

ANTITRUST STALEMATE IN MOROCCO

For some time, parties making merger control filings in Morocco have suffered from a stalemate in the application of its merger control regime. There are currently two main issues: an overly expansive jurisdictional test and great uncertainty over the process for obtaining final clearance.

1. Jurisdiction: casting a wide net

Prior to December 2014 deals involving a concentration were subject to clearance from the Moroccan antitrust authority (“*Conseil de la Concurrence*”) when the entities involved had a market share of more than 40% in Morocco.

Since December 2014, however, deals involving a concentration have required prior clearance from the *Conseil de la Concurrence* when one of the three following conditions is met:

- (i) The worldwide turnover of all the persons or entities involved in the deal exceeds 750 million Moroccan Dirhams.¹
- (ii) The turnover generated in Morocco by all the persons or entities involved in the deal exceeds 250 million Moroccan Dirhams.
- (iii) The entities involved and their related entities have performed, in the year preceding the transaction, more than 40% of the sales, purchases or other transactions on the local market of goods, products or services of the same nature or on a substantial part of such market.

If only one of these conditions is met the transaction is subject to prior clearance from anti-trust authorities.

As a result any acquisition made in Morocco by a group of companies whose size exceeds one of the ceilings in (i) and (ii) is subject to prior clearance – no matter how small the target. For example, the acquisition of a single shop by an international chain whose size exceeds one of these ceilings would need prior clearance. Clearly this makes little sense since such acquisitions do not have any impact on free competition in Morocco. Indeed,, antitrust officials have informally admitted that the law was wrongly worded and should have instead provided that all three conditions must have been met for antitrust clearance to be required, rather than just one of them. Yet whilst the legislation stands, the wide net cast by the jurisdictional test in Morocco remains in place.

Therefore if you are contemplating a transaction in Morocco – no matter how small – it is important to consider whether it could trigger a notification requirement in the

¹ The current exchange rate is approximately 1 Euro=10.80 Dirhams.

jurisdiction. For the reasons described below, however, if your transaction is caught by the Moroccan regime you may then face challenges in obtaining clearance.

2. Clearance and timing

A stalemate within the government has meant that the members of the *Conseil de la Concurrence* (who together control executive decision making within the authority) have not been reappointed since 2013. As a result the *Conseil de la Concurrence* has not been able to officially clear transactions.

In practice the staff of the *Conseil de la Concurrence* tend to make additional information requests in order to suspend the time periods – with the effect that no clearance is deemed granted. The only way to circumvent this is to file another clearance request with the office of the Prime Minister of Morocco.

As a result, parties to a transaction cannot rely on the *Conseil de la Concurrence* to clear a transaction, and need to ensure that lines are opened to the Prime Minister's office at the same time as filing. Parties should also build in some element of contingency planning for their completion timeline as, although the Prime Minister's office does usually respond to clearance requests, it has no legal obligation nor any set timeframe in which to do so.

Where next for Moroccan merger control?

The paralysis of the “*Conseil de la Concurrence*” is likely to last at least until the next general election, which has been called for October 7th, 2016. It stands to reason that the reappointment of members must be completed as soon as possible so that it is operational again. Likewise, the relevant legislation needs to be amended to provide that antitrust clearance will only be required when the three conditions listed above are met cumulatively.

In the meantime any business considering an acquisition or business sale within Morocco should be alive to the – potentially significant – quirks and pitfalls of merger control within the jurisdiction.

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