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

Contribution from the Competition Council of Morocco

-- Session I --

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CROSS-BORDER MERGER CONTROL BY DEVELOPING COUNTRIES, OR THE VITAL LINK BETWEEN GLOBALISED LAW AND ECONOMIC UPGRADING

-- Competition Council of Morocco[1]--

1. The globalisation of trade has triggered an increase in the number of cross-border mergers and agreements. This has resulted in heightened vigilance and a strengthening of national controls. The problems involved are even more delicate for developing countries. Moreover, the desire to preserve the competitiveness of national economic infrastructure and protect against the effects of cross-border concentration has been encouraged by the advice dispensed by international economic and financial institutions. For some, these processes have even been viewed as an opportunity to collect financial flows.

2. Nevertheless, it must be pointed out that the observation of such controls has remained relatively limited insofar as controls at a time when the economy is globalising are based fundamentally on national laws, with their own particularities, and at best on bilateral or international co-operation. The institution of globalised competition law thus remains a distant prospect.

3. The issues involved are even thornier for developing countries, which face not only objective difficulties in combating anti-competitive practices and merger control, but also the overriding need to upgrade their economies so as to cope with domestic and international competitive processes.

4. Let us therefore attempt to look in turn at the difficulties of control systems based on national law before turning to the vital implementation of globalised competition law and the necessity of upgrading the economies involved.

1. The difficulties of control systems based on national law

5. Let it be stipulated from the outset that a majority of countries currently have legislation and institutions for regulating competition and controlling concentration. The task is already vast domestically; it gets seriously more complicated when the focus becomes international, especially with regard to cross-border mergers and acquisitions. The problems are obviously thornier for developing countries or transitional economies.

6. The primary difficulty stems from the existence of potential conflicts between national codes, especially as a result of the legal principle of effectiveness, which means that national law shall apply as soon as an operation produces an effect on the trade of the country in question.

7. Such a situation generates multiple solutions for a given case, and these may be difficult to reconcile. Have there not been examples of abuse of dominant position cases being handled differently under the laws of different countries?

[1] Contribution submitted by Mr. Abdelali Benamour, Chair of the Competition Council of Morocco.

8. Of course, it has been attempted at times to mitigate the effects of unilateral solutions by having national decisions factor in the interests of businesses from other countries, just as bilateral agreements have became more numerous, but such a situation remains detrimental to certain countries, and particularly developing ones. Not only do these countries find themselves in the position of having to upgrade their entire economies in order to cope properly with the problems of domestic and international competition, but in addition they must deal with extremely complex cases of cross-border concentration. For example, in the course of this year, the Moroccan Competition Council had to address a merger case involving the Moroccan subsidiaries of Kraft Foods Inc. and Cadbury PLC. Obviously, we examined this case as we would have done for any Moroccan companies. It should be specified that we would have liked to have information about the merger on an international level, and about the businesses concerned, in order to get a better handle on the problem; it proved highly complicated to grasp this process fully.

9. In short, tackling cross-border concentration issues with domestic law proves highly delicate, especially for developing countries or transitional economies. As a result, thought has been given to the difficult process of instituting globalised competition law.

2. Indispensable consideration of globalised competition law

10. Given the inadequacies of unilateral solutions and bilateral agreements, it became obvious that a globalised economy demanded consideration of cross-border competition law. Recommendations along these lines had been made by the OECD back in 1967 and by UNCTAD, as well as in lengthy negotiations culminating in the establishment of the WTO in 1995 and continuing until the September 2003 Cancun conference and a long time thereafter.

11. It must be admitted that all efforts to bring about globalised competition law have failed. In 1995, Professor Wolfgang Fikentscher of the University of Munich presented a sort of world trade code known as the “Munich Code” consolidating the commercial and competition-related dimensions of trade with the institution of an anti-trust authority within the WTO. The plan was not adopted. Developed countries fear binding rules and the surrender of their powers in this area, whereas developing countries remain attached to the particularities of economic transitions.

12. As it happens, it would seem that the biggest losers here are the latter, especially with regard to the effects of cartels and cross-border mergers and acquisitions, the complexities of which they have a hard time grasping. For these countries, the optimum stance might be to call for implementation of globalised competition law, which would of course incorporate a number of economic and social exceptions during the transitional phase. Such law would highlight the interactions of free trade and competition while taking care not to let State-imposed trade barriers be replaced by private barriers erected by the large entities emerging from cartels or mergers.

13. Worldwide, developing countries could demand that a “development” approach could be used in symbiosis with globalised competition law. Apart from the exceptions cited earlier, this would assume that the countries in question carry out a process of upgrading their economies, with a certain degree of international support.

3. The need to upgrade developing economies within a globalised framework

14. Looking at the economic history of nations, three important steps can be highlighted.

15. The first, and perhaps longest, step was that of a world dominated by the idea of modernity grounded in the reason of the Age of Enlightenment, the essential orientations of which being: the scientific revolution; the secular and democratic nation-state; liberalism or the market economy; and lastly, a takeover by a regulating State of control over market excesses as well as of the solidarity that was

traditionally the province of regions, bloodlines or religious communities. The moral of the story is that when the market expands from fragmented mediaeval spheres to those of the nation-state, it is that nation-state which must cope with the solidarity and excesses that a free market can generate.

16. The second step is that of regional groupings such as the one formed by the European Union. This is a new step in the organisation and expansion of areas of citizenship, including that of the market. Consequently, the sphere of competition has widened, entailing a joint effort to raise the level of the most highly disadvantaged regions via an institutionalised action to allow everyone to cope with the workings of a free market and competition. Such an effort has been observed repeatedly, in particular for the benefit of Spain, Portugal, Greece and Italy, and in other circumstances.

17. The third step, which in fact began practically at the same time as the second, but which expanded considerably thereafter, was globalisation. The market widened even more, but in contrast to the two other situations in which the enlargement process was accompanied by regulation and organised solidarity to bolster the shakiest structures, to date nothing has been provided on a supranational level to assist developing countries. All attempts along these lines seem to have failed.

18. In conclusion, it would therefore seem necessary for transitional economies to position themselves in favour of some sort of Munich Code reworked so that the resultant supranational institution could monitor enforcement of free trade and free competition but also institute transitional exceptions and lend assistance in upgrading their economies.

ANNEX [*]

1. The unshackling of trade from all sorts of State-imposed barriers must be extended and guaranteed by control over operators so that these operators do not artificially reconstitute barriers to market entry: this is what is commonly known as concentration (or merger) control.

2. It is acknowledged that some instances of concentration may in fact benefit the economy by allowing greater output and giving consumers access to lower-priced and higher-quality products. Other instances, however, may reduce competition on a given market by creating or strengthening a dominant operator, prompting that operator to charge higher prices for less choice or less innovation.

3. Moroccan Act 06-99 on pricing freedom and competition was instituted to counter such situations. It requires that certain economic concentration operations be notified to the competition authorities. It stipulates explicitly the criteria for notifying proposed mergers, the evaluation test, the notification procedure and the penalties to be imposed if control rules are not complied with.

4. Nevertheless, it should be pointed out that concentration control under current domestic law is not very highly developed in Morocco; the Competition Council has examined only one case since its re-activation in 2009.

1. Overview of the Moroccan concentration control regime

1.1 Definition of concentration

5. Under Article 11 of Act 06-99, concentration is construed as any act, irrespective of its form, involving:

- Transfer of ownership or the right to use all or part of a firm's assets, rights and obligations;
- Any act, the purpose or effect of which is to enable a firm or group of firms to exert a decisive influence, directly or indirectly, over one or more other firms.

6. Even so, Moroccan law covers not only mergers and acquisitions as a means of concentration, but takeovers as well.

7. In this regard, a takeover is considered a concentration operation if it confirms a decisive influence over the activity of the firm to be acquired, as is the case when the acquiring party can sway strategic decisions or influence the composition of the firm's executive bodies.

[*] Contribution submitted by Mr. Khalid El Bouayachi, Rapporteur-General and Director of Investigations of the Competition Council of Morocco.

1.2 Notification threshold: market share of over 40%

8. Article 10, paragraph 2 of Act 06-99 makes any proposed concentration, as defined above, subject to administrative control by the competition authorities[1]. This control model intervenes if the aggregate market share of the firms taking part in the act or constituting the purpose thereof, during the previous calendar year, accounted for more than 40% of the sales, purchases or other transactions on a national market for goods, products and/or services of the same type or substitutable for a substantial portion thereof. Moreover, concentration involves not only the firms engaged in the operation, but also all firms having economic ties to a firm involved in or concerned by the operation[2].

9. The firms involved must indicate, in respect of any concentration operations, any domestic market shares if the aggregate direct market shares for the firms concerned amount to 40% within Morocco or a substantial part thereof, specifying the basis for calculating or estimating those market shares. Lastly, it should be emphasised that under Article 12 of the aforementioned Act, operations subject to concentration control must be notified to the competition authorities before they are carried out.

2. Methodology used by the Moroccan competition authority in respect of concentration control

10. The essential purpose of controlling a concentration operation is to ensure that the operation does not impede competition by creating or strengthening a dominant position. To address this concern, concentration control takes place over three successive and interrelated steps: what these involve is ascertaining the relevant market; then computing market shares; and, lastly, assessing the competition-related effects of that concentration on the market in question.

2.1 Defining the relevant market

11. Defining the market is an essential factor in enforcing the rules of competition law regarding concentration. Clearly the definition plays a key role insofar as, under Article 10 of Act 06-99, control over a concentration operation shall be exercised only if the market shares involved exceed the 40% threshold.

12. Therefore, the objective of defining the reference market is to allow the competition authority to delineate the boundaries within which competitive pressures come to bear and to assess the economic power of the firms involved vis-à-vis their counterparts and consumers. Consequently, it is necessary to define the relevant market both in terms of products and geographically[3] in order to ascertain if the firm is subject to sufficient effective competition.

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1 Under the institutional structure currently established by Moroccan law, the competition authorities are constituted by the Prime Minister or the Prime Minister's appointed delegate (in this case the Minister for Economic and General Affairs, who has decision-making power in concentration control), and the Competition Council, whose powers in this area are solely advisory.

2 The following are considered to be firms with economic ties to a firm concerned by a concentration operation and deemed to be a single enterprise: (i) dependent and/or dominant enterprises, as well as enterprises affiliated to a group of companies; (ii) firms controlled by the firm in question alone or together with other firms, and conversely, firms in a position to exert a decisive influence over the firm in question.

3 The relevant product market comprises all products and/or services considered to be interchangeable or substitutable by virtue of their characteristics, price and intended use. For its part, the relevant geographic market comprises the areas in which the firms involved are engaged in supply and demand of the products and/or services, in which competitive conditions are sufficiently uniform.

2.2 Computing market shares

13. To compute market shares, the method adopted by the competition authority can be based on volume or value: on merchandise markets, for example, where price variations are limited, it makes no difference whether market shares are computed on the basis of prices or volumes. However, if the products in question are differentiated and are branded, for example, market shares based on value might diverge considerably from market shares based on volume. Market shares computed on the basis of value are generally considered more accurate.

2.3 Assessing the competitive effects of a concentration

14. As soon as it defines the relevant market and computes the market share resulting from the concentration operation, and if the legally stipulated threshold is attained or exceeded, the competition authority must conduct a competition analysis, in particular to ascertain whether the concentration is such as to be likely to create or strengthen a dominant position[4] for the firms involved.

15. The analysis must factor in the market positions of the firms involved and their economic and financial power, options open to suppliers and users, their access to sources of supply or sales outlets, the existence of *de jure* or *de facto* barriers to entry, supply and demand trends for the products and services involved, consumers' interests and technical and economic progress.

2.4 Timeframe and procedures for conducting concentration controls

16. Pursuant to Article 12 of Act 06-99, the Prime Minister and his delegated Minister for Economic and General Affairs, along with the Competition Council, have a total of six months in which to authorise a concentration or not. This timeframe is divided into the following phases:

- Phase I (maximum: two months after receipt of complete notification)

  After receiving complete notification of the concentration operation, the Prime Minister forwards the dossier to his delegated Minister for Economic and General Affairs[5] for study and opinion. The Directorate for Competition and Prices, which is a part of that ministerial department, has two months in which to ascertain whether the concentration is likely to impede competition, and in particular whether it is likely to create or strengthen a dominant market position. The Directorate prepares a dossier in which its conclusions will help the Prime Minister take a reasoned decision to:

  – Authorise the concentration unconditionally;

  – Authorise the concentration subject to conditions; or,

  – Request the opinion of the Competition Council.

  A two-month silence on the Prime Minister's part is tantamount to tacit acceptance of the concentration proposal and of any conditions that may have been a part of it.

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4 A dominant position is a position of economic strength allowing the firm in that position to thwart the preservation of effective competition in the market in question by wielding the power to behave independently of its competitors and consumers.

5 This ministerial department has been given express delegation of the Prime Minister's powers to control concentration operations.

- Phase II (maximum: six months after receipt of complete notification, including Phase I)

  In the event a proposed concentration has been deemed likely to impede competition by creating or strengthening a dominant position, the Prime Minister submits the matter to the Competition Council for an opinion. In such cases, the deadline is extended to six months from the date on which complete notification is received by the Prime Minister.

  The Council then proceeds to review the concentration proposal, assessing its competitive effects. Indubitably, it is required to express its opinion on whether the proposal's contribution to the country's economic progress would be sufficiently beneficial to offset any detrimental effects on competition.

  In making its assessment, the Council must also factor in the competitiveness of the firm in question in relation to international competition.

  After this review, the Council must issue a reasoned opinion within a reasonable amount of time not exceeding the deadline imposed by law. It is only after having received the opinion of the Competition Council that the Prime Minister may, by a reasoned decision:

  – Authorise the concentration;

  – Prohibit the concentration on the grounds that it would create or strengthen a dominant market position; or,

  – Request changes or additions to the proposed operation, or take any measures needed to ensure or establish adequate competition. Authorisation of the concentration operation may be made conditional on compliance with directives that could result in a tangible contribution to the country's economic progress which could offset the detrimental effects on competition.

2.5 The role of the courts in concentration control

17. Each of the Prime Minister's decisions in the realm of concentration control may be appealed to the competent administrative jurisdiction. The main aspect on which the courts must rule is whether the Prime Minister's decision – whether to prohibit or allow the concentration, with or without conditions – is justified, and thus whether the concentration can create or strengthen a dominant position.

18. Indeed, decisions prohibiting concentrations that directly affect corporate interests are not the only ones open to challenge before an administrative court; decisions authorising such operations are contested as well. In such cases, competitors and other third parties whose legitimate interests are adversely affected by the decisions may file complaints with the competent court.

2.6 Penalty regime applicable in the event of non-compliance with concentration control rules

19. The Prime Minister may, by a reasoned decision and on recommendation of the Competition Council, issue an injunction to the parties involved in the concentration, imposing protective measures to revert to the previous state of affairs if he had been served no notice of the concentration. In addition, and in the event of failure to serve compulsory notification, or of non-compliance with decisions in respect of notified concentrations, the Prime Minister may, after consulting with the Competition Council, refer to the Crown Prosecutor of the competent court of first instance to initiate judicial proceedings against violators, pursuant to Article 70 of Act 06-99, which provides, *inter alia*, for fines of up to 2 to 5% of the turnover of the firms in question.

3. Analysis of the Moroccan Competition Council's experience of concentration control

20. Although the Moroccan Competition Council's experience of concentration control is only recent, it did have an opportunity since its re-activation in 2009 to review a proposed cross-border concentration operation in 2010. It would therefore be interesting to look briefly at that project and draw initial conclusions from the experience.

3.1 Presentation of the cross-border concentration case

21. In February 2010, and pursuant to regulations in force in Morocco, the Prime Minister petitioned the Competition Council for its opinion regarding a concentration proposal that had been notified to him by the multinational Kraft Foods Inc., which was intending to launch a takeover bid for all shares of another multinational, Cadbury PLC.

22. The purpose of the operation, which was in fact a takeover and not a merger, had international ramifications insofar as it would enable Kraft Foods Inc. to take on new lines of business (confectionery, chocolates, chewing gum, etc.) that were geographically diversified on a global scale. The new lines of business were a close match to its basic activities in the food industry (sale of prepared beverages and food products), the aim being to harness synergies, especially in marketing and distribution. The new activities had been developed by Cadbury PLC.

23. At the national level, the operation involved the two multinationals' two subsidiaries present in Morocco and incorporated under Moroccan law, along with a joint venture that one of the subsidiaries had set up with a Moroccan group.

24. Its review of the case enabled the Council to formulate and apply the methodology explained in Section 2 above.

25. The opinion issued by the Council and followed by the Prime Minister held that the planned operation would not lead to the strengthening of a dominant position in the markets concerned by the operation[6] and that the operation could have a beneficial effect on the competitive environment of national firms, enabling them to raise their competitiveness to international standards.

3.2 Main conclusions from this experience

- In the absence of any agreement with competition authorities having already had a chance to speak out on this concentration (the European Commission, FTC, UK competition authorities, etc.), the Competition Council had to formulate its judgement on the basis of its own analyses, using input provided from the party in question or compiled by its own efforts. There was no contact with these authorities.

- The Competition Council, having recently become an official participant in the OECD Global Forum on Competition and a member of the International Competition Network (ICN), has not yet sufficiently developed its contacts with competition authorities in the realm of bilateral or multilateral co-operation on issues involving concentration.

- Both of the multinationals concerned have already received authorisations from the European Commission and the Romanian competition authorities, subject to a commitment to exclude the

[6] After segmentation, the markets concerned were confectionery and biscuits.

chocolate market from the operation. This commitment could not be imposed in Morocco, given the insignificance of the Moroccan market for this product.

- Enforcement of concentration control is contingent on a market share threshold that is calculated over Moroccan national territory as soon as that territory is affected, irrespective of the nationality of the firms or the legal location of the concentration.

- In its assessment, the Competition Council took only the operation's domestic market effects into consideration. The test by which it decided whether the operation could or could not be authorised was examined solely with relation to that market, it being understood that the geographical market of the multinationals concerned was worldwide. In this case, it was difficult to identify competition problems, and in particular to establish the market power or domination of the new entity resulting from the operation.

- Concentration control is an unusual and delicate activity insofar as it entails an *ex ante* judgement about the future, as opposed to the control of illegal agreements, which relies on *ex post* assessments.

- The evaluation method used in this case incorporated both an assessment of competition and an assessment of the operation's economic consequences.