

Economic Concentrations under Algerian Competition Law

التجميعات الاقتصادية حسب قانون المنافسة الجزائري

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Received: 30/08 /2025

Accepted: 29/10 /2025

Published: 29/11 /2025

Abstract:

Economic concentrations represent one of the most important types of economic concentration regulated by the Algerian legislator in Competition Law 03-03, as amended and supplemented. This paper addresses the types of concentrations regulated by the Algerian legislator, namely merger, corporate grouping, and the establishment of a joint venture. Given that economic concentrations can affect market competition, it was imperative for the Algerian legislator to regulate them with conditions to benefit from them and avoid their drawbacks. The conditions stipulated are that they must not harm competition, meaning they do not reach the threshold mentioned in Article 18 and that they are not among the prohibited practices mentioned in the same law. Additionally, supervision by the concerned sector was required for entities wishing to consolidate within certain sectors, not all.

Key words: : Economic Concentrations, Enterprises, Competition Law

Introduction:

Modern economic life is witnessing the phenomenon of economic concentration as an economic necessity imposed by the problems and difficulties hindering the progress of small and medium-sized enterprises (SMEs) and preventing them from achieving their goals in facing large enterprises that dominate many sectors of economic activity. However, while this economic concentration is considered an economic necessity, it can also certainly harm the competitive process, as it can lead to the creation or strengthening of a dominant position for an enterprise in the market, resulting in the exclusion of other parties from the competitive sphere. Therefore, it was necessary for the legislator to include provisions within the texts of the competition law that would prevent this economic concentration from negatively affecting competition¹.

From the above, the core issue of this article becomes clear: To what extent has the Algerian legislator succeeded in balancing economic concentrations and their friendliness to the national economy on one hand, and the principle of free competition as a constitutional principle on the other? (Protection of small and medium-sized enterprises).

To answer the posed problem, we used the analytical method when analysing legal texts and the opinions of jurists, as well as the descriptive method when reviewing doctrinal opinions.

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1–The Concept of Economic Concentrations:

The Algerian legislator has adopted the term "economic concentration" (التجميع الاقتصادي) instead of "economic concentration" (التركيز الاقتصادي) according to Competition Law No. 03-03. Therefore, it is necessary to provide a definition of economic concentrations and explain their types according to Ordinance 03-03.

1.1-Definition of Economic Concentrations:

An economic concentration is defined according to Article 15 of the aforementioned Ordinance 03-03: "A concentration within the meaning of this Ordinance occurs if:²

1. Two or more previously independent enterprises merge.
2. One or more natural persons already controlling at least one enterprise, or one or more enterprises, acquire, directly or indirectly, control of the whole or parts of one or more other enterprises, by purchasing shares or assets, by contract or by any other means.
3. A joint venture is created performing on a lasting basis all the functions of an autonomous economic entity."

It is notable in this definition that the Algerian legislator used the term "التجميع" (grouping/amalgamation) instead of "التركيز" (concentration), even though the French legal text uses the term "concentration économique". The term "التجميع" mentioned above does not encompass the three legal forms mentioned in the aforementioned Article 15 (merger, control acquisition, and creation of a joint venture), because the term "التجميع" implies the merging of two or more previously separate things. In this sense, "التجميع" only applies to one form: the merger.

As for doctrine, definitions have varied. Economists define it as "the acquisition by one or more companies of a majority or a significant portion of the shares of another company, giving them decisive influence over its management."

Aude Choumendch also defined it as "concentration is an economic phenomenon characterized by the growth in the size of enterprises on one hand, and the decrease in the number of enterprises on the other."

Blaise Jean-Bernard also defined it as "a grouping or combination of two or more enterprises in a specific arrangement, aiming to bring about a lasting change in market structure, with all the combining enterprises losing their independence to enhance the economic power of the whole."

From these previous definitions by various jurists, it is clear that these definitions only shed light on the forms of concentration without deviating from the definition provided by the legislator³.

1.2- Forms of Economic Concentrations:

Economic concentrations arise, according to the aforementioned Article 15, based on two main criteria: the means employed and the result achieved. An economic concentration is thus defined by the means used, which is the merger, as well as by the result achieved by the economic concentration, namely the acquisition of control, or through the creation of a joint venture that performs all the functions of an autonomous economic entity.

1.2.1– Merger:

The Algerian legislator did not provide a definition of merger, but only outlined its types and characteristics. It has been defined by doctrine⁴ as "a legal process through which two or more companies unite, and this union occurs either by merging them into a new company that replaces them."

From this definition, it is clear that a merger can only occur between companies or enterprises possessing legal personality. Among the consequences of this merger is the dissolution of the legal personality of the merged companies, and the transfer of all their assets and liabilities to the acquiring or new company. In this concept, it is noted that there are several types of merger,

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including merger by absorption⁵, merger by consolidation⁶, and merger by division, which takes one of the two previous forms.

1.2.2- Acquisition of Control over one or more enterprises:

The meaning of control mentioned above is specified in Article 16 of the same Ordinance, which

This is the second form of economic concentrations mentioned in Article 15/2 of the aforementioned Ordinance 03-03.

states: "Control within the meaning of the second case of Article 15 above means control resulting from rights, contracts or any other means which, either separately or jointly, confer the possibility of exercising decisive and lasting influence on the activity of an enterprise, particularly with regard to:

1. Ownership or usufruct rights over the assets of an enterprise or part thereof.

2. Rights or contracts which confer decisive influence on the composition, deliberations or decisions of the organs of an enterprise."

It is certain that the legislator intended, through the exercise of control by one enterprise over another, either directly or indirectly, to cover economic interest groupings and corporate groups regulated by the Algerian legislator in the Commercial Code⁷.

The difference between them is that the former acquires legal personality, while the latter does not.

1.2.3- Joint Venture:

A joint venture refers to an enterprise created by two or more enterprises or companies to achieve common economic objectives. From this, it is clear that this enterprise or company can be created because of either a merger (merger by consolidation) or a merger by division, or through a partial transfer of assets. The legislator also required that it be independent, meaning it enjoys legal personality and financial independence, which completely excludes the possibility of this enterprise being a branch subsidiary to the companies that created it⁸.

2- Conditions for Monitoring Economic Concentrations:

Competition Law 03-03 does not prohibit economic concentrations, unlike it prohibits practices contrary to competition. The goal of this monitoring is to protect competition, considering that concentration may lead to market monopolization and the elimination of other competing enterprises. This oversight also aims to steer competition towards a specific economic and social policy⁹.

Therefore, for these economic concentrations to complete this process, they must obtain authorization from the Competition Council. Article 17 of Ordinance 03-03 states: "Any concentration likely to harm competition, particularly by strengthening a dominant position of an enterprise in a market, must be submitted by its parties to the Competition Council, which shall rule on it within a period of 3 months."

It is notable in this article that it adopts the likelihood of the concentration harming competition or not. Determining this is based on the structure of the market, in which the combining enterprises operate, as well as the size of competitors, the ease of market entry, and the size of the concentration.

It is also notable in the aforementioned text that the legislator closely linked harm to competition with a dominant position through the phrase "particularly by strengthening a dominant position of an enterprise in a market". This makes us wonder: do the parties to a concentration project only request authorization from the Competition Council if they are in a dominant market position?

The answer is negative. The likelihood of a concentration harming competition is not limited only to creating a dominant position, although it is the most serious case requiring

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oversight of economic concentration operations. This is clearly shown by the phrase "particularly" (لا سيما), which implies example, not limitation.

The concentration must also not be one of the forms of restrictive practices mentioned in Articles 06 and 07 of Ordinance 03-03.

The legislator specified in Article 18 of the same Ordinance the threshold required for the illegality of economic concentrations: "The provisions of Article 17 above shall apply whenever the concentration aims to achieve a level exceeding 40 percent of the sales or purchases made in a particular market."

Reaching a share greater than 40 percent of sales or purchases in a particular market, while a fundamental criterion for knowing that the concentration will or may harm competition, and thus necessitates its subjection to authorization by the Competition Council, this criterion alone is insufficient to determine that the concentration will harm competition, especially with the legislator's abolition of Executive Decree No. 2000-315¹⁰, which defined the criteria for assessing concentration projects or concentrations.

However, economic concentrations cannot be deemed illegal even if they exceed a share of 40% of the volume of sales or purchases in a particular market, unless another condition is met: harm to competition, as this is the sole condition for establishing the illegality of concentrations.

3- Procedures for Monitoring Economic Concentration Operations:

The procedures for monitoring economic concentrations begin when the combining enterprises or companies reach the threshold specified in Articles 17 and 18 of Ordinance 03-03¹¹.

Similar to various legislations, Algerian law, like others, requires that economic concentration operations be subject to oversight by the Competition Council¹².

A duality of oversight over economic concentrations is noted in some sectors, as their founding laws include rules granting the sectoral authority the power to approve concentration operations.

For example, in the insurance sector, Article 230 of the Insurance Law¹³ 95-07 states: "Any action aimed at concentrating insurance or reinsurance companies in the form of a concentration or merger of these companies is subject to the supervision of the Control Authority¹⁴. The same procedure applies to any concentration of insurance brokerage companies in a concentration or merger..."

In the electricity and gas sector, Article 113 of Law 02-01 concerning electricity and gas distribution via pipelines¹⁵ states: "The Commission is responsible for ensuring the competitive and transparent functioning of the electricity and gas market and the national gas market for the benefit of consumers and operators." Furthermore, Article 115 thereof, in defining the role of the Electricity and Gas Regulatory Commission, states: "...to give a prior opinion on operations involving the concentration of enterprises or the imposition of control over one or more electrical enterprises by another enterprise carrying out the activities mentioned in Article 1 above..."

From the above, it is clear that the role of the Competition Council is to monitor freedom of competition in the market, while the sectoral authorities are concerned with technical oversight and the conformity of the concentration with the objectives of the activity. The issue of conflict of jurisdiction cannot be raised.

Generally, the Algerian legislator remedied this matter by amending Article 19 of Ordinance 03-03 via Law 08-12¹⁶, which states: "The Competition Council may authorize the concentration or refuse it by a reasoned decision after obtaining the opinion of the Minister responsible for Commerce and the Minister responsible for the sector concerned by the concentration."

Article 39 of the same aforementioned law also states: "When a case is brought before the Competition Council relating to a sector of activity falling within the competence of a regulatory

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authority, the Council shall immediately send a copy of the file to the concerned regulatory authority for its opinion within a maximum period of 30 days."

Therefore, we conclude that the Competition Council cooperates with these bodies until it issues its decision on the economic concentration.

3.1- Request for Authorization:

According to the text of Article 17 of Ordinance 03-03, any concentration likely to harm competition, particularly by strengthening a dominant position of an enterprise in a market, must be submitted by its parties to the Competition Council, which shall rule on it within a period of 3 months.

These requests are submitted by the enterprises according to the conditions and procedures specified in the regulatory text¹⁷ provided for in Article 22 of Ordinance 03-03.

3.2- Project Assessment:

According to the text of Article 19 of Ordinance 03-03, the Competition Council is competent to grant the authorization for the concentration, by a reasoned decision after obtaining the opinion of the Minister responsible for Commerce and the Minister responsible for the sector concerned by the concentration.

The Council may accept the concentration subject to conditions intended to mitigate its effects on competition.

The enterprises intending to concentrate may also voluntarily commit to undertakings intended to mitigate the effects of the concentration on competition.

This means that in this latter case, the concentration might be risky for competition but highly beneficial for the national economy, prompting the Competition Council to negotiate with the enterprise to reach a mitigation of the severity of this concentration on competition.

The project is also assessed from an economic perspective, i.e., its contribution to economic development. The work of the Competition Council requires not only safeguarding competition and operating according to the requirements of the free market but also considering certain economic and social interests and embodying state policy in the economic field through economic concentrations.

The Algerian legislator, in amending the competition law in 2008, emphasized encouraging small and medium-sized enterprises. Article 21 bis states: "...The threshold provided for in Article 18 above shall not apply to concentrations whose parties can demonstrate that they lead, in particular, to the development of their competitive capabilities or contribute to improving employment or are likely to allow small and medium-sized enterprises to strengthen their competitive position in the market."

Based on the above, it appears that the Council's treatment of enterprises differs regarding the required threshold, as the Council does not take into account and study its impact on competition if the concerned enterprises provide evidence showing the achievement of economic development, such as working to strengthen the role of small and medium-sized enterprises or encouraging investment in certain geographical areas and sectors.

Thus, it is noted that the legislator has narrowed the scope of discretion of the Competition Council after abolishing Executive Decree 2000-315, which defined the criteria for assessing concentration projects, and adding Article 21 bis via the 2008 amendment.

3.3- Decision Making:

After the Competition Council completes the project assessment procedures, it can then make a decision to either accept or reject.

Nevertheless, what is the solution if the 3-month period expires and the Council issues no decision? Is this implicit acceptance or rejection?

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In fact, there is no explicit text clarifying the legislator's position in this case regarding whether silence implies acceptance or rejection, although both Moroccan, Tunisian, and French law explicitly state that silence in this case is considered acceptance.

Some Algerian doctrine¹⁸ confirms that silence in this case is considered rejection, and this is confirmed by Article 20 of the Competition Law, which states: "The concerned enterprises are prohibited from taking any step or measure that would make the concentration irreversible during the period set for the issuance of the Competition Council's decision."

Furthermore, if the project is rejected by the Competition Council, its parties may submit the request to the government, which may then grant them the authorization if the public interest so requires, based on a report from the Minister responsible for Commerce and the Minister overseeing the sector concerned by the concentration.

It is also possible to appeal the decision to reject the concentration before the Council of State.

3.4- Sanction for Failure to Notify the Competition Council of the Economic Concentration:

Article 61 of Ordinance 03-03 states: "Concentration operations provided for in the provisions of Article 17 above which are carried out without authorization from the Competition Council shall be punished by a financial fine that may reach 7 percent of the turnover excluding taxes, achieved in Algeria during the last closed financial year, imposed on each enterprise party to the concentration or on the enterprise resulting from the concentration operation."

It is notable in this article and the following one that the Algerian legislator did not impose the penalty of nullity on these operations carried out without authorization and only imposed a financial fine. This has diminished the role of the Competition Council in monitoring these operations that negatively affect competition and, consequently, the national economy¹⁹.

Conclusion:

Freedom of competition and freedom of trade are two constitutional principles in Algerian law. Therefore, the legislator has striven to balance them, but each attempt tends to favor one side at the expense of the other.

This research has reached several results and legal issues:

- The term "economic concentration" (التجميع الاقتصادي), linguistically, does not encompass the three legal forms mentioned in the aforementioned Article 15 (merger, control, and establishment of a joint venture), because the term "التجميع" implies the merging of two or more previously separate things. In this sense, "التجميع" only applies to one form: the merger. It would have been better for the legislator to find another term that encompasses these different forms or to abolish this terminology and directly refer to the forms that require authorization from the Competition Council without grouping them under a single name.

- Reaching a share greater than 40 percent of sales or purchases in a particular market according to Article 18 of the Competition Law, while a fundamental criterion for knowing that the concentration will or may harm competition, and thus necessitates its subjection to authorization by the Competition Council, this criterion is insufficient to determine that the concentration will harm competition, especially with the legislator's abolition of Executive Decree No. 2000-315, which defined the criteria for assessing concentration projects or concentrations. This abolition implies that the legislator has narrowed the scope of discretion of the Competition Council, especially with the addition of Article 21 bis via the 2008 amendment to the Competition Law, which stipulates that the threshold required in the aforementioned Article 18 does not apply to small and medium-sized enterprises wishing to merge. This raises the problem of infringing on market competition.

- The legislator acted wisely when amending Article 19, which addresses the duality of oversight over economic concentrations in some sectors, as their founding laws include rules

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granting the sectoral authority the power to approve concentration operations. This leads to coordination between sectors, and the decision of the Competition Council does not contradict the decision of the concerned sectoral authority.

- It is also notable in Article 61 and the following article that the Algerian legislator did not impose the penalty of nullity on these operations carried out without authorization and only imposed a financial fine. This has diminished the role of the Competition Council in monitoring these operations that negatively affect competition and, consequently, the national economy.

From the above, it is evident that the Algerian legislator, under Law 95-06 and the executive decrees implementing it, sought to tip the scales in favor of protecting the market from competition [excesses?]. However, after the issuance of Ordinance 03-03 and the abolition of its executive decrees, the amendment of Ordinance 03-03 in 2008, and Algeria's encouragement of small and medium-sized enterprises to enter the market, there has been a significant impact on competition, indeed tipping the scales in favor of economic concentrations over freedom of competition.

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⁸ - Article 15/3 of the aforementioned Ordinance 03-03.

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¹⁰ - Executive Decree 2000-315, dated October 14, 2000, defining the criteria for assessing concentration projects or concentrations, Official Journal No. 61, issued October 18, 2000, repealed by Article 73 of Ordinance 03-03.

¹¹ - Article 19 of Ordinance 03-03 states: "The Competition Council may authorize the concentration or refuse it by a reasoned decision, after obtaining the opinion of the Minister responsible for Commerce." (Note: This seems to be the pre-amendment text cited in the footnote; the main text discusses the post-amendment version requiring also the opinion of the sector minister).

¹² - Najat Ben Jawal, Previous Reference, Page 83.

¹³ - Ordinance No. 95-07 dated January 25, 1995 relating to insurance, Official Journal No. 13, issued March 8, 1995.

¹⁴ - The Control Authority is the Insurance Supervisory Commission.

¹⁵ - Law No. 02-01 dated February 5, 2002, relating to electricity and gas distribution via pipelines, Official Journal No. 08, issued February 6, 2002. (Footnote date says 2006, likely a typo; law is from 2002).

¹⁶- Law No. 08-12 dated June 25, 2008, amending and supplementing Ordinance 03-03 relating to competition, Official Journal No. 36, issued July 2, 2008.

¹⁷- Executive Decree No. 05-219 dated June 22, 2005, relating to authorization for concentration operations, Official Journal No. 43, issued June 22, 2005.

¹⁸ - Ait Mansour Kamel, Previous Reference, Page 08.

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