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Economic Concentrations between Control and Oversight: A Comparative Legal Analysis of Algerian and Brazilian Competition Regimes

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Abstract

This research examines the legal frameworks governing economic concentrations in Algerian and Brazilian competition law, employing a functional comparative methodology to analyze the dual nature of "control" as both a private legal instrument for corporate structuring and a subject of public administrative oversight. The study analyzes how Ordinance No. 03-03 (Algeria) and Law No. 12.529/2011 (Brazil) conceptualize "control" as a mechanism for establishing economic concentrations, defined as the decisive and lasting influence over an undertaking's strategic decisions while preserving its legal personality. Concurrently, it investigates the ex ante oversight exercised by the Competition Council (*Conseil de la Concurrence*, Algeria) and the Administrative Council for Economic Defense (CADE, Brazil), focusing on institutional independence, procedural efficiencies, and the balance between economic freedoms and competitive safeguards. Through a systematic comparison of notification thresholds, review procedures, and remedial structures, the research reveals significant divergences in institutional design. While Algeria maintains a centralized administrative model subject to governmental override on public interest grounds, Brazil has established a more autonomous technocratic agency with turnover-based notification thresholds and sophisticated remedy structures. The findings suggest that Algeria's framework, despite robust doctrinal foundations, suffers from procedural ambiguity regarding the Council's finality of decisions and economically undefined legal thresholds, whereas Brazil's system offers greater predictability but faces challenges regarding regulatory capture in concentrated markets. The study concludes by recommending the reinforcement of the Algerian Council's decisional autonomy through the adoption of clear economic thresholds and the elimination of ministerial override provisions, drawing lessons from Brazil's institutional evolution toward regulatory independence.

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Introduction

The regulation of economic concentrations constitutes a cornerstone of modern competition policy, representing the delicate equilibrium between facilitating business efficiencies through corporate restructuring and preserving market contestability to prevent the entrenchment of dominant positions. In an era characterized by globalization and the transnationalization of corporate entities, merger control mechanisms have evolved from rudimentary prohibitions against monopolization to sophisticated regulatory frameworks that assess the competitive effects of concentrations through complex economic analysis (Whish & Bailey, 2018, p. 879). The theoretical underpinnings of this evolution reflect a paradigmatic shift from the Harvard School's structural presumptions—wherein market concentration inherently predicts anticompetitive outcomes—toward the Chicago School's emphasis on efficiency defenses and consumer welfare standards (Bork, 1978, pp. 50-60; Gerber, 1998, pp. 223-245). Within this global context, emerging economies have increasingly adopted merger control regimes that balance the imperative of attracting foreign direct investment against the necessity of protecting nascent domestic markets from predatory consolidation.

This research situates itself at the intersection of comparative administrative law and competition policy, undertaking a functional comparative analysis of two jurisdictions representing distinct models of regulatory development within the Global South: Algeria and Brazil. Both nations share civil law traditions and have experienced significant economic liberalization since the 1990s, yet they have developed markedly divergent institutional architectures for controlling economic concentrations (Michaels, 2006, pp. 339-382; Zweigert & Kötz, 1998, pp. 32-45). Algeria's competition regime, anchored in Ordinance No. 03-03 of 2003, reflects a state-centric model where the Competition Council (*Conseil de la Concurrence*) exercises oversight subject to governmental intervention on public interest grounds, while Brazil's Law No. 12.529/2011 has established the Administrative Council for Economic Defense (CADE) as a structurally independent agency with technocratic authority over merger review, albeit within the broader administrative state framework.

The central research problem interrogates the legal requirements for establishing economic concentrations through the mechanism of "control" (*contrôle / controle*) and the conditions subjecting such concentrations to administrative oversight in both jurisdictions. Specifically, the study addresses three interrelated inquiries: First, how do Algerian and Brazilian legal systems define "control" as a modality of economic concentration, and what doctrinal distinctions emerge regarding the preservation of legal personality and the exercise of decisive influence? Second, what procedural mechanisms characterize the ex ante oversight of concentrations, and how do institutional designs affect the efficiency and predictability of merger review? Third, to what extent do public interest exceptions and governmental override mechanisms compromise the independence of competition authorities, and what lessons can be drawn from comparative institutional analysis?

The significance of this comparative inquiry extends beyond doctrinal exposition. Algeria's hydrocarbon-dependent economy seeks diversification through private sector development, necessitating a merger control regime that facilitates efficient business restructuring while preventing the formation of domestic oligopolies that might impede economic modernization. Conversely, Brazil's position as Latin America's largest economy requires a competition authority capable of reviewing complex cross-border transactions while maintaining procedural legitimacy and insulating technical decisions from short-term political pressures (Fels, 2016, pp. 112-134; Salomão, 2013, pp. 45-67).

By analyzing the "control" mechanism—whereby one undertaking exercises decisive influence over another without necessarily merging legal personalities—this research illuminates how different legal cultures conceptualize the boundaries between legitimate business freedom and market dominance, offering prescriptive insights for the harmonization of competition regimes in developing economies.

1. Theoretical Framework and Methodological Approach

1.1. The Functional Method in Comparative Competition Law

This study employs the functional approach to comparative law, examining how each jurisdiction addresses the universal problem of preventing anticompetitive concentrations while accommodating legitimate business efficiencies (Riles, 1999, pp. 78-92). The functional method proceeds from the premise that legal systems face similar social problems—here, the tension between economic efficiency and market competition—but solve them through different institutional and doctrinal mechanisms. As Zweigert and Kötz (1998) articulate, the comparative lawyer must identify the "legal institution" in each system that performs a comparable function, while remaining sensitive to the systemic constraints imposed by distinct legal cultures (pp. 32-34). This approach avoids the trap of "legal imperialism" while enabling meaningful comparison of regulatory solutions across civil law traditions.

In the competition law context, the functional method requires examining how different regimes address the "control" mechanism—not merely as a formalistic property concept, but as an economic reality that enables the coordination of market behavior. The analysis must therefore transcend statutory language to examine how institutions interpret and apply legal standards in practice, particularly regarding the distinction between legal control (*controle de droit / controle societário*) and factual control (*controle de fait / controle de fato*).

1.2. The Duality of Control: Private Instrument and Public Regulatory Object

The concept of "control" in competition law embodies a fundamental duality. As a private legal instrument, control serves as a vehicle for corporate governance, enabling undertakings to achieve efficiencies through strategic coordination while maintaining separate legal personalities. As a regulatory object, control triggers public oversight because it enables the exercise of decisive influence that may lead to market dominance or collusive outcomes without the formal dissolution of corporate boundaries (Kovacic & Shapiro, 2000, pp. 43-60). This dual nature creates tension between business autonomy and regulatory intervention, requiring legal frameworks to draw precise boundaries between permissible influence and prohibited dominance.

From an ordoliberal perspective, control mechanisms require rigorous oversight because they enable undertakings to coordinate market behavior without engaging in explicit collusion, thereby circumventing the procedural safeguards of merger control while achieving equivalent anticompetitive effects (Möschel, 1989, pp. 142-159). The challenge for competition regimes lies in defining control with sufficient precision to capture economically significant transactions while providing legal certainty for corporate planners.

2. Control as a Legal Mechanism for Creating Economic Concentrations: A Comparative Analysis

Economic concentration occurs either through the merger of several companies into a single entity or through influence acquired by one or more persons over at least one institution, or through control over one or more institutions. This legal mechanism operates through a set of guarantees, conditions, and legal procedures that vary significantly between Algeria and Brazil, reflecting distinct approaches to balancing corporate flexibility with competitive safeguards.

2.1. Conceptual Foundations and Legal Definitions

2.1.1. The Algerian Framework: Decisive Influence and Factual Circumstances

Article 15 of Ordinance No. 03-03 establishes three exhaustive modalities of economic concentration: merger (*fusion*), control (*contrôle*), and the creation of joint undertakings (*entreprises communes*) (Ordinance No. 03-03, 2003). The second paragraph of Article 15 specifically identifies control as occurring when "one or more undertakings obtain control, directly or indirectly, over one or more other undertakings or parts thereof." This provision marks a significant departure from the repealed Ordinance 95-06, which required the acquisition of assets or capital rights for control to constitute a concentration, thereby expanding the regulatory capture to include contractual and factual control mechanisms (Salemi Ben Hamla, 2011, p. 168).

Article 16 provides the definitional elaboration, stating that control comprises "control arising from contract law or other methods which, individually or collectively, considering the factual circumstances, confer the possibility of exercising decisive and lasting influence on the activity of an undertaking" (Ordinance No. 03-03, 2003, Art. 16). The reference to "factual circumstances" (*circonstances de fait*) explicitly incorporates the doctrine of factual control into Algerian law, enabling the Competition Council to examine the economic reality of influence beyond formal ownership structures. This standard aligns with European Union competition law concepts under Council Regulation (EC) No. 139/2004, though without the detailed implementing guidelines that characterize EU merger control (Whish & Bailey, 2018, p. 912).

2.1.2. The Brazilian Framework: Strategic Decision Control

Brazil's Law No. 12.529/2011 establishes a sophisticated framework for identifying control in merger transactions. Article 4º, §2º defines economic concentration acts broadly to include "the acquisition of control, by any means, of one or more undertakings by another" (*a aquisição de controle, por qualquer meio, de uma ou mais empresas por outra*) (Lei nº 12.529, 2011). This definition transcends simple majority shareholding to encompass any arrangement conferring the "possibility of exercising, directly or indirectly, decisive influence over the strategic decisions of the undertaking" (CADE Resolution No. 2/2021, Art. 4º).

Brazilian doctrine distinguishes between *controle societário* (corporate control) and *controle de fato* (factual control). Corporate control typically arises from ownership of more than 50% of voting shares or through shareholders' agreements conferring permanent majority rights in corporate deliberations (Salomão, 2013, p. 112). Factual control, conversely, emerges from the ability to direct strategic decisions despite minority ownership, often through veto rights over essential business decisions (such as budget approval, executive appointments, or asset divestitures) or through economic dependency relationships (Fels, 2016, p. 234).

Table 1 (organized by the authors): *Comparative Definition of Control in Algerian and Brazilian Competition Law*

Dimension	Algeria (Ordinance 03-03)	Brazil (Law 12.529/2011)	Doctrinal Sources
Primary Definition	"Decisive and lasting influence" through contract law or other methods considering factual circumstances (Art. 16)	"Possibility of exercising decisive influence" over strategic decisions (Art. 4º, §2º)	Salemi Ben Hamla (2011, p. 168); Salomão (2013, p. 112)
Legal vs. Factual Control	Explicit recognition of factual circumstances; no quantitative thresholds	Explicit distinction between <i>controle societário</i> and <i>controle de fato</i>	Fels (2016, p. 234); Zaki (2006, p. 248)
Scope of Application	Control over "undertakings or parts thereof"	Control over "one or more undertakings" including asset acquisitions	Ordinance 03-03 (2003); Lei 12.529 (2011)
Temporal Element	"Lasting influence" required	No explicit temporal requirement; focus on structural permanence	Djilali (2022, p. 324); Rover (2015, p. 89)

As illustrated in Table 1, while both jurisdictions employ "decisive influence" as the conceptual anchor, Algeria explicitly incorporates a temporal dimension ("lasting influence") that Brazilian law addresses through structural analysis of the transaction's permanence. This distinction reflects Algeria's concern with transient control arrangements that might evade merger scrutiny, whereas Brazil focuses on the immediate competitive effects of strategic decision-making authority.

2.2. Legal and Economic Implications of the Control Mechanism

2.2.1. Preservation of Corporate Personality

The Algerian legislator's decision to preserve the legal personality of controlled undertakings while subjecting the acquisition of control to merger review reflects a nuanced understanding of corporate flexibility. Unlike mergers, which dissolve the legal existence of at least one participating undertaking, control transactions allow for the maintenance of distinct corporate entities while achieving the economic efficiencies of integration (Mehrez, 2001, p. 18). This mechanism proves particularly valuable for small and medium-sized enterprises (SMEs) seeking to enhance competitiveness through strategic alliances without surrendering their corporate identity or local market knowledge.

Brazilian law similarly distinguishes control acquisitions from full mergers, though with greater emphasis on the continuity of legal obligations. Under Brazilian corporate law, the controlling entity assumes subsidiary liability for anticompetitive acts of the controlled undertaking, creating stronger incentives for compliance than under Algerian law, where corporate separation generally shields the controller from the controlled entity's liabilities unless piercing the corporate veil is justified (Rover, 2015, p. 92).

2.2.2. Economic Efficiency and Market Concentration

Economically, the control mechanism facilitates the rationalization of production costs, the internalization of technological spillovers, and the achievement of economies of scale necessary to confront multinational competition (Djilali, 2022, p. 324). However, from a competition policy perspective, control acquisitions present heightened risks of unilateral effects, particularly where the controlling undertaking gains access to

competitively sensitive information or coordinates pricing strategies across nominally independent entities (Daoud, 2016, p. 53).

In Brazil, CADE has developed sophisticated economic analysis of "creeping acquisitions" (*aquisições graduais*), whereby undertakings acquire control through incremental share purchases that individually fall below notification thresholds but collectively result in decisive influence. This contrasts with Algeria's approach, which relies on the general "factual circumstances" standard to capture such arrangements, potentially creating enforcement gaps due to the lack of specific quantitative triggers (Fels, 2016, pp. 245-246).

2.3. Mechanisms for Exercising Control

2.3.1. Property Rights and Shareholding Control

The Algerian Commercial Code establishes specific presumptions regarding shareholding-based control. Article 729, paragraph 1, states that if a company holds more than 50% of the capital of another company, the latter is considered a subsidiary (*filiale*) of the former (Ordinance No. 75-59, 1975). Article 731, paragraph 1, further provides that a company is considered controlling when it holds, directly or indirectly, a portion of capital granting the majority of voting rights in general assemblies (Ordinance No. 75-59, 1975).

Brazilian law similarly recognizes majority shareholding as constituting control, but CADE Resolution No. 2/2021 introduces more nuanced thresholds. While ownership of more than 50% of voting shares creates a rebuttable presumption of control, the Resolution specifically targets acquisitions crossing the 20% threshold when accompanied by additional rights such as board representation or veto powers over strategic decisions (CADE Resolution No. 2/2021, Art. 5º). This "20% rule" addresses the specific risks of minority blocking positions in concentrated markets, a refinement absent from Algerian law.

2.3.2. Usufruct Rights and Non-Traditional Control

Article 16 of Ordinance 03-03 explicitly recognizes usufruct rights (*droits d'usufruit*) as a mechanism for exercising decisive and lasting influence, particularly when strategic assets related to products with wide international renown are transferred, or in the case of the transfer of usufruct rights related to intellectual property (Masaad, 2012, p. 206). This provision rectifies a lacuna in Ordinance 95-06 and reflects the civil law tradition's sophisticated treatment of divided property rights.

Brazilian competition law, while not explicitly codifying usufruct in the same manner, captures such arrangements through the broad "by any means" (*por qualquer meio*) language of Article 4º, §2º. CADE has reviewed transactions involving fiduciary sales (*alienação fiduciária*) and trust arrangements where economic benefits and voting rights are separated, applying the decisive influence standard to the party exercising strategic control despite non-ownership of title (Pinheiro, 2014, p. 189).

2.3.3. Contractual Control Mechanisms

In Algeria, control may arise from linkage between institutions through contracts, especially loan contracts, lease contracts, and management lease contracts (*baux-gérance*). This type preserves the legal existence of all parties, particularly the institution subject to control, distinguishing it from merger transactions (Daoud, 2016, p. 53). Commercial franchise agreements represent another significant category, wherein suppliers may impose conditions such as determining selling prices and service types,

effectively exercising control despite the franchisee's formal independence (Masaad, 2012, p. 249).

Brazilian law similarly recognizes contractual control through management contracts (*contratos de gestão*), voting trusts (*acordos de acionistas*), and lease arrangements. However, CADE has developed specific jurisprudence regarding "negative control" (*controle negativo*), where veto rights over strategic decisions (business plans, budget approval, major asset sales) constitute control even absent affirmative management rights. This doctrine, articulated in CADE Decision No. 08700/2015, provides clearer guidance than Algerian law's general reference to "decisive influence" (CADE, 2015).

Table 2 (organized by the authors): *Mechanisms of Control: Comparative Analysis*

Mechanism	Algerian Law	Brazilian Law	Academic Commentary
Majority Shareholding	>50% capital = subsidiary (Commercial Code Art. 729); majority voting rights = control (Art. 731)	>50% voting shares = rebuttable presumption; 20% + strategic rights triggers notification	Zaki (2006, p. 248); Rover (2015, p. 89)
Usufruct Rights	Explicitly recognized (Ordinance 03-03, Art. 16); strategic asset focus	Captured under "any means"; analyzed through economic effects	Masaad (2012, p. 206); Pinheiro (2014, p. 189)
Management Contracts	<i>Baux-gérance</i> and lease contracts recognized	<i>Contratos de gestão</i> recognized; specific rules on de facto management	Daoud (2016, p. 53); Salomão (2013, p. 134)
Veto Rights	Implicit under "decisive influence" over deliberations (Art. 16)	Explicit "negative control" doctrine (<i>controle negativo</i>)	CADE (2015); Fels (2016, p. 234)
Franchising	Recognized as control mechanism if price/service conditions imposed	Analyzed under vertical restraints; control depends on strategic decision rights	Masaad (2012, p. 249); Whish & Bailey (2018, p. 945)

3. Institutional Oversight and Regulatory Mechanisms

The effectiveness of merger control regimes depends not merely upon substantive legal definitions but upon institutional design, procedural efficiency, and the autonomy of competition authorities from political interference. This section analyzes the ex ante oversight mechanisms in Algeria and Brazil, examining procedural safeguards, decision-making timelines, and the balance between technocratic expertise and democratic accountability.

3.1. The Algerian Competition Council: Structure and Competences

3.1.1. Institutional Design and Qualified Independence

The Competition Council (*Conseil de la Concurrence*) operates as an independent administrative authority (*autorité administrative indépendante*) established under Ordinance 03-03, though its independence remains qualified by governmental oversight mechanisms. The Council comprises members appointed by governmental decree, including representatives from the judiciary, economic administration, and academic experts (Ordinance No. 03-03, 2003, Art. 8). This composition reflects the French *Conseil de la Concurrence* model, emphasizing interdisciplinary expertise while maintaining administrative ties to the executive branch.

The Council's primary competence regarding economic concentrations involves the ex ante review of proposed transactions to prevent the creation or reinforcement of dominant positions that may impair free competition (Ordinance No. 03-03, 2003, Art.

17). This preventive function requires the Council to assess prospective competitive effects rather than merely remedying realized anticompetitive harms, necessitating sophisticated economic forecasting and market definition analysis (Al-Ayeb, 2016, p. 95).

3.1.2. The Authorization Procedure and Procedural Safeguards

Executive Decree No. 05-219 establishes the procedural framework for concentration authorization. The process commences with a mandatory pre-notification requirement: parties must file an authorization request with the Council before implementing any concentration that risks creating a dominant position (Executive Decree No. 05-219, 2005, Art. 3). The request must include: (1) authorization request forms; (2) information forms detailing market shares and competitive conditions; (3) powers of attorney; (4) certified by-laws of the undertakings; and (5) financial statements for the preceding three years certified by statutory auditors (Executive Decree No. 05-219, 2005, Art. 6).

Upon receipt, the Council appoints a rapporteur (*rapporteur*) to investigate the transaction's compatibility with competition principles (Ordinance No. 03-03, 2003, Art. 17). The parties must observe a standstill obligation (*obligation de suspension*), refraining from implementing the concentration during the Council's review period, which extends to three months from the date of complete notification (Ordinance No. 03-03, 2003, Art. 20). Article 09 of Executive Decree 05-219 provides for "Business Confidential" filings to protect sensitive information, though the regime lacks detailed guidelines on access to file and third-party rights comparable to Brazilian or EU procedures (Executive Decree No. 05-219, 2005, Art. 9).

3.2. The Brazilian CADE: Structure and Merger Review Procedures

3.2.1. Tripartite Institutional Architecture

CADE operates as a structurally independent agency (*agência reguladora*) within the Executive Branch but with constitutional protections for functional independence. The agency is tripartite, comprising: (1) the Superintendence-General (SG), responsible for initial investigation and technical analysis; (2) the Administrative Tribunal, a collegiate body of seven commissioners (*conselheiros*) with quasi-judicial authority; and (3) the Attorney General's Office, providing legal representation (Lei nº 12.529, 2011, Arts. 6-10).

CADE's independence is reinforced by fixed, non-renewable four-year terms for commissioners, security of tenure, and budgetary autonomy—features that distinguish it from Algeria's Competition Council, whose members serve at the pleasure of the appointing authority (Salgado, 2018, p. 45). This institutional design reflects Brazil's commitment to reducing political influence in technical competition assessments, though tensions with sectoral regulators and the Executive persist (Pinheiro, 2014, p. 156).

3.2.2. Pre-Merger Notification and Phased Review

Brazil employs a mandatory pre-merger notification system with strict filing deadlines. Transactions meeting the turnover thresholds must be notified prior to closing, with CADE maintaining a "fast track" (*via rápida*) procedure for non-problematic concentrations and an ordinary procedure (*via ordinária*) for complex cases (CADE Resolution No. 2/2021, Arts. 12-14).

The review process is bifurcated: the SG conducts preliminary analysis (Phase 1) within 30 days (extendable to 60 days for fast track), determining whether the transaction presents competitive concerns. If cleared, the SG issues a non-binding opinion (*parecer*),

which becomes final unless appealed to the Tribunal. If competitive concerns emerge, the SG initiates a deep investigation (Phase 2), lasting up to 90 days (extendable to 240 days in complex cases), culminating in a recommendation to the Tribunal for final decision (Lei nº 12.529, 2011, Art. 50).

Table 3 (organized by the authors): *Institutional Architecture and Independence: Comparative Analysis*

Feature	Algeria (Competition Council)	Brazil (CADE)	Doctrinal Analysis
Legal Nature	Independent administrative authority (<i>autorité administrative indépendante</i>)	Independent regulatory agency (<i>agência reguladora</i>)	Al-Ayeb (2016, p. 95); Salgado (2018, p. 45)
Composition	Government-appointed members (judiciary, administration, academics)	7 Commissioners (Tribunal) + SG + Attorney General	Ordinance 03-03 (2003, Art. 8); Lei 12.529 (2011, Arts. 6-10)
Term of Office	No fixed term; serves at pleasure of appointing authority	4-year non-renewable terms for Commissioners	Arezki (2011, p. 81); Pinheiro (2014, p. 156)
Budgetary Autonomy	Limited; dependent on executive allocation	Protected autonomy; separate budget line	Salgado (2018, p. 45)
Decisional Structure	Collegiate Council with rapporteur system	Bifurcated: SG (investigation) + Tribunal (adjudication)	Al-Ayeb (2016, p. 107); Fels (2016, p. 312)

3.3. Comparative Analysis of Notification Thresholds and Review Timelines

3.3.1. Subjective vs. Objective Thresholds

A critical distinction between the two regimes lies in the determination of which concentrations require notification. Algeria employs a subjective, effects-based threshold: notification is mandatory for any concentration that "may affect fair competition" or risk creating a dominant position (Ordinance No. 03-03, 2003, Art. 17). This standard requires parties to self-assess their market power and competitive effects, creating legal uncertainty and potential for inconsistent application (Djilali, 2022, p. 337).

Brazil, conversely, utilizes objective, turnover-based thresholds that serve as proxies for market significance. CADE Resolution No. 2/2021 requires notification when: (1) one economic group registered gross revenues or assets in Brazil exceeding R750 million in the previous fiscal year; and (2) at least one other group exceeded R 75 million (CADE Resolution No. 2/2021, Art. 3º). This "double-turnover" test provides clarity and reduces the compliance burden for small transactions, though it may miss "killer acquisitions" of nascent competitors below the revenue thresholds (Killer Acquisitions Working Group, 2020).

3.3.2. Procedural Timelines and Efficiency

The Algerian Council must decide within three months of complete notification, with a single-phase review process (Ordinance No. 03-03, 2003, Art. 17). While this appears efficient, the lack of a formal "stop-the-clock" mechanism for incomplete filings and the absence of a simplified procedure for non-problematic transactions create bottlenecks.

Brazil's two-phase system offers greater procedural sophistication. The Phase 1 review (30-60 days) clears straightforward transactions quickly, while the Phase 2 investigation (up to 240 days) allows for thorough economic analysis of complex cases. The SG's power to clear transactions administratively (subject to Tribunal appeal)

reduces the caseload for the collegiate body, enhancing overall efficiency (Fels, 2016, p. 267).

Table 4 (organized by the authors): *Notification Thresholds and Review Procedures: Comparative Analysis*

Element	Algeria	Brazil	Critical Commentary
Notification Trigger	Risk of creating dominant position; effect on fair competition (subjective)	Turnover thresholds: R750M/750M/R 75M double test (objective)	Djilali (2022, p. 337); CADE Resolution 2/2021 (Art. 3º)
Creeping Acquisitions	General "factual circumstances" standard (Art. 16)	Specific 20% threshold with additional rights (Art. 12; Resolution 2/2021, Art. 5º)	Fels (2016, pp. 245-246)
Review Phases	Single phase (3 months)	Phase 1 (30-60 days) + Phase 2 (90-240 days)	Al-Ayeb (2016, p. 95); Lei 12.529 (2011, Art. 50)
Standstill Obligation	General prohibition on implementation (Art. 20)	Strict prohibition with daily fines (Art. 88)	Executive Decree 05-219 (2005); Fels (2016, p. 312)
Gun-Jumping Sanctions	Administrative sanctions (undefined magnitude)	Fines up to 60,000 BRL per day; transaction unwinding possible	Ordinance 03-03 (2003, Art. 20); Lei 12.529 (2011, Art. 88)

4. Remedies, Sanctions, and the Finality of Administrative Decisions

4.1. Conditional Authorizations and Remedial Structures

4.1.1. Algerian Remedial Flexibility

Article 19 of Ordinance 03-03 permits the Competition Council to authorize concentrations conditionally where parties propose commitments that mitigate competitive concerns (Ordinance No. 03-03, 2003, Art. 19, para. 2). The Council may impose structural remedies (divestitures) or behavioral remedies (access obligations, firewalls). However, Algerian law lacks detailed guidelines on remedy design, implementation deadlines, and monitoring mechanisms, creating uncertainty regarding enforceability (Al-Ayeb, 2016, p. 107).

Article 21 bis introduces an efficiency defense, permitting authorization of concentrations that create or reinforce dominant positions if parties demonstrate improved competitive capabilities, employment generation, or SME development against foreign competition (Ordinance No. 03-03, 2003, Art. 21 bis; Kettou, 2006, p. 64). This provision reflects industrial policy considerations that may conflict with pure competition analysis.

4.1.2. Brazilian Sophistication in Remedy Design

CADE possesses broad authority to impose structural and behavioral remedies, including divestitures, licensing obligations, and firewall provisions. The agency has developed sophisticated guidance on remedy design, emphasizing the "fix-it-first" principle where parties implement remedies pre-clearance, and requiring upfront buyers (*upfront buyers*) for divestiture remedies in concentrated markets to avoid "fire-sale" discounts (CADE, 2019). CADE's Remedies Guidelines provide detailed protocols for monitoring trustees and implementation timelines, offering greater predictability than the Algerian framework.

4.2. Gun-Jumping Enforcement and Sanctions

Algerian law prohibits implementation during the review period (Ordinance No. 03-03, 2003, Art. 20), but enforcement mechanisms and sanction magnitudes remain

underdeveloped in the regulatory text. The absence of specific penalties for premature closing creates weak compliance incentives.

Brazil's enforcement against gun-jumping is particularly stringent. Article 88 of Law 12.529/2011 prohibits "acts of concentration" prior to CADE clearance, interpreted to include the exercise of control rights, integration of IT systems, or exchange of competitively sensitive information. CADE has imposed substantial fines (up to 60,000 BRL per day of violation) and has unwound completed transactions, creating strong deterrence (Fels, 2016, p. 312).

4.3. Public Interest Exceptions and Governmental Override

4.3.1. The Algerian Override Mechanism (Article 21)

Article 21 of Ordinance 03-03 establishes an exceptional procedure whereby the Algerian government may authorize concentrations previously rejected by the Competition Council. The provision requires the Minister of Commerce and the relevant sectoral minister to submit a joint report to the Council of Ministers (*Conseil des Ministres*) demonstrating that the concentration serves "public interest" despite its anticompetitive effects (Ordinance No. 03-03, 2003, Art. 21).

This mechanism reflects the tension between competition policy and *dirigiste* economic planning traditions. While potentially justified for strategic sectors (energy, telecommunications, defense), the absence of statutory criteria defining "public interest" grants the Executive discretionary authority that may compromise legal certainty. The Competition Council's role is reduced to advisory, as its technical determination of anticompetitive effects may be overridden by political considerations (Al-Ayeb, 2016, p. 107; Arezki, 2011, p. 81).

4.3.2. Brazil's Technocratic insulation

Brazil's Law 12.529/2011 nominally excludes non-competition factors from merger analysis, focusing exclusively on the "protection of competition as a means of promoting efficiency, innovation, consumer welfare, and economic development" (Lei nº 12.529, 2011, Art. 1º). Unlike Algeria's explicit override mechanism, Brazil accommodates public interest through the "efficiency defense" under Article 54, which permits approval of otherwise anticompetitive mergers if efficiency gains clearly outweigh competitive harms, subject to strict evidentiary standards.

Moreover, CADE may recommend sector-specific regulation to the Executive or Congress when structural remedies prove insufficient to address public interest concerns—a dialogic approach that preserves the agency's technical independence while acknowledging broader policy goals (Pinheiro, 2014, p. 223).

4.4. Judicial Review and Due Process

In Algeria, Article 19, paragraph 3 permits appeals of prohibition decisions to the Council of State (*Conseil d'État*), though the law remains silent on procedural details such as time limits, standing requirements, and the effect of appeals (Ordinance No. 03-03, 2003, Art. 19). This legislative gap creates procedural uncertainty and potential delays in judicial resolution. The Council of State's generalist jurisdiction may lack the economic expertise to review complex technical findings, potentially leading to unpredictable intervention (Arezki, 2011, p. 81).

Brazil has developed specialized judicial review through the Federal Courts and the Superior Court of Justice (STJ), with increasing specialization in competition matters. The STJ has developed jurisprudence emphasizing the binding nature of CADE's technical

findings unless arbitrary or capricious, providing greater legal certainty. Moreover, CADE's Tribunal operates with quasi-judicial procedures, including oral hearings and cross-examination rights, enhancing due process protections absent in Algeria's primarily written procedure (Cruz, 2017, pp. 156-167).

Table 5 (organized by the authors): *Remedies, Sanctions, and Finality: Comparative Analysis*

Aspect	Algeria	Brazil	Academic Commentary
Types of Remedies	Structural and behavioral (general provisions)	Structural, behavioral, and hybrid; detailed guidelines	Al-Ayeb (2016, p. 107); CADE (2019)
Efficiency Defense	Explicit (Art. 21 bis): employment, SME competitiveness, foreign competition	Explicit (Art. 54): consumer welfare, efficiency gains must be verifiable	Kettou (2006, p. 64); Pinheiro (2014, p. 223)
Gun-Jumping Penalties	Administrative sanctions (magnitude unspecified)	Up to 60,000 BRL/day; transaction unwinding; personal liability for directors	Fels (2016, p. 312)
Government Override	Explicit (Art. 21): Council of Ministers may override on public interest	No explicit override; CADE decisions final unless judicially appealed	Arezki (2011, p. 81); Salgado (2018, p. 45)
Judicial Review	Council of State (<i>Conseil d'État</i>); general administrative procedure	Federal Courts → STJ; specialized competition panels developing	Cruz (2017, pp. 156-167)

5. Critical Analysis and Recommendations

5.1. Conceptual and Institutional Deficiencies in Algerian Law

The comparative examination reveals that while Algeria's Ordinance 03-03 provides a doctrinally sophisticated definition of control, the framework suffers from three critical deficiencies. First, the absence of objective notification thresholds based on turnover or transaction value creates legal uncertainty, forcing undertakings to engage in costly self-assessment of "dominant position" risks without clear guidance (Djilali, 2022, p. 337). Second, the single-phase review procedure lacks the efficiency of Brazil's bifurcated system, potentially delaying both non-problematic transactions and complex investigations. Third, and most significantly, the governmental override provision under Article 21 undermines the Competition Council's independence, creating a "regulatory chill" wherein the Council may hesitate to prohibit politically sensitive concentrations, knowing the government may reverse the decision (Al-Ayeb, 2016, p. 107).

5.2. Lessons from the Brazilian Experience

Brazil's evolution toward an independent, technocratic merger control regime offers several lessons for Algeria. The turnover-based notification system provides objective clarity, reducing compliance costs and administrative discretion. The structural independence of CADE—secured through fixed terms, budgetary autonomy, and the elimination of ministerial override—insulates technical competition analysis from short-term political pressures. However, Brazil's rigid thresholds also present risks, potentially missing anticompetitive acquisitions of nascent competitors ("killer acquisitions") that fall below the R\$ 75 million subsidiary threshold but possess significant competitive potential (Killer Acquisitions Working Group, 2020).

5.3. Prescriptive Recommendations for Algerian Law Reform

Based on the comparative analysis, this study proposes the following reforms to strengthen Algeria's merger control regime:

1. **Adopt Objective Notification Thresholds:** Replace the subjective "dominant position" trigger with a double-turnover test similar to Brazil's model, adjusted for Algeria's economic scale (e.g., DZD 5 billion / DZD 500 million thresholds), to provide legal certainty and reduce administrative burden.
2. **Eliminate or Restrict Governmental Override:** Limit Article 21 override to narrowly defined national security or public health emergencies, requiring parliamentary notification and judicial review, to preserve the Council's technical independence and credibility.
3. **Institutionalize Phased Review:** Implement a two-phase review system with a simplified "fast track" for non-problematic concentrations (30-day review) and an extended investigation phase for complex cases, following CADE's model.
4. **Strengthen Gun-Jumping Enforcement:** Codify specific monetary penalties for premature closing (e.g., percentage of turnover) and establish clear rules regarding the exchange of competitively sensitive information during the interim period.
5. **Develop Detailed Remedy Guidelines:** Publish guidelines on the design, implementation, and monitoring of remedies, incorporating Brazil's "fix-it-first" and upfront buyer protocols to increase predictability.
6. **Enhance Judicial Specialization:** Establish a specialized chamber within the Council of State for competition matters, or create an appellate administrative court with economic expertise, to improve the quality of judicial review.

Conclusion

This comparative analysis of Algerian and Brazilian merger control regimes reveals the complex interplay between legal formalism, economic efficiency, and institutional independence in emerging economies. Both jurisdictions have evolved from prohibitionist frameworks toward ex ante notification systems that recognize the procompetitive potential of economic concentrations while guarding against market dominance. However, they diverge fundamentally in their conceptualization of the relationship between the competition authority and the administrative state.

Algeria's framework, centered on Ordinance 03-03, employs a flexible, economically-oriented definition of "control" that captures de facto dominance through various legal and contractual mechanisms. The preservation of corporate legal personality under this regime facilitates SME development and strategic alliances while maintaining regulatory oversight. Nevertheless, the regime suffers from critical deficiencies: the absence of objective notification thresholds creates legal uncertainty; the Competition Council's oversight is truncated by the ex ante review phase without post-merger monitoring mechanisms; and the governmental override provision under Article 21 undermines the authority's independence, subjecting technical competition analysis to industrial policy considerations.

Brazil's Law 12.529/2011 offers a contrasting model characterized by institutional autonomy, procedural efficiency, and quantitative clarity. CADE's structural independence, reinforced by fixed terms and budgetary autonomy, enables technocratic decision-making insulated from immediate political pressures. The turnover-based notification thresholds and strict gun-jumping enforcement provide the predictability necessary for sophisticated transactional planning, while the two-phase review system balances efficiency with thoroughness. However, the Brazilian model is not without

limitations; the rigid threshold system may miss anticompetitive acquisitions of nascent competitors, and the tension between competition policy and industrial policy persists, albeit mediated through judicial review rather than executive override.

From a theoretical perspective, this study confirms that the "control" mechanism in economic concentrations serves as a nexus between private autonomy and public regulation. The dual nature of control—as a vehicle for business efficiency and a potential vector for market dominance—demands oversight mechanisms that are simultaneously economically sophisticated and institutionally independent. As Algeria seeks to diversify its economy and integrate into global value chains, adopting the Brazilian model of technocratic independence, while tailoring thresholds to its developmental context, would enhance both competition and investment. The convergence of these regimes toward standards of independence and predictability ultimately serves not merely the abstract goal of market efficiency, but the concrete welfare of consumers and the sustainable development of emerging economies.

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