

# The Brief

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## North Africa

### Morocco: new legislation on "delegated management"

Act No. 54-05 promulgated by the *Dahir* of 14 February 2006 introduces regulations governing agreements for the outsourcing (or "delegated management") of public services in Morocco. Yet, this type of partnership between private companies and public bodies has been used in Morocco since the beginning of the last century. It has even enjoyed a revival over the last twenty years with the signature of major agreements in sectors as varied as electricity, water, irrigation and urban transport. As there was no specific legal framework for such agreements, they have been based on various models some inspired by French law and others by the common law systems of the English-speaking countries. Although the Moroccan legislature has demonstrated its determination to seek partnerships with the private sector, especially to finance public infrastructure and facilities, without sanctioning the use of PPPs according to the strict definition of such agreements<sup>1</sup>, it is firm in its resolve to safeguard the system and values of public service.

The Act is relatively short (34 articles) and only one decree has been issued to date to implement its provisions. Its aim is to maintain a balance between service in the public interest, guaranteed by public bodies, and the pursuit of profit required by private partners. Therefore, the Act establishes an administrative law framework to protect the values of public service while, at the same time, allowing contractual negotiation to cover a vast field and decide a number of important issues.

<sup>1</sup> Under French law, PPPs are "administrative contracts whereby the State or an institution of the State entrusts to a third party, for a defined term, depending on the period required to amortise investments or on the means of financing selected, a general mission relating to the financing of intangible investments, infrastructure or facilities required for public service, the construction or transformation of infrastructure or facilities, and their upkeep, maintenance, operation and management and, according to the circumstances, other services contributing to the provision by the public body, of the public service mission for which it is responsible." Article L. 1414 (1) of the General Local Authorities Code.



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## Scope

The legislature has been specific in its definition of the scope of the Act from an institutional point of view: it relates to delegated management agreements entered into by local authorities or groups of local authorities and by public entities (Article 1) but excludes agreements entered into by the State.<sup>1</sup> Yet, the State has longstanding experience of outsourcing management. Many of the provisions of this Act confirm and uphold rules included in many concession agreements entered into by the Moroccan State. Excluding the State from the scope of the Act allows it a wide discretion: it may continue to act by contractual means, either under delegated management agreements or PPP-type agreements.

Act 54-05 permits the use of various types of arrangements for delegating public services: the various categories of concessions (public service concessions, construction work concessions without a right to operate the public service and construction work concessions combined with the right to operate the public service, which have been employed in practice in Morocco for several decades) but also leases of the right to manage infrastructure (*contrats d'affermage*) or of the right to operate and manage a public service (*régie intéressée*).

It also allows for agreements not only for the management of a public service but also for the construction and/or management of infrastructure or facilities provided they contribute to the provision of a public service. This is not dissimilar to the public works contract, except that the consideration of the builder of the infrastructure will depend on its use (this will be the case for a public highway, bridge, etc.).

## Procedure for the award of the contract

Delegated management agreements are normally signed with a public or private partner following a tendering procedure. This procedure will be defined by regulation for local authorities. As far as public enterprises are concerned, the rules for the tendering procedure will be defined by their board of directors.

After defining a standard legal framework for the award of contracts, the Act provides for two categories of exceptions: direct negotiation and spontaneous proposals.

The first relates to urgent situations, sensitive matters to do with national defence and public safety or very specific activities.

The second, inspired by the framework laid down in Ordinance No. 2004-559 of 17 June 2004 establishing the role of PPPs in France, is nevertheless different from the French system in that there is no provision for a procedure safeguarding the confidentiality of the tender. As the law stands, there is little likelihood that a company will risk submitting a comprehensive tender which may later be used by the delegating public authority should it decide to use the services of a competitor.

Finally, the legislature has provided for an exceptional procedure for the outsourcing of services by local authorities but the cases in which this procedure may be used remain unclear, and need to be defined in greater detail by regulation. Tendering procedures are nevertheless to be overseen by a supervising authority and lead to direct negotiation or a simplified tendering procedure.<sup>2</sup> However, the Act excludes key public services, such as water supply, sewerage disposal, electricity, urban transport and waste management, from the scope of this exceptional procedure.

## A delegated management agreement, the result of painstaking contractual negotiation

The Act defines delegated management, primarily as an agreement binding a public law corporate entity, the delegating authority, and a private law corporate entity, the delegatee. Although Article 25 requires the delegatee to be incorporated as a Moroccan company, its capital is nevertheless, open to "*natural persons or public or private law corporate entities.*" Accordingly, part state-owned companies, public enterprises, public bodies and private companies may be involved in the delegated management of a public service.

One of the key criteria defining this type of agreement is the remuneration of the delegatee. On this issue, the legislature has introduced a relatively open system, offering a range of solutions to the parties: payment by users, the earning of operational income or a combination of both, with the aim of maintaining the economic balance of the agreement. The implementation of these solutions, defined in detail in Article 29, makes it clear that the delegating authority may contribute

<sup>1</sup> *Article 1: Scope*

*This Act shall apply to delegated management agreements for services and public infrastructure entered into by local authorities or their groupings and by public enterprises.*

<sup>2</sup> *Article 33(2):*

*Where the sector or activity concerned, or the number of public service users, does not justify or does not permit this Act to apply, the local authority or groups of local authorities may request the government authority responsible for overseeing local authorities to authorise it to proceed with the intended outsourcing of the public service in question by means of direct negotiation or a simplified tendering procedure.*

to the financing of the public service by a variety of means, allowing for use agreements such as contracts granting the right to operate and manage a public service (*régie intéressée*) or management leasing arrangements, within the framework of the Act. This provision also makes it possible to outsource public services without identifiable users, for example. Thus, some agreements strictly, we may even say administratively, govern the method and variation of the remuneration of the delegatee. These elements are the subject of frequent renegotiations between the parties.

If we consider the legislation as a whole, we observe that the Act leaves solutions to a number of important issues open to negotiation between the parties.

The overall contract, comprising an agreement, technical specifications and schedules (Article 12), must contain a number of mandatory provisions. For example, it must contain a definition of the public service to be delegated. It must also state the term of the contract, which must be limited and may not, as a rule, be extended. However, the legislature has provided for exceptions, strictly defined, in the case of major changes to the conditions in which the contract is to be performed (Article 13 (2) et seq.). The contract must also contain provision for anything to do with funds circulating between the delegating authority and the delegatee, whether in the form of subsidies, fees or buy-in costs, and the terms and possible variations of the delegatee's remuneration (Article 29). It will also settle the issue of supervision by the delegating authority, defining how and how often it may exercise this right (Article 17 (4)) and will include a list of the technical, accounting and financial documents to be disclosed by the delegatee to the delegating authority (Article 18). The parties must also set up a structure for the oversight and monitoring of the delegated management (Article 18 (2)). They will define a schedule for regular meetings to monitor performance of the contract and, for contracts for a term exceeding ten years, they will plan for a meeting every five years, to carry out a joint evaluation of the project (Article 19).

The agreement must also provide for penalties against the delegatee should it hinder supervision on the part of the delegating authority and/or fail to disclose the relevant documents (Article 18 (1)). Similarly, it will provide for the various punitive measures that the delegating authority may take against the delegatee for any breach of its contractual obligations and which may range from straightforward financial penalties to forfeiture of rights under the contract. Such measures must be preceded by notice procedures which must also be set out in the agreement (Article 32 (1) and (2)).

The contract must also define the punitive measures that the delegatee may take against the delegating authority, whether these be compensation in the event of a breach of its contractual obligations or even termination of the agreement. If a dispute should arise between the delegatee and the users, the contract must provide for a mediation procedure which must be used before any other method of dispute settlement (Article 9 (2)). This overview of the mandatory provisions would not be complete without reference to the various terms applicable when the contract comes to an end, whether prior to term (pursuant to a buy-back, rights forfeiture, termination) or expires (Article 10). It should be noted that the Act empowers the delegatee to terminate its commitment in the event of a particularly serious breach on the part of the delegating authority, which is not always accepted in concession agreements with the State.

The legislature has left a number of important provisions to the discretion of the parties, including the right for the partners to re-examine how the delegated management operates, balancing adaptation of the service to requirements against the financial interests of the private partner. This opens up the operational conditions of the delegated management which allows and even paves the way for making contractual provision for a unilateral application of the principle of the adaptation of the public service to requirements (Article 19 (3)). The private partner also has the right to exclude the delegating authority from its board meetings or general shareholders' meetings (Article 17 (6)), a guarantee of independence which is highly attractive to potential private partners of the public entity.

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Act No. 54-05 constitutes a significant step forward in the definition of the relationship between parties to a public service delegated management agreement. Without detracting from the powers devolved on public bodies (municipalities, public enterprises, etc.) to supervise the public service, ensure that it is adapted to requirements and that there is continuity, the parties may, to an extent, adapt the terms on which these powers are exercised.

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## RULES APPLICABLE TO ROUTINE TRANSACTIONS WITH FOREIGN AND CURRENCY ACCOUNTS

### Preliminary remarks

Regulation No. 07-01 of 3 February 2007 on rules applicable to routine transactions with foreign and currency accounts (hereinafter "**Regulation 07-01**") repeals all previous regulations contrary to its provisions, including Regulation No. 91-12 of 14 August 1991 on "import domiciliation" and Regulation No. 95-07 of 23 December 1995, amending and replacing Regulation No. 92-04 of 22 March 1992 on exchange control.

The repeal of the last two regulations is particularly important. Before Regulation 07-01 came into force, there was no single legal instrument setting out the import domiciliation and payment rules. Instead, they were set out in a variety of regulations, instructions and guidelines.

A principle contribution of Regulation 07-01 is therefore to unify the core international trade rules, particularly those on "domiciling" imports of goods and services.

### 1. Legal framework for international trade

Algeria still applies fairly strict exchange control regulations and a rigorous legal framework for international trade transactions. However, legal instruments issued by the Bank of Algeria have gone some way towards making the procedures for private undertakings trading with companies abroad more flexible (limiting the cases requiring prior authorisation).

This trend is furthered by some Regulation 07-01 provisions.

According to Article 3 of Regulation 07-01, there are no longer any restrictions, as a basic rule, on payments and transfers of funds in settlement of routine international transactions (without prejudice to the applicable legislation and regulations).

#### *Routine international transactions*

Article 4 of Regulation 07-01 defines payments and transfers of funds in settlement of routine international transactions as follows:

- payments or transfers of funds made pursuant international trade transactions in goods and services (including technical assistance and production transactions in the ordinary course of business);
- loan interest and net investment income payments; and
- loan repayments.

Instruction No. 02-07 of 31 May 2007 (issued by the Governor of the Bank of Algeria) on payments in settlement of routine international transactions, clearly defines what is meant by "*routine transactions with foreign countries*" for the purposes of Article 4 of Regulation 07-01. The following are considered to be routine international transactions abroad:

- duly declared international trade transactions in goods authorised for import and export;
- transport transactions (air, sea or road transport);
- insurance and reinsurance transactions: transactions and commitments accepted contractually by insurance companies incorporated in Algeria;
- financial services: commissions connected with international trade transactions, loans and other financial transactions;
- travel: assignment costs, travel allocations, foreign health care, schooling and pilgrimage expenses, depending on the rules governing each type of transaction;
- technical assistance and production transactions:
  - assembly, repair, start up, working, processing, machining and associated services;
  - plant and equipment leasing and maintenance;
  - buildings and public works, earthworks, architecture, drilling;
  - technical assistance relating to the Algerian undertaking's business, including visits and assistance from experts and technicians, the verification and evaluation manufacturing processes, studies and surveys, education courses and professional training (technical assistance would appear only to be relevant to Algerian **manufacturing** companies);
  - industrial property rights (patents and manufacturing licences);
  - management agreements;

- technical and scientific analysis and expert assistance, due diligence and international standards (such as ISO) certification;
  - software leasing and database subscriptions, including computer training and systems maintenance;
  - remuneration and salaries of foreign personnel under contract, according to the specific provisions governing this area;
  - exhibition stand and space rental at trade fairs and similar events abroad;
- communication and marketing transactions;
  - loan interest, dividends, profits, percentage shares and directors' fees;
  - other routine operations (offers in response to international invitations to tender, court costs and legal fees, patent, manufacturing process and trade mark registration fees payable abroad, Algerian undertakings' representative office expenses according to applicable laws and regulations, etc.).

Note that imports of services by Algerian companies for onwards sale "as is" unrelated to production activities in Algeria, are outside the scope of the instruction.

This suggests that such transactions will still require prior authorisation by the Bank of Algeria.

#### *Approved Intermediaries*

Payments and transfers of funds in settlement of routine international transactions abroad must be made by an intermediary (bank or financial institution) approved by the Bank of Algeria (an "**Approved Intermediary**").

Banks and financial institutions must be Approved Intermediaries to involve themselves in foreign exchange and international trade. Only Approved Intermediaries are allowed to administer and transfer the funds required in import and export transactions.

The delegation by the Bank of Algeria of responsibility of applying the exchange control regulations to Approved Intermediaries is further proof of the relaxation in procedures. Approved Intermediaries must now check the legitimacy of such transactions from a legal standpoint.

Approved Intermediaries remain the primary contact for handling all transfers of funds from Algeria to a foreign country. They control compliance with Regulation 07-01.

A company must therefore contract an Approved Intermediary before engaging in any agreement that may require an export of foreign currency.

The Bank of Algeria may still exercise control after the fact to ensure that transactions do indeed comply with Regulation 07-01.

## **2. Business agreement domiciliation formalities**

According to Article 25 of Regulation 07-01, international trade transactions are those involving goods or services governed by a business agreement, in which:

- the amount and the parties rights and obligations are defined and set out; and
- the consideration for the transfer and the legality of the transaction are defined and proven.

All transactions for the import or export of goods or services must be domiciled with an Approved Intermediary. There are some express exceptions to this general rule in Regulation 07-01.

Domiciliation is a pre-requisite for any transfer or repatriation of funds, commitment and/or passage through customs.

The Approved Intermediary to which the application is made will open a domiciliation file and attribute a domiciliation number to the relevant commercial transaction. This file will contain all documents relevant to the transaction.

The importer is free to choose the Approved Intermediary with which it undertakes to satisfy all the banking formalities connected with the transaction.

#### *Role of Approved Intermediaries*

The selected Approved Intermediary will open a domiciliation file so that it can follow the import transaction.

A copy of the transaction agreement will be endorsed with the domiciliation stamp. All invoices issued pursuant to the agreement will also be stamped in this way.

This stamp makes it possible:

- to commence the customs clearance of the goods;
- to endorse bills accepted or signed by the importer;
- to issue payments in dinars and foreign currency transfers; and
- at the end of the domiciliation, to prepare a transaction closing report for submission to the Bank of Algeria.



To accept a domiciliation file and an undertaking that may require a foreign currency transfer abroad in payment, an Approved Intermediary must assess (i) the legality of the transaction and (ii) the financial standing of its client.

#### *Domiciliation requirements*

Pursuant to Article 26 of Regulation 07-01, the commercial agreement or document evidencing a transfer of title in and/or sale of goods or services between a resident and non-resident undertaking must stipulate:

- the names and addresses of the parties;
- the country of origin, provenance and destination of the goods or services;
- the nature of the goods or services;
- the quantity, quality and technical specifications;
- the goods or services sale price in the invoice and currency of payment under the agreement;
- the goods delivery date or services supply date;
- contractual provisions governing the apportionment of liability for risk or other incidental expenses;
- the payment terms.

Unless otherwise stated by law, any of the commercial terms (INCOTERMS) contained in the rules and practices of the International Chamber of Commerce may be included in a commercial agreement.

### **3. Paying for the imports and auditing the file**

#### *Payment*

No payment may be made or financial commitment honoured pursuant to a commercial agreement until the Approved Intermediary has been supplied with:

- final invoices;
- certificates attesting to the performance of the services in the case of service imports.

Article 45 of Regulation 07-01 authorises payment for imports (of goods or services) in foreign currency. The Approved Intermediary will pay out of foreign exchange reserves:

- belonging to it;
- purchased from its clients;
- purchased on the interbank foreign exchange market; or

- earned from an external loan.

Foreign currency transfers will be subject to applicable laws and regulations, contractual terms and conditions and international rules and practices.

The amount to be transferred can exceed neither the transferable part provided by the contract and/or its additional clause, nor the amount of the final invoices for the imported good or service. Any difference with respect to the amounts initially indicated must be duly justified.

Where imports are subject to external financing, the Approved Intermediary must, when accepting domiciliation of the agreement, verify that the financial arrangements and their governing terms and conditions comply with Bank of Algeria requirements.

An external debt declaration will be filed with the Bank of Algeria as required by law and in accordance with the relevant procedures.

An international foreign currency transfer in payment of imported goods or services worth the foreign currency equivalent of 100 000 dinars or more by debiting a foreign currency account, will be operated by the Approved Intermediary subject to the disclosure by the Algerian company of documents proving effective delivery of the goods or performance of the services provided for under the agreement.

The Approved Intermediary accepting domiciliation may make payments on account for the goods or services to be imported of up to 15% of the total consideration stipulated in the agreement. However, the agreement must contain a clause complying with international rules and practices offering a guarantee to refund any payment on account in the event of non-performance or breach by a bank of good standing.

No payment on account in excess of 15% may be made without Bank of Algeria approval.

The transfer will be executed pursuant to the agreement and/or final invoice endorsed by the importer, with, in the case of services, a certificate attesting to performance, and any other necessary document or public authority authorisation.

Any transfer in payment for imported services supplied under a subcontract must be expressly provided for in the main agreement.

#### *Auditing the file*

The Approved Intermediary agreeing to domicile an agreement will audit and control the import file and fund transfers according to the following documents:



- a commercial agreement and/or final invoices;
- a certificate attesting to the performance of the services (service imports only);
- shipping and customs documents (bank's copy) or documents deemed equivalent (goods imports only);
- any other necessary documents or authorisations;
- a copy of the "Swift" message;
- the Bank of Algeria statistics form.

The audit of import files and payment transfers must be completed:

- within three (3) months of payment for the transaction (commercial agreements requiring payment in cash);
- within thirty (30) days of payment of the final instalment (for commercial agreements allowing for deferred payments).

At the end of the auditing period import, the Approved Intermediary:

- will close the file if it is in order and complies with the regulations;
- notify the importer, if required, of any omissions so that it may supplement the file, or discrepancies, particularly payment surpluses, so that it may correct the situation;
- forward a copy of the file to the Bank of Algeria, after an additional period of thirty (30) days in the event all matters have not been settled and/or if the payment surplus exceeds the foreign currency equivalent of 100 000 dinars.

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### NEW PHARMACY CODE AND THE INDUSTRIAL ORGANISATION OF PHARMACEUTICAL GROUPS IN MOROCCO

Voted after a relatively long gestation period, Act No. 17-04 establishing the Moroccan Medicines and Pharmacy Code (the "**New Pharmacy Code**") was promulgated by Dahir No. 1-06-151 of 22 November 2006 and published in Official Journal No. 5480 of 7 December 2006.

The contribution of the new legislation to the deregulation of the sector is undeniable. It is therefore hardly surprising that it has been very enthusiastically received by the Moroccan Pharmaceutical Industry Association (AMIP) and, generally, by all Moroccan drug and medicine manufacturers.

However, one year after its implementation, issues are already being raised by an industry which is still keen to secure even greater flexibility.

#### **1. A real liberalisation of the Moroccan pharmacy sector**

One of the objectives of the New Pharmacy Code was to encourage foreign investors to acquire interests in Moroccan pharmaceutical businesses.

To achieve this objective, the cornerstone of the New Pharmacy Code was undoubtedly the repeal of Article 9 of *Dahir* No. 1-59-367 of 19 February 1960.

This provision required Moroccan pharmaceutical businesses to be owned by a pharmacist or by a company in which the majority of the board of directors, including the chairman, had to be pharmacists. The capital of such companies also had to be 51% owned by pharmacists and 26% owned by pharmacists licensed to practice in Morocco.

These restrictions were no longer suitable for a sector in which the industrial setup and critical size require investments far beyond the means of pharmacists as private individuals.

In practice, attempts had sometimes been made to circumvent these extremely stringent rules but more often than not, these attempts involved the use of techniques that were risky, poorly suited or even contrary to the spirit of the law, and in any event rarely satisfactory (nominee agreements or other indirect ownership arrangements, etc.).



The New Pharmacy Code has the merit of abolishing these outdated restrictions.

There is now only one restriction affecting the capital ownership of pharmaceuticals businesses<sup>3</sup>: the business (i.e. manufacturing facility, stocks, employees, contracts and, generally, all the assets and liabilities of the pharmaceuticals business) must be owned by a pharmacist or by a Moroccan company (in which the managing director or one of the general managers is a pharmacist) (Article 85 of the New Pharmacy Code).

However, the legislation has been in force for a year but we have not yet witnessed the major shifts in capital ownership and massive investments that the reform was designed to facilitate.

Nevertheless, pharmaceuticals groups doing business in Morocco have undoubtedly seized the opportunity offered by the New Pharmacy Code to rethink the ownership structures of their Moroccan subsidiaries.

## 2. Restrictions still hinder industrial flexibility

Practice shows that the international pharmaceutical groups, with the potential for significant investment in the Moroccan industry, require the greatest possible flexibility and freedom in how they organise their businesses.

The first clashes between this need for flexibility and the New Pharmacy Code have shown that there are still real obstacles to be overcome.

One notable obstacle, although there are many more, is the very strict regulation of distribution. For a company to be granted industrial pharmaceuticals business status, it has to satisfy onerous production capacity requirements but there is, as yet, no means whereby drug licences or "marketing authorisations" may be assigned.

### 2.1 Distribution restrictions

In organising how their products are to be distributed, Moroccan pharmaceuticals businesses must take into account the requirements laid down in the New Pharmacy Code.

For example, as the law stands, a wholesale distributor may not work exclusively for one industrial pharmaceuticals business (Article 89 of the New Pharmacy Code) (the definitions of "industrial pharmaceuticals business" and "wholesale distributor" are set out in paragraph 2.2 below).

In other words, if an industrial pharmaceuticals business wishes to "outsource" the marketing and sale of a drug or group of drugs, although it may wish to manufacture the products itself, it may only do so via another industrial pharmaceuticals business, more often than not a direct or indirect competitor, or a wholesale distributor that also works with its competitors.

Furthermore, it does not appear legally possible for a pharmaceuticals business to operate exclusively as an importer of medicines into Morocco.

If a pharmaceuticals manufacturer with no business base in the country wishes to distribute a new drug in Morocco, it may only do so if it has been licensed as an "industrial pharmaceuticals business" (Articles 19 and 74 (2) of the New Pharmacy Code).

As we will see (paragraph 2.2 below), a pharmaceuticals business will only be granted such a licence if it has production capacity in Morocco.

If the potential importer does not satisfy this requirement, it will need to enter into an agreement with an established industrial business, which is likely to be a competitor, to distribute its drug in Morocco, requiring the disclosure of essential information about manufacturing processes, commercial policy, etc. In practice, this often means that the plan to import is abandoned.

Finally, it seems accepted, although the New Pharmacy Code is silent on the subject, that the grant of licences for trade marks (rights in a drug name) or other intellectual property rights (e.g. a manufacturing patent) is unrestricted and requires no form of authorisation provided the grant is not combined with the carrying on of a pharmaceuticals business per se.

### 2.2 The requirement for industrial pharmaceuticals businesses to "possess" a manufacturing facility

The New Pharmacy Code creates two categories of pharmaceuticals business: industrial pharmaceuticals businesses and wholesale pharmaceuticals distribution businesses.

A company wishing to carry on a pharmaceuticals business in Morocco must fit into one of these categories. More often than not, it will have no choice other than to opt for the status of an industrial pharmaceuticals business, which is intended for drug manufacturers (schematically, wholesale distributor licences are intended for businesses engaged in the bulk sale of pharmaceutical products).

The requirements to qualify as an industrial pharmaceuticals business are so restrictive that it may prove prohibitive for businesses of modest size to satisfy them.

<sup>3</sup> if we exclude the provisions contained in the New Pharmacy Code concerning the right to sue a "responsible pharmacist", etc.

According to Article 74 of the New Pharmacy Code:

*"An industrial pharmaceuticals business is any business possessing a manufacturing facility, involved in the manufacturing, import, export and wholesale of medicines and, as the case may be, wholesale distribution."*

Furthermore, industrial pharmaceuticals business licences stipulate the place where the manufacturing facility is located. Any transfer of the manufacturing premises requires a new licence to be issued.

We understand – although this has not, to our knowledge, been confirmed in any law or regulation – that "possess" should not be understood as meaning "be the owner of".

The legislature's intention was not so much to encourage the building of new manufacturing facilities as to promote the use of existing factories.

Thus, an industrial pharmaceuticals business in Morocco may validly "possess" production capacity without actually owning a factory provided it has entered into an agreement with a third party for manufacturing and storage premises to be made available to it in Morocco.

However, this approach raises numerous questions. What criteria does the agreement need to satisfy? Must production capacity be permanent or is it sufficient for a manufacturing facility (or part of a facility) to be available for given periods of time? Should the agreement provide for the industrial pharmaceuticals business to have absolute control over the production setup or is it sufficient for it to subcontract the manufacturing of its product, according to defined technical specifications, to the factory owner? How should the employees "made available" with the production facility be managed, etc?

In practice, the restriction laid down by Article 74 of the New Pharmacy Code may well result in some pharmaceutical groups abandoning the manufacture and distribution of their drugs in Morocco although, for drugs with a smaller potential turnover, they could have been assigned to smaller manufacturers or simply manufactured under subcontract.

Finally, an industrial pharmaceuticals business is also required to "possess" its own laboratory (Article 88 of the New Pharmacy Code). In this case, it does not appear possible for a laboratory to be "made available" under contract.

### 2.3 The assignment of "marketing authorisations"

The New Pharmacy Code reiterates the fundamental principle that each product manufactured in, or imported into, Morocco requires a marketing authorisation.

As the law stands, there is no provision for assigning marketing authorisations (despite the fact that an assignment procedure is announced in Article 12 of the New Pharmacy Code).

Experience proves that many industrial reorganisations – whether "intra-group" or external – are achieved by the sale of corporate assets or their contribution to capital. This implies the assignment of marketing authorisations for drugs and medicines.

If no provision is made for a suitable assignment procedure, it is obvious the inability to assign such licences may create an obstacle to the restructuring of the pharmaceuticals sector in Morocco<sup>4</sup>.

It is to be hoped that the assignment procedure will be simplified in the case of "intra-group" reorganisations.

It also seems regrettable that the New Pharmacy Code does not provide, at least not expressly, for the possibility for marketing authorisations to be issued to companies that are not manufacturers or importers of the drugs. This implies that such authorisations may only be issued to industrial pharmaceuticals businesses in Morocco.

In the final analysis, it appears, on this subject and many other issues raised by the New Pharmacy Code, that the manner in which its provisions will be applied by the regulatory authorities will be decisive in ensuring the complete success of the reform and growth in the sector.

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<sup>4</sup> According to Article 14 of the old Decree No. 2-76-266 of 6 May 1977 (17 jomada I 1397) on licensing, authorisations to distribute pharmaceuticals and the advertising of pharmaceutical products and medicines in dispensaries, published in the Office Journal of 25 May 1977, which is still in force: "an application for authorisation must first be submitted to the Public Health Ministry before a licence issued to a pharmaceutical manufacturing company may be assigned to another. The application must include, in addition to the information referred to in Article 1 of this decree:

a) the opinion of the current holder of the licence;  
b) the undertaking of the pharmacist to whom the licence is to be assigned pursuant to the authorisation to comply with all of the conditions to which the grant of the licence is subject, particularly to conform to the manufacturing and quality control methods."

This article imposes an obligation to apply for authorisation to assign the licence and an obligation for the pharmacist (industrial pharmaceuticals business in the New Pharmacy Code) to whom the licence is to be assigned pursuant to the authorisation to comply with all of the conditions to which the licence is subject, particularly to conform to the manufacturing and quality control methods.



# TUNISIA

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## SECURITIES MARKET

A large number of companies doing business in Tunisia and many active on the Tunisian financial market have, for more than two years, been waiting for a securities market to be established in Tunisia with more flexible rules to allow small and medium-sized companies to offer their shares for sale to the public to finance their businesses either in replacement of or in addition to standard bank borrowing.

An alternative market has now been set up pursuant to an Order of the Finance Minister of 27 September 2007 approving the amendments made to the General Rules of the Tunis Stock Exchange (TSE).

Until now, there have been two securities markets in the TSE listing: the "capital stock market" and the "bond market".

The new rules now provide that the securities market comprises a capital stock market, sub-divided into a "principal market" and an "alternative market", and a bond market.

We have set out below, succinctly but comprehensively, the share admission and continued listing rules on the alternative market.

### **The rules and criteria for the admission of shares to listing on the alternative market of the Tunis Stock Exchange**

- (i) Preparation of a prospectus for approval by the Financial Markets Authority (FMA) both on floatation and before engaging in certain financial transactions.
- (ii) Publication of certified financial statements for the two financial years prior to market admission.

Companies that have been in business for less than two years are required to file audited financial statements for the latest financial year.

If the latest financial year ended more than eight months beforehand, there is an obligation to publish accounts for the first half of the following financial year plus an opinion issued by the company's statutory auditor.

Submission of forecasts and predictive information for the next five years, the underlying assumptions on which they are based and an opinion issued by the company's statutory auditor.

(iii) Proof that the company has:

- a procedural manual covering its organisation, management and the disclosure of financial information;
- an internal audit structure which should be appraised by the statutory auditor in his report on the company's in-house financial control system;
- a management control structure.

(iv) Submission of an asset valuation report for the applicant for admission to the alternative market, prepared by an expert from the Tunisian Order of Accounting Experts (other than the statutory auditor or the company's listing sponsor) or by another expert whose assessment will earn FMA recognition.

(v) Any sale or disposal of assets prior to the company's admission to listing must be notified to the TSE.

Should companies under incorporation wish to offer their shares for sale to the public straight away by applying for listing on the alternative market, such applications will be reviewed on a case by case basis by the FMA which may approve such admissions to listing.

### **The requirements for the continued listing of shares on the alternative market**

(i) Listing procedures (available options)

- minimum price offer;
- direct listing (this procedure supposes that at least 20% of the capital of the issuer has been owned by at least two institutional investors for more than a year);
- fixed price offer;
- open price offer.

(ii) Ownership of the shares must be spread, by the date of admission to the market, between at least 100 individual shareholders (owning more than 0.5% of the capital) or at least 5 institutional shareholders (individually owning no more than 5% of the capital).



- (iii) The company is required to designate a "listing sponsor" to manage the company's market admission, to help it draft the prospectus and to conduct the relevant due diligence enquiries prior to listing. The listing sponsor is also responsible for assisting the company throughout the share listing period to ensure that it honours all of the obligations incumbent upon it as a company offering its shares for sale to the public. The term of a listing sponsor's mandate may not be less than two years.
- (iv) The company is required to provide the FMA and the TSE with any information that may have an impact on the price of its shares listed on the alternative market.
- (v) The company is required to file with the FMA and the TSE:
- the resolutions passed by shareholders at ordinary and special general meetings;
  - the company's annual financial statements and statutory auditor's reports;
  - its interim financial statements and full statutory auditor's report;
  - its quarterly business indicators.
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