



The European, Middle Eastern and African Antitrust Review 2019

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The European, Middle Eastern and African Antitrust Review 2019

A Global Competition Review Special Report

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The European, Middle Eastern and African Antitrust Review 2019

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Europe

European Union

Economics: Overview 1
David N Mishol and Joshua White
Analysis Group

Abuse of Dominance 7
Frédéric Louis and Cormac O'Daly
WilmerHale LLP

Cartels and Leniency 13
Geert Goeteyn, Elvira Aliende Rodriguez and Ruba Noorali
Shearman & Sterling LLP

Financial Services 20
Vincent Brophy and Tom Bainbridge
Cadwalader, Wickersham & Taft LLP

IP & Antitrust 27
Nadine Herrmann and Henning Wienstroth
Quinn Emanuel Urquhart & Sullivan, LLP

Joint Ventures 33
Catriona Hatton and David Cardwell
Baker Botts LLP

Merger Control 38
Craig Pouncey, Kyriakos Fountoukakos, Peter Rowland, Camille Puech and Dafni Katrana
Herbert Smith Freehills LLP

Pharmaceuticals 52
Jérémie Jourdan, James Killick, Axel Schulz, Strati Sakellariou-Witt and Pierre Pêcheux
White & Case

State Aid 59
Falk Schöning and David Dauchez
Hogan Lovells

Cyprus

Commission for the Protection of Competition 65
Loukia Christodoulou
Chairperson

Denmark

Overview 67
Olaf Koktvedgaard, Søren Zinck and Frederik André Bork
Bruun & Hjejle

Merger Control 73
Olaf Koktvedgaard, Søren Zinck and Frederik André Bork
Bruun & Hjejle

France

Competition Authority 78
Isabelle de Silva
President

Merger Control 80
Mélanie Thill-Tayara and Laurence Bary
Dechert LLP

Germany

Federal Cartel Office 86
Andreas Mundt
President

Merger Control 89
Silvio Cappellari and Stephanie Birmanns
SZA Schilling, Zutt & Anschutz Rechtsanwaltsgesellschaft mbH

Private Antitrust Litigation 94
Albrecht Bach and Christoph Wolf
Oppenländer Rechtsanwälte

Greece

Overview 100
Cleomenis Yannikas
Dryllerakis & Associates

Latvia

Competition Council 106
Skaidrīte Ābrama
Chairwoman

Moldova

Competition Council 109
Viorica Carare
President

Netherlands

Authority for Consumers and Markets 111
Chris Fonteijn
Chairman

Private Antitrust Litigation 115
Winfred Knibbeler, Onno Brouwer and Nima Lorjé
Freshfields Bruckhaus Deringer LLP

Norway

Competition Authority	119
Lars Sjørgard Director general	

Poland

Office of Competition and Consumer Protection	122
Marek Niechciał President	

Portugal

Competition Authority	127
Margarida Matos Rosa President	
Overview.....	130
Miguel Mendes Pereira and João Francisco Barreiros Vieira de Almeida	

Romania

Overview.....	135
Silviu Stoica and Mihaela Ion Popovici Nițu Stoica & Asociații	

Russia

Federal Antimonopoly Service	142
Igor Artemiev Head	

Spain

National Authority for Markets and Competition	148
José María Marín-Quemada Chairman	

Sweden

Competition Authority.....	150
Rikard Jermsten Director general	

Switzerland

Overview.....	152
Daniel Emch, Anna-Antonina Gottret and Stefanie Schuler Kellerhals Carrard	

Turkey

Cartels.....	157
Gönenç Gürkaynak and Öznur İnanılır ELIG Gürkaynak Attorneys-at-Law	
Dominance	162
Gönenç Gürkaynak and M Hakan Özgökçen ELIG Gürkaynak Attorneys-at-Law	
Merger Control	167
Gönenç Gürkaynak and K Korhan Yıldırım ELIG Gürkaynak Attorneys-at-Law	

Ukraine

Merger Control	172
Denis Lysenko, Sergey Denisenko and Yevgen Blok AEQUO Law Firm	

United Kingdom

Cartel Enforcement.....	175
Frances Murphy, Joanna Christoforou, and Michael Zymler Morgan Lewis & Bockius UK LLP	

Middle East and Africa

COMESA

Competition Commission	182
Willard Mwemba Head of M&A	

Egypt

Competition Authority	187
Mahmoud A Momtaz Head of Policy and Advocacy	

Israel

Antitrust Authority	190
Michal Halperin Director general	

Overview.....	197
Tal Eyal-Boger, Ziv Schwartz and Shani Brown FBC – Fischer Behar Chen Well Orion & Co	

Mauritius

Competition Commission	204
Deshmuk Kowlessur Executive director	

Mozambique

Overview.....	209
Miguel Mendes Pereira and João Francisco Barreiros Vieira de Almeida	

Global Competition Review is delighted to publish 2019 edition of *The European, Middle Eastern & African Antitrust Review*, one of a series of three special reports that have been conceived to deliver specialist intelligence and research to our readers – general counsel, government agencies and private practice lawyers – who must navigate the world’s increasingly complex competition regimes.

Like its sister reports, *The Antitrust Review of the Americas* and *The Asia-Pacific Antitrust Review*, *The European, Middle Eastern & African Antitrust Review* provides an unparalleled annual update, from competition enforcers and leading practitioners, on key developments in the field.

In preparing this report, *Global Competition Review* has worked with leading competition lawyers and government officials. Their knowledge and experience – and above all their ability to put law and policy into context – give the report special value. We are grateful to all of the contributors and their firms for their time and commitment to the publication.

Although every effort has been made to ensure that all the matters of concern to readers are covered, competition law is a complex and fast-changing field of practice, and therefore specific legal advice should always be sought. Subscribers to *Global Competition Review* will receive regular updates on any changes to relevant laws over the coming year.

Global Competition Review

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Mozambique: Overview

Miguel Mendes Pereira and João Francisco Barreiros
Vieira de Almeida

Competition law and policy are still a novelty in Mozambique, as it was first addressed merely 11 years ago with the adoption of Mozambique's Competition Policy. The aim in 2007 was to promote a competition culture at a time when the country was starting to liberalise a number of key sectors and preparing for free flow of trade within the Southern African Customs Union (SACU).

The country has since adopted the Competition Act (approved by Law 10/2013 of 11 April), the Regulation putting in place the Competition Act (Decree 97/2014 of 31 December) (the Regulation) and the Statutes of its Competition Authority (approved by Decree 37/2014 of 1 August).

The Mozambican legislation is largely inspired by the Portuguese Competition Act of 2003, the predecessor of the Competition Act currently in force in Portugal. This is a natural consequence not only of the linguistic and historic ties between the two countries, but also of the result of the institutional cooperation between the Portuguese Competition Authority and the Mozambican authorities.

In June 2015, Mozambique adopted Decree 79/2015, setting out the fees due to the Mozambique Competition Authority (MCA) for a number of services, including merger filings.

Recently, in May 2016, Mozambique signed a memorandum of understanding (the MOU) on inter-agency cooperation in competition policy, law and enforcement in the context of the Southern African Development Community (SADC). The SADC is an inter-governmental organisation dedicated to promoting the political and socioeconomic cooperation between Southern African countries. The MOU intends to serve as the basis for closer cooperation between national watchdogs in order to address national and regional competition concerns more effectively. The signatories have pledged to enhance cooperation, notably by:

- exchanging information;
- coordinating investigations;
- harmonising procedural rules; and
- conducting joint investigation initiatives.

The fact that Mozambique signed the MOU suggests that competition policy was hopefully not totally side-lined within the country's busy political and economic agenda.

Despite being in force as a matter of law, in practice Mozambique's Competition Act is still to be applied: the MCA is yet to become operational, as the appointment of the members of its board (the Board) awaits the decision from the Mozambican Government.

Even though the operationalisation of the MCA is running behind schedule, public information indicates that it will soon be fully operational. Once the Board members are appointed, in principle no obstacles remain for the MCA to operate. In fact, Mozambique already secured an amount of close to 10 million Mozambican meticaís from the United States Agency for International Development (USAID) for hiring and training of the MCA's staff.

In case the MCA follows the steps of other competition watchdogs in Africa, it can be expected to prosecute undertakings for facts that

occurred before its own creation. Hence, companies should carefully assess their practices impacting the Mozambican market.

All in all, the application of competition rules in Mozambique is currently surrounded by a significant degree of uncertainty stemming from both the novelty of the legislation and the question marks around the setting-up of the MCA. The wording of both the Competition Act and the Regulation on certain aspects adds up further uncertainty.

Accordingly, the most advisable approach for undertakings operating in Mozambique and wanting to ensure compliance is to carry out thorough self-assessment exercises of their commercial practices and to judiciously analyse future steps with potential impact on competition.

Institutional framework

The Statutes of the Mozambican Competition Authority (the Statutes) entrust the MCA with regulatory, supervisory and sanctioning powers. Its institutional design closely follows the structure of most European competition authorities.

The MCA holds powers which are typical powers of competition watchdogs, including the power to interview the legal representatives of companies involved in an alleged breach of competition law, to request documents and other items of information, to carry out searches, examinations and to seize documents in the premises of companies (dawn raids) and to seal-off the premises of undertakings.

The MCA's decision-making body is the Board. The Board is composed of the president and four other members, appointed by the government for five-year terms (renewable only once). However, day-to-day activities will likely be in the hands of the Directorate-General, its investigative branch. Led by a director general appointed by the chairman of the Board, the Directorate-General will comprise a number of departments, including the mergers and market monitoring department, the antitrust department, and the economic studies department.

Soon after their adoption, the Statutes were amended by Decree 96/2014, of 31 December. The amendment increased the independence of the MCA by clarifying its financing mechanisms. It was established that the MCA would receive 5 per cent of the fees charged by a number of sector-specific regulators. For the sake of transparency, the MCA is obliged to publish an annual report of its activities and to submit it to both the government and the parliament. The MCA is also due to publish its enforcement priorities every year.

Until the Mozambican government appoints the members of the Board, the main question facing practitioners consist of second-guessing how exactly the MCA will make use of its powers. Bearing in mind that the Competition Act follows closely the Portuguese Competition Act both in wording and in structure, it is reasonable to expect that the MCA will to a large extent rely on the decisional practice of the Portuguese Competition Authority, rather than on those of its Southern African neighbours. The language factor will unquestionably play a critical role in this respect, in addition to the fact that the Portuguese Competition Authority keeps a close

relationship with Mozambican authorities. Indeed, not only are the two authorities members of the Lusophone Competition Network, in August 2010 they signed a protocol of technical cooperation in competition matters.

It is also worth noting that, further to the Competition Act, some pieces of sector-specific regulation (eg, on telecommunications and oil products) also contain rules on promotion of competition. Such powers are entrusted to the sectorial regulators. In some cases, such provisions encompass not only antitrust-like obligations, but also rules regarding concentrations. Once the MCA is operational, it will be relevant to ascertain how it will coordinate its powers with those of sectorial regulators. For the time being, and until the MCA becomes active, undertakings operating in regulated industries must keep in mind that competition-like rules may already be enforced by the sectorial regulators.

Antitrust

The Competition Act explicitly covers anticompetitive agreements, both horizontal (such as price-fixing or market sharing) and vertical (such as resale price maintenance and discriminatory pricing). It also sets forth a prohibition of abuse of a dominant position, notably for the refusal of access to an essential facility, to break a commercial relation in an unjustified manner or to sell goods below cost.

The Competition Act considers an undertaking to hold a dominant position when it operates in the market without facing significant competition or when it holds a prominent position in the market. The Regulation sets out that an undertaking is deemed to hold a dominant position if its market share is above 50 per cent. However, should the market have strong barriers to entry, undertakings holding a market share below 50 per cent could still be considered to hold a dominant position. In practical terms, when the criteria are fulfilled there is a rebuttable presumption that the undertaking holds a dominant position and it is up for the undertaking to prove otherwise. Accordingly, undertakings which find themselves close to such threshold should carefully assess the impact of their commercial tactics in Mozambique.

The Competition Act also prohibits the abuse of economic dependence of a trading partner. The concept corresponds to the exploitation by an undertaking of one of its trading partners (either a supplier or a customer) when such trading partner has no 'equivalent alternative' to the undertaking's services to obtain or to distribute a certain good.

Like many competition law systems (most notoriously that of the EU until 2004), the Competition Act allows for temporary exemptions from the prohibition of the anticompetitive practices. However, practices deemed as an abuse of economic dependency cannot be granted such an exemption.

In order to obtain an exemption, undertakings are bound to submit a request for prior assessment by the MCA. An exemption may be granted if the undertaking is able to successfully demonstrate that it fulfils three conditions:

- the objective of the practice at stake will either lead to efficiencies (eg, to speed up economic development or to lead to a better allocation of resources) or is relevant for public interest reasons (eg, to promote national products and services or exports);
- the practices at hand are not liable to eliminate competition; and
- they do not impose restrictions on competition which are not strictly indispensable for the attainment of their objective.

Pursuant to Decree No. 79/2015 of 5 June, exemptions are subject to an annual fee of 150,000 meticalais, on top of the 200,000 meticalais due for the initial request. This is an unusual solution when compared

with the more common one-off fee model in those jurisdictions charging a fee for granting exemptions.

Merger control

The Competition Act and the Regulation put forward a merger control regime similar to those in force in the EU and provide for mandatory filing if the thresholds are met.

Concentrations between undertakings (ie, mergers, acquisitions of control and creation of fully-function joint ventures) are subject to prior notification to the MCA when they fulfil one of the following conditions:

- (i) as a consequence of the concentration, a market share equal to or higher than 50 per cent of the domestic market in a specific product or service, or in a substantial part of it, is acquired, created or reinforced;
- (ii) as a consequence of the concentration, a market share equal to or higher than 30 per cent but lower than 50 per cent of the domestic market in a specific product or service, or in a substantial part of it, is acquired, created or reinforced in the case where the individual turnover in Mozambique in the previous financial year, by at least two of the undertakings involved in the concentration, is higher than 100 million meticalais, net of taxes directly related to such turnover; or
- (iii) the undertakings involved in the concentration reached an aggregate turnover in Mozambique in the previous financial year higher than 900 million meticalais, net of taxes directly related to such turnover.

In view of the low thresholds as regards the parties' turnover in Mozambique (particularly as concerns criterion (iii)), undertakings with limited or occasional business activities in Mozambique may be easily caught by the obligation to file transactions with the MCA.

In terms of procedure, the regime is quite similar to the Portuguese merger control regime. It provides for an investigation divided into Phase I (which may last for up to 30 days) and, when deemed necessary, a Phase II (which may last for up to 60 days). Such time limits are suspended in case of:

- requests for information (which stop the clock until the parties provide to the MCA the requested information);
- submission of remedies by the parties (which stop the clock for 30 working days); and
- submission of observations by interested third parties.

However, unlike most merger control regimes elsewhere, the Mozambican procedure sets for an additional 30-day phase during which the Board is due to adopt a formal decision on the transaction.

As regards the substantive test, the Mozambican regime mirrors the pre-2004 world in the EU and in most of its member states: it is rather focused on determining whether a dominant position will either emerge or be reinforced as a result of the transaction. Some (limited) room is left, however, for the equivalent to the substantial-lessening-of-competition test.

One of the most notorious (and striking) aspects of the merger control regime is the fact that the MCA may on its own motion require the notification of a concentration that does not meet the threshold for mandatory filing. It is entitled to do so within six months of the public announcement if it deems that the transaction may significantly hinder competition. The MCA is bound to take a formal decision in 60 days but until then the parties must refrain from implementing the transaction.

Last, but by no means least, it must be noted that

Decree 79/2015 of 5 June, set the merger filing fee at 5 per cent of the annual turnover of the participating undertakings. In cases of acquisition of exclusive control, the obligation to notify rests on the acquiring party. The fee is therefore, in principle, calculated on the basis of its individual turnover. However, in cases of mergers, acquisitions of joint control and creation of joint-ventures, the duty to notify rests on all parties involved. In these cases, it appears that the filing fee is due by all parties and calculated on the basis of all companies' turnovers. This move is certainly far from encouraging M&A activity in Mozambique and raises questions as to how far compliance pays-off when compared with gun-jumping.

Penalties

As in most jurisdictions, in Mozambique competition law infringements may be subject to severe penalties. Undertakings may be subject to fines of up to 5 per cent of their annual turnover if they are found to have entered in a restrictive agreement or other restrictive practices (such as abuse of dominance or of economic dependence), or to have breached the obligation of prior notification of a concentration. As bizarre as it may seem, the fine due for the latter may be lower than the actual filing fee.

Undertakings are further liable to fines of up to 1 per cent of their annual turnover if they refuse to cooperate with or provide information to the MCA, or are found to have provided false, inaccurate or incomplete information. Likewise, failure to notify a concentration within seven business days of its completion is also punishable with a fine of up to 1 per cent of the parties involved.

While the Competition Act explicitly sets out the criteria that must be complied with for the determination of the amount of a fine, once operational the MCA is further due to publish more specific guidelines.

Moreover, should the MCA conclude that the infringement is of particular severity, it may also apply ancillary penalties, including the publication of the penalty in the national gazette and in one of the newspapers with the highest circulation in the relevant geographic area (national, regional, or local) and impose restrictions to participation in public tenders for up to five years. More striking, however, is the fact that the MCA is entitled to impose the spin-off of an undertaking, the transfer of shareholder control, to sell assets, a winding-down of activities or to take any other act or measure which it deems necessary to eliminate harmful effects on competition.

The Competition Act further allows the MCA to impose periodic penalty payments on undertakings of up to 5 per cent of their average daily turnover. Such measure shall only be applied if objectively necessary and in cases where an undertaking:

- fails to comply with a decision imposing either sanctions or the adoption of specific measures; or
- does not provide, or provides false statements, to the MCA during a merger control proceeding.

It should be noted that the MCA's decisions are enforceable titles. Accordingly, should an undertaking fail to comply with the decision within the set deadline, the MCA is free to require the enforcement of the decision before the Tax Enforcement Court.

Judicial review

Pursuant to article 45 of its Statutes, the MCA's decisions are subject to judicial review. Decisions including the application of fines or other sanctions may be appealed to the Judicial Court of the city of Maputo. Decisions concerning merger control or exemptions can be appealed to the Administrative Court.

It must be stressed that while the appeal against decisions of the

MCA generally suspends the effects of the decision, the appeal against decisions imposing fines does not. In such cases, the addressee of the decision can request the court to suspend the effect of the decision but has to prove that the implementation of the decision would cause serious damage. The appellant will in any case be required to provide a guarantee.

Legal privilege

Experience from other African jurisdictions demonstrates that newly-created competition authorities often start investigations on undertakings for practices occurred prior to their own operationalisation. The MCA may well choose to follow such approach. Accordingly, companies should carefully plan their future practices which can have an impact in the Mozambican market, as well as assess the effects of their current (and even past) actions. In some cases, such exercise may require the involvement of attorneys experienced in antitrust matters and perhaps economic consultants.

The majority of jurisdictions consecrate legal privilege, ie, the principle according to which correspondence exchanged between natural or legal persons and their lawyer cannot be analysed nor seized by public authorities. Mozambique, however, takes quite a peculiar and tough stance towards such principle.

In fact, the combined application of articles 52, 56 and 62(2) of the Statutes of the Mozambican Lawyers Bar Association (approved by Law 28/2009 of 29 September) establishes a prohibition of seizing legal advice and correspondence between a lawyer admitted to practice in Mozambique and a client (only) if such documents are at the lawyers' offices. A similar stance is taken by the Mozambican Constitution, which contains a sole express reference to legal privilege in a provision concerning searches to lawyers' offices and the apprehension of documents and correspondence entrusted by clients to lawyers.

Likewise, Mozambican criminal procedure law does not provide for legal privilege. It bears emphasis that the Mozambican Criminal Procedure Code is an extremely old piece of legislation and lacks a number of commonly accepted guarantees connected to rights of defence. However, it is worth noting that the Criminal Procedure Code is currently under revision and a new code is expected soon. Hence, it is possible that Mozambique will align the scope of legal privilege with that of most jurisdictions.

Nevertheless, for the time being, in case documents or correspondence exchanged between an undertaking and its lawyer are found at the undertaking's premises during a dawn raid, the MCA may be tempted to use them as evidence of anticompetitive wrongdoing or even try to equate them to an admission of guilt.

This is not to say that legal privilege does not apply in Mozambique at all nor that undertakings seeking to assess or modify their commercial practices should not engage with an attorney.

Indeed, a number of provisions of the Mozambican Constitution provide sound arguments in favour of a broader interpretation of the legal privilege regime in the country. That is notably the case of provisions concerning rights of defence, inadmissibility of evidence and inviolability of correspondence. Accordingly, even though it does not expressly stem from the law, the scope of legal privilege in Mozambique may indeed be broader than what it seems at first sight. However, for undertakings to be able to advocate the protection of their communications with their lawyers, a thorough communications plan must be set in advance by a lawyer experienced in Mozambican law.

Hence, undertakings seeking to assess and or ensure the compliance of their business practices with antitrust rules, must engage with a lawyer not only for the substantive analysis of the acts at stake, but also to accurately structure how client-attorney communication is to occur.



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He is the author of various articles and publications, including the *Commentary to the Portuguese Competition Act* (2009), and speaks regularly at conferences and seminars.

His work has also been recognised by the most important international rankings, including *Chambers Europe*, *The Legal 500* and *Who's Who Legal*, all of which rate Miguel Mendes Pereira as a leading and recommended lawyer.



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