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Moroccan Competition Authority Imposes Its First Gun Jumping Fine

On 28 April 2022, the Moroccan Competition Authority (“MCA”) imposed its first ever fine for failure to notify, *i.e.*, gun jumping. The fine was imposed on a Swiss company, Sika AG, in the context of its acquisition of a French company, Financière Dry Mix Solutions SAS ([press release](#)). The MCA imposed a fine of MAD 11.7 million (approx. EUR 1.1 million) on Sika AG on the basis of Article 19 of Law 104-12.

Both Sika AG and Financière Dry Mix Solutions SAS are active in the production and commercialization of chemicals for the construction industry. Sika AG has a subsidiary in Morocco. The acquisition was completed in 2019. The MCA initiated the investigation *ex officio* in a decision dated 6 December 2021 (Decision No 134/D/2021) and imposed the fine in its decision dated 28 April 2022.

Morocco’s merger control regime was established by Law 104-12 on free pricing and competition and by Law 20-13 on the MCA. The Moroccan merger control regime is mandatory and suspensory, *i.e.*, transactions that meet the notification thresholds should be notified and their completion should be suspended pending the MCA’s approval. However, the enforcement level of the Moroccan merger control regime had so far been rather low since, prior to the Decision of 28 April 2022, the MCA had never imposed any fines for gun jumping. Following the Decision, the MCA has demonstrated that it will not hesitate to enforce its rules on an *ex officio* basis. Companies operating in Morocco are therefore warned that completing a notifiable transaction without notifying the MCA might result in substantial fines.

MOROCCO’S MERGER CONTROL THRESHOLDS

An obligation to notify transactions to the MCA is required where, during the last completed financial year, either of the following three alternative thresholds are met:

- The parties had a combined market share of 40% in Morocco, or



- The parties had a combined worldwide turnover exceeding MAD 750 million (approx. EUR 70.5 million), or
- The parties each had a turnover exceeding MAD 250 million (approx. EUR 23.5 million) in Morocco.

Foreign-to-foreign transactions are caught by Morocco's merger control regime if the activities of the parties have an impact on competition on the Moroccan market. Transactions which meet the worldwide turnover threshold should only be notified if at least one party is established in or generates turnover in Morocco. This means that the Moroccan thresholds can be met by the acquirer or the target alone. In addition, the MCA has stated that a notification may be required under the market share threshold even where there is no market share increment.

MOROCCO'S MERGER CONTROL PROCEDURE

Morocco's merger control regime is mandatory and suspensory. Accordingly, the parties must not close the transaction before having received the approval from the MCA. The MCA has 60 days to review the transaction as of the date of notification, which can be extended by an additional 20 days in case of remedies or at the request of the parties. If, at the end of those 60/80 days, the MCA has not taken a decision, the transaction is deemed tacitly approved. In case the MCA opens an in-depth investigation during the first 60/80 days, an in-depth investigation is conducted within a period of 90 days from the day of the notification. The in-depth investigation can be extended by an additional 30 days in case of new or missing facts or at the request of the parties, for a total period of 120 days.

FINES FOR FAILURE TO NOTIFY

Sanctions for failure to notify or failure to suspend the closing of the transaction pending the MCA's approval are as follows:

- A daily penalty payment of up to 5% of the parties' daily turnover,
- A fine of up to 5% of the acquirer's turnover in Morocco during the last completed financial year, increased by the turnover made in Morocco during the same period by the target,
- An order to unwind the transaction.

The statutory limit for the MCA to investigate unnotified transactions is five years.

Prior to the MCA's Decision of 28 April 2022, the MCA had never imposed any fine for failure to notify a transaction meeting the merger control thresholds. However, with this new Decision, it is evident that the MCA will scrutinize transactions *ex officio* where it suspects that the parties have failed to notify a reportable transaction.

By imposing this first ever fine for gun jumping, the MCA announced a more stringent approach to enforcement of the Moroccan merger control rules. Companies operating in Morocco, or companies that are acquiring a business that operates in Morocco, are advised to take this into account when assessing antitrust risk in the context of cross-border mergers. Where in the past international transactions would not have led to antitrust scrutiny in Morocco, going forward this may no longer be the case – a theme that is becoming more and more prevalent in the MENA region.



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