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General Chapters:

Country Question and Answer Chapters:

Morocco

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1 General

1.1 Please identify the scope of claims that may be brought in Morocco for breach of competition law.

Morocco is a civil law jurisdiction. The Moroccan competition law exposes expressly both a criminal and administrative enforcement system against economic operators (companies and traders) that are responsible of unlawful or unfair behaviour.

These measures aim to enforce respect of the public economic order.

1.2 What is the legal basis for bringing an action for breach of competition law?

Rules of competition law are set forth in:

- Law n° 06-99 of 5 June 2000 on freedom of prices and competition. It constitutes the basis of the law.
- Dahir of 13 August 1913 relating to contracts and obligations. It constitutes the counterpart of civil law in Morocco.
- Law n° 17-97 of 15 February 2000, relating to the protection of industrial property.

1.3 Is the legal basis for competition law claims derived from international, national or regional law?

In Morocco, the legal basis for competition law claims derives from national law especially the law n° 06-99. However, in order to honour its commitments to its economic partners, Morocco joined the GATT in 1987 (General Agreement on Tariffs and Trade) and the World Trade Organization in 1994. Note also the Free Trade Agreement with the European Union in 1995.

Through this national law (n° 06-99) and its international commitments, Morocco aims to ensure the best conditions for its integration into the globalisation process, with all the requirements it involves in terms of economic competitiveness, as adopted nowadays by the international community.

1.4 Are there specialist courts in Morocco to which competition law cases are assigned?

There is no specialist court in Morocco to which competition cases are assigned. Indeed, different courts can have jurisdiction, depending on the circumstances:

- The criminal courts are in charge of punishing the perpetrators of criminal breaches as provided by law n° 06-99.
- The commercial courts have jurisdiction over actions between traders regarding their business arising under the application of law n° 06-99.
- Administrative courts rule on the legality and regularity of the decisions taken by the Prime Minister (currently head of the Government, under the new constitution dated 1 July 2011) regarding anticompetitive practices and merger control.
- The civil courts have also jurisdiction because the consumer organisations under article 99 of law n° 06-99 may bring a civil action or redress action on the basis of an independent civil action.

1.5 Who has standing to bring an action for breach of competition law and what are the available mechanisms for multiple claimants? For instance, is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation?

For criminal offences, as provided by law n° 06-99, the Prime Minister (head of the Government) has the authority to refer to the King's Procurator.

Thereby, the head of the Government, or regional councils, urban communities, commercial chambers, industry and services chambers, handicrafts, sea fishing chambers, professional or trade union (French: *syndicale*) organisations and consumer associations recognised as public utilities have the authority to refer to the Competition Council any fact which may constitute a breach of articles 6 and 7 of law n° 06-99 in cases they are in charge of.

After review, the Competition Council may only advise the head of the Government or organisations applying for advice and recommend appropriate actions, conditions or instructions provided by law.

The Competition Council can also refer to the King's Prosecutor at the Court of First Instance (civil court), the purpose of prosecution in case of non-compliance notification regarding the proposed merger and provisional measures under article 32.

This is the same for an injunction under paragraph 1 of article 36, as well as non-compliance with decisions provided for in article 46.

In addition to the head of the Government and other authorities, anyone with interest, capacity and quality can bring a civil action (inherent in a criminal action) or claim compensation for damages to a civil or commercial court (if both parties are traders) on the basis of an action for unfair competition under the Dahir of Obligations and Contracts.

Finally, under article 99 of Law n° 06-99 "consumer associations of public benefit may bring a civil action or repair on the basis of an independent civil action for damage suffered by consumers".

With regard to class actions, these are possible if their use justifies the same object, the same cause and an interest common to all candidates.

1.6 What jurisdictional factors will determine whether a court is entitled to take on a competition law claim?

In terms of territorial jurisdiction rules, we have to make the following distinctions:

If the action is public:

- it is territorially qualified: the prosecutor of the place of the offence, of residence of one of those suspected of involvement in the offence, or of the place of arrest of these people; even when the arrest was made for another reason. (Article 44 of the Criminal Proceedings Code dated 3 October 2002).

If the action is civil or commercial:

- the territorial jurisdiction of the court belongs to the real or elected domicile of the defendant. In case there are multiple defendants, the plaintiff has a choice between the court of the domicile or residence of one of them.
- if the subject of a trial is compensation of damages, the plaintiff has the right to choose whether the court in the territory where the damage occurred, or where the defendant lives has jurisdiction.

If the action is brought before the administrative court:

- the action for annulment for abuse of power are brought before the court of the applicant's home or of the territorial jurisdiction in which the decision was taken.

1.7 Does Morocco have a reputation for attracting claimants or, on the contrary, defendant applications to seize jurisdiction and if so, why?

Yes, Morocco has a reputation for attracting claimants.

Anticompetitive practices infringe the freedom of competition and its protective conditions for both consumers and professionals.

Moroccan law allows victims to refer to the competition Council. It turns out that it receives a lot of requests. The applicants (consumers and harmed professionals) are the ones who constitute the major part to refer to the Competition Council, which acts as an advisor. However, it is the head of the Government who then seises the King's Prosecutor. However, the competition council may report, by substantiated decision, the application inadmissible, if the facts are not part of its scope or are not supported by sufficient evidence. The victim also has the right to file directly an action in the court of jurisdiction.

The defendant party may file a counter-claim and ask the court to sentence the applicant to pay damages and interest if it turns out that the main claim was abusive. But in practice, rarely does the court order such condemnation, unless the defendant provides strong evidence of abuse.

1.8 Is the judicial process adversarial or inquisitorial?

The process is inquisitorial. The plaintiff has to provide evidence of the facts he alleged. Also, the King's Prosecutor can make investigations and request additional evidence to the Competition Council (authority) (title VIII of law n° 06-99 governing investigations which are authorised by the Procurator).

2 Interim Remedies

2.1 Are interim remedies available in competition law cases?

Yes, interim remedies are available in competition law cases.

2.2 What interim remedies are available and under what conditions will a court grant them?

The available interim remedies are:

- Precautionary measures: involving the suspension of the relevant practice and an injunction to the parties to return to the previous situation. They are strictly limited to what is necessary to deal with the emergency. They can only occur if the practice has denounced a serious and immediate infringement to the country's economy, the sector concerned, the interests of consumers or the firms affected.
- Order to stop anticompetitive practices: it is an injunction to bring to an end to these practices within a specified period of time or impose specific conditions on the parties for the continuation of their activities.
- Publication of the decisions of the head of the Government, who may order that decisions on anticompetitive practices will be published in full or in excerpts in a journal of legal announcements. They are displayed in the places the head of the Government indicates to the expense of the party who has contravened the provisions of articles 6 and 7 (anticompetitive practices) of law n° 06-99, or on the expense of the measures' applicant in the case of precautionary measures.

3 Final Remedies

3.1 Please identify the final remedies which may be available and describe in each case the tests which a court will apply in deciding whether to grant such a remedy.

Law n° 06-99 on freedom of prices and competition provides two types of remedies:

1. Criminal remedies:
   - the imprisonment of natural persons;
   - a penalty;
   - confiscation;
   - the temporary closure of the establishment;
   - the temporary prohibition to practice a profession or determined activity, or any other business with the ban to be employed in an institution operated (even sold or leased management or leased); and
   - the publication of judgments.
2. Administrative remedies:

Law n° 06-99 law provides administrative remedies that illustrate a balance between prevention and repression. According to article 91, administrative penalties are:

- The warning by registered letter with acknowledgement of receipt.
- A fine not exceeding 100,000 DHS, and up to twenty (20) times the average weekly turnover of the offender. To this sum may be added the amounts illegally collected for the duration of the infringement.

The publication of sanctions, or more precisely, the decisions indicating sanctions is another means of punishment. The use of publication of decisions appears in both the penalties imposed by the courts and those decided by the Government.

Administrative sanctioning power constitutes a strong way of regulation that can be seen as a complement to the regulatory authority.

3.2 If damages are an available remedy, on what bases can a court determine the amount of the award? Are exemplary damages available?

A civil action will allow the victim to obtain an award of damages. The victim should encrypt the request and fix an amount but only the judge can appreciate it, he will take into consideration the repetition and duration of unfair conduct but also the loss of benefit interests, decreasing or diluting the reputation of the victim or the profits or advantages that the competitor has done. The judge can also appoint an expert.

Exemplary damages are not available in Moroccan law.

3.3 Are fines imposed by competition authorities taken into account by the court when calculating the award?

Fines imposed by competition authorities are not taken into account by the court when calculating the award.

Fines do not reflect the amount of damages. They remain at the discretion of the judge who uses judicial discretion.

The award compensates the damage suffered by the plaintiff.

4 Evidence

4.1 What is the standard of proof?

Each party to a civil trial bears the burden of proving the facts on which its arguments rely by producing supporting evidence.

In civil matters, written evidence overrides, in principle, other types of evidence. The following constitute proof:

- The admission (articles 405 to 415).
- The electronic document has the same value as the written document. (Articles 416 to 417-3 and 433 to 442.) Material in electronic form is admissible as evidence as well as material written on paper; provided that can be duly identified by the person submitting it and it is established and maintained under conditions that ensure its integrity.
- There is also testimonial evidence (articles 443 to 448), the presumption (articles 449 to 459) and, finally, the oath and the refusal to take the oath (article 460).

In commercial matters, the evidence is free between traders.

Expert evidence may be presented by the parties. The court may also designate its own expert.

The strength of the evidence produced by the parties will be assessed by the court when making its decision.

4.2 Who bears the evidential burden of proof?

Each party to a civil or commercial trial should prove the facts on which its arguments rely by producing supporting evidence.

In cases relating to competition acts, the supervisory authorities also have the burden of proof.

Indeed, the administrative authorities oversee the compliance of the operators' acts with the law of freedom of prices and competition. So they operate through a continuous monitoring through inquiries and investigations when the Competition Council is seised.

The usefulness of investigations is having sufficient information to make administrative decisions and the opinion of the Competition Council.

The law gives investigators the necessary prerogative to carry out their mission successfully. They have the right to access places, the opportunity to visit places (under inquiries requested by the administration and authorisation reasoned by the procurator of the place when the visit had to be done) and finally the right of seizure of objects and documents.

4.3 Are there limitations on the forms of evidence which may be put forward by either side? Is expert evidence accepted by the courts?

In commercial matters, the autonomous will of the parties can be an obstacle to the principle of freedom of proof, because they can require written proof, for example.

Proof by testimony, for example, is not accepted for the request of an amount of more than 10,000 DHS.

The extra-judicial confession, meanwhile, cannot be proved by witnesses, if the relevant obligation requires written evidence.

Parties tend to use expert evidence, especially where the case is technical, or to determine a value. They may request the appointment of a court expert. The court specifies the exact mission of the expert and informs him on the matters upon which he is required to report. The expert must compose a report where he answers the questions and addresses the remarks of the parties. This expertise has stronger probative value. Each party has the right to discuss the expert's findings and make observations, or request a second expert opinion.

4.4 What are the rules on disclosure? What, if any, documents can be obtained: (i) before proceedings have begun; (ii) during proceedings from the other party; and (iii) from third parties (including competition authorities)?

In principle, each party is required to prove the facts on which its arguments rely. However, there is no duty of disclosure.

During the proceedings before the Commercial Court, if one party has a significant document or key evidence, the judge may –upon the petition of one of the parties– request or order, where necessary under a penalty, the production of that document or evidence by the other party, or a third party within a reasonable time.

The President of the Competition Council is not allowed to disclose any part involving trade secrets, except in the case where the communication or consultation of these documents is necessary for the procedure or the exercise of the rights of the parties.

Investigators authorised under law n° 06-99 shall be bound by professional secrecy subject to the penalties provided for in the article 446 of the Criminal Code.

These investigators can, without facing professional secrecy, have access to any document or piece of information held by the administrations, public institutions and local authorities.

The courts must provide, to the Competition Council, upon its request, a copy of the records, investigation reports or any document that has a direct link with the facts before the Competition Council is seised.

The Competition Council may be consulted by the courts on anticompetitive practices. It cannot give an opinion until an adversarial procedure is done. However, if information has already been collected during a previous procedure, it may give an opinion.

4.5 Can witnesses be forced to appear? To what extent, if any, is cross-examination of witnesses possible?

Under the provision of the Code of Civil Procedure, the witnesses failing to appear may face, by an executory judgment, fines that may not exceed 50 DHS.

If the witness has been called one more time to appear and they are still deficient, such fine is doubled (100 DHS).

Parents or spouses in direct or collateral line (third degree) related to either of the parties are not heard as witnesses.

In civil matters, cross-examination is not allowed (article 82 of the *Code de Procedure Civile*).

4.6 Does an infringement decision by a national or international competition authority, or an authority from another country, have probative value as to liability and enable claimants to pursue follow-on claims for damages in the courts?

The Competition Council is just a simple advisory body with no power of decision neither in the administrative nor in the judicial way. In this context it may be consulted by a number of authorities and institutions. Those institutions are not forced to ask for his advice, except in some specific issues.

Thus, the opinion that he gives in response to the consultation will never be imposed to the institutions that have requested it.

If the Competition Council could play a more or less important role in the future regulation of economic activity in Morocco, it remains currently a strictly advisory body and lacks disciplinary and jurisdiction ability.

4.7 How would courts deal with issues of commercial confidentiality that may arise in competition proceedings?

As discussed in question 4.4, there is privacy in enquiries and investigations, but before the court, we can no longer talk about commercial confidentiality.

4.8 Is there provision for the national competition authority in Morocco (and/or the European Commission, in EU Member States) to express its views or analysis in relation to the case? If so, how common is it for the competition authority (or European Commission) to do so?

As mentioned in the answer to question 4.6, the Competition Council in Morocco can express its point of view, but has no judicial part.

As for proceedings before the Competition Council, it is detailed in law n° 06-99 and based on practice (articles 24 to 46).

A section relative to the procedure of anticompetitive practices, and another section relative to operations of economic concentration are dedicated to this proceeding.

Article 25 provides that: "the Competition Council examines whether the practice before it constitute violations of Articles 6 and 7 above (law) or whether these practices can be justified by applying Article 8 above. It shall provide its opinion to the head of the Government or organisations making the request for an opinion, and recommends appropriate actions, conditions or orders under this section. It cannot be referred to facts dating back more than five years if any act tending to their research statement or punishment, was done during this period".

5 Justification / Defences

5.1 Is a defence of justification/public interest available?

The only public interest defence that can be used as an argument is the one relating to economic concentrations.

Also, acts of concentration may disturb free competition when they become extensive or abusive. Below a determined threshold, they remain instruments of a legal and regular competition.

According to article 42 "the Competition Council assesses whether the proposed merger or the merger brings economic progress sufficient contribution to offset the harm to competition".

5.2 Is the "passing on defence" available and do indirect purchasers have legal standing to sue?

The "passing on defence" is available in Morocco. Indeed, article 99 of law n° 06-99 states clearly that "consumer associations of public benefit may bring a civil action or redress on the basis of an independent civil action for the damage suffered by consumers".

However, a causal link between the fault and the damage caused must be established.

6 Timing

6.1 Is there a limitation period for bringing a claim for breach of competition law, and if so how long is it and when does it start to run?

Regarding limitations, it is necessary to make the difference between the various actions undertaken by the applicant:

- If the action is public (before the criminal court): The Criminal Procedure Code provides for a four-year limitation period.
- If the action is brought to a civil court: The Dahir relating to contracts and obligations (DOC) provides for a fifteen-year limitation period.
- If the action is commercial: The commercial code provides for a five-year limitation period unless a special provision exists such as the disposal of the same code.

6.2 Broadly speaking, how long does a typical breach of competition law claim take to bring to trial and final judgment? Is it possible to expedite proceedings?

This question has no specific answer. A time limit cannot be given between the beginning of the trial and the final judgment as to the claim of competition law.

Moroccan courts have had to deal with only a few cases in this field; competition law is a recent field in Morocco.

That said, article 80 of Law n° 06-99 provides that "the criminal proceedings under Titles VI and VII of this Law are carried out by a direct summons and the court decides at its next hearing if it is ruled on emergency on appeal".

7 Settlement

7.1 Do parties require the permission of the court to discontinue breach of competition law claims (for example if a settlement is reached)?

Yes, the applicant may end the proceeding by desisting (articles 119 to 123 of the Civil of Proceedings Code). The acceptance of the defendant is not required except if he has formulated a defence on the substance of the case.

The parties may also compromise (articles 1098 to 1116 DOC); which will end the trial. Indeed, article 1105 of the Civil Code states that: "The transaction has the effect of permanently switching off the rights and claims that were the subject of the contract."

However, in criminal cases the plaintiff desisting does not extinguish the trial if the public prosecutor has decided to proceed.

8 Costs

8.1 Can the claimant/defendant recover its legal costs from the unsuccessful party?

According to article 124 of the *Code de Procedure Civile*, the unsuccessful party, whether an individual, a company or a public administration, shall through a decision, pay all or a part of costs of the other party.

These costs do not include fees for consultations and pleadings of attorneys.

8.2 Are lawyers permitted to act on a contingency fee basis?

A Moroccan lawyer may not act even with express permission on the basis of contingency fees according to law n° 28-08 organising the legal profession.

Lawyer's fees based solely on the result of a judgment are prohibited. However, it is possible to set fees which are partly based on the result of a judgment.

8.3 Is third party funding of competition law claims permitted? If so, has this option been used in many cases to date?

Third party funding of competition law claims is not permitted in Morocco.

9 Appeal

9.1 Can decisions of the court be appealed?

Yes, decisions of the court may be appealed.

- Appeals against civil decisions have to be filed within thirty days from the date of the notification of the judgment.

This period is tripled for the parties which neither have a home nor residency in the Kingdom.

- Appeals against criminal decisions have to be filed ten days from the date of the judgment.
- Appeals against commercial decisions have to be filed fifteen days from the date of notification of the judgment.
- The judgments of the administrative and civil courts may be appealed within thirty days from the date of the notification of the judgment.

10 Leniency

10.1 Is leniency offered by a national competition authority in Morocco? If so, is (a) a successful and (b) an unsuccessful applicant for leniency given immunity from civil claims?

Under Article 86 of Law n° 06-99 an administrative authority has been created that can grant clemency if an action has not been introduced yet before the court. If conciliation has occurred, the administration loses its right to sue.

The leniency before the administrative authority does not prevent the plaintiff from proceeding before a civil court.

10.2 Is (a) a successful and (b) an unsuccessful applicant for leniency permitted to withhold evidence disclosed by it when obtaining leniency in any subsequent court proceedings?

Confidentiality is guaranteed at the investigation stage. In case of subsequent court proceedings, if the communication or consultation of evidence is necessary for the procedure or the exercise of the rights of the parties, courts can request the communication of said evidences from the competition authority.

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