Journal of Ecohumanism
2024
Volume: 3, No: 7, pp. 461 – 470
ISSN: 2752-6798 (Print) | ISSN 2752-6801 (Online)
https://ecohumanism.co.uk/joe/ecohumanism
DOI: https://doi.org/10.62754/joe.v3i7.4217

The Legal Framework Governing Merger Transactions in Tunisia: A Comparative Analysis of Equitable Competition with France

Habiba Bhouri[1]

Abstract

This abstract offers an in-depth comparative analysis of the legal frameworks governing merger operations in the Tunisian Republic and the French Republic, highlighting the legal and regulatory mechanisms aimed at guaranteeing fair competition on the markets. The study explores in detail the similarities and distinctions between these two legal systems, looking at key aspects such as the notification procedures for mergers and acquisitions, the essential criteria for assessing merger operations, as well as the sanctions imposed in the event of proven anti-competitive practices. This comparative analysis provides essential legal perspectives to understand the different approaches taken by these two nations to the regulation of merger operations, thereby contributing to an in-depth understanding of the practices and legal obligations surrounding these transactions in an international context.

Keywords: *Merger, Tunisian Law, French Law, Regulation, Legislative Framework, Institutional Framework.*

Introduction

Merger transactions represent pivotal junctures in corporate evolution, wielding profound implications for market structures and competitive dynamics. This study undertakes a meticulous examination of the legal intricacies governing merger transactions in Tunisia, juxtaposed against the legal landscape of France. At the crux of this analysis is the imperative of equitable competition—a conceptual underpinning indispensable for the cultivation of fair and competitive market environments. This research unfolds with a dual mission: firstly, to furnish a comprehensive exploration of the legal apparatus governing merger transactions in Tunisia, and secondly, to conduct a rigorous comparative analysis with the French legal framework. This multifaceted examination aims to delineate nuanced distinctions, identify convergent facets, and contribute substantively to the ongoing discourse on equitable competition within dynamically evolving economic contexts.

Since 1987, Tunisia has embarked on an extensive economic reform program with the aim of defending market mechanisms and ensuring the opening of the economy to the international arena. The Tunisian legislature devised a strategic program to reform various sectors, including taxation, competition, and pricing.

In the face of globalization, which has led to corporate concentration and raised concerns, particularly for small and medium-sized enterprises (SMEs), the Tunisian legislature must, on one hand, regulate the market and, on the other hand, preserve its functionality. Hence, control becomes imperative to regulate the structural characteristics of the market.

The concept of concentration control is not new; it was initially discussed in the first competition law draft in 1985, which included a specific chapter on the control of economic concentrations. However, this provision was removed as it was deemed unnecessary given the national economic situation at the time.

Nevertheless, in light of globalization intensifying competition among businesses and an increase in economic concentration operations, the Tunisian legislature revived its previously abandoned project. This revival culminated in the enactment of Law No. 95-42 on April 24, 1995. This innovation was prompted by economic necessity, as competition standards must ensure a satisfactory number of companies with genuine decision-making autonomy engaged in economic competition. Therefore, a market economy

[1] Assistant Professor in Prince Sultan University (Riyadh, Saudi Arabia, ORCID: 0000-0001-7855-3965

Volume: 3, No: 7, pp. 461 – 470
ISSN: 2752-6798 (Print) | ISSN 2752-6801 (Online)
https://ecohumanism.co.uk/joe/ecohumanism
DOI: https://doi.org/10.62754/joe.v3i7.4217

necessitates the regulation of agreements between companies that could undermine competition, as well as economic consolidations that might compromise the competitive structure of the market due to the abuse of dominant positions by powerful companies.

For this reason, the law of April 24, 1995, introduced, for the first time in Tunisia, a prior control mechanism for significant cases of economic concentration.

Currently, the regulation of concentrations in Tunisia is governed by Law No. 2015-36 of September 15, 2015, concerning the reorganization of competition and prices. Exemptions from the general regime are provided for certain sectors, particularly in banking, as well as in the insurance, microfinance, and audiovisual sectors.

Similar to the French legislature, the Tunisian legislature does not seek to prohibit concentration, as in the case of anticompetitive practices, but rather aims to avoid the harmful effects that certain mergers can have on free competition. Concentration can be advantageous for promoting productivity, enhancing international competitiveness, and restructuring industrial and commercial sectors. The legislature seeks only to prevent adverse effects, as "too much concentration kills concentration."

Articles 7 and 8 of Law No. 2015-36 of September 15, 2015, frame economic concentration. Prior control of economic concentration operations is a precautionary measure aimed at avoiding the emergence of market dominance situations that are difficult to overcome afterward. In contrast to anticompetitive practices that aim to track commercial behaviors harmful to competition (Conduct Of Control), the control of economic concentration signifies the development of the structuring of the economy (Control Of Structure).

The Tunisian legislator draws heavily from the principles adopted by the French legislator since the French ordinance No. 86-1243 of December 1, 1986, on the conditions for exercising control and procedures. Upon reviewing the opinions of the Competition Council and its annual reports, this Tunisian institution strongly references community law, particularly French law .

Between 2015 and 2020, the Ministry of Commerce examined 26 concentration proposals, of which 22 were unconditionally approved, 3 were approved with commitments, and one was rejected in 2017 .

This study employs a qualitative analytical framework, delving into key legal texts, statutory provisions, and regulatory instruments to form the basis of the analysis. The subsequent sections entail a comprehensive exploration of the legal framework governing merger transactions in Tunisia. This detailed dissection serves as a prelude to a comparative analysis with France, aiming not only to highlight legislative disparities but also to unveil the embedded intricacies shaping fair competition within these distinctive economic contexts.

Similar Criteria to French Law in the Exercise of Merger Control

Once the scope of application has been clarified (1), attention will be directed towards the criteria in the exercise of merger control (2).

Scope of Application of Merger Control

Similar to French legislation, Tunisian law does not provide a precise definition of the concept of concentration. However, both the law of April 24, 1995, and the 2015 law fully reproduce the same wording as Article 39 of the French ordinance of 1986.

Article 7§1 of the Tunisian Law No. 2015-36 of September 15, 2015, defines economic concentration as "any act, regardless of its form, that involves the transfer of ownership or enjoyment of all or part of the assets, rights, or obligations of a company, having the effect of enabling a company or a group of companies to directly or indirectly exercise a decisive influence over one or more other companies." The Tunisian legislator adopts a cumulative approach, unlike the French legislator of 1986, which employs an

Journal of Ecohumanism
2024
Volume: 3, No: 7, pp. 461 – 470
ISSN: 2752-6798 (Print) | ISSN 2752-6801 (Online)
https://ecohumanism.co.uk/joe/ecohumanism
DOI: https://doi.org/10.62754/joe.v3i7.4217
alternative approach.." . Therefore, "for an operation to be subject to control, it must result from an act of transfer of ownership or enjoyment, having the effect of exercising a decisive influence ».

It was only later, in the Law on the Modernization of the Economy (LME) in 2008 and Article 430-1 of the French Commercial Code, that significantly modified the definition of concentration. Now, it is considered to be realized "1° When two or more previously independent companies merge; 2° When one or more persons, already controlling at least one company, or when one or more companies acquire, directly or indirectly, whether through capital participation or purchase of assets, contract, or any other means, control over all or parts of one or more other companies."

It is characterized either by the realization of a merger between independent companies or by the acquisition of control, defined as the ability to exert a decisive influence on the activity.

The concept of decisive influence is not clearly defined by the Tunisian legislator, leading to potential interpretation challenges. Therefore, it is the responsibility of regulatory authorities to seek the economic reality chosen by companies opting for concentration operations. The acts of concentration are based on the criterion of taking control, which is a legal concept that generically designates concentration operations. It implies a qualification of facts based on a criterion determining whether there is control or not. ». Article 7 of the Tunisian Law No. 2015-36 of September 15, 2015, does not explicitly mention the taking of control, but it is interpreted as such by legal scholars. Moreover, despite the absence of laws or any legal provision in this regard, competition authorities have established that the creation of a joint venture that continuously performs all the functions of an autonomous economic entity constitutes a form of consolidation. However, due to the lack of explicit legal provisions on this matter, businesses may not be aware of their obligation to notify for this type of operation.

A business is legally defined as an entity engaged in economic activity and possessing an autonomous organizational structure. In the case of Apple.IMSI vs. I.BLIS-SISR- Société du progrès informatique, the activity is defined by its functions rather than its legal form. In other words, it is considered to be engaged in economic activity regardless of whether it is a natural person or a legal entity.

Tunisia shares the same European approach in the sense that the recognition of a subsidiary having a distinct legal personality is not sufficient to exclude the possibility of attributing its behavior to the parent company". In the Poulina case, the Tunisian Competition Commission emphasizes that there is no difference between a single enterprise and a group of enterprises in terms of legal qualification.

Article 7 of Law No. 2015-36 of September 15, 2015, stipulates that any enterprise involved in the transaction, either as a party or by its objective, as well as any economically linked enterprise with one or more other enterprises, is subject to the concentration operation. The scope of "economically linked enterprises" is assessed on a case-by-case basis because the legislator's intention was to reflect economic reality without focusing on the legal forms of the enterprises.

The scope of concentration control is broad, which is why the Tunisian legislator has established a narrow threshold to limit the possibilities of control.

Threshold Criterion for Merger Control

In the 1995 law, the Tunisian legislator did not follow the French law contained in the 1986 ordinance (before the French law reform of May 15, 2001, the New Economic Regulations Law, known as NRE). It maintained the cumulative nature of the conditions regarding market share and turnover, while the French law adopted an alternative criterion.

Today, with the 2015 law, the Tunisian legislator follows the path of the French legislator and adopts the alternative criterion. The law establishes criteria to determine concentration operations subject to prior control, based on one of the two alternative criteria.

Journal of Ecohumanism
2024
Volume: 3, No: 7, pp. 461 – 470
ISSN: 2752-6798 (Print) | ISSN 2752-6801 (Online)
https://ecohumanism.co.uk/joe/ecohumanism
DOI: https://doi.org/10.62754/joe.v3i7.4217

On one hand, a criterion based on the total turnover generated by these companies in the domestic market. Indeed, concentration operations are subject to ex ante control if they exceed a threshold defined by a government decree. Currently, and since Government Decree No. 2016-780 of June 13, 2016, establishing the threshold for total turnover, the amount has been set at 100,000,000 Tunisian dinars. It is important to note that the threshold amount increases to avoid scrutinizing and rejecting minor transactions that do not impact the market and to focus solely on the most significant business transactions that have an impact on the proper functioning of the market. However, the number of controls conducted by the Competition Council is very low compared to France, as evidenced by the annual reports.

On the other hand, a criterion based on market shares. Indeed, "the average share of these companies combined in the market during the last three financial years is 30% of sales, purchases, or any other transactions in the domestic market for substitutable goods, products, or services, or on a substantial part of this market." . At times, the Competition Council uses market shares as a criterion without reaching the threshold of 100,000,000 Tunisian dinars.

The concern is that these provisions do not determine any threshold for the two merging companies individually or for the target company specifically. This means that a high-revenue company could merge with a smaller one without affecting the market structure or competition itself. In such a case, a complex assessment of the relevant market and the companies' activities will be necessary to determine market shares at the time of notification. This evaluation will entail significant costs for the concerned companies and create considerable uncertainty regarding the assessment of the notification obligation, potentially leading to significant delays in notifications and even raising doubts about the existence of such an obligation. For this reason, the International Competition Network (ICN) recommends establishing best practices for setting notification thresholds. It is wise for Tunisia to examine and develop the criterion based on market shares, meaning that a certain threshold could trigger a notification obligation even if the concerned companies have low turnover.

Competitive Analysis by the Tunisian Competition Council

When the Department of Commerce seeks an opinion from the Competition Council, it employs a systematic approach, beginning with defining relevant markets. Defining the relevant market is crucial as it is a prerequisite for calculating market shares.

After identifying the relevant market, the Competition Council assesses the level of concentration in these markets to determine if this concentration could harm competition, especially structurally. The competitive analysis conducted by the Competition Council and the DGCEE aims to determine whether the proposed merger may create or strengthen a dominant position in the domestic market or a significant part of it.

However, under Law No. 2015-36, the Competition Council utilizes a method or test based on the creation or strengthening of a dominant position, taking into account public interest considerations. This method involves an analysis of the benefits of the operation in terms of economic or technical progress, which may offset the negative effects on competition, or an analysis of the necessity of concentration for industrial policy reasons.

Regarding the method delineating the competitive analysis, jurisdictions typically use the "substantial lessening of competition" or "SLC test." This was emphasized in 2009 during the OECD Roundtable on Merger Analysis Criteria.

This method would allow for the consideration of the consequences of concentration on the market, as well as the deterioration of competition among firms, rather than solely focusing on structural issues such as market share analysis, which forms the basis of the dominance test. This method would take into account the anti-competitive effects of concentration, even if it does not create a dominant position.

However, following Tunisian law and stakeholder input, the Competition Council has limited its analysis to the structural aspects of concentration, considering the potential creation of a dominant position. For

Journal of Ecohumanism
2024
Volume: 3, No: 7, pp. 461 – 470
ISSN: 2752-6798 (Print) | ISSN 2752-6801 (Online)
https://ecohumanism.co.uk/joe/ecohumanism
DOI: https://doi.org/10.62754/joe.v3i7.4217
example, in its merger study between Total and Groupe SAFT SA, the Council notes that, as there is no direct competition between the two parties in the Tunisian market, the merger will not lead to the creation of a dominant position. Therefore, the Council approves the concentration project.

The Competition Council also considers vertical or conglomerate effects and coordination risks arising from the operation, especially when the parties create a joint venture that could facilitate coordination between the parent companies. For instance, in the Competition Council's opinion No. 192726 of October 17, 2019, concerning the merger between "Sidel Participation SAS" and the French consortium "Holcom SAS," owner of COMEP, the Council deemed that there were no significant horizontal effects, as the transaction did not result in the disappearance of one of the two companies, and each would continue its activities autonomously. However, the Council examined the vertical effects of the transaction, as COMEP was the main supplier of input products for the production of PET bottles.

However, as mentioned by certain stakeholders, the Council relies on a legal analysis and compliance with legislative texts rather than an economic analysis of the effects of concentration, often limited to defining market shares and assessing impacts on market structures. This approach is also attributed to the composition of the Council's staff, which is predominantly composed of 13 legal professionals compared to 7 economists, with a relatively high percentage of staff not specialized in competition law and not involved in competition rule enforcement activities.

Other elements are to be considered in the context of merger control under Article 12, first paragraph, especially when the Council determines that the operation harms effective competition; it must conduct an assessment using the aforementioned competitive criteria and determine whether the concentration makes a sufficient contribution to economic or technical progress to offset the damage to competition. The final decision regarding this balance is made by the Minister of Commerce. Although the concept of economic or technical progress is not precisely defined by the law, it can be subject to fairly flexible interpretation.

Under Article 7 of Law No. 2015-36 dated September 15, 2015, the Minister responsible for trade is competent for any horizontal control of concentrations. The concerned companies must notify any concentration project to him, except for certain sector-specific laws (insurance, banking, microfinance). Additionally, Tunisia is subject to competition rules within the framework of the Common Market for Eastern and Southern Africa (COMESA). Tunisia officially became the 20th member of COMESA in July 2018 , in Lusaka, Zambia . COMESA has specific rules at the regional level, and it designates the competent authority responsible for receiving notifications of concentrations.

Indeed, on a regional level, Article 24 of the COMESA competition regulations states that the involved parties are required to report to the COMESA Competition Commission (CCC) any merger project involving parties active in two or more COMESA member states. However, the challenge lies in the fact that each state gives an individual interpretation of this article. For example, Tunisia "does not provide for any exemption from the notification obligation for concentrations of regional dimension, and therefore, according to the interpretation of the Tunisian authorities, when the conditions established by national law are met, the concerned companies are subject to the notification obligation to the Ministry responsible for trade in accordance with Article 7 of Law No. 2015-36." . In other words, it is imperative to notify not only the CCC but also the minister responsible for trade to comply with legal requirements. These supranational rules are therefore not interpreted uniformly across all member countries. The OECD, in its 2022 report, highlighted this issue and recommended that "Member countries be encouraged to facilitate effective cooperation and coordination in merger control and consider initiatives, including through national legislative means as well as through bilateral or multilateral agreements or other instruments, to eliminate or reduce obstacles to cooperation and coordination".

Similarities in Merger Control Procedures

The Tunisian legislation adopts the principle of automaticity in the control of economic concentrations. This option implies that exceeding the thresholds, whether in relative or absolute terms, determines the scope of the legislation and triggers the control process. In this sense, any concentration exceeding the

Volume: 3, No: 7, pp. 461 – 470
ISSN: 2752-6798 (Print) | ISSN 2752-6801 (Online)
https://ecohumanism.co.uk/joe/ecohumanism
DOI: https://doi.org/10.62754/joe.v3i7.4217

limits is considered to potentially have adverse effects on market structure, thus requiring a thorough analysis and prior authorization from the Minister of Trade.

However, the Tunisian regulations in this regard differentiate between the feasibility of control and the impact on the principle of competition. Exceeding the control thresholds is merely an indication for both the competition authority and the companies that it is possible, but not certain, that the operation may have negative effects on competition. The infringement on competition is not presumed solely based on reaching the control thresholds.

Notification of Merger Operations

Just like in France, the pre-notification phase is optional in Tunisia. The concerned company may consult the DGCEE regarding the obligation to notify or, in the case of complex operations. This pre-notification step is unofficial and, therefore, not disclosed to the public. It has no impact or consequence. The advantage lies in the communication of information between the two parties to jointly prepare the notification file. This phase helps minimize the risks of incompleteness in the file during its official notification to the Minister responsible for Trade, in accordance with Article 7 of the 2015 law.

Based on Article 8, paragraph 1, of the Competition and Price Law, "any concentration project or concentration must be submitted to the Minister responsible for Trade by the parties involved in the concentration within fifteen days from the date of the conclusion of the agreement, merger, publication of the offer to purchase or exchange rights or obligations, or the acquisition of a controlling interest."

Similar to the French legislator, the Tunisian legislator opts for the procedure of prior and mandatory notification. This implies that companies whose thresholds are outlined in Article 7 of the aforementioned law must notify their concentration to the Minister before its effective implementation.

Pursuant to Article 9, paragraph 3, the notification phase begins as soon as the DGCEE's dossier reception service verifies certain documents. This step marks the start of the three-month period during which the Minister of Commerce must make a decision on the concentration project. If the Minister of Commerce does not respond within the specified period, the economic concentration is considered approved . Additionally, under Article 8, paragraph 4, of the aforementioned law, the legislator specifies that the parties involved in the concentration project or operation must refrain from taking measures during the minister's concentration review period that could make the merger irreversible or cause permanent changes in the market. However, the Tunisian legislator does not specify the timeframes for ordinary and more complex operations. It is therefore assumed that these deadlines apply regardless of the level of complexity of the operation.

Two copies of the dossier must be sent to the DGCEE during the notification, with one of them being forwarded by the Minister responsible for commerce to the Competition Council. The notification must be accompanied by a dossier presented in duplicate, including several documents described in paragraph 5 of Article 8 of Law No. 2015-36. The notification obligation in Tunisian law has a suspensive effect on concentration operations because it cannot be completed until the operation is authorized by the Minister responsible for commerce. Therefore, companies cannot proceed with the implementation of the ongoing concentration project during the control period. This suspension period cannot exceed six months; otherwise, submission is deemed tacit acceptance of the concentration project or concentration and the commitments annexed to it.

Merger Control Procedure

The examination of the concentration operation covers both formal aspects (applicability of control) and substance (delineation of the relevant market or markets, assessment of the impact on competition, evaluation of the contribution to economic progress in case of negative competitive balance).

Journal of Ecohumanism
2024
Volume: 3, No: 7, pp. 461 – 470
ISSN: 2752-6798 (Print) | ISSN 2752-6801 (Online)
https://ecohumanism.co.uk/joe/ecohumanism
DOI: https://doi.org/10.62754/joe.v3i7.4217

The Tunisian concentration control is structured around two phases of review: the first, conducted by the General Directorate of Competition and Economic Investigations (DGCEE), and the second, led by the Competition Council.

Once the notification of the concentration operation is accepted, the Minister responsible for Commerce requests the opinion of the Competition Council under Article 11, paragraph 8, of Law No. 2015-36. To achieve this, one or more rapporteurs from the DGCEE are designated to draft a report, which will be presented during the plenary session of the Council. The Council, according to Article 20 of the aforementioned law, has the authority to summon the involved parties for a hearing to gather additional information for a better understanding of the case or information related to commitments, aiming to preemptively address any concerns regarding a dominant position. Those requests, which do not pertain to the completeness of the file, do not suspend the deadline. The Council will be able to give its opinion based on this hearing as well as the report from the rapporteurs and has a period of sixty days from the date of receipt of the opinion request by the minister.

The Council's opinion is an essential prerequisite, meaning that any decision is subject to the prior opinion of the Council, except in the case of tacit approval of an operation or a decision stating the impossibility of controlling concentrations. However, the minister responsible for trade has discretionary power to follow or not follow the recommendations issued by the Competition Council in its opinion. The Council can issue three types of opinions under Article 10 of Law No. 2015-36: Authorize the concentration operation, or authorize the competition operation under certain conditions while obliging the companies involved to comply with commitments to restore the balance between expected economic progress and impacts on competition; or finally, refuse the operation.

The final decision is then prepared by the minister responsible for trade. In the case of injunctions, the decision will be co-signed by the minister responsible for the relevant sector. Generally, the minister responsible for trade follows the opinion of the Competition Council as it is based on in-depth economic analyses. However, the minister has the discretion to reject the opinion if deemed necessary. This was the case in the well-known concentration operation between the companies SGTM and MBG. In this case, the minister chose to consider economic and social aspects, such as maintaining employment, rather than relying on the competitive risks identified by the Council.

This concentration control allows the Competition Council to intervene and report to the minister any concentration that leads to an abuse of a dominant position, even if it has not been notified to the minister. The minister can then, by reasoned decision, approve, amend, or reject any concentration agreements that have led to abuses.

The final decision is then prepared by the minister responsible for commerce. In the case of injunctions, the decision will be co-signed by the minister responsible for the relevant sector. The decision is then transmitted to the parties involved in the concentration.

Economic Concentration in Special Regimes

In the general regime concerning concentration issues, the authority lies with the Ministry of Commerce, which has advisory powers with the Competition Council. However, special legislation covers the insurance sector, microfinance, banking, and audiovisual media.

Under Article 62 of the Tunisian insurance code, it is the Minister of Finance who is competent to approve agreements concluded by insurance or reinsurance companies concerning competition. Since the entry into force of Law No. 2008-8 of February 13, 2008, the General Committee of Insurance (CGA), a regulatory body under the Ministry of Finance, assumes its regulatory functions. According to this law, agreements must be notified to the Minister of Finance and can only be implemented if the minister does not raise objections within two months from the notification. This control process completely replaces the horizontal control usually exercised by the Minister of Commerce in the context of concentration operations. The CGA also has the option to seek the opinion of the Competition Council.

Journal of Ecohumanism
2024
Volume: 3, No: 7, pp. 461 – 470
ISSN: 2752-6798 (Print) | ISSN 2752-6801 (Online)
https://ecohumanism.co.uk/joe/ecohumanism
DOI: https://doi.org/10.62754/joe.v3i7.4217

In the financial sector, under Article 25 of Decree-Law No. 211-117, it is the Minister of Finance, after consulting the microfinance supervisory authority, who is competent for concentration control.

In the banking sector, based on a report drafted by the Central Bank of Tunisia (BCT) , the Accreditation Commission is competent to approve concentrations. No member of the Accreditation Commission is part of the Competition Council. Examining the provisions of Law No. 2016-48, it remains uncertain whether the Accreditation Commission, after consulting with the BCT, takes charge of or replaces the concentration control carried out by the Ministry of Commerce on the advice of the Competition Council. Moreover, the Ministry of Commerce has never been informed of concentration operations in the banking sector (even for informational purposes), and the issue of competence has not yet been raised in practice.

Finally, regarding the audiovisual sector, the High Independent Authority for Audiovisual Communication (HAICA) is competent in matters of concentration under Article 15 of Decree-Law No. 2011-116 of November 2, 2011. In its opinion No. 202750 of October 23, 2020, concerning the freedom of audiovisual communication, the Competition Council recommended removing the prohibition of ownership concentration in audiovisual media and relying on comparable experiences to establish sector-specific criteria and thresholds, in order to respect the principles of pluralism and free movement of capital.

Sanctions and Commitments

The Competition Council is obligated to assess whether the concentration project has a negative impact on competition. If so, it must demonstrate that it provides a sufficient contribution to technical or economic progress to offset these adverse effects on competition. The Council's evaluation is not limited solely to competition aspects but also extends to other considerations of public interest in accordance with Article 12 of Law No. 2015-36.

In the absence of the Competition Council's opinion within 60 days following notification, the Minister of Commerce is empowered to make a decision (within three months) without seeking the Council's advice. If the Minister of Commerce does not pronounce within this three-month period, it amounts to tacit acceptance of the concentration project or the concentration operation, as well as the commitments made by the parties in their notification letter.

The Minister responsible for Commerce may approve the concentration operation under certain specific conditions. According to Article 43, paragraph 2, of Law No. 2015-36, if the commitments made are not adhered to, companies may face financial penalties of up to 10% of the turnover generated during the previous fiscal year."

Furthermore, the law provides two options to cancel or modify commitments made by the parties. The first is outlined in Article 10 of Law No. 2015-36, where the Minister responsible for Commerce can withdraw approval for the concentration if the companies fail to uphold their commitments or if the information provided by the parties was false. The second option is defined in Article 27 of Law No. 2015-36. According to this provision, if an abusive dominant position results from a merger of companies, the Competition Council has the power to recommend to the Minister in charge of commerce to 'revise, complete, or terminate all agreements and acts that allowed these abuses during the merger.'

Several criteria are necessary for the validation of commitments submitted by the parties: first, they must be effective in combating anti-competitive practices. Next, their implementation should not raise doubts. In this regard, they must be formulated precisely and clearly, and the parties must provide adequate information regarding their execution. Additionally, to avoid any disruption of competition during the implementation phase, their execution must be swift. Finally, the parties should establish control mechanisms that allow competition authorities to verify their effective implementation

Competition authorities can approve or impose two types of commitments. On one hand, there are structural commitments aimed at ensuring fair competition conditions by divesting activities or assets to a competent acquirer capable of exerting effective competition. On the other hand, there are behavioral

Journal of Ecohumanism
2024
Volume: 3, No: 7, pp. 461 – 470
ISSN: 2752-6798 (Print) | ISSN 2752-6801 (Online)
https://ecohumanism.co.uk/joe/ecohumanism
DOI: https://doi.org/10.62754/joe.v3i7.4217

commitments that may complement structural measures by framing the behavior of the company resulting from the concentration.

The opinion of the Competition Council is not binding, and the Minister can deviate from it and decide under Article 10 of Law No. 2015-36 of September 15, 2015. The Minister can either approve the operation, approve the operation while imposing commitments on the parties, or refuse the operation. Thus, under Article 10 of the 2015 law, the absence of motivation in the decision of the Ministry of Commerce can legitimize an appeal to the Administrative Court.

The Council, as a judicial body, imposes a fine in cases where an economic concentration operation is carried out without notification, or information has been omitted in the notification, or incorrect statements have been included. In such cases, the Competition Council compels the parties to return to their previous situation before the merger. It penalizes intentional infractions, as well as omissions due to simple negligence. The Council's power to sanction is primarily focused on financial penalties rather than punitive measures. Article 27 of the law of September 15, 2015, stipulates that the Competition Council has the power to issue injunctions to the involved operators to put an end to their anticompetitive practices. It can also order the temporary closure of one or more implicated establishments for a maximum period of three months, and it has the authority to refer the case to the public prosecutor for criminal proceedings. Despite its justification, the decision of the Tunisian legislator to establish a specialized jurisdiction in competition law raises questions about its alignment with the commitment to align Tunisian competition legislation with that of the European Union, which advocates replacing hybrid authorities with independent administrative authorities. One wonders if the judicialization of the Competition Council is a way to conceal the influence of the Ministry of Commerce on competition regulation.

Conclusion

This in-depth examination of the legal frameworks governing merger transactions in Tunisia and France underscores the nuanced dynamics at play in these distinct economic landscapes. Tunisia, in its ascent on the regional economic stage, exhibits a robust legal foundation, while France, entrenched in the European Union, navigates the delicate balance between economic growth and fair competition.

The comparative analysis reveals divergences in legal definitions, review processes, and the application of equitable competition principles. Tunisia's framework, though aligned with international standards, adopts tailored approaches reflecting its economic trajectory. In contrast, France's well-established legal landscape within the EU context showcases a different set of considerations.

Recommendations for fortifying these legal frameworks emerge: fostering harmonized definitions, promoting regulatory cooperation, strengthening judicial capacities, conducting periodic legislative reviews, engaging in international collaboration, and encouraging public awareness and participation.

By heeding these recommendations, Tunisia can enhance its legal frameworks, ensuring that mergers contribute to economic development while upholding the principles of fair competition. This positions Tunisia as exemplars of legal adaptability in response to the demands of a rapidly evolving economic landscape.

Acknowledgments

I would like to extend my deepest gratitude to Prince Sultan University (PSU) for their invaluable support and resources, which were instrumental in the completion of this research. The encouragement and academic environment provided by the university have greatly contributed to the development of this work.

Volume: 3, No: 7, pp. 461 – 470
ISSN: 2752-6798 (Print) | ISSN 2752-6801 (Online)
https://ecohumanism.co.uk/joe/ecohumanism
DOI: https://doi.org/10.62754/joe.v3i7.4217

References

BOUAYAD, H, (2019). Politique de la concurrence entre théories et pragmatisme, Economia HEM research center, available at: http://economia.ma/fr/content/politique-de-laconcurrence-entre-th%C3%A9ories-et-pragmatisme-0

Commission Regulation (EU) 2017/1084 of 14 June 2017 amending Regulation (EU) No 651/2014 as regards aid for port and airport infrastructure, notification thresholds for aid for culture and heritage conservation and for aid for sport and multifunctional recreational infrastructures, and regional operating aid schemes for outermost regions and amending Regulation (EU) No 702/2014 as regards the calculation of eligible costs (Text with EEA relevance.).

Commission Regulation (EU) 2021/1237 of 23 July 2021 amending Regulation (EU) No 651/2014 declaring certain categories of aid compatible with the internal market pursuant to Articles 107 and 108 of the Treaty.

IDOT, L. (2015), Contrôle des concentrations et contrôle des investissements étrangers : Réflexions de juriste, Revue des droits de la concurrence, pp 324-350.

IDOUX, P, NICINSKI, S (2022), Actualité du droit de la concurrence et de la régulation, L'Actualité Juridique Droit Administratif, pp.2511.

JAIDANE, R, (2000) L'évolution du droit tunisien de la concurrence à la lumière de la réforme du 10 mai 1999, Revue trimestrielle de droit civil R.T.D.

JAIDANE, R, (2002) « l'influence du droit français sur le droit tunisien des concentrations économiques », Revue internationale de droit économique, vol. t. XVI, 4, issue 4.

LASTENNET, J , (2022), « La concurrence dans l'Union européenne, » toute l'Europe, available at https://www.touteleurope.eu/economie-et-social/la-concurrence-dans-l-unioneuropeenne/

Law n°2015-36 of September 15, 2015 relating to the reorganization of competition and prices

LIANOS, I (2020), Competition law, Oxford University press, pp- 40-42.

MARSON, G (2016), « Contrôle des concentrations économiques », Dictionnaire des Régulations, available at : https://www.gibsondunn.com/wpcontent/uploads/documents/publications/Marson-Controle-des-Concentrations-EconomiquesDictionnaire-des-Regulations-2016.pdf

MASMI-DAZI, F, (2021), Double modernisation du contrôle européen des concentrations , Dalloz actualité, pp340-345.

MIDOUN, M (1993), « La privatisation des entreprises publiques : le cas de la Tunisie », Vues Économiques, pp54-55.

Opinion of the Competition Council No. 172655 of December 21, 2017 concerning the concentration between General Electric (GE) / ABB Verwaltungs LTD.

RODGER, B (2023), Private enforcement of competition law in the EU, Edward Elgar, 2023.

SVETIEV, Y, (2020), Experimentalist competition law and the regulation of markets", Hart publishing, pp-28-30.

Tareck Alsamara Alsamara T. ,Ghazi Farouk Farouk G. ,Mallaoui Halima Halima M, The Role Of The European Court Of Justice In The Management And Protection Of Wetlands: A European States Case Study, Academy of Strategic Management Journal 2021-04-01

WHISH, R (2023), Competition law, Oxford university press, pp-959.

WISE, M, (2005), Droit et politique de la concurrence en France, Revue sur le droit et la politique de la concurrence, Vol. 7.