

The application of Indexes by competition Council: Mergers and joint ventures

تطبيق مجلس المنافسة للمؤشرات الاقتصادية: عمليات التركيز الاقتصادي للمؤسسات

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Date of send:08/04/2023 Date of acceptance:16/05/2023 Date of publication :30/05/2023

Abstract: Mergers and acquisitions are key functions of the capital markets. Combined with the fact that nowadays a merger control regime is in force in almost every country of the world, the need for merger clearance is often seen as a potentially frustrating bump on the road. Time is money, and every day spent awaiting merger clearance has an impact on the profitability calculations behind a deal. Hence, the parties are eager to speed up the merger control process as much as possible. Bearing that in mind, it is hard to imagine a more tragic outcome of a merger control process than a prohibition, and a withdrawal is effectively the same. Our study will focus on the economic analysis in merger investigations –and the treatment of notifications by the competition Council.

Keywords: Merger notification, Marketshare, Relevant market, All business sectors, Joint-venture, algorithmic cartels.

Introduction

The "rule of reason" is a principle within competition law that is used to assess whether a particular business practice or agreement violates antitrust laws. It is an analytical framework that requires a detailed examination of the potential anticompetitive effects of the practice or agreement, as well as any procompetitive benefits it may bring. Unlike the "**per se**" rule, which automatically considers certain practices as anticompetitive and illegal, the rule of reason takes a more nuanced approach. It recognizes that certain practices may have both positive and negative effects on competition, and it aims to strike a balance between promoting competition and allowing legitimate business conduct. Under the rule of reason, the analysis typically involves evaluating the market power of the parties involved, the potential harm to competition, and any efficiency or consumer welfare benefits that may arise from the practice or agreement. The focus is on determining whether the overall effect on competition is net positive or net negative. In the context of competition council decisions, the application of indexes plays a significant role. Competition councils may use various indexes and indicators to assess market concentration, market power, and the competitive effects of a particular conduct or transaction. For example, one commonly used index is the Herfindahl-Hirschman Index (HHI), which measures market concentration by summing the squared market shares of all firms in a market. A higher HHI indicates a more concentrated market, potentially raising concerns about reduced competition.

Additionally, competition councils may consider other indexes or indicators such as price-cost margins, barriers to entry, market shares, and pricing behavior to evaluate the competitive impact of a business practice or merger. These indexes and indicators provide quantitative measures that assist competition councils in their decision-making process. They help identify potential anticompetitive effects, assess market power, and evaluate the impact on competition and consumer welfare.

However, it's important to note that the application of indexes and indicators is just one component of the overall analysis conducted by competition councils. They are used in conjunction with other qualitative and quantitative evidence, economic analysis, and legal principles to make informed decisions regarding the compatibility of a business practice or merger with competition law.

Ultimately, the rule of reason and the application of indexes by competition councils aim to strike a balance between promoting competition, protecting consumer interests, and allowing for efficient and procompetitive business conduct within the bounds of antitrust laws.

Overall, the Economic market structures can generally be categorized into four main types; these categories include perfect competition, monopolistic competition, oligopoly, and monopoly.

the Perfect competition is characterized by numerous small firms producing identical products or services. In this structure, businesses can easily enter and exit the market, and no individual firm has control over the market price.

Monopolistic competition involves a large number of firms that produce similar but slightly differentiated products. Each firm in this structure has some degree of control over its price due to product differentiation, although entry and exit from the market remain relatively easy. Then, Oligopoly occurs when a few dominant firms dominate the market, and they may produce similar or differentiated products. These firms possess substantial market power, allowing them to influence prices and market conditions. However, a Monopoly exists when a single firm controls the entire market without any direct competition. In this structure, the monopolistic firm has complete control over prices and market conditions. These market structures represent varying levels of competition and concentration within an industry, and they carry distinct implications for market dynamics, pricing strategies, and consumer welfare. The goal of all firms is to maximize their profits by optimizing the balance between marginal revenue and marginal cost. However, the relationship between marginal revenue and price differs across market structures. In perfect competition, marginal revenue is equal to price, resulting in optimal decision-making. In contrast, in other market structures, such as monopolistic competition, oligopoly, and monopoly, price generally exceeds marginal revenue. This is because firms in these structures must lower the per unit price to sell more units and increase their revenue.

Among the different market structures, perfect competition tends to have the highest quantity of goods or services sold. Additionally, prices are typically lowest in perfect competition, although this can be influenced by factors such as demand elasticity and economies of scale that may reduce a producer's marginal cost. On the other hand, monopolists, oligopolists, and firms in monopolistic competition often engage in product differentiation to justify charging higher prices. Monopolists typically sell a smaller quantity of goods or services at a higher price, allowing them to generate larger profit margins and positive cash flows. Investors may find benefits in holding shares of monopolistic firms with substantial profit margins. In competitive markets, firms do not earn economic profit beyond the compensation they receive for the rental of capital and management services. Due to the absence of pricing power, there are no additional profit margins available in these structures.

In the short run, firms across all market structures can experience economic profits. However, the level of competition and the ease of market entry play a significant role in determining how long these extra profits will persist. In the long run, as new firms enter the market, profit margins tend to shrink, and less efficient firms may be forced to exit the market. Strategic behavior is a key characteristic of oligopoly. Firms in this market structure have the ability to manipulate various factors such as price, quantity, quality, and advertising to gain a competitive edge. Different types of equilibrium, such as Nash equilibrium, Cournot equilibrium, or the kinked demand curve, can impact the likelihood of firms (both incumbents and

potential entrants in the long run) achieving economic profits. Price wars may also be initiated to pressure weaker competitors into exiting the market.

This article delves into the main issue:

What is the importance of understanding the relationship between mergers, acquisitions, joint ventures, market structure, and the application of the "rule of reason" for competition authorities, policymakers, and industry participants?

which will lead us to discuss :

- How quantitative methods may be used in such cases as well as the weight of qualitative analysis in handling concentration cases by the Competition Council?

- Is there a definition of 'control' and are minority and other interests less than control caught?

- What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated? Are there also rules on foreign investment, special sectors or other relevant approvals?

- What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

Firstly: The concept of economic concentrations in Algerian law

The control of mergers in Algeria by the competition authority called the "Competition Council" is provided for in Chapter III of Ordinance 03-03 of July 19, 2003 through the statement of 9 articles (15, 16, 17, 18, 19, 20, 21, 21 bis, 22) under the title "economic concentrations" as well as by Articles 61 and 62 of Chapter IV on "sanctions for restrictive practices and concentrations."

It should be noted that within certain articles of Chapter III, the Minister in charge of trade and the one in charge of the sector concerned by the concentration may intervene, as we will see in the following development. It is also worth recalling that the Algerian Commercial Code provides, in its Book IV Chapter III on "Joint-stock companies," and notably in its Section IV on "Merger and Splitting," the technical modalities of mergers in its paragraphs:

- containing "general provisions" (Articles 744 to 748).
- containing "provisions relating to joint-stock companies" (Articles 749 to 762) and in its paragraph.
- containing "pr
- ovisions relating to limited liability companies" (Article 763).

From that It appears that company law with regard to the treatment of merger transactions logically preceded competition law, but was limited exclusively to the "accounting/technical" aspect. Competition law came to complement the provisions of company law with regard to the treatment of mergers by introducing new technical criteria (notably apprehended with the help of Executive Decree 05-219 of

June 22, 2005) aimed primarily at protecting the market, in particular by ensuring the functioning of competition rules¹.

1. Mergers according to the Commercial Code:

The Code of Commerce, in its Section IV (Book V, Chapter III) concerning "mergers and splits," as announced in the introduction, is limited exclusively to the technical and accounting aspects of setting up a merger by absorption. Nevertheless, Article 744 provides a definition of a merger, whether it is carried out by absorption or by split.

The same Code of Commerce limits merger and split operations to two legal forms: joint-stock companies and limited liability companies, with reference to the corporate bodies of these companies often highlighted in the decision-making process. Article 748 deserves particular attention in that it stipulates that "the draft contract is deposited in a notary office at the location of the registered office of the acquiring and acquired companies. It is subject to publication in a newspaper authorized to receive legal announcements". In fact, this article is likely to guide the Competition Council's services on how to "uncover" unnotified concentrations (provided, of course, that companies comply with Article 748 of the Code of Commerce). To do so, it would suffice to seek the assistance of notary offices and/or refer to the BOAL to detect companies that have violated the notification provisions. We will see in Part IV that in both cases, the exercise is not as straightforward².

Regardless, we can deduce that competition law in "mergers" matters prevails over corporate law since a merger transaction cannot be initiated without obtaining the authorization of the concentration. A possible rejection by the Competition Council is therefore likely to nullify all the merger procedures provided for in the aforementioned articles of the Commercial Code. In our opinion, **statutory auditors** (as well as **contribution auditors**) should implement their "obligation to alert" in this regard, by preventing the companies concerned from embarking on merger transactions whose authorization is not necessarily guaranteed in the form of a favorable response to the notification made to the Competition Council by these same companies³.

2. Mergers and Acquisitions under Ordinance 03-03 of July 19, 2003, as amended and supplemented:

Eleven (11) out of the seventy-four (74) articles of the modified and supplemented Ordinance 03-03 of July 19, 2003 are devoted to economic concentrations⁴.

Article 15 of the aforementioned ordinance defines the realization of a concentration as:

- The merger of two or more previously independent companies;
- One or more natural persons already holding control of at least one company, or one or more companies directly or indirectly acquire, whether through the

acquisition of shares, assets, contracts, or by any other means, control of all or part of one or more other companies.

This definition is actually taken verbatim from the French Commercial Code, which concludes this definition in Article L 430-1 1 by stating: "The creation of a joint venture performing, on a lasting basis, all the functions of an autonomous economic entity constitutes a concentration within the meaning of this Article."

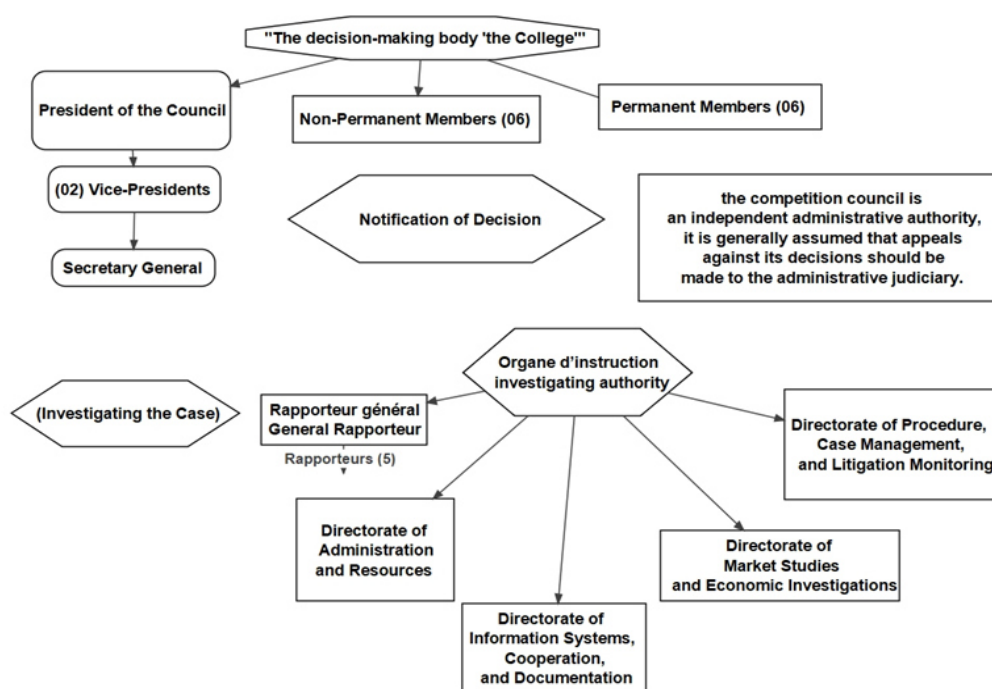
In summary, these provisions indicate that there are three cases of "concentration:"

- Merger;
- The durable acquisition of control;
- The creation of a joint venture that performs, on a lasting basis, all the functions of an autonomous economic entity (known as a "full-function joint venture").

Article 17 of Ordinance 03-03 of July 19, 2003, as amended and supplemented, relating to competition, implies that not all concentrations are subject to the law on free competition; only those that are likely to impede the free play of competition are concerned, namely those that "strengthen in particular the dominant position" or more precisely "whenever the concentration aims to achieve a threshold of more than 40% of sales or purchases made on a market" as supplemented by Article 18.

Article 19 submits the decision to authorize or reject a concentration by the Competition Council to the opinion of two ministers: the one in charge of commerce and the one in charge of the sector concerned.

Illustration: The Role and Position of the Competition Council in the Institutional Framework through the Organizational Structure.



(Website source : <https://www.conseil-concurrence.dz/>)

Algeria has adopted a new Investment Law In 2022⁵Who presented several substantial amendments to those already existing in the 2016 Investment Law.

In 2016, most of the provisions of Ordinance No. 01-03 on the development of investment has been subject to substantial changes to the legal framework governing investments. Six executive decrees dated March 2017 complete this new set of legal rules.

Foreign investments were merely subject to a prior registration with the National Agency for Investment Development. The approval of the National Council for Investment were no longer required, except with regard to the exceptional advantages granted by the Investment Law⁶.

Among the rules applicable to foreign investments, it is worth noting that the exercise in Algeria by foreign investors of activities in the sectors of production of goods, services and importation was only conducted through a company in which 51 per cent of the share capital is held by one or several Algerian national residents. As a consequence, the level of foreign ownership in the capital of an Algerian company operating in these sectors cannot exceed 49 per cent of the share capital , but in 2022, Thus, it is indeed the removal of the rule limiting foreign ownership to 49% of the share capital of an Algerian company, for sectors that are not considered to have a “particular” or “strategic” interest⁷.

In addition, it should be added that some sectors are regulated and require specific approvals. Such sectors include:

- The medical and pharmaceutical sector supervised by the Ministry of Health;
- The banking sector supervised by the Banking Commission (within the Central Bank);
- The oil and gas sector supervised by the Ministry of Energy, the Hydrocarbons Regulatory Authority and the Hydrocarbons Resources Valuation National Agency;
- The insurance sector supervised by the Insurance Supervisory Commission;
- The automotive sector supervised by the Ministry of Industry and Mines; and
- The telecommunication sector supervised by the Post and Telecommunications Regulatory Authority.

In terms of the merger control regime, the Competition Council seeks the opinion of the Minister in charge of the sector concerned with the concentration, before authorising or rejecting the concentration, by motivated decision

Finally, any rejection decision may be subject to appeal before the Council of State.

The Algerian legislator has also introduced the notion of the public interest in the handling of concentrations (Article 21), without however defining its content when this notion is related to economic concentrations.

The public interest, which only the government can invoke upon the report of the two aforementioned ministers, consists of overriding the decision of rejection by

the Competition Council by granting an "authorization ex officio"⁸, at the request of the parties concerned.

Finally, article 21 bis authorizes "concentrations resulting from the application of a legislative or regulatory text." Under this type of text (legislative or regulatory), the concentration operation may be subject to considerations other than free competition. Some parameters may indeed take precedence, such as employment development, improvement of business competitiveness, and/or consolidation of the competitive position of SMEs (Small and Medium Enterprises).

In addition, it should be noted that in order to submit a concentration authorization request, an executive decree referenced 05-219 of June 22, 2005 has set the conditions and procedures for it.

Furthermore, two articles of Ordinance 03-03 of July 19, 2003, as amended and supplemented, act as a "safeguard" or "sword of Damocles" against possible "fraudsters" in this matter. These are:

➤ Article 61, which imposes a fine of up to 7% of the pre-tax turnover achieved in Algeria during the last closed financial year on companies that carry out a concentration without the authorization of the Competition Council.

➤ Article 62, which imposes a fine of up to 5% of the pre-tax turnover achieved in Algeria during the last closed financial year on companies involved in the concentration who have not complied with the prescriptions or commitments mentioned in Article 19.

This brief overview of the legislative framework concerning concentrations leads us to examine the obstacles that the Competition Council often faces in implementing the provisions of Ordinance 03-03 of July 19, 2003, as amended and supplemented, in its "economic concentrations" aspect.

3-The Artificial Intelligence and Competition Law:Post-merger and acquisition

The digital economy heavily relies on electronic communications and digital technology for the production and distribution of goods and services. To stay competitive, firms are increasingly using big data and pricing algorithms to improve pricing models and predict market trends. However, the use of algorithms also raises legal issues, particularly in competition law, as it may facilitate collusion between companies.

Cartels involve collusion between firms and can therefore be distinguished from unilateral conduct that can result from Mergers and joint ventures ; capable of infringing competition laws (i.e. an abuse by a dominant firm of its position of market power).A legislative review on the subject is necessary. A modern law to protect competition in Algeria, following the practice and solutions of modern European legislation. To prevent anti-competitive agreements and abuses of dominant positions, and protect consumer welfare, especially from algorithmic cartels These cartels are a challenge for competition bodies to detect and assign responsibility for the violations.

The use of algorithms is increasingly common in business processes, allowing companies to reduce expenses and improve efficiency. Companies are making strategic decisions based on algorithm results, which improve pricing models, customize services, and predict market trends. While using pricing algorithms is allowed, colluding on prices via algorithms is prohibited under modern competition law⁹.

Secondly: role of economic analysis in Algerian competition law regarding economic concentrations

The Competition Council, as an administrative authority assigned to the Trade Minister, is entrusted with many tasks as ; to sanction anticompetitive practices, such as concerted practices, cartels and abuses of a dominant position; to control concentrations, in particular to prevent the strengthening of dominant positions and the abuses that may derive from it; and to advise companies and associations at the request of public authorities or on its own initiative.

1. Some ambiguities in the texts indirectly affecting economic analysis

Article 17 of Ordinance 03-03 of July 19, 2003, as amended and supplemented, on competition states that "Concentrations which are likely to harm competition by strengthening, in particular, the dominant position of an undertaking in a market, must be submitted by their authors to the Competition Council, which shall make a decision within a period of three (03) months".

From reading this article, one can deduce that the parties to the concentration may consider that the new structure created does not harm competition or strengthen their dominant position in the market, and consequently may be exempt from the obligation to submit the concentration project to the Competition Council by invoking, if necessary, their inability to evaluate "the degree of harm to competition". Stated differently, this wording gives the power to the companies applying for a concentration to estimate whether the proposed operation is "likely to harm competition..." As a result, it appears that companies are only required to submit their operations to the scrutiny of the Council if, of their own accord, they consider that the operation is likely to harm competition.

The consequence is that the insignificant number of concentration cases notified to the Competition Council in eight years of operation (four notifications) appears to be related to the provisions of Article 17, which seems to make concentration notifications optional. In fact, it is the responsibility of the Competition Council to assess, particularly on technical and economic grounds, the real or potential effects on competition of a concentration project and therefore to examine all initiatives taken in this regard by companies. Any concentration operation should be notified to the Competition Council before its completion. Notification should occur as soon as the parties concerned are able to present a sufficiently developed project to allow for the instruction of the file, and in particular when they have reached a principle agreement, signed a letter of intent, or upon the announcement of a public offer for purchase or sale (in the case of listed companies). In addition, Article 18 of the same ordinance provides that: "The provisions of Article 17 above apply each time the

concentration aims to achieve a threshold of more than 40% of sales or purchases made in a market." However, the use of a percentage (%) indicator for the determination of sales or purchases does not allow us to know whether these are to be evaluated in physical terms (volumes) or in terms of values (dinars). From our point of view, it would have been more appropriate to replace the notification criterion based on market share with one based on turnover. Experience at the comparative level has revealed that the former criterion remains legally uncertain and ineffective.

Indeed, the determination of market shares requires prior definition of the relevant markets concerned by the operation, which is often a source of dispute between companies and competition authorities; the former tend to broaden this definition to dilute their market share and therefore not be subject to control, while the latter try as much as possible to limit the scope of this market to define the economic power of the companies in question. This is why most authorities use the turnover criterion, which allows for automatic notification of operations that exceed the set turnover threshold.

The determination of the required turnover level in Algeria (concentration threshold) could be determined by a multidisciplinary working group proficient in competition law and economic analysis. Finally, the legislator has authorized the "a priori" justification of the concentration when it aims at "improving competitiveness, contributing to job creation or consolidating the competitive position of SMEs (small and medium-sized enterprises)" justification for which evidence is to be sought by the Competition Council. This provision of the aforementioned ordinance paves the way for difficult-to-control permissiveness, since any concentration could find at least one of the three aforementioned criteria as a justification¹⁰.

2.The issue of mergers in Algeria

The main observation to make is that the Algerian legislator in the field of concentration law seems to be ahead of the prevailing economic context to this day. Indeed, while the text covers the treatment of concentrations extensively and can adapt to a state of market economy (and economic freedom), the existing gap between administered economy and market economy has not yet been bridged, despite economic reforms undertaken since the 1990s.

As stated earlier, even though the texts have dealt with concentrations since the 1990s (see the commercial code and ordinance 95-06 on competition), it remains a new phenomenon to this day, with no statistics available to account for the (likely low) importance of concentrations in Algeria.

The explanation lies in the lack of real market dynamism. Indeed, the economic sector, especially the industrial sector, is characterized mainly by family shareholding in companies and the almost complete absence of financial markets (insignificant number of listed companies).

Thus, the bulk of the dynamism of large companies is achieved through investments (often funded by state aid) to increase their size (internal growth) rather than through company acquisitions (mergers and acquisitions) constituting external

growth. And according to the latest statistics from the Ministry of Industry and Mines, the Algerian industrial fabric is made up of 97% very small enterprises, i.e. companies with a workforce of 1 to 9 people, generating a turnover of less than 40 million dinars (criteria set by the law 17-02 of 10/01/2017 on the orientation law for the development of SMEs).

The breakdown by legal form of the 203,134 legal entities (according to 2019 statistics from the NATIONAL CENTER OF THE TRADE REGISTER) indicates that nearly 90% are SARLs (Limited Liability Companies) and EURLs (Single-Person Limited Liability Companies), while only 5.8% are SPA (Joint Stock Companies). The predominance of small businesses (TPE) and the SARL and EURL legal forms (90%) reveals the weakness of mergers and acquisitions that have occurred in recent years. The family ownership of businesses and the absence of efficient financial markets largely explain this lack of dynamism. Since the 1990s, Algeria has been engaged in a program of liberalization and structural adjustment aimed at establishing market mechanisms, freedom of internal and external trade, and since the 2000s, in an approach aimed at encouraging private initiative and activating the privatization of state-owned enterprises.

Given the entrepreneurial context and the average size of Algerian companies, the new imperatives of restructuring and modernization, as well as adaptation to market laws in order to internationalize and achieve critical mass to face international competition, are difficult to achieve without resorting to quick and effective solutions for increasing resources (technical, human, etc.) and strengthening the capacities of Algerian companies.

In Algeria, mergers and acquisitions should be seen as one of the solutions to the new challenges facing companies dictated by the economic liberalization policy of the country. We hypothesize that the first merger transactions must have occurred in the early years of the reforms (1990s) and particularly or essentially in the public sector since it went through several industrial restructuring. To our knowledge, none of these restructurings which sometimes consisted of company mergers (merger and acquisition) have been submitted or notified to the Competition Council during both the 1990s and recently between 2013 and 2020. This situation, which appears to go against the law on concentrations, seems to have been reinforced (at least between 2003 and 2020) by the provisions of Article 21 bis which states "concentrations of companies resulting from the application of a legislative or regulatory text are authorized."

2.1. Characteristics of the concentration cases handled:

From 2013 to date, only four (04) concentrations have been notified to the Competition Council. In Part II, we provided the explanations that we believe justify this situation. In this section, we provide a description of each case, highlighting its main characteristics. It should be noted that the notifications concerned:

- One notification from the healthcare sector;(2015)
- Two notifications from the industrial sector (2017 and 2018);

- One notification from the insurance sector (2019).

Regarding the nature of the decisions taken by the Competition Council in matters of economic concentration: only one concentration was authorized (LIND GAZ AG/PRAIXER INC) while the other three were subject to the following decisions:

i. The concentration of the companies SANOFI and CHEPLAPHARM

This was subject to a decision deferral until the presentation of the document (registration decision in the name of the new purchaser of the business required by the Ministry of Health).

This request concerned the acquisition by CHEPLAPHARM Company (a German pharmaceutical distribution company) of assets related to the drug URSOLVAN from the SANOFI Group. More specifically, it was the sale by the SANOFI Group to CHEPLAPHARM Sarl of the business (asset sale) relating to the drug URSOLVAN.

The Competition Council, based particularly on the opinion of the Ministry of Health of October 22, 2015, decided to defer its decision until the two companies eligible for the concentration presented the registration decision established in the name of the new holder, in this case, CHEPLAPHARM Sarl as the buyer of the business¹¹.

ii. The merger of the companies SIEMENS/ALSTOM

This notification was withdrawn by the representatives of the two companies as soon as the European Commission issued an unfavorable opinion.

The representatives of both companies withdrew this notification after the European Commission issued a negative opinion.

This merger raised the issue of how to handle transnational mergers in a developing country.

iii. The merger between Spa SAE EXACT (a subsidiary of SAA) and Spa EXAL

The merger request was refused on the basis of Resolution 01/166/12/12/2018 of the State Participation Council (CPE) regarding the indebtedness of State-owned Economic Enterprises (EPEs).

Djillali SLIMANI, Permanent member of the Competition Council, reports on the nature of economic concentration operations, including two mergers (SIEMENS/ALSTOM and SAE EXACT Spa/EXAL SPA), one purchase of assets (SANOFI and CHEPLAPHARM), and one joint venture creation (LIND AG/PRAIXER INC). However, the distribution of economic concentrations based on national and global turnover can not be determined due to the use of the marketshare percentage criterion by Algerian competition law. Each concentration resulted in a marketshare exceeding 40%, which makes them eligible under articles 17 and 18 of Ordinance 03-03 of July 19, 2003. The distribution of notifications of economic concentrations is also classified based on the origin of the parties involved, where three

notifications (Sanofi/Cheplapharm, Siemens/Alstom, and Lin AG/Praixer Inc.) involve foreign companies, and one notification (SAE EXACT Spa/EXAL SPA) involves Algerian companies. However, information on the distribution of economic concentrations based on the amounts of transactions carried out is not available in the notification of concentration information form¹².

Finally, the motivations put forward by the companies concerned for carrying out these concentration operations revolve around the following points given in order of importance:

- Imperatives of internal restructuring;
- The desire to create synergies and pool resources between the companies concerned;
- The search for investment opportunities;
- The search for portfolio diversification;
- And the development of the service offering of the parties involved in the notified economic concentrations.

2.2. Use of economic analysis in the aforementioned cases

The economic analysis used in the four cases was mainly devoted to the examination of Annex 2 of Executive Decree No. 005-2019 of June 25, 2005, relating to the authorization of concentration operations. Annex 2 is a form that the parties involved in the concentration must fill out and which contains three essential parts:

- Data relating to the companies involved in the concentration;
- Data relating to the concentration;
- Data relating to the market.

The Competition Council is a young institution (eight years of actual operation after its activities were frozen in 2003 and reactivated in 2013).

It should be noted that the Council does not have a dedicated service specifically for concentrations, nor does it have a team of economists specifically dedicated to economic analysis and headed by a chief economist. Moreover, no senior economist has a higher education degree in econometrics.

More specifically, it can be said that it is the rapporteurs who play the role of economic analysts in the instruction of concentration cases and then the two members of the college at the level of the Council's deliberations.

It should also be noted that Algerian concentration law does not provide for Phase 1¹³ and Phase 2¹⁴ in the treatment of concentrations. Only one phase is provided, at the end of which the decision to authorize the concentration or refuse it must be made within a period of three (03) months.

As a result, a thorough examination of a concentration case has not yet been carried out, and the Council's economists have not had to design requests for information (other than those provided for in the aforementioned Annex 2) or negotiate corrective measures for each of the concentration notifications received.

Given the low number of concentration notifications received and the limited experience in using surveys in merger review cases, the Council did not use

quantitative analysis in the examination of the four aforementioned cases or precise quantitative techniques such as SSNIP or HHI, although our economists are capable of mastering these techniques¹⁵.

Finally, the Competition Council did not use external economic experts in the cases dealt with, particularly due to the absence of in-depth examination mandates.

As for qualitative evidence or indicators, the Competition Council generally uses internal studies and analyses transmitted by the parties to the concentration as well as all public information or market studies and analyses available.

In particular, the following explanations and clarifications are sought through these studies and analyses

for the delimitation of markets in terms of products:

- The physical characteristics of products and services;
- Customer needs or preferences;
- Differences in prices;
- Distribution channels;
- The legal environment.

For the geographic delimitation of markets:

- Transportation costs;
- The distance or travel time of consumers or buyers.

2.3. Quantitative methods that may be used for concentration cases

a)The necessity of guidelines

Although to date, the Competition Council has not used quantitative methods to examine notified concentrations, it remains aware of the interest in using these techniques as they contribute to strengthening the argumentation of its decisions on the one hand, and to providing its contribution to judges in courts to strengthen their conviction on the other hand¹⁶.

Indeed, the importance of economic analysis is at the heart of the control of concentrations, even if this is not explicitly stated in the guidelines that the Competition Council is called upon to publish and make available to stakeholders as a pedagogical guide.

Economic analysis should be a necessary tool, in particular for the analysis of market power and the potential effects of mergers.

In addition, quantitative studies submitted by stakeholders (companies applying for mergers and acquisitions) should be supervised by the Competition Council so that they can be properly evaluated. They must not only clearly present the methodology used, but also discuss the validity of the methodological choice and its limitations, in order to fully address the specific economic concerns of the case at hand¹⁷.

b)The involvement of economists

The involvement of economists in the control of concentrations is currently considered relatively weak, as mentioned above, because the Competition Council is

a "small and young" organization and no in-depth examination of a concentration has been carried out to date.

The same explanations account for the absence of external expertise, without excluding it definitively, given that concentration notifications may evolve depending on the launch of economic reforms planned by the public authorities between 2020-2024.

A stronger involvement of economists is dependent on the establishment of a dedicated structure for economic concentrations, a "concentration service," which will be strengthened with skills in industrial economics (econometrics) and which will effectively contribute to the collection of information (quantitative or qualitative).

These same skills will also be called upon to exchange with economist firms used by the parties, especially during the pre-notification phase and, if necessary, throughout the entire procedure (at the request of the parties or the rapporteurs' team) in order to discuss the data and/or hypotheses used.

c) Quantitative tests that may be implemented by the Competition Council

i. The Herfindahl-Hirschman Index

This index is regularly used to assess the nature of market concentration, particularly to identify the possibility of a dominant position. For this reason, it is used by the European Commission, which uses the following definition": **Market concentration index**, i.e., the extent to which a small number of firms represent a large portion of production". The HHI is used as a possible indicator of market power or competition among firms. It measures market concentration by adding the squares of the market shares of all firms in the sector¹⁸.

illustration: Calculating the Herfindahl-Hirschman Index using market size

Firm	Market Share in Percent	Market Share
A	38%	.38
B	25%	.25
C	20%	.20
D	17%	.17

(Website source : <https://www.concurrences.com>)

Procedure for Calculating Herfindahl-Hirschman Index :

1. Square (or multiply the market size times itself) the market size (either absolute terms or percentage terms) of all of the firms in the market.

2. Sum up the squares.

3. Compare the result with the index numbers provided by Herfindahl and

$$HHI = (\text{Market Size of Firm A})^2 + (\text{Market Size of Firm B})^2 + (\text{Market Size of Firm C})^2 + (\text{Market Size of Firm D})^2$$

$$HHI = (38)^2 + (25)^2 + (20)^2 + (17)^2$$

$$HHI = 1,444 + 625 + 400 + 289$$

$$HHI = 2758$$

The interpretation of Herfindahl-Hirschman Index

- A HHI index below 100 — *Indicates a highly competitive market.*
- A HHI index below 1,000 — *indicates an unconcentrated market.*
- A HHI index between 1,000 to 1,800 — *indicates moderate market concentration.*
- A HHI index above 1,800 — *indicates high market concentration*

Since 2,758 greater than 1,800, there is high market concentration in this market

Assuming the data is reliable and available, the competition Council could easily calculate this index and use it as a guide for its approvals or refusals of notified concentrations¹⁹.

ii. The Hypothetical Monopolist Test (SSNIP)

To date, the Authority has not had the opportunity to implement quantitative methods such as the Hypothetical Monopolist Test (SSNIP) in merger control decisions.

This test could be implemented if it were possible to do so under satisfactory conditions for obtaining reliable data. However, we had previously mentioned the weakness of the statistical system both at the institutional and business levels.

The purpose of the Hypothetical Monopolist Test (or "SSNIP test") is to determine the smallest group of goods for which a slight but significant (usually 5 to 10%) and non-transitory price increase would be profitable to a hypothetical company that would control all of the goods considered. As the Hypothetical Monopolist Test relies by definition on an unobservable situation, its quantitative implementation can be difficult.

However, it is possible to use it, especially when the market contains only one or two goods or when doubts exist about whether or not a good should be included in a delimited market thanks to qualitative indicators. The test can be implemented based on available data. Some data is relatively easy to obtain (diversion ratios, margins). The data necessary for the quantitative implementation of the Hypothetical Monopolist Test can come from internal company data such as the variable cost margin, which can be calculated from the accounting data of the parties. In addition, marketing studies, expert reports or consumer surveys generally contain estimates of direct price elasticity or diversion ratios (rate of transfer between products). As it is quite possible to use econometrics to obtain direct price elasticities by estimating demand functions from price and quantity data (data that can be taken from cash register outputs or scanning data at least at the level of large sales areas).

The Hypothetical Monopolist Test should guide any relevant market definition. However, it requires a special effort to collect the data necessary for its implementation. It should be noted that it is not easy to put this type of test into practice within the deadlines set by merger control (90 days according to article 17 of Ordinance 03-03) and the financial resources required to collect data (surveys in particular).

iii. The Upward Pricing Pressure (UPP) Test

The debates surrounding the revision of guidelines in the United States have highlighted the possibility of using new quantitative tests by directly measuring the unilateral effects of mergers.

Thus, the Upward Pricing Pressure (UPP) test proposed by professors Farrell and Shapiro is supposed to indicate, based on indicators derived from a calculation based on the margins and diversion ratios between the products of the merging companies, whether the parties would have an interest in increasing or not their prices post-merger. The UPP test (Upward Pricing Pressure) is one of the quantitative tests used by Competition authorities to carry out an initial assessment of the risk of unilateral effects that may arise from a concentration. According to EU guidelines on concentrations, the UPP test consists of taking into account the incentives of the new entity to increase its prices due to the internalization of the effects of a price increase on the products acquired as a result of the operation, but also the incentives to decrease prices that could result from the efficiency gains generated by the operation. The aim is to analyze the sign of the net effect: if it is positive, the operation is likely to lead to a price increase; if the net effect is negative, the operation may be considered favorable to consumers. The interest of this test is that it requires less information than the Hypothetical Monopolist Test.

iiii- The Illustrative Price Rise (IPR) Test

This is a quantitative test used by competition authorities to obtain an initial estimate of the risk of unilateral effects resulting from M & A. This test has in common with all the previous, that they focus only on the incentives of the merging parties to raise their prices, without taking into account the reaction of competitors.

This incentive to raise prices comes from the elimination of the cannibalisation effect that existed between the merging companies. Prior to the merger, if a company raised the price of one of its products, all or part of its demand was shifted to other products sold by competitors. This limited the incentive for that company to raise prices. After the merger, not all the sales lost by the firm raising its price are lost to the group, since some of them will be passed on to the other merging firm. The merger of the two companies therefore removes one of the incentives not to raise prices.

As an illustration, suppose that Companies 1 and 2 merge. Suppose also that if firm 1 increases its price by 10%, then its demand will fall by 100 units, with 30% going to firm 2 and 70% going to competitors. Prior to the merger, as long as firms 1

and 2 are in competition, firm 1 does not care which competitors are deferring demand. After the merger, however, the demand of company 1, which refers to the products sold by company 2, remains within the group. Only the 70% that defers to competitors will be lost. The merger therefore eliminates the cannibalisation effect that previously existed between companies 1 and 2, and thus makes a price increase more profitable.

Conclusion

Based on the analysis of mergers and acquisitions presented in this study, the following results and recommendations can be drawn:

Results:

1. Differentiating between acquisitions and mergers: An acquisition involves the purchase of a portion of one company by another, while a merger leads to the absorption of one company by another, resulting in a single surviving entity.

2. Types of mergers: Horizontal mergers occur among peer companies in the same business, vertical mergers involve companies along a value chain, and conglomerates are formed by companies in unrelated businesses.

3. Concentration of merger activity: Merger activity tends to be concentrated in industries undergoing changes such as deregulation or technological advancement.

4. Motives for M&A activity: Motives for mergers and acquisitions include synergy, growth, market power, acquisition of capabilities and resources, diversification, increased earnings, management incentives, tax considerations, and uncovering hidden value. Cross-border motivations may involve technology transfer, product differentiation, government policy, and serving international clients.

5. Role of competition law: Competition law prohibits mergers and acquisitions that impede competition, ensuring a fair and competitive market.

6. the Herfindahl-Hirschman Index (HHI) is a widely employed tool for evaluating market concentration and determining the potential existence of a dominant position. the Competition Council plays a crucial role in ensuring fair competition and market efficiency Through the use of the HHI to measure market concentration, specifically the degree to which a few firms control a significant portion of production. By summing the squares of market shares, the HHI serves as an indicator of market power and competition intensity among companies.

7. the implementation of quantitative methods such as the Hypothetical Monopolist Test (SSNIP) in merger control decisions has not been possible due to the lack of satisfactory conditions for obtaining reliable data. Despite the weaknesses in the statistical system at both institutional and business levels, it is still feasible to use the test, especially in markets with few goods or when qualitative indicators are inconclusive. Collecting the necessary data for the test's quantitative implementation requires additional efforts and resources, which can be challenging within the time constraints and financial limitations of merger control processes.

Recommendations:

1. Concentration department: Establish a concentration department within the Competition Council, staffed with experts in industrial economics or econometrics, to handle the increasing number of merger notifications resulting from ongoing economic reforms.(2024-2020)

2. Enhance transparency and census accuracy: Address the challenges in obtaining accurate information on mergers and acquisitions, particularly for non-listed companies. Promote transparency among companies and develop mechanisms to ensure an accurate census of these operations.

3. Support small and medium-sized enterprises (SMEs): Recognize the importance of SMEs in Algeria and their vulnerability to acquisition by larger enterprises. Implement measures to protect and support SMEs, considering their financial, human, and technical limitations.

4. Enhance quantitative analysis capabilities: Invest in developing the Competition Council's expertise in econometric techniques and economic analysis. Encourage the use of more complex economic analyses, especially in evaluating mergers, to improve decision-making.

5. Revise the Executive Decree: Review the provisions of the Executive Decree "05-219 of June 22, 2005 on authorization of concentration operations," particularly Annex 2 related to the form. Align the decree with the practices of efficient competition authorities to facilitate rigorous analysis in merger investigations.

6. Emphasize economic analysis in decision-making: Encourage the Competition Council to prioritize economic analysis in merger investigations, considering the increasing complexity of concentration notification cases. Investing in internal expertise can lead to cost savings by reducing reliance on external expertise.

Margins:

¹- The Executive Decree No. 05-219, dated 22 June 2005 (Decree 05-219) specifies the conditions of merger control notifications, Official Journal Corresponding to June 22, 2005, N°. 43.

²- Cherouat Hussein, Explanation of the Competition Law, in light of Ordinance N° 03/03 amended and completed by Law 12/08 amende and completed by Law 05/10, and in accordance with the decisions of the Competition Council, Dar El Huda, Algeria, 2012, pp. 56-81. (Edited only in Arabic& french-personal translation)

³- Tayorsi Mohamed, Legal regulations of competition freedom in Algeria, Dar Homeh, Algeria, 2013, p.p.233-243. (Edited in Arabic-personal translation)

⁴- Ordinance No. 03-03 dated 19 July 2003 relating to competition, as amended by Law N° 08-12 dated 25 June 2008 and Law N°. 10-05 dated 15 August 2010 (Official Journal Corresponding to July 20, 2003, N°. 43.)(personal translation)

⁵ - Law No. 22-24 of Aouel Joumada Ethania 1444 corresponding to December 25, 2022, on the Finance Law for 2023, corresponding to the Official Journal of December 29, 2022, No. 89. ; also rf. Law N°. 22-18 of Dhou El Hidja 25, 1443 corresponding to July 24, 2022, on

Investment, Official Journal Corresponding to July 28, 2022, N°. 50.. (Edited only in Arabic & french-personal translation)

⁶- Djillali SLIMANI, Economic analysis in merger investigations - Treatment of notifications by the Competition Council, contribution presented during the third session of the Global Forum on Competition, held from 7 to 10 December 2020, published in Official bulletin of Competition Council/No.23, pp.57-71, available in Website : www.conseil-concurrence.dz (consulted on 23/03/2023-Edited only in french-personal translation).

⁷-Adel Fendri, THE NEW LEGAL FRAMEWORK OF INVESTMENT IN ALGERIA IN 2022., Website : <https://bit.ly/43f78xo>(consulted on 23/03/2023-Edited only in french-personal translation).

⁸-Ex ante control is defined as the notification of a proposed merger, prior to the completion of the transaction, if the conditions for control are met, for example, in relation to the turnover of the companies concerned. As a corollary, the regime for ex ante control of mergers in French and European Union law is suspensive. This means that, in principle, the procedure for such control suspends the completion of the proposed transaction until the authorization decision rendered by the Competition Authority or the European Commission. In French law, the Commercial Code provides, in Articles L430-4 and L430-5, for certain special circumstances that may justify deviating from the suspensive effect of the control procedure. In such cases, duly justified, the company that requests and obtains such a derogation may proceed with the merger, without waiting for the final decision of the Competition Authority. The granting of a derogation does not prejudice the outcome of the final decision to be taken at the end of the investigation. The Competition Authority may thus impose corrective measures, or even prohibit the operation if it harms competition.

The regime applicable to ex ante control provides for sanctions, on the one hand, in the event of « failure to notify in advance » and, on the other hand, in the event of « anticipatory implementation of the operation » (or gun jumping). In the first case, companies that carry out a notifiable merger without having previously notified it are sanctioned. They are exposed to the sanctions provided for in Article L. 430-8 of the Commercial Code. This device punishes both an intentional offense and an omission due to simple negligence. In the second case, the violation of the suspensive effect of the control procedure is targeted, thus punishing companies that have implemented a notifiable merger before obtaining the corresponding authorization. This prohibition applies regardless of the form of the merger envisaged, whether it is a takeover, a merger of companies, or the creation of a full-fledged joint venture.

Article L430-3 of the Commercial Code – « The merger must be notified to the Competition Authority before its completion. [...] ».

Article L430-4 of the Commercial Code – « The actual implementation of a merger can only take place after the agreement of the Competition Authority [...] ».

In : Michaël Cousin, Merger Control : Should we reform to better control ? Contracts Competition Consumption, No. 8-9, August 2018, file 4 ; Wladimir Soltmann, Ex Ante / Ex Post Control, Dictionary of Competition Law, Concurrences, Art. No. 100157. (published in French).

⁹- :EZRACHI (A.) et STUCKE (M. E.), « Artificial Intelligence & Collusion : When Computers Inhibit Competition », University of Tennessee Legal Studies Research Paper n° 267, 2015 ; Kanita Imamović Čizmić, Artificial Intelligence and Competition Law –

Challenges for Bosnia and Herzegovina, European Integration Studies, 2022/16, p.p.166-176.

¹⁰ - Rachid ZOUAÏMIA, Law of Economic Regulation - PRACTICAL LAW COLLECTION - BERTI Editions, Algeria, 2006, p.p.66- 95. (Edited only in French- (personal translation)).

¹¹- Djillali SLIMANI, Economic analysis in merger investigations - Treatment of notifications by the Competition Council, Official bulletin of Competition Council/No.23, 2020, pp.57-71, available in Website : www.conseil-concurrence.dz (consulted on 23/03/2023).

¹²Djillali SLIMANI, loc.cit.

¹³ - in comparative law, we find procedure of clearance phase I (MERGER), that according to European Commission Begins after notification of the merger the Commission has 25 working days to analyse the deal during the phase I investigation. More than 90% of all cases are resolved in Phase I, generally without remedies. A phase I review may involve the following: (i) Requests for information from the merging companies or third parties; (ii) Questionnaires to competitors or customers seeking their views on the merger, as well as other contacts with market participants, aimed at clarifying the conditions for competition in a given market or the role of the merged companies in that market. The Commission keeps the merging companies informed about the progress of its analysis. Towards the end of phase I, a "state-of-play meeting" is typically held, where the Commission informs them about the results of the phase I investigation. If there are competition concerns, companies can offer remedies, which extends the phase I deadline by 10 working days. There are two main conclusions of a phase I investigation: The merger is cleared, either unconditionally or subject to accepted remedies; or the merger still raises competition concerns and the Commission opens a phase II investigation

¹⁴- Phase II is an in-depth analysis of the merger's effects on competition and requires more time. It is opened when the case cannot be resolved in Phase I, i.e. when the Commission has concerns that the transaction could restrict competition in the internal market. A phase II investigation typically involves more extensive information gathering, including companies' internal documents, extensive economic data, more detailed questionnaires to market participants, and/or site visits. In phase II the Commission also analyses claimed efficiencies which the companies could achieve when merged together. If the positive effects of such efficiencies for consumers would outweigh the mergers' negative effects, the merger can be cleared. In order to be taken into account, efficiencies must fulfil strict conditions and it is for the merging companies to prove that they are met. First, the claimed efficiencies must be verifiable (such as that the Commission can be reasonably certain that they will materialise and be substantial enough). Second, the efficiencies must be merger specific (i.e. they cannot be achieved by other means than by a merger). Third, the efficiencies must be likely passed-on to consumers, and not only recapped by the merging companies alone. The Commission updates the companies regularly about the process. If, after such a market investigation, the Commission concludes that the planned merger will likely impede competition, it sends a statement of objections (SO) to the notifying parties, informing them of the Commission's preliminary conclusions. Parties then have the right to respond to the SO in writing within a certain period. They have the right to consult the Commission's case

file and to request an oral hearing which is conducted independently by the competition Hearing Officer. available in Website :

<https://bit.ly/3UsVWJt>(consulted on 23/03/2023).

Also for further information see, Jens Munk Plum, Prohibited mergers: An overview of EU and national case law, 3 March 2021, e-Competitions Prohibited mergers, Art. N° 87143.

¹⁵-Djillali SLIMANI, op.cit. ,pp.57-71.

¹⁶-Guidelines are interpretative text adopted by the regulator in order to facilitate the application of competition rules and to provide for transparency and legal certainty with regard to the Commission's administrative practice.

¹⁷--Djillali SLIMANI, loc.cit.

¹⁸-For further information see, for example, G. Rosenbluth, "Measures of Concentration" in National Bureau of Economic Research, Business Concentration and Price Policy, Princeton University Press, Princeton, 1955; E.M. Singer, "The Structure of Industrial Concentration Indexes," Antitrust Bulletin, Vol. X, January-April, 1965, pp. 75-104; and D. Encaoua and A. Jacquemin, "Degree of Monopoly, Indices of Concentration and Threat of Entry," International Economic Review, Vol. 21, 1980, pp. 87-105.

¹⁹- also for Further information see the definition that the European Commission and OECD provided ; for various concentration indexes, these measures are used to describe market structure and/or as a prima facie indicator of market power or competition among firms. Essentially, concentration indexes attempt to measure the number and relative size inequality of firms. Available in Website

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