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The International Comparative Legal Guide to:

Merger Control 2007

A practical insight to cross-border merger control issues

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Introductory Remarks

The contributors would like to bring the reader's attention to the fact that Algerian merger control is in its early stages and that numerous provisions of local competition regulation have not yet been interpreted. This situation is particularly well illustrated in the lack of clarity of the articles pertaining to the notification threshold.

However, it is worth stressing that the principles underlying Algerian merger control mechanisms are directly inspired from those applicable within the European internal market. The approximation of Algerian regulation towards European regulation has been formalised by an Algerian Declaration attached to the Association Agreement signed with the European Community and its Member States. The Declaration states that Algeria "shall be inspired by the orientations of European Union competition policy when applying its own competition regulation". As to the interpretation of provisions other than that pertaining to the notification threshold, such commitment is liable to ensure a certain level of predictability.

1 Relevant Authorities and Legislation

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

According to Ordinance n°03-03 of 19 July 2003 (hereinafter "the Ordinance"), the "Conseil de la Concurrence" (hereinafter "the Council") is empowered to control mergers. The Council can authorise or reject a concentration after having solicited the opinion of the Minister of Commerce.

When justified by reasons of general interest, the Government may, on its own initiative or on demand of one of the parties to the merger, override a rejection decision taken by the Council.

In some specific sectors, other authorities may have their say in the control of the merger (please refer to question 1.4).

1.2 What is the merger legislation?

Merger control is ruled by the Ordinance that amends Ordinance n°95-06 of 25 January 1996. Executive Decree n°05-219 of 22 June 2005 sets the procedure governing the notification of a concentration project (hereinafter "the Decree").

1.3 Is there any other relevant legislation for foreign mergers?

Under domestic law, there is no specific provision applicable to mergers which exclusively involve foreign firms.

From a financial standpoint, foreign investments are subject to the same regime as that applicable to domestic ones. The said regime flows from Ordinance n°01-03 of 10 August 2001, recently amended by Ordinance n°06-08 of 15 July 2006, which is mainly intended to encourage investment in economic activities.

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

Yes. Some particular sectors are subject to specific vertical regulations. These provisions may enable authorities other than the Council to take part in the merger control process.

The main fields in which specific legislation is inclined to have an effect on the merger control process are the following:

- **Electricity**: Act n°02-01 of 6 February 2001 pertaining to electricity and gas distributions provides in its Article 115, point 13, that, under certain circumstances, an acquisition or a takeover of electrical power undertakings shall be approved by the Electricity and Gas Regulation Commission.
- **Post and Telecommunication**: According to Article 13, paragraph 1, of Act n°00-03 of 6 August 2000, the Post and Telecommunication Regulation Authority shall ensure the existence of an effective competition on the post and telecommunications market. This prerogative may encompass the possibility for the said Authority to control mergers which are liable to have an effect on competition.
- **Banking**: According to Article 94 of Ordinance n°03-11 of 26 August 2003, all transfers of shares of banks and financial institutions shall be subject to the prior authorisation of the Governor of the Bank of Algeria.

From a horizontal standpoint, one shall also bear in mind that privatisation operations, which are deemed mergers under the Ordinance, are to be authorised by the "Conseil des Participations de l'Etat" by application of Article 9 of Ordinance n°01-04 of 20 August 2001.

It must be stressed that the coexistence between the rules set in the Ordinance and the above-mentioned specific rules is still unclear.

The only relevant provision in this respect is Article 39 of the Ordinance which states that when a practice referred to the Council occurs within an industry which is under the control of a specific regulation authority, it must transmit a copy of the file to the said authority in order to obtain its opinion.

Present legislation thus leaves room for interpretation and practice will undoubtedly play a key role in defining the coexistence between the Ordinance and other specific regulation.

2 Transactions Caught by Merger Control Legislation

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

Merger control is intended to cover all transactions that lead to a lasting change in the structure of the party's undertakings and that consequently have an effect on the structure of the market.

The notion of a concentration adopted by Article 15 of the Ordinance is the same as that defined in the European Community Merger Regulation (hereinafter ECMR).

A concentration shall be deemed to arise when:

- two or more previously independent undertakings merge; or
- one or more persons already holding control of at least one undertaking, or one or more undertakings, acquire control of all or part of one or more other undertakings, directly or indirectly, whether by the acquisition of a holding in the capital or by purchasing assets, a contract or any other means.

As well as concerning the notion of concentration, the notion of control is directly inspired from the ECMR.

Indeed, control shall be constituted by rights, contracts or any other means which, either separately or in combination, and having regard to the considerations of fact or law involved, confer the possibility of exercising a decisive influence on an undertaking on a lasting basis. Such control shall notably take the shape of:

- the ownership or the right to use all or part of the assets of an undertaking; or
- rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking.

2.2 Are joint ventures subject to merger control?

Only "full-function" joint ventures, as defined for instance by EC law, are subject to merger control.

According to Article 15.3 of the Ordinance, the creation of a joint venture is subject to domestic merger control if the newly created entity is intended to perform on a lasting basis all the functions of an autonomous economic entity.

There is no specific threshold applicable to joint ventures.

Joint ventures other than "full-function" shall, in principle, be reviewed under rules pertaining to anti-competitive agreements set in Articles 7, 8 and 9 of the Ordinance.

Such joint ventures may be notified to the Council and certified as not being in breach of competition law. Certification will be granted within a document entitled "attestation négative" delivered by the Council to the undertaking parties. The procedure to be complied with in order to obtain the said certificate is set by Executive Decree n°05-175, of 12 May 2005.

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

The jurisdictional threshold is one of the rare points in which domestic law clearly departs from EC regulation.

Indeed, the threshold set in the Ordinance is grounded on the market shares of the participating undertakings and not on their turnover, as is the case under EC law.

According to Article 17 of the Ordinance, operations that are liable to hinder competition, notably by strengthening a dominant position on a market, have to be notified to the Council.

Article 18 of the Ordinance provides that Article 17 applies each time that operations are intended to exceed a 40% threshold of sales or purchases on a market.

From a practical standpoint, it is to be stressed that the market share threshold raises important issues, since it implies that the undertaking parties must define the relevant market prior to the notification of the operation to the Council.

Moreover, as mentioned below, the interaction between Article 17 and Article 18 of the Ordinance is, for the time being, unclear (please refer to question 3.1).

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

In principle, merger control applies each time that a transaction is liable to hinder competition. As mentioned below, some important issues are dependent on the interpretation of Article 18 (please refer to question 3.1). The application of merger control to situations where there is no substantial overlap will depend on the said interpretation.

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

No provision of merger control legislation pertains to the "nationality" of the parties. Therefore, as soon as they meet the criteria set in the Ordinance, "foreign to foreign" transactions shall be subject to the control of the Council. In such circumstances, a cooperation mechanism may be needed to implement the Council's decision.

For instance, a cooperation mechanism has been set up between the Council and the European Commission in order to control mergers carried out within the European internal market which may have an effect on the Algerian market (please refer to question 6.1).

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

There is no such mechanism under domestic law.

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?

As mentioned above, the rules pertaining to the threshold control are set by Articles 17 and 18 of the Ordinance (please refer to question 2.3). These two provisions have not yet been interpreted by the Council. They could be interpreted either narrowly or broadly:

- Under the narrow interpretation, ***only operations which are intended to exceed 40% of sales or purchases on a market would have to be notified to the Council***. Such an interpretation does not seem entirely compatible with article

17 of the Ordinance to the extent that it only allows the control of operations where dominant positions are at issue.

- According to the broad interpretation, operations intended to exceed 40% of sales or purchases on a market would have to, as is the case under the narrow interpretation, be notified to the Council.

  In addition, however, ***all other operations that are liable to jeopardise competition would also have to be notified to the Council***. This interpretation seems more in line with the substantive test set by article 17 of the Ordinance as stated below (please refer to question 4.1).

One has to stress that, owing to the important practical issues that both of these interpretations are liable to raise (i.e. definition of the relevant market and assessment of the potential anti-competitive effects of the concentration by the undertakings parties prior the notification to the Council), none may be deemed a panacea.

There is no deadline for notification. However, the control must be exercised *ex ante*, and Article 20 of the Ordinance provides that during the period necessary for the Council to render its decision, the parties shall not adopt any measure that would make the operation irremediable.

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

There is no such exception under domestic law. However, as will be explained hereinafter (please refer to question 5.1), the Government can, under certain circumstances, override a refusal decision of the Council.

3.3 Where a merger technically requires notification and clearance, what are the risks of not filing?

According to Article 61 of the Ordinance, if the notification obligation is not complied with, the Council is empowered to impose a fine that could reach up to 7% of the turnover achieved in Algeria during the previous financial year by each undertaking that is a party to the concentration, or by the undertaking which the concentration created.

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

No. As soon as the threshold set in the Ordinance is met, the merger is to be notified to the Council. As mentioned above (please refer to question 3.1), the parties to a transaction shall not adopt any measure that would make the operation irremediable before the decision of the Council.

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

As mentioned above (please refer to question 3.1), the transaction shall be notified to the Council before the signing of a definitive agreement. However, the Ordinance does not specify precisely the stage at which the notification shall be made.

3.6 What is the timeframe for scrutiny of the merger by the regulatory body? What are the main stages in the regulatory process?

According to Article 17 of the Ordinance, the Council shall render its decision within a three-month period. The different phases of the regulatory process have not been specified in the Ordinance.

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

Yes. As mentioned above (please refer to question 3.1), the parties to the transaction shall not adopt any measure that would make the operation irremediable before the decision of the Council.

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

Executive Decree n°05-219 of 22 June, 2005 relates to the rules governing the request for a merger clearance.

According to the said Decree, a clearance must be requested in a file that must be notified in French and reproduced in five copies. The said file includes:

- a formal request of clearance of which a model is annexed to the Decree;
- a form containing relevant information on the operation at stake. A model of the form is annexed to the Decree;
- evidence of the powers conferred to the individual or individuals requiring the clearance;
- a certified copy of the statutes of the company or companies requiring the clearance;
- copies of the last three balance sheets which must all be certified. If the concerned company or companies have existed for less than three years, they must transmit copies of the last balance sheets; and
- if available, a legalised copy of the bylaws of the company "resulting from the merger".

If several companies jointly request the clearance, only one file must be presented.

The Decree has been published in the Official Journal of the Democratic and Popular Algerian Republic n°43 of 25 June, 2005, p.3.

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

Under Article 4 of the Decree, a distinction is drawn between two situations:

- when a concentration is to be achieved through a merger or a joint venture, the operation shall jointly be notified by the parties; and
- when a concentration takes the shape of an acquisition, the operation shall be notified by the enterprise that takes the control of the target firm.

There are no filing fees.

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?

The test provided by the Ordinance is quite similar to the SIEC test used under ECMR, and the SLC test used under US legislation.

Indeed, in order to anticipate the problems and limits raised by the

use of the "Dominance Test", the Ordinance provides that the Council is empowered to control all mergers that are liable to jeopardise competition by notably strengthening a dominant position of an undertaking in a market. A dominant position is not the exclusive criterion upon which the assessment of the Council shall be grounded.

The Test used under Algerian legislation seems therefore sufficiently wide to allow the Council to deal with issues flowing from horizontal, vertical and conglomerate mergers. It also allows for the assessment of collective dominance and unilateral effects on oligopolistic markets. However, a strict interpretation of the rules pertaining to the notification threshold could limit these possibilities, especially concerning vertical mergers.

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

There are no specific rules pertaining to the involvement of third parties in the regulatory scrutiny process. However, given the wide inquiry powers of the Council, their intervention shall not be precluded.

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

According to Article 8 of the Decree, the Council can require the firms involved in the transaction to communicate all documents and information which it deems necessary.

The Council can decide, after having received the report of its auditor, to impose a fine which may not exceed DZD 500,000 (i.e. approximately US$ 6,500) on undertakings which deliberately, or by negligence, have provided an incorrect or incomplete version of the information that has been requested on the basis of Article 51. The same fine will be imposed on companies that did not supply the information within the timeframe that was granted to them by the auditor.

The Council can also decide to impose a DZD 50,000 (i.e. approximately US$ 650) penalty per day of delay.

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

The Council may, without being opposed professional secrecy, access any document or information which it deems necessary. The parties may however request the protection of sensitive information. In this case, the information or document must be notified separately and the statement "professional secrecy" must be apposed on each page.

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

5.1 How does the regulatory process end?

At the end of the regulatory process, the Council shall adopt either a clearance or a refusal decision. However, it is to be stressed that the Government may, upon request or on its own initiative, override the Council's refusal for the sake of general interest.

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

Clearance decisions may be subject to conditions that are intended to attenuate the anti-competitive effects of the concentration at issue. The parties to the concentration may also, on their own initiative, commit themselves to implementing measures aimed at remedying the anti-competitive effects of the concentration.

Structural as well as behavioural remedies are acceptable. Once adopted, remedies are compulsory.

5.3 At what stage in the process can the negotiation of remedies be commenced?

In the notification file, the parties to the transaction are required to specify the measures intended to remedy the anti-competitive effects of the concentration.

5.4 How are any negotiated remedies enforced?

Enforcement of negotiated remedies is not ruled in a detailed way. There is no rule specifying when, how and by whom compliance with remedies is to be controlled.

However, there is no doubt as to the compulsory nature of remedies. According to Article 62 of the Ordinance, in the case of non-compliance with remedies or commitments, the Council is empowered to impose fines that can reach up to 5% of the turnover achieved in Algeria in the previous financial year by each undertaking party to the concentration, or by the undertaking to which the concentration gave birth.

5.5 Will a clearance decision cover ancillary restrictions?

Domestic merger control legislation does not provide any specific provision on this issue and it has not yet been dealt with by the Council. However, one can reasonably assume that restrictions necessary to push the concentration forward are covered by clearance decisions.

5.6 Can a decision on merger clearance be appealed?

On the one hand, the Ordinance only explicitly deals with the possibility of appealing a Council's "refusal" decision. According to its Article 19, paragraph 1, such a decision may indeed be the object of an appeal before the "Conseil d'Etat", which is the highest administrative jurisdiction in the country.

On the other hand, the possibility of appealing a "clearance" decision of the Council has not been provided for by the Ordinance. However, common administrative rules allow one to seek the annulment of an administrative decision. By virtue of these general rules, it should be possible for third parties to a merger to lodge an action against a clearance decision. This possibility is subject to compliance with the following conditions:

- the applicant has to demonstrate that it has an interest in challenging the clearance decision; and
- the action is to be preceded by an out-of-court administrative settlement procedure.

The action seeking the annulment of the clearance decision of the Council shall be lodged before the "Conseil d'Etat" by application of Article 9.1 of Law n°98-01 of 30 May 1998.

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

Yes. According to Article 44 paragraph 4 of the Ordinance, facts dating back more than three years may not be referred to the Council if no attempt has been made to investigate, establish or punish them.

6 Miscellaneous

6.1 To what extent do the regulatory authorities in your jurisdiction liaise with those in other jurisdictions?

Under the condition of reciprocity, the Council may, on its own initiative or upon request, transfer to foreign competition authorities information gathered within its jurisdiction. It has to comply with professional secrecy.

Furthermore, in order to facilitate the fulfilment of the free trade area between Algeria and the European Union, Article 41 of the Association Agreement, which entered into force 1st September 2005, and its Appendix 5, provide for a cooperation mechanism between the Council and the European Commission.

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

28 September 2006.

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