Public Interest Considerations in Moroccan Merger Control

Client briefing |Antitrust & Merger Control
Morocco | Public Interest Considerations in Moroccan Merger Control
30 June 2026

Moroccan merger control is primarily governed by competition law considerations. The Moroccan Competition Council (MCC) reviews notifiable transactions to determine whether they are likely to restrict competition, in particular through the creation or strengthening of a dominant position or purchasing power that may place suppliers in a situation of economic dependence. Public interest considerations do not arise as a general standalone criterion of assessment before the MCC. The MCC may consider whether a transaction contributes sufficiently to economic progress to compensate for identified harm to competition, but this assessment remains part of the competition law analysis. It does not amount to a broader public interest review.

Public interest considerations are addressed through a separate governmental mechanism under Article 18 of Law No. 104-12 (Moroccan Competition Law). This mechanism allows the Government to intervene on grounds of public interest other than the maintenance of competition. These grounds include industrial development, the international competitiveness of the companies concerned, and the creation or preservation of employment.

Moroccan Competition Council Review

The MCC's review is competition-based and focuses on the effects of the transaction on the relevant markets. In this respect, the MCC assesses factors such as the structure of the market, the parties market positions, the competitive constraints remaining after completion, barriers to entry and expansion, and the likely impact of the transaction on customers, competitors and suppliers. Where the transaction is subject to an in-depth review, the MCC examines whether it is likely to harm competition, by creating or strengthening a dominant position or by creating or strengthening purchasing power that places suppliers in a situation of economic dependence. In this context, the MCC may also assess whether the transaction contributes sufficiently to economic progress to compensate for the identified harm to competition.

Therefore, the MCC may consider certain economic benefits of the transaction, but only where they are connected to the competition assessment. Efficiencies, improvements in market functioning, benefits to consumers or users, or other contributions to economic progress may be relevant where they offset restrictive effects on competition.

This is not the same as a standalone public interest review. The MCC does not have a general mandate to approve, prohibit or condition a transaction since broader policy considerations such as industrial policy, employment protection, international competitiveness or the preservation of strategic economic interests. Such considerations may only be relevant before the MCC if they are framed within the competition law assessment and capable of compensating for harm to competition.

Public Interest Right of Evocation

Public interest considerations are dealt with through the right of evocation under Article 18 Moroccan Competition Law. This mechanism is separate from the MCC's ordinary merger review and allows governmental intervention on grounds of public interest other than the maintenance of competition.

Article 18 Moroccan Competition Law refers to industrial development, the international competitiveness of the companies concerned, and the creation or preservation of employment. These considerations are distinct from the competition law criteria applied by the MCC and reflect broader economic and policy objectives.

The right of evocation operates after the MCC's review. Following the MCC's initial review, the governmental authority, within 20 days from receiving the MCC's decision or being informed that no decision was adopted within the applicable period, request that the MCC open an in-depth review. This is not itself the public interest override. It is a mechanism allowing the transaction to be examined further by the MCC.

The public interest evocation mechanism applies after the in-depth review stage. Following the MCC's decision after an in-depth review, or where the governmental authority is informed that the MCC did not adopt a decision within the applicable Phase II period, it may, within 30 days, evoke the case and decide on the transaction on public interest grounds other than the maintenance of competition. Where the right of evocation is exercised, the governmental authority must issue a reasoned decision after hearing the observations of the parties to the transaction. The decision may also be subject to the effective implementation of commitments.

Thus, the right of evocation does not replace the MCC's competition assessment. It operates as a separate and exceptional public interest mechanism, allowing the Government to intervene where broader economic or policy considerations justify a decision beyond the competition law analysis carried out by the MCC.

To date, no published precedent has been identified in which the right of evocation under Article 18 Moroccan Competition Law has been exercised to take over a transaction following the MCC's review under the current Moroccan merger control regime. This conclusion should be stated cautiously, as it is based on publicly available information. However, Moroccan merger control rules provide that decisions adopted by either the MCC or the competent governmental authority must be published. Therefore, a formal exercise of the right of evocation should in principle be publicly traceable.

The absence of an identified precedent does not mean that the mechanism is irrelevant. The power exists under Moroccan Competition Law and may become relevant where a transaction raises broader political, economic or strategic sensitivities in Morocco. This may include transactions affecting significant employment levels, national industrial capacity, strategic assets, or businesses considered important to the Moroccan economy.

Key Takeaways

Moroccan merger control does not provide for a public interest test before the MCC. The MCC's review remains competition-based, although it may consider contributions to economic progress where they compensate for identified harm to competition.

Broader public interest considerations are addressed separately through the governmental right of evocation under Article 18 Moroccan Competition Law. This mechanism allows the governmental authority in charge of competition to intervene after the MCC's review on grounds other than the maintenance of competition, including industrial development, international competitiveness and the creation or preservation of employment.

In practice, public interest considerations should be treated as exceptional and relevant primarily where the right of evocation may be exercised. Based on publicly available information, no published precedent has been identified in which this right has been exercised under the current Moroccan merger control regime.

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