Local nexus test under the Moroccan merger control regime

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Morocco | Local nexus test under the Moroccan merger control regime
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As merger control enforcement continues to evolve in Morocco, the ambiguities of the local nexus test introduced by the 2023 Moroccan Merger Guidelines (Guidelines) are being increasingly scrutinized. The Moroccan Competition Council (MCC) intentionally drafted the local nexus test somewhat ambiguous in the Guidelines. This approach—not specific to Morocco—allows enforcers flexibility in excreting jurisdiction over transaction. Still, on the flip side this ambiguity introduces uncertainty, which requires parties to conduct more comprehensive assessments. In practices, this will require parties to balance higher transaction costs through increased assessment and regulatory risks. Consequently, businesses are seeking clarity. A look back at the MCC's practice since the Guidelines were introduced in 2023, provides some answers.

Pursuant to the Moroccan Competition Law a concentration must be notified to the MCC if it meets the jurisdictional thresholds set forth in the law. In addition, the transaction must potentially impact competition in the Morocco. The MCC expanded on this local nexus criterion in the Guidelines. Where the target meets the Moroccan turnover element of the notification threshold, a transaction will always be considered to have a local effect in Morocco. However, where the Moroccan turnover element is met by the acquirer, notification is only required, where the target has a relevant link to Morocco. The Guidelines list some general criteria that could establish such a link. However, these criteria remains ambiguous.

Target turnover in Morocco

Where the acquirer meets the Moroccan turnover element of the notification threshold, a relevant connection of the target to Morocco may be established by target turnover in Morocco below the threshold. The Guidelines do not set a minimum Moroccan turnover the target must meet for a transaction to have a local effect. This is by design. The lack of a minimum requirement allows the MCC flexibility to establish jurisdiction over transactions they consider to warrant review. Still, recent enforcement practice provides some insight into the MCC's position.

In a recent case, the MCC considered a situation in which the target had generated approx. USD 100,000 in revenue in Morocco through a one-off sale. The MCC concluded that this was not enough to establish a local nexus for the purposes of Moroccan merger control review. In another case the MCC found that target sales in Morocco of approx. USD 130,000 did not establish a local nexus. These decisions are based on individual assessments the MCC reached considering the specific circumstances of the individual cases. Hence, they cannot be considered as universally applicable. Nonetheless, the cases do show that the MCC will not consider any target turnover in Morocco to establish a local nexus.

Legal relationship

Moreover, a 'legal' relationship of the target to Morocco may suffice. The Guidelines do not detail what constitutes a 'legal relationship' of the target to Morocco. From recent practice, the target maintaining an active legal entity, branch, or representative office is a legal relationship that establishes a local effect. Whether dormant entities or Moroccan staff without corporate vehicle would also suffice remains unclear.

Conceivably registration of trademarks, patents, or other IP rights in Morocco may establish a legal connection. Still, for lack of relevant practice or guidance, this remains speculative. Furthermore, there are suggestions that minority shareholding by Moroccan investors could be deemed a legal connection establishing a local nexus. Connections through minority Moroccan shareholding may pose challenging where publicly traded companies or investment funds are involved. The identity of minority investors in these may not be immediately apparent.

Vertical and horizontal relationships

The Guidelines go on to state that vertical or horizontal relationships of the target to Morocco can establish a local nexus. Neither the Guidelines nor the MCC's practice provided further guidance on what horizontal relationships to Morocco would establish a local nexus may be. Conceivably this criterion would address a situation where the target is not active in Morocco, but the acquirer is active in the relevant market—thus, in the market the target is active in globally—in Morocco. On what would constitute a relevant vertical relationship of the target to Morocco, there is more guidance. As with horizontal relationships the Guidelines also do not detail what would constitute a relevant vertical relationship of the target to Morocco. Still, form the MCC's practice it appears clear that the target procuring supplies from Morocco could establish a local nexus, even if the target is not itself active in Morocco. However, how substantial such a supply relationship to Morocco would have to be establish a local nexus and whether one-off purchases or only ongoing supply relationships would suffice to trigger a filing remains unclear.

Other factors establishing a relationship of the target to Morocco

The Guidelines include an open ended category of factors that may establish a local nexus. What would fall under this category is still unclear. The MCC could possibly use this category to establish jurisdiction over transaction that have indirect effects on Morocco. Yet, without guidance from the MCC, this remains speculation.

Way forward

Considering the increased enforcement of the Moroccan merger control regime by the MCC—including against foreign-to-foreign transactions—carefully assessing exposure of transactions to Morocco is becoming increasingly important. The first gun jumping fines the MCC imposed concerned a foreign-to-foreign transaction; the 2022 acquisition of French Dry Mix Solutions SAS by the Swiss Sika AG. In 2024 the MCC fined Viatris Inc. for failing to notifying the MCC of the merger that formed it in the amount of 2.5 percent of Viatris' 2023 Moroccan turnover. Moreover, the MCC is increasingly aggressively reviewing and taking enforcement action against past transactions. While the MCC until 2023 was lenient and agreed to summary settlement of prior violations, they now typically require normalization of each violation individually. Furthermore, where the MCC discovered prior violations during a merger control review, they have started to delay clearance of the transaction notified until all prior violations are settled.

Given these trends parties are well advised to adopt a cautious approach when assessing Moroccan nexus. A thorough and clearly reasoned analysis of local nexus is essential to ensure compliance and mitigate enforcement risks. Failure to do so not only expose parties to significant financial penalties but may also complicate future filings and delay clearances.

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