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Global Forum on Competition

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

Contribution from the Moroccan Ministry of Economic and General Affairs

-- Session I --

This contribution is submitted by Mr. El Hassane Bousselmame, Director of Competition and Prices, Moroccan Ministry of Economic and General Affairs under Session I of the Global Forum on Competition, to be held on 17 and 18 February 2011.

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

-- Moroccan Ministry of Economic and General Affairs* --

I. General description of the concentration control system in our country

1. Article 11 of Moroccan Act 06-99 on pricing freedom and competition states that the following operations are considered to be concentrations:

- Transfer of ownership or the right to use all or part of a firm's assets, rights and obligation; or
- 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.

2. An operation is subject to concentration controls of market share captured by the firms taking part in the act, or constituting the purpose thereof, during the previous calendar year accounts for more than 40% pursuant to the provisions of Article 10, paragraph 2, of the Act: *"firms which are parties to the act, or constitute the purpose thereof, or firms which have economic ties to such firms and which have together accounted for, in the course of the previous calendar year, over 40% of the sales, purchases or other transactions on a national market for goods, products or services of the same type of substitutable for a substantial portion thereof"*.

3. Exceeding this 40% threshold on aggregate market share makes it *de jure* compulsory to notify the Prime Minister of any planned concentration as laid down in Article 12 of the Act.

4. The Ministry of Economic and General Affairs, in particular the Directorate of Competition and Pricing, examines the dossier and drafts a report for the Prime Minister. Within a period of two months, the Prime Minister may, under a reasoned decision:

- Authorise the concentration;
- Authorise the concentration subject to conditions;
- Request the opinion of the Competition Council.

5. 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.

* Contribution submitted by Mr. El Hassane Bousselmame, Director of Competition and Pricing, Ministry of Economic and General Affairs (Morocco).

6. If the concentration is such as to be likely to impede completion, notably by creating or strengthening a dominant position, it is submitted by the Prime Minister to the Competition Council for an opinion. The latter body prepares its opinion and submits it to the Prime Minister.

7. The maximum deadline for examining the concentration operation is 6 months following receipt of full notification.

8. After receiving the opinion of the Competition Council, the Prime Minister may by a reasoned decision:

- Authorise a 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.

9. Paragraph 5 of Article 12 of the Act expressly states that “during the above-mentioned period, the firms concerned may not proceed with the planned operation”.

10. The Act is currently being reformed once again. Amendments will be made to several provisions, particularly those relating to economic concentration.

11. The reason for this reform is that the requirement that the firms party notify the concentration operation once market share exceeds 40% poses a problem in terms of the assessment of the percentage market share of the firms concerned both for the firms and for the competition authority, which tends to take turnover in absolute terms as the threshold. Other amendments are to be made to the procedure regarding economic concentration operations.

II. Cross-border concentrations

12. The first article of Act 06-99 clearly states that the concentration control system requires notification of a planned merger should the latter have an impact on the domestic market. The Act provides that *“the present Act shall apply to all physical and legal persons, regardless of whether or not they have headquarters or establishments in Morocco, in all cases where their operations or behaviour have an impact on market competition or a substantial portion thereof”*.

13. This article implicitly addresses legal persons with headquarters outside Morocco, hence the eminently **extraterritorial** nature of Moroccan competition law.

14. It is national legislation that is international in scope in that notification must be given of all mergers at the international level which have an impact on the domestic market.

15. An example worth mentioning here is that of Kraft Foods Inc., incorporated in the United States, which through its representative notified our department of a concentration operation following its planned takeover of the British company Cadbury plc.

16. After analysing this operation, we decided that it did not pose any particular problems over competition in Morocco.

17. The main weakness of the extraterritorial scope of our Act is clearly that of its effectiveness in that an Act must be applied in its entirety, particularly in terms of its penalties. The extraterritorial penalties provided for in article 70 of the Act state that *“legal persons may be held criminally responsible where the circumstances so justify [...] the penalty incurred consists in a fine amounting for a firm to 2% to 5% of its pre-tax turnover in Morocco in the course of the previous financial year.”*

18. It is scarcely conceivable that such penalties could be imposed on major international groups established outside Morocco, which generally wield economic power which is wholly disproportionate to that of Morocco.

19. Consequently, it would seem that the penalties laid down in article 70 can only be imposed on locally established entities with ties to the networks of the multinational firms which initiated the concentration operations in question.

20. Moreover, it should be noted that multinational firms pay close attention to the rules governing concentrations and are careful to notify any planned concentration even in the smallest countries, not only to be legally safe but also out of a concern to safeguard their firm's image. However, another problem arises here with regard to the ability of the will of such countries to prohibit or to impose conditions of these firms in view of the risk of seeing such investments being withdrawn from the country, at a time when the priority for these developing economies is to attract foreign investment.

21. With regard to the bilateral agreements we have signed, it is worth mentioning two bilateral agreements with Tunisia and Jordan respectively on the exchange of information on anti-competitive practices and economic concentrations. Another bilateral agreement is in the process of being signed with Egypt.

22. It should be recalled that since the entry into force of the competition Act, Morocco has authorised about a dozen concentration operations.