

The Moroccan Government approves competition law reform: key amendments and pitfalls (bill n°104.12 on freedom of prices and bill no.20.13 on the Competition Council)

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Moroccan Parliament, Projet de loi n° 20-13 relative au Conseil de la concurrence, January 2013 Moroccan Parliament, Projet de loi n° 104-12 relative à la liberté des prix et de la concurrence, January 2013

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The competition's regulation institutional architecture is expecting to have a radical change in its structure. The first aspects of this long-awaited overhaul were substantially announced in the constitutional text. The latter has not only enshrined "free competition" as a constitutional principal (Article 35), but it has also institutionalised its counterweight, namely competition regulation embodied by the Competition Council as "supervisory body" in charge of protecting, framing and controlling competition freedom in markets (Article 166).

In the perspective of the implementation of the new constitutional configuration, the government approved in January 2013 two bills: bill n° 104.12 on freedom of prices and Bill No.20.13 on the Competition Council. Up to the writing of this paper, these projects are still being examined by the finance commission in the Moroccan parliament.

The main amendments introduced by these bills can be summarized as follows:

1. Regarding anti-competitive practices: Three main matters are to be highlighted:

- The Introduction of the "de minimis" rule that exempts agreements of minor importance which do not appreciably restrain competition;
- In addition to the conventional anti-competitive practices (cartels, abuse of dominant position, and abuse of economical dependence), the bill introduced a new category of anti-competitive practices which is "predatory pricing". What is new about this infringement is that, unlike the abuse of dominant position, this new infraction does not require a dominant position as a pre-condition of the offense legal characterization (Article 8 of the bill n° 104.12)
- The introduction of negotiated procedures as an effective antitrust tools (leniency program, "not

challenge” procedure and the commitment procedure)

2. Regarding the mergers control: At this level, radical changes are expected to be introduced:

- The transfer of merger control competency to an independent body (Competition Council) instead of a political authority (the Head of Government);
- the submission of any merger project that exceeds a certain threshold to a compulsory notification before the CC;
- the introduction of the turnover threshold criterion in parallel with market shares one currently in force;
- enable the head of government to exercise an “evocation right” against the competition council decisions in merger areas at the condition to duly motivate and publish these decisions.

3. The strengthening of the Competition Council powers: In accordance with the new constitution spirit, the two bills have consecrated the vision of a competition regulation system polarized around a single and unique competition authority with broad powers, while the current two-headed configuration (department of General Affairs, Competition Council) has shown its limits. Beyond this key change, other new features are to put under the spotlight:

- Acknowledge to the future Competition Council an organizational and functional independence vis-à-vis political influences;
- Endow the future competition Council with wide powers: decision-making power in antitrust and merger control areas, own initiative investigations and opinions, investigation powers...
- Expand the sphere of entities entitled to apply before the Competition Council.
- Raise the deterrence effect of antitrust sanctions: the bill has increased the level of fines that can be inflicted by the competition council from 5% to 10% of the national or global involved companies' turnover.

Provided that most of these amendments are adopted by the parliament, this reform is - at first reading level, a significant improvement in comparison with the current situation. However, a thorough reading of some provisions of the two bills set out previously can raise several concerns which may limit the expected positive effects of this reform. Beyond some shortcomings that can be highlighted in these texts (ex. the lack of discretionary power), two critical points are worth to be raised:

A. The extent of the competition council competences into regulated sectors :

Article 108 of the bill n°104.12 set out previously suspends and submits the implementation by the competition council of competition rules into regulated sectors to a subsequent issuance of an enforcement decree specific to each sector. This article is objectionable at two levels:

- ▶ Firstly, it has to be considered as unconstitutional. As previously mentioned, provision 166 has explicitly enshrined the general and unlimited sector-based jurisdiction of the competition council which covers the competition regulation of all the economic sectors without any exception or referral to a secondary regulation. It follows that the fact to limit and suspend the implementation of this general competence to the publication of enforcement decree (not even a law), is likely to breach the constitution provisions set out above.
- ▶ Secondly, this provision is likely to muzzle the cross jurisdiction of the Competition Council and

through him to the extent and the effectiveness of the competition regulation in Morocco. Basically , this article may not only exclude from the competition council scope of action the most important and strategic sectors in term of added value, but also the most sensitive areas to consumers needs (telecommunications, audiovisual, insurance, banking, financial and ports sectors), and that for the simple reason that these sectors are submitted to a specific sectoral regulation, knowing that the role of a sectoral regulation and competition policies are not substitutable but complementary.

B. Suspending the implementation of the Bill n°104.12 to the publication of all the secondary legislation related to its enforcement.

According to article 110 of Billn°104-12, the later shall take effect on the date of entry into force of the regulations required for its full implementation.

It is important to notice that, unlike the bill N° 20.13 that frames only Competition Council organization and procedures, the extension of bill n°104.12 is broader because this text does not only regulate competition issues which fall under the jurisdiction of the competition Council (anti-competitive practices, mergers), but also regulate other matters that are strange to the competition council scope of competences (price regulation, transparency in relations between professionals ...). A simple overview of this bill shows that, within 13 references to secondary regulations all confused matters, only six are related to competition issues (Articles 9,12,13, 21,41,73)

Suspending the implementation of the entire law provisions (including the competition rules aspects) to the entry into force of all its secondary regulations (including those that have nothing to do with the competition council competences), is likely to freeze -to an indefinite time- the implementation of competition council prerogatives that has been devoted by the constitution.

To conclude, we can say that, despite the positive features of the amendments set out previously, the entire edifice of this reform could collapse because of the two elements previously mentioned, which may empty the reform of its substance.

The views expressed herein are of the author and do not necessary reflect the official position of Moroccan Competition Authority

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