlement to acquire an equity interest in the future are caught by merger control in Morocco. Moroccan legislation does not specify any categories of control or minority interest, the acquisition of which would constitute a merger.

6 Are joint ventures subject to merger control?

Moroccan competition law does not provide specifically for joint ventures' merger control.

7 What are the jurisdictional thresholds for application of merger control?

Moroccan competition law provides only for market share based threshold by which the combined market share of the participating merging parties in an overlap market in Morocco is at least 40% during the last completed fiscal year. The market corresponds indeed to the sales, purchases or other transactions on the national market of goods, products or services of similar nature or which are substitutable, or on a substantial part of the same market.

8 Does merger control apply in the absence of a substantive overlap?

Yes.

- 9 In what circumstances is it likely that transactions between parties outside your jurisdiction ("foreign to foreign" transactions) would be caught by your merger control legislation?**

Foreign to foreign transactions may not be caught by Moroccan merger legislation unless one or both of the merging businesses have a subsidiary, branch or assets and is/are making sales in Morocco. To our best knowledge, no foreign businesses have, as yet, been fined for failure to notify in our jurisdiction.

- 10 Please describe any mechanisms whereby the operation of the jurisdictional thresholds may be overridden by other provisions.**

No such mechanisms are available.

Notification and its impact on the transaction timetable

- 11 Where the jurisdictional thresholds are met, is notification compulsory?**

The notification is compulsory and the concerned companies are to inform the Prime Minister of such concentration. Please note that the competition Council is not the addressee of said notification as it is empowered with advisory capacity only.

- 12 Please describe any exceptions where, even though the jurisdictional thresholds are met, clearance is not required.**

No such exceptions are foreseen.

- 13 Where a merger technically requires notification and clearance, what are the risks of not filing?**

The fine would be between 2% to 5% of the, tax excluded, turnover made in Morocco during the latest fiscal year. Such fine may be applied to each of the defaulting companies intervening in the economic concentration.

- 14 Is it possible to carve out local completion of a merger to avoid delaying global completion?**

In our opinion, a carve-out is not possible per se. However, the Prime Minister, advised by the Competition Council, may accept such carve out considering the social and economic impact of the prospected concentration.

- 15 At what stage in the transaction timetable can the notification be filed?**

The transaction can be filed any time, subject to it not becoming binding.

- 16 What is the timeframe for scrutiny of the merger by the regulatory body? What are the main stages in the regulatory process?**

The Prime Minister's response is normally within two months, or at the most 6 months when referred to the Competition Council for advice. Such delays may be considered as deadlines. Should the Prime Minister keep silent during the two aforementioned months, the concentration project would be considered as tacitly accepted. No distinction is made between simple or complex cases.

- 17 Is there any prohibition on completing the transaction before clearance is received or any compulsory waiting period has ended?**

Generally, when a transaction is subject to Moroccan concentration control, it may not be completed before clearance has been received. Completing the concentration before clearance would constitute a criminal offence as provided in article 70 of the Moroccan competition law.

- 18 Where notification is required, is there a prescribed format?**

No prescribed form is foreseen. However, we recommend the documentation be remitted into Arabic or French languages exclusively with original or legalised forms only. Therefore, required documentation should be remitted including (i) a copy of the deed/agreement subject to notification together with a memorandum on the prospective consequences of the transaction, (ii) the list of the managers and the main shareholders of the companies party to the deed/agreement or which are subject to it, (iii) the latest 4 years financial summaries of the concerned companies and the market share evolution of each concerned company for the same aforementioned period, (iv) a note on the main concentration operations undertaken by the concerned companies during the last 4 fiscal years, and (v) the list of subsidiaries and if the case may be, the capital share amount and the list of the corporations which are economically linked to them regarding the concentration transaction.

- 19 Who is responsible for making the notification and are there any filing fees?**

No such details are provided by Moroccan competition law. We assume the most diligent person would make the notification and no filing fees are applicable to the best of our knowledge.

Substantive assessment of the merger and outcome of the process

- 20 What is the substantive test against which a merger will be assessed?**

There is no substantive test against which a merger will be assessed. The sole criterion is relating to the creation or the strengthening of a dominant position. It should be necessary to wait for the release of the first Competition Council annual report in order to have an idea about the mode of analysis and tests the latter will consider for its assessments.

- 21 What is the scope for the involvement of third parties (or complainants) in the regulatory scrutiny process?**

The sole third parties who can be involved in the regulatory scrutiny process are among others local administrative authorities, commercial, agricultural, handicraft, maritime and industrial chambers, trade unions, or consumer associations. These may be consulted by the Competition Council for any major issues relating to competition.

22 What information gathering powers does the regulator enjoy in relation to the scrutiny of a merger?

No such detailed procedure is provided in Moroccan competition law.

23 During the regulatory process, what provision is there for the protection of commercially sensitive information?

No specific protection of commercially sensitive information is mentioned in Moroccan competition law.

24 How does the regulatory process end?

Further to the Competition Council's advice and through a motivated decision, the Prime Minister may enjoin the concerned companies within a limited period of time, to either (i) reject the merger project, (ii) modify or complete the transaction or (iii) to take necessary steps to ensure or implement sufficient competition. However, the aforementioned decision will not enter into force until the concerned parties have been able to submit their comments to the report prepared by the Competition Council's rapporteur, subject to these observations being made within one month of their receipt of the report.

25 Where competition problems are identified, is it possible to negotiate "remedies" which are acceptable to the parties?

We assume the negotiation of remedies would be possible under the administrative decision procedure noted above in question 24.

26 At what stage in the process can the negotiation of remedies be commenced?

No such detailed procedure steps are foreseen under Moroccan competition law.

27 How are any negotiated remedies enforced?

Any negotiated remedies would be enforced with fines.

28 Will a clearance decision cover ancillary restrictions?

We assume merger clearance would include clearance for competition restrictions included in the merger documentation, unless the Competition Council considers in due course that it would be necessary to prosecute the parties involved in such anti competitive practices.

29 Can a decision on merger clearance be appealed?

Any of the Prime Minister's decision can be appealed before the administrative jurisdictions.

30 Is there a time limit for enforcement of merger control legislation?

The enforcement of merger control legislation is not subject to a time limitation.

Miscellaneous**31 To what extent do the regulatory authorities in your jurisdiction liaise with those in other jurisdictions?**

This information is not available to us in so far as we do have very little public information relating to the Competition Council's international co-operation activities.

32 Please identify the date as at which your answers are up to date.

The answers are up to date as at July 2004.



Amin Hajji, JD

Hajji & Associés – Avocats
28, Bd Moulay Youssef
Casablanca 20 000
Morocco

Tel: +212 22 48 74 74
Fax: +212 22 48 74 75
Email: a.hajji@ahlo.ma
URL: www.ahlo.ma

Amin Hajji is the founding member of Hajji & Associés law firm in 1996.

He specialises in international finance law and he is responsible for the merger/competition subjects. In April 2002 he presented a paper on the subject of "the effects of international economic concentration on the enforcement of the Moroccan competition laws". The text of this paper prepared into French language is available at Hajji & Associés web site www.ahlo.ma, at publications French pages under Seminars and conferences rubric. He is preparing for the end of 2004, a book on international investment law in Morocco which will include a chapter on the applicable competition law.



Hajji & Associés Law Firm has been developing for several years, its activities oriented towards international business.

To some extent, practice in Moroccan competition law has had a quiet beginning as the competition rules are relatively new. They only became operational when the Competition Council members had been nominated in January 2002. Since that date, the firm has been involved in some recent major worldwide M&A transactions having direct or indirect effects in Morocco. Hence, the Moroccan competition legal issues have been examined with pre-closing filing before the competition authority. The weakness of such specific activities is due first to the persistent traditional family industrial economy and second to the effects of the smuggling and unofficial economy which does not allow having accurate information about the national market for products and services.

Hopefully, Morocco entered into large FTA with the European Union and the USA with complete adherence to WTO trade agreements. Therefore the Moroccan economy is progressively shifting to modern structure mainly through the industrial fabric. This evolution would be a prerequisite for any prospected valuable action of the competition authority and the firm is ready to develop an expertise and to be a leading counsel for coming national and international transactions having competition cases.

Apart from the above, the legal counsel activity has been elaborated in some areas of expertise as international finance including aeronautic financing, Euro-loans, Euro-bonds issuing, direct and indirect investments in Morocco, distribution contracts, joint ventures, telecommunication and intellectual property law.

In general, the Firm has a strategic objective to get more involved as legal adviser in major investment transactions in Morocco, notably under the privatisation/concession program of public sector institutions. It has thus the ambition to undertake innovative legal engineering services in transactions relating to project financing, venture capital, telecommunication and e-business as well.