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## **Global Forum on Competition**

### **ROUNDTABLE ON CROSS-BORDER MERGER CONTROL: CHALLENGES FOR DEVELOPING AND EMERGING ECONOMIES**

#### **Contribution from Tunisia**

-- Session I --

*This contribution is submitted by Tunisia under session I of the Global Forum on Competition that will be held on 17-18 February 2011.*

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## CROSS-BORDER MERGER CONTROL: CHALLENGES FOR DEVELOPING AND EMERGING ECONOMIES

-- Tunisia\* --

1. In an open economy that is adopting market mechanisms, competition becomes a fundamental principle essential to a successful transition. This economic choice is aimed at achieving objectives such as efficiency, competitiveness, control of inflation and consumer welfare. However, a free-market regime can function properly only if it is accompanied by the tools and means for establishing the appropriate operating rules and safeguards.
2. For this reason, all countries that have opted for a market economy must adopt rules governing competition either directly or indirectly, and the majority of developed and developing countries have already taken steps to do so.
3. Tunisia has been no exception to this process. As early as 1991, it enacted a law on competition and prices that enshrined free pricing and the principle of competition as the rules of the market; like all such legislation, it laid down provisions aimed at ensuring the proper functioning of the market, and in particular at defining the obligations and rights of parties.
4. It should be borne in mind that experience has shown the limits of the theory of pure and perfect competition, which sooner or later leads to a monopoly situation and to abuses. Modern regulation provides for preventative measures aimed at maintaining competition and averting any slippage towards a situation that might undermine the principle of competition.
5. We know that, ultimately, businesses do not like competition, which continuously subjects them to pressures to compete and innovate.
6. Businesses often seek to escape competition in two possible ways, *i.e.* either by forming cartels or by merging and restructuring.
7. Tunisian lawmakers, aware of how businesses can be expected to behave, have, as in any modern regulatory system, passed laws that prohibit anti-competitive agreements but that also control concentrations and mergers, *i.e.* restructuring operations.
8. Although the Tunisian legislation provided for the prohibition of anti-competitive practices when it was enacted in 1991, there has been considerable debate on whether it is advisable to control concentration in an economy made up of small companies for which concentration can be a means of countering foreign competition.

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\* Contribution submitted by Mr. Khalifa Tounakti, Director-General for Competition and Economic Surveys, Ministry of Trade and Crafts, Tunisia.

9. The fact of the matter is that an economy opening up to the outside world and having an export-based development strategy must provide the means of competition necessary to keep quality and prices under control.

10. Concentration is but one way to achieve economies of scale and gain the same advantages as competing businesses.

11. Controlling concentration in an economy still in the liberalisation stage sends a wrong message to businesses, which do not even fully understand the concept and scope of a control mechanism, which they often perceive as tantamount to a ban.

12. For this reason, it was necessary to wait until 1995 before introducing a concentration control regime. This regime consists of submitting concentration and merger operations to the Ministry of Trade for authorisation after obtaining the opinion of the Competition Council.

13. In the interest of efficiency and simplification, this control is limited to those concentrations that may enable a company or group of companies to exert a decisive influence on one or more other companies, and thus on the market. This control is undertaken only if the concentration meets one of the following two conditions:

- the market share of the companies involved in the agreement exceeds 30% of the domestic market;
- the companies' combined turnover exceeds 20 million dinars (US \$15 million).

14. The companies concerned must notify the Ministry of Trade of the planned concentration, following a procedure defined by law. The file submitted consists of numerous documents, including the draft agreement, the companies' accounts (balance sheets), the list of shareholders, subsidiaries and the economic assessment of the aims of the operation.

15. Authorisation is granted after obtaining the opinion of the Competition Council, on the basis of an in-depth examination of the concentration by the services of the Ministry of the Economy (DGCEE) assessing its impact on competition and the structure of the market. A number of criteria are used to evaluate the merger or concentration operation:

- expected overall impact on competition in the light of current market conditions;
- expected impact for consumers, in particular on product prices;
- foreseeable impact on the domestic economy with respect to exports, job creation, investment and innovation and technological progress;
- economic policy aims and strategic sectoral choices.

16. Although cross-border mergers are of concern to developed countries, they are of even greater concern to developing and emerging countries.

17. The developed countries where multinationals originate, such as the European Union, the United States, Japan, etc., have legal systems and means of control over the merger operations carried out by companies established within their borders. These countries' competition authorities control mergers in the light of their impact on the domestic market.

18. However, the decision to authorise or deny the merger takes account solely of considerations specific to those countries, but never of foreign interests, except when there is co-ordination and co-operation in this regard between the competition authorities of the major powers. To our knowledge, such co-ordination is virtually non-existent in the developing countries.

19. For example, the trend towards concentrations and mergers that has affected a number of sectors, such as air transport (four main air carrier alliances: Star Alliance, Qualiflyer, Oneworld and Skyteam), finance (BNP-Paribas, etc.), telecommunications (France Telecom-Deutsche Telecom – Sprint, etc.), oil (Exxon-Mobil, Total-Petrofina-Elf Aquitaine), automobiles (General Motors, Ford-Mazda, Daimler-Chrysler, Renault-Nissan, etc.) and pharmaceuticals (Rhone Poulenc-Hoechst, Glaxo Wellcome-SmithKline Beecham, etc.), has inevitably had a negative impact on developing countries since the companies involved in the mergers operate directly or indirectly in these countries through their subsidiaries.

20. Developing countries are often neither notified nor consulted, even when their interests are at stake, for example in the fields of pharmaceuticals, information technology, telecommunications and energy.

21. Unfortunately, developing countries suffer the consequences of this situation with scant means of action for want of a genuine will to engage in co-ordination. The Tunisian experience with regard to cross-border merger control is very limited, and is based on a pragmatic approach to dealing with the cases that have been submitted to the competition authorities.

22. Merger authorisations often involve transnational companies that have subsidiaries in Tunisia. In such cases, the competition authority examines the application on the basis of criteria set by law and gives its opinion in the light of the domestic market impact and the national interest. However, for merger operations that take place abroad and have an obvious impact on the Tunisian market, there is no means of control since there is no co-ordination with the corresponding authorities of the partner countries.

23. Domestic legislation has shown its limits in preventing the negative cross-border effects of mergers. Steps must be taken to improve co-operation between competition authorities and do a better job of co-ordinating action to counter the abuses of multinational enterprises.

24. Convinced of the need for this approach, Tunisia has sought to forge close ties with specialised bodies such as the OECD, UNCTAD, WTO and ICN to learn from their experience and to apply their recommendations in handling merger control cases.

25. Tunisia has also signed a series of bilateral co-operation agreements in the field of competition with four countries of the Mediterranean region – Morocco, Egypt, Jordan and Syria – and negotiations are under way with the European Union and Turkey.

26. Through these agreements, Tunisia hopes to lay the groundwork for close and fruitful co-operation in the field of competition. While the agreements must begin with the exchange of experience and information, they must ultimately lead to more effective co-ordination of the control of anti-competitive practices and of the impact of mergers that affect both parties.

27. Co-ordination among authorities should be carried out within a regional framework. Tunisia has already made an effort in this direction by helping to prepare common rules of competition for the members of the League of Arab States. Our country is strongly in favour of any co-operation or co-ordination initiative in the field of competition policy within regional groupings such as Arab Maghreb Union, the Agadir Agreement or the Euromed countries, and it hopes that one day a multilateral agreement will be reached.