Chapter 34

Morocco

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Note

A new set of laws relating to competition in Morocco has been adopted by the Moroccan Parliament and published in the Moroccan Official Bulletin: Law n°104-12 of 30 June 2014 (Dahir N° 1-14-116) on free pricing and competition and Law N°20-13 of 30 June 2014 (Dahir N° 1-14-117) relating to the Competition Council.

Law n°104-12 will take effect only after the entry into force of the regulations necessary to its full application.

A draft decree (the "Draft Decree") dated 24 September 2014 has been published on the Moroccan government website. Since this version is subject to amendment, it is essential to verify whether the final version contains the same provisions as the contents of the Draft Decree summarised hereinafter.

1 Relevant Authorities and Legislation

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

Current law:

The Moroccan merger control authorities are:

- the Chief of Government, who has granted an express delegation of powers to the Ministry of General Affairs and Governance to receive and review the merger filing applications, delivers the decisions authorising or not authorising the transactions; and
- the Competition Council, which has a consultative role when the notified concentration is likely to infringe competition.

Future Law:

The merger control function is transferred to the Moroccan Competition Council ("*Conseil de la Concurrence*") which is an independent institution. The Moroccan Competition Council has jurisdiction over merger control cases.

In addition, the Moroccan administration is granted the following ancillary powers:

(i) At the end of the first phase, the administration may request the Competition Council to open a second phase (in-depth) review of the concentration within 20 days upon receipt of the decision of the Competition Council (or of the information relating to its tacit authorisation), following a phase I review; and

(ii) within a 30-day period after it has been informed or has received the decision of the Competition Council following an in-depth review ("phase II"), the administration which according to the Draft Decree shall be the Chief of Government or the delegated authority of the Government, has an evocation power and the possibility to decide over the case based on public interest grounds other than the protection of competition.

1.2 What is the merger legislation?

Current law:

The Moroccan merger control regime is set out in Law No. 06-99 of 5 June 2000 (Dahir No. 01-00-225) on free pricing and competition (the "Law" or the "Current Law") and its enforcement decree No. 2-00-854 (the "Decree").

Future Law:

Mergers are regulated under the terms of the Law n°104-12 of 30 June 2014 (Dahir N° 1-14-116) on free pricing and competition ("Law n°104-12" or the "future Law") and Law n°20-13 of 30 June 2014 (Dahir N° 1-14-117) relating to the Competition Council (the "Law on the Competition Council").

Title IV (articles 11 to 22) of the Law n°104-12 provides specifically for merger control.

1.3 Is there any other relevant legislation for foreign mergers?

Common to Current and Future Law:

The Moroccan Foreign Exchange Office has set up a convertibility regime in favour of foreign investments in its "*Instruction Générale des opérations de change 2013*", according to which an investor must, within six months from the date of the foreign investment, file a report with the Foreign Exchange Office.

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

Common to Current and Future Law:

Law No. 55-04 and its enforcement decree, relating to the telecommunications sector, grant the National Telecommunication Regulatory Authority (ANRT) the right to implement merger control rules in its industry.

Future Law:

It should be noted that for particular sectors or geographic areas, the Draft Decree provides that specific turnover based thresholds may be defined at a later time by the regulatory power.

2 Transactions Caught by Merger Control Legislation

2.1 Which types of transaction are caught – in particular, how is the concept of "control" defined?

Current law:

"Concentrations" that are caught by Moroccan merger control may result from any measure, regardless of its form, which:

- leads to a transfer of ownership or a transfer of right of use over all or part of the assets, rights and obligations of an undertaking; or
- as its object or effect, allows an undertaking or a group of them to exercise, directly or indirectly, a decisive influence on one or more other undertakings (article 11 of the Law); according to the Moroccan Competition Council, a "decisive influence" means the power to block decisions that determine the commercial strategy of a company.

The concept of "control" is not defined by the Law.

Future Law:

Pursuant to article 11 of Law n° 104-12, the Moroccan merger control regime applies to "concentrations", which are deemed to occur either:

1. when two or more formerly independent undertakings merge;
2. when one or more persons who already control at least one undertaking, acquire, directly or indirectly, control of all or part of one or more other undertakings, whether by acquisition of securities or assets or contract or any other means; or
3. when one or more undertakings, acquire, directly or indirectly, control of all or part of one or more other undertakings, whether by acquisition of securities or assets or contract or any other means.

Control is defined as the ability, arising from rights, contracts or any other means taken either separately or in combination and taking into account the factual or legal circumstances, to exercise a decisive influence over the activities of an undertaking, in particular through:

- ownership rights or rights of use of all or parts of the assets of an undertaking; and
- rights or contracts that confer a decisive influence on the composition, the voting powers or the decisions of the organs of an undertaking.

The merger control regime applies to the creation of a joint venture if the conditions described in question 2.3 are fulfilled.

2.2 Can the acquisition of a minority shareholding amount to a "merger"?

Common to Current and Future Law:

Yes, if it allows an undertaking or a group of them to exercise, directly or indirectly, a decisive influence on one or several other undertakings (for a definition of the concept of "a decisive influence" see question 2.1).

2.3 Are joint ventures subject to merger control?

Current Law:

Yes. Even if joint ventures are not specifically mentioned within the Law, they are subject to merger control if they qualify as concentrations under article 11 of the Law (see question 2.1) and if they meet the 40% market share threshold (see question 2.4).

Future Law:

Joint ventures are expressly subject to merger control if they fulfil the definition of a concentration.

The creation of joint venture will be considered to constitute a "concentration" if it qualifies as a "full function" joint venture, which is defined as a joint venture performing on a lasting basis all the functions of an autonomous economic entity (article 11§4 of Law n°104-12).

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

Current Law (market share threshold):

It results from the combination of articles 10 and 12 of the Law that merger control applies when the undertakings which are parties to or subject of the planned transaction, or the undertakings which are economically linked to them, have achieved together, during the previous calendar year, more than 40% of the sales, purchases or other transactions on a national market of identical or substitutable goods, products or services, or on a significant part of such market.

Common to Current and Future Law:

The concept of "undertakings which are economically linked" is defined neither by the current Law nor by the future Law. In our opinion, these terms include at least the subsidiaries, the parent companies and the sister companies of the undertakings which are parties to or subject of the concentration.

Future Law:

Law n°104-12 has maintained the 40% market share threshold applicable under the current competition Law, and has added two alternative turnover-based thresholds, the minimum amounts of which have been defined by the Draft Decree as follows:

- the aggregate worldwide pre-tax turnover of all of the parties concerned (undertakings or groups of natural or legal persons) exceeds an amount fixed by the Draft Decree at MAD 750 million; and
- the pre-tax turnover achieved in Morocco by at least two of the parties concerned (undertakings or groups of natural or legal persons) exceeds an amount fixed by the Draft Decree at MAD 250 million.

In any case, a concentration has to be notified only if the transaction has an effect on competition on the Moroccan market, or a significant part of such market.

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

Common to Current and Future Law:

Yes. Regarding the market share threshold, it has to be noted that, in Morocco, a concentration should be notified even if the concentration does not lead to any addition of market shares. In practice, the competition authorities have already examined concentrations where only the target company was active in Morocco.

Future Law:

Any transaction that fulfils one of the two newly introduced turnover-based thresholds (see question 2.4), is caught by the Moroccan merger control legislation and must be notified, even if there is no substantive overlap.

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

Common to Current and Future Law:

Foreign-to-foreign transactions are caught by the Moroccan merger control legislation if they qualify as concentrations under article 11 of the Law (see question 2.1) and meet the 40% market share threshold, or under the future law the relevant turnover thresholds (see question 2.4), without regards to the location of the undertakings involved in the concentration.

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

Common to Current and Future Law:

No provision may override the operation of the jurisdictional thresholds.

2.8 Where a merger takes place in stages, what principles are applied in order to identify whether the various stages constitute a single transaction or a series of transactions?

Common Current and Future Law:

Neither the current Law nor the future Law address this point and, to the best of our knowledge, the decisional practice of the Moroccan authorities has not clarified it either.

However, in order to determine whether the various stages of a merger or acquisition are to be treated as a single transaction or distinct separate transactions, the Moroccan authorities should decide to follow the position of the European Commission as they have tended to do it on other subject matters.

3 Notification and its Impact on the Transaction Timetable

3.1 Where the jurisdictional thresholds are met, is notification compulsory and is there a deadline for notification?

Common to Current and Future Law:

Notification is compulsory if the thresholds are met.

There is no deadline for notification provided it is made before completion of the concentration.

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

Common to Current and Future Law:

There is no exception to the clearance requirement when the jurisdictional thresholds are met.

Future Law:

Once a transaction has been notified, the parties may, based on duly justified necessity, seek from the Competition Council, an exemption from the suspension requirement.

Such derogations do not lift the clearance requirement but only the obligation of the parties to suspend the transaction until clearance is obtained.

3.3 Where a merger technically requires notification and clearance, what are the risks of not filing? Are there any formal sanctions?

Current Law:

If a transaction is completed in breach of the notification requirement set out in article 12 of the Law, the Chief of Government can, after consulting the Competition Council, bring the case in front of the King's Prosecutor at the relevant First Instance Court for prosecution (article 46 of the Law).

The main penalty is a fine in the amount of 2 to 5% of the pre-tax turnover made in Morocco during the last fully closed financial year for legal entities, and of MAD 200,000 to MAD 2 million for natural persons; the maximum amount of the applicable fine may be doubled in the event of a subsequent offence within five years (article 70 of the Law).

The Court may also order the publication and display of the decision at the offender's costs.

Finally, the Chief of Government may adopt conservatory measures ordering the undertakings involved to revert to the situation which existed prior to the operation.

Future Law:

If a concentration has been completed in breach of the prior notification requirement, the Competition Council shall order the parties to notify the transaction, subject to a daily penalty payment (within the limits of a maximum of 5% of their average daily pre-tax turnover), unless they revert to the situation which existed prior to the operation (article 19 § 1 of Law n°104-12).

In addition, the Competition Council may impose on the parties responsible for the notification the following sanctions:

- for legal persons, a fine of up to 5% of the pre-tax turnover achieved in Morocco during the last fully closed financial year, increased, if applicable, by the turnover achieved by the target, during the same period; or
- for natural persons, a fine that shall not exceed a maximum amount of MAD 5 million (article 19 § 2 of Law n°104-12).

3.4 Is it possible to carve out local completion of a merger to avoid delaying global completion?

Common to Current and Future Law:

The Moroccan merger control regime does not provide expressly for such a possibility.

3.5 At what stage in the transaction timetable can the notification be filed?

Current Law:

As soon as a project of concentration that meets the legal requirements is established, the parties must file the notification.

Future Law:

Notifications may be formally filed with the Competition Council as soon as the concerned parties are able to present a "sufficiently advanced project" in order to allow the investigation of the case; a "sufficiently advanced project" shall be formalised, in particular, by a memorandum of understanding ("MoU"), a signed letter of intent or when it follows the announcement of a public offer/bid (article 13 of Law n°104-12).

3.6 What is the timeframe for scrutiny of the merger by the merger authority? What are the main stages in the regulatory process? Can the timeframe be suspended by the authority?

Current Law:

The Chief of Government has a maximum period of six months upon receipt of full notification to deliver its decision authorising (with or without conditions) or prohibiting the merger. There are two main stages in this regulatory process.

I. First phase

During this phase of a maximum of two months, the Chief of Government can either:

- authorise the transaction without remedies or with the sole remedies offered by the notifying parties if any; or
- request the opinion of the Competition Council when the merger is likely to infringe competition rules particularly by creating or strengthening a dominant position (second phase of the review process).

A two-month silence from the Chief of Government after having received the full notification shall amount to tacit approval of the concentration plan and of the remedies offered by the parties, if any.

II. Second phase

During this four-month phase, the Competition Council, whose opinion has been requested by the Chief of Government, assesses whether the concentration plan provides a sufficient contribution to the economic progress to outweigh its restrictions on competition. The Competition Council takes into account the competitiveness of the involved undertakings in the context of international competition (article 42 of the Law).

Following the opinion of the Competition Council, the Chief of Government may either:

- authorise the operation or, with a reasoned decision, order the parties not to implement the planned concentration or revert to the situation which existed prior to the transaction; or
- order the parties to modify or complete the transaction or take any measures that will ensure or establish sufficient competition.

The implementation of the planned transaction may also be subject to fulfilment of the requirements set forth to provide a sufficient contribution to economic and social progress to outweigh the restrictions to competition (article 43 of the Law). When the opinion of the Competition Council is requested, a six-month silence from the Chief of the Government after having received a full notification shall amount to tacit approval of the concentration plan and of the remedies offered by the parties, if any.

The possibility to suspend the timeframe is not provided by the Law.

Future Law:

The Moroccan regulatory process starts with the notification and consists of the two following stages:

I. The first phase of review of the concentration starts to run upon receipt by the Competition Council of a "complete" notification file which, according to the Draft Decree shall be formally acknowledged by the Competition Council.

The Competition Council has **60 days** to either:

- decide that the transaction does not fall within the scope of Moroccan merger control;
- formally authorise the transaction subject or not to the implementation of remedies;
- open an in-depth review of the transaction, if it considers that the transaction raises serious competition concerns; or
- refrain from adopting any of these three formal decisions, hereby granting tacit authorisation.

Upon receipt of the formal decision of the Competition Council or of the information relating to its tacit authorisation, the administration is granted 20 days to request an in-depth review of the transaction. When this time-limit has expired, the operation is definitively deemed to have been approved (tacit authorisation).

The 60-day time-limit will be extended by **20 days** if the parties offer commitments (see questions 5.2 and 5.4 below).

The parties may ask for a suspension of the first phase review period ("stop-the-clock" procedure) for a maximum of **20 additional days**, in case of necessity which typically covers the finalisation of their commitments.

If the Competition Council opens an in-depth investigative phase, the notifying parties and the Government Commissioner have **20 days** upon receipt of the report of the Competition Council to submit their comments (article 16 of Law n°104-12).

II. From the opening of the **second phase**, the Competition Council has **90 days** to issue a motivated decision to either:

- authorise the operation, subject or not to the implementation of the parties' commitments;
- authorise the operation while ordering the parties to take all appropriate measures to preserve competition or compelling the parties to observe directives to contribute sufficiently to the economic progress in order to offset distortions of competition; or
- prohibit the operation.

The Competition Council may also refrain from taking any of these three formal decisions hereby granting tacit authorisation.

Within **30 days** from the notification of the formal decision of the Competition Council or from the receipt of the information relating to its tacit approval of the transaction, the Chief of Government or the delegated authority of the Government, is granted an evocation power and may take the final decision on the concentration, based on public interest grounds other than competitive grounds.

When this time-limit has expired, the operation is definitively deemed to have been approved (tacit authorisation).

If the parties submit commitments less than **30 days** from the expiration of the 90-day period, the review period will expire **30 days** from the date of receipt of the commitments.

The in-depth review period may be suspended in the following situations ("stop-the-clock" procedures):

- for a period of up to **30 days**, at the request of the parties based on specific necessity (for instance, the finalisation of the commitments); or
- for an **undetermined period of time**, by the Competition Council, if the notifying parties have failed to inform it of a new fact or to provide it with requested information within the prescribed deadline, or if, for reasons attributable to the parties, third parties have failed to provide it with requested information. The review period starts to run again when the reason for interruption has been cured.

3.7 Is there any prohibition on completing the transaction before clearance is received or any compulsory waiting period has ended? What are the risks in completing before clearance is received?

Current Law:

The parties are not entitled to complete the transaction prior to the decision the Chief of Government either explicitly, by a formal decision, or tacitly (for further details on tacit acceptance see question 3.6).

Since no specific sanction is provided by the Law for completing a transaction before clearance, it can be assumed that such a conduct may lead to the same penalties as those incurred for not filing (see question 3.3).

Future Law:

Yes. Except in cases where the Competition Council has granted derogation to the stand-still effect of the notification following a justified request of the parties (Law n°104-12 – article 14§2), the parties are prohibited from closing a notified transaction before clearance is obtained.

The Competition Council may impose to the parties who have completed a notified concentration prior to clearance from the Competition Council (or from the Chief of Government in specific cases as explained in question 3.6), the same fines that are applicable for not filing (Law n°104-12 – article 19§3):

- for legal persons, a fine of up to 5% of the pre-tax turnover achieved in Morocco during the latest fully closed financial year, increased, if applicable, by the turnover achieved, during the same period, by the target; or
- for natural persons, a fine that shall not exceed a maximum amount of MAD 5 million (see question 3.3 above).

3.8 Where notification is required, is there a prescribed format?

Current Law:

The content of the notification file is described under article 7 of the Decree, which provides, in particular, for the following information and documents to be attached, either in Arabic or in French, to the notification file sent to the Chief of Government:

- a copy of the draft instrument which is subject to notification and a memo related to the concentration's anticipated impact;
- the list of the managers and main shareholders or partners of the undertakings which are parties to the concentration or the subject of the concentration;
- the summary statements of the concerned undertakings for the last four accounting years and the evolution of the market shares of each concerned undertaking over the same period of time;
- a memo related to the main concentration transactions carried out by these undertakings over the last four years, if any;
- the list of their subsidiaries together with for each of them, if applicable, the amount of their shares participation, and the list of the undertakings which are economically linked to them with regards to the contemplated concentration; and
- if applicable, the remedies offered by the undertakings involved in the concentration.

Future Law:

The content of the notification file as determined by the Draft Decree (article 9 and the Annex) includes:

(i) a presentation of the transaction;

(ii) information on the parties involved and their business;

(iii) the definition of each relevant product and geographical market(s) concerned by the transaction, the criteria used for the market definitions, and an assessment of the market shares of the parties and of their main competitors;

(iv) the affected markets; and

(v) a declaration of the completeness and accuracy of the notification.

3.9 Is there a short form or accelerated procedure for any types of mergers? Are there any informal ways in which the clearance timetable can be speeded up?

Common to Current and Future Law:

The Moroccan merger control rules do not provide for any simplified or accelerated procedure. To our knowledge, there are no informal ways in which the timetable can be speeded up.

3.10 Who is responsible for making the notification and are there any filing fees?

Current Law:

The undertakings which are parties to the concentration are responsible for making the notification. There are no filing fees.

Future Law:

The parties acquiring control have the responsibility to notify.

In case of a merger or creation of a joint venture, the notification is to be made jointly by the all the concerned parties (article 13 §2 of Law n°104-12). There are no filing fees.

3.11 What impact, if any, do rules governing a public offer for a listed business have on the merger control clearance process in such cases?

Current Law:

There are no specific merger control rules governing public offers for listed businesses.

Future Law:

A concentration consisting of a public offer may be notified to the Competition Council after the announcement of the offer; Law n°104-12 does not specify however whether the filing can be made as soon as the intention to make an offer is announced or only once the offer has been formally announced to the market (Law n°104-12 - article 13).

3.12 Will the notification be published?

Current Law:

No, the text of the notification will not be published.

Nevertheless, it has to be noted that the decisions of the Chief of Government are published in the Official Bulletin together with the opinion of the Competition Council (article 46 of the Law).

Future Law:

The complete notification itself is not published by the Competition Council. However, receipt of the notification triggers the obligation for the Competition Council to publish a release which shall include, in particular, a non-confidential summary of the transaction provided to the Competition Council by the parties and which shall specify the timeframe granted to interested third parties to submit their comments.

4 Substantive Assessment of the Merger and Outcome of the Process

4.1 What is the substantive test against which a merger will be assessed?

Current law:

The Moroccan Competition authorities will examine whether the concentration is likely to infringe competition, particularly by creating or strengthening a dominant position.

To conduct this review, the authorities will take into consideration the effects of the concentration on competition and will determine whether the transaction leads to:

(i) horizontal effects (see Opinion No. 17/11 issued on 26 September 2011 relating to the acquisition by Vitol and Helios of Shell du Maroc and Butagaz Maroc);

(ii) vertical effects (see Opinion No. 32/12 relating to a concentration concerning the SNI and Danone);

(iii) conglomerate effects (see Opinion No. 31/12 relating to a concentration concerning the SNI and Kraft Foods Maroc); and

(iv) coordinated effects (see Opinion No. 9/10 relating to the public takeover bid launched by Kraft Foods Inc over Cadbury PLC).

During the second phase of the review process, the authorities will assess whether the concentration provides a sufficient contribution to economic progress to outweigh its restrictions on competition. For purposes of this assessment, the competitiveness of the involved undertakings within the frame of international competition, may, in particular, be taken into account (see question 4.2).

Future Law:

Law n°104-12 provides that the substantive test for clearance is whether the planned concentration is likely to infringe competition, in particular:

- by creating or reinforcing a dominant position, or
- by creating or reinforcing a situation of buying power which places suppliers in a situation of economic dependency.

4.2 To what extent are efficiency considerations taken into account?

Common to Current and Future Law:

The Competition Council has to assess whether the concentration provides a sufficient contribution to economic progress in order to outweigh its restrictions on competition; for purposes of this assessment, price reductions, creation or maintenance of employment and/or stimulation of the relevant markets, may be taken into consideration.

4.3 Are non-competition issues taken into account in assessing the merger?

Current law:

Yes, non-competition issues may be taken into consideration by the Competition Council during the second phase of the investigation, when assessing whether the planned concentration provides a sufficient contribution to the economic progress to outweigh its restrictions on competition (article 42 of the Law).

In this regard, in the Opinion No. 17/11issued on 26 September 2011 relating to the acquisition by Vitol and Helios of Shell du Maroc and Butagaz Maroc, the Competition Council has taken into consideration the social impacts of the concentration. In particular, the Council has underlined the fact that the planned investments will generate employment and that the acquiring parties had undertaken not to lower the wages conditions of the Shell's employees over a given period of time.

Future Law:

Specifically, non-competition issues are taken into account in phase II cases when the Chief of Government or the delegated governmental authority exercises its power of evocation and decides on the operation based on reasons of public interest such as industrial development, competitiveness of the concerned undertakings in the context of international competition, and creation and maintaining of employment (Law n°104-12 – article 18).

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

Current law:

The Moroccan legislation does not provide for any provisions that involve third parties (or complainants) such as customers or competitors in the regulatory scrutiny process, except for the possibility for regional councils, urban communities, chambers of commerce, industry and of services, chambers of agriculture and craft industries, chamber of sea fishing, trade union and professional organisations and public utility consumer associations to inform the Chief of Government of any concentration transaction that has been implemented without having been notified in breach of the legislation (article 12 of the Law).

In practice, however, the Competition authorities can hear and request information from third parties such as the supplier, competitors or customers to assess the competition concerns raised by the merger.

Future Law:

Third parties will be informed of the merger review process by the publication of the release of the Competition Council (see question 3.12).

Subject to the final version of the enforcement decree, third parties, such as complainants, are not granted any general right to be consulted or even to access the notification file.

The same entities as listed in article 12 of the current Law have the right to inform the Competition Council that a concentration has been implemented in breach of the notification requirement (Law n°104-12 – article 13 §2).

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

Current law:

The information gathering process is conducted either in writing or orally, through information requests; these requests, during the first phase of the review process, are coming from the Ministry of General Affairs and Governance upon delegation of powers from the Chief of Government, and, during the second phase of the review process, from the officer in charge of the case who may also request information from third parties.

Under article 76 of the Law, everyone who knowingly provides false information or makes a false statement to the competent body or to the persons empowered to declare infringements of the rules or refuse to provide them with the explanations or justifications required shall be subject to the following penalties: imprisonment

from two months to two years; and/or a fine amounting from MAD 5,000 to MAD 200,000.

Future Law:

The Competition Council may order the parties and third parties to submit all information and documents relevant for the assessment of the concentration.

In the case of omission of information or inaccurate declaration in the notification, the Competition Council may:

- impose the same fine that is applicable for failure to notify (see question 3.3); or
- withdraw the decision authorising the concentration, in which case the parties must re-notify the transaction within a month of the decision of withdrawal or revert to the situation which existed prior to the operation (article 19 § 4 of Law n°104-12).

If the parties have not implemented in a timely manner, an injunction/obligation/commitment included in a clearance decision, the Competition Council may:

- withdraw the clearance decision (except if the parties demerge);
- order the parties, under daily penalty payments, to enforce within a fixed time limit the unfulfilled injunction/obligation/commitment; and
- impose the same fine that is applicable for failure to notify (see question 3.3).

During the in-depth review, the rapporteur in charge of the case may order any third party, under periodic penalty, to provide documents or information deemed necessary for the review of the case.

The Competition Council may also hear third parties in the absence of the notifying parties and interview third parties, concerning the transaction, the effects of the transaction or the commitments proposed by the parties.

According to the general provisions relating to the procedure in front of the Competition Council (Law n°104-12 - articles 29 to 33), the latter may also:

- issue injunctions; and
- impose penalties on companies or entities for failure to appear at a hearing or failure to respond within the deadline to an information or documents request or for providing false or misleading responses.

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

Current law:

Article 33 of the Law provides that the president of the Competition Council is prohibited from communicating any document involving business secrets, unless the communication or the consultation of this document is necessary to the proceeding or to the exercise of rights of defence of the parties involved.

Common Current and Future Law:

The disclosure by one the undertakings involved of information obtained during the process concerning another party or a third party is punishable by a fine of MAD 10,000 to MAD 100,000.

Future Law:

When hearing third parties, or upon publication of the final decision, the Competition Council and the administration have to take into account, the legitimate interests of the notifying parties and of the legal or natural persons concerned, in protecting their business secrets against public disclosure (Law n°104-12 - article 21).

When providing information or documents to the Competition Council, the parties are required to identify information that constitutes business secrets. However, the president of the Competition Council appreciates, according to common business practices, the confidential nature of the specified information or documents.

5 The End of the Process: Remedies, Appeals and Enforcement

5.1 How does the regulatory process end?

Common to Current and Future Law:

The regulatory process ends with the formal or tacit decision of the competition authorities (see question 3.6). Under the future Law, the regulatory process may also end with the decision of the administration when it has decided to exercise its evocation power.

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

Common to Current and Future Law:

The parties may take the initiative to offer commitments to remedy competition concerns.

These remedies can be either of structural or behavioural nature.

In this respect, it can be noted that the Competition Council has issued in 2012 the sole opinion to date involving commitments; in this opinion the Competition Council has advised the Chief of Government to authorise the operation under the condition that Kraft Foods respects behavioural commitments (Opinion No. 31/12 relating to a concentration concerning the SNI and Kraft Foods Maroc).

5.3 To what extent have remedies been imposed in foreign-to-foreign mergers?

Common to Current and Future Law:

So far, the Chief of Government has not imposed remedies in foreign-to-foreign mergers.

5.4 At what stage in the process can the negotiation of remedies be commenced? Please describe any relevant procedural steps and deadlines.

Current law:

According to article 12 of the Law and article 7 of the Decree, the parties are granted the possibility to offer commitments, at the very beginning of the review process, in their notification file.

However, we are of the opinion that the parties may take the initiative to offer commitments at any stage of the review process.

In addition, article 43 of the Law, provides that, at the end of the second phase of the merger control process, the Chief of Government can order the companies involved in the concentration to take any measures that will ensure or establish sufficient competition and subject the implementation of the contemplated transaction to compliance with instructions destined to provide a sufficient contribution to economic and social progress to outweigh the restrictions on competition.

Future law:

- During phase I:

  Remedies can be offered by the parties either at the filing stage or at any time before the expiry of the 60-day deadline and as long as the Competition Council has not issued its decision (article 15 of Law 104-12).

  Submission of commitments by the parties extends the time limit in phase I by 20 days.

  For the finalisation of their commitments, the parties may also request a suspension of the review period for an additional period of up to 20 days.

- During phase II:

  The parties may submit commitments as soon as they are informed of the decision of the Competition Council to initiate an in-depth review of the concentration.

  If the commitments are received within 60 days of the opening of phase II, the period of 90 days for the Competition Council to issue its decision is maintained; if the commitments are submitted less than 30 days from the expiration of the 90-day review period, this review period will expire 30 days from the receipt of the commitments.

  The parties may also request a suspension of the examination period for an additional period of up to 30 days, in order to finalise their commitments.

5.5 If a divestment remedy is required, does the merger authority have a standard approach to the terms and conditions to be applied to the divestment?

Common to Current and Future Law:

No, to date the Moroccan merger legislation does not have a standard approach to the terms and conditions to be applied to the divestment. Indeed, neither the current Law nor the future Law address this point and, so far, the Competition Council has only rendered one Opinion that was only related to behavioural remedies (see question 5.2).

5.6 Can the parties complete the merger before the remedies have been complied with?

Current law:

We assume that the merger can be completed before the remedies have been complied with, even though the Law does not address this point which has not been clarified as of date by the decisional practice of the Moroccan authorities.

Future law:

The Future Law provides for the possibility for the Competition Council to subject the clearance decision after a Phase I or a Phase II, to the effective implementation of the commitments of the parties.

5.7 How are any negotiated remedies enforced?

Current law:

We assume that the application of the fines set out in question 3.3 may be triggered by failure to comply with the commitments taken in the notification file or with the orders and instructions imposed by the Chief of Government.

Future law:

The Competition Council may, in case of non-compliance with an injunction, an obligation or a commitment included in the clearance decision (Law n°104-12 - article 19):

- withdraw the clearance decision. Except if the parties revert to the situation which existed prior to the transaction, they must re-notify the concentration within one month of the withdrawal decision;
- order the parties, under daily penalty payments, to enforce the unfulfilled obligation/commitment; or
- impose a fine of up to 5% of the turnover achieved in Morocco during the last completed financial year.

5.8 Will a clearance decision cover ancillary restrictions?

Common to Current and Future Law:

There is no specific provision in either the current Law or the Future Law relating to ancillary restrictions and the decisional practice of the Moroccan authorities has not addressed this point.

However, the Moroccan authorities should follow the position of the European Commission on this issue.

5.9 Can a decision on merger clearance be appealed?

Current law:

The merger decisions of the Chief of Government (authorising or prohibiting the transaction) may be appealed before the Administrative Court having jurisdiction.

Future law:

Yes, a decision of the Competition Council or of the Chief of Government on merger clearance may be appealed by the parties or by the Government commissioner before the Administrative Chamber of the *Cour de Cassation* (the Moroccan Supreme Court).

According to the Draft Decree, in case of annulment in whole or in part, of the decision of the Competition Council or of the Chief of Government by the *Cour de Cassation*, the parties involved have to file an updated version of the notification within two months of the decision of the *Cour de Cassation*.

5.10 What is the time limit for any appeal?

Current law:

According to the common provisions contained in the administrative jurisdiction law (Law No. 41-90 dated 10 September 1993), the time limit for an appeal is 60 days from the date of the publication or of the notification of the decision.

Future law:

The time limit for an appeal by the notifying parties or the Chief of Government is 30 days from the date of notification of the decision.

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

Common, Current and Future Law:

The Moroccan legislation does not contain any specific provision dealing with the time limit for enforcement of merger control legislation and the decisional practice of the Moroccan authorities has not yet addressed this point.

However, both the current and future Law provide for the following time limit of five years for anticompetitive practices: matters of more than five years, which have not been investigated, established or sanctioned during this five-year period, may not be brought before the Competition Council or examined by the latter of its own motion (*ex-officio*).

French law has a similar provision for the time-limit period applicable to anticompetitive practices and the French Competition Authority considers that its enforcement powers for mergers are subject to this provision.

Clarification is needed as to whether such general time limit is applicable for enforcement of merger control legislation.

Until jurisdictional interpretation is provided on this point, we are of the opinion that the enforcement of merger control legislation is subject to a five-year time-limit.

6 Miscellaneous

6.1 To what extent does the merger authority in Morocco liaise with those in other jurisdictions?

Common to Current and Future Law:

Morocco is part of the Euro-Mediterranean Agreement, an association founded between Morocco and the Member States of the European Communities in 2000.

Within this framework, the decision No. 1/2004 of the EU-Morocco Association Council which was adopted on 19 April 2004 has established a mechanism of cooperation between the European and Moroccan competition authorities.

The Moroccan Competition Council is also a member of the following international organisations:

- the International Competition Network (ICN) since April 2010; and
- the Euro-Mediterranean Competition Forum (EMCF), which is an informal regional network created in 2012 whose purpose is to enhance cooperation in competition matters in the Mediterranean region.

Finally, a bilateral cooperation also exists between Morocco and Tunisia under which many exchanges such as training courses or conferences have occurred.

6.2 Are there any proposals for reform of the merger control regime in Morocco?

The substantial reform resulting from the future Law n°104-12 still needs to be completed by the final version of the enforcement decree that is expected.

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

These answers are up-to-date as of October 2014.

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Catherine Chappellet-Rempp has been a senior associate of the competition team of UGCC Law Firm since 2010.
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UGGC Law Firm is a leading independent law firm that was established in France in 1993.

UGGC Law Firm assists its clients – private companies, public bodies and individuals – across a wide range of legal and tax practice areas such as corporate law, employment law, public law, economic law, intellectual property, insolvency law and litigation and arbitration.

With more than 100 lawyers including 26 partners in offices located in four geographical areas (Europe, Africa, Asia and the Middle-East) and an established network of correspondents, the firm is well positioned to offer a fully international service to its clientele.

The Casablanca office was created in 2002 and has become one of the most significant French law firms in Morocco. Working as legal and tax counsels, the Casablanca office offers the same services as the Paris office, covering all areas of law necessary to service its clients. The office works in collaboration with lawyers from the Paris office who are familiar with all aspects of Moroccan law.