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EUROPE, MIDDLE EAST AND AFRICA

ANTITRUST REVIEW 2020

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Contents

Europe

European Union

Cyprus

Denmark

France

Germany

Greece

Norway

Portugal

Romania

Russia

Spain

Switzerland

Turkey

United Kingdom

Ukraine

Middle East and Africa

Angola

COMESA

Israel

Mauritius

Mozambique

Preface

Global Competition Review is a leading source of news and insight on competition law, economics, policy and practice, enabling subscribers to stay apprised of the most important developments worldwide.

GCR's *Europe, Middle East and Africa Antitrust Review 2020* is one of a series of regional reviews that deliver specialist intelligence and research to our readers – general counsel, government agencies and private practitioners – who must navigate the world's increasingly complex competition regimes.

Like its sister reports covering the Americas and the Asia-Pacific, this book provides an unparalleled annual update from competition enforcers and leading practitioners, on key developments in both public enforcement and private litigation.

In addition to updates on the European Commission, Cyprus, Denmark, France, Germany, Greece, Norway, Romania, Portugal, Russia, Spain, Switzerland, Turkey, the United Kingdom, Ukraine, COMESA, Israel, Mauritius and Mozambique, this edition features a chapter on Angola, which launched its Competition Regulatory Authority in early 2019.

In preparing this report, *Global Competition Review* has worked with leading competition lawyers and government officials. The latter group provides crucial perspective on the thinking behind cutting-edge matters such as the intersection of privacy, data and antitrust; 'phygital' retail distribution that combines brick-and-mortar with online sales; screening tools to detect collusion in public procurement; and much more.

The lawyers' and officials' 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.

If you have a suggestion for a topic to cover or would like to find out how to contribute, please contact insight@globalcompetitionreview.com.

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Angola: Overview

Miguel Mendes Pereira and João Francisco Barreiros
VdA

In a one year, Angola adopted a comprehensive competition legal regime, now fully in effect and ready to be enforced by the Competition Regulatory Authority (CRA).

The first step was taken in April 2018 when parliament approved the Angolan Competition Act (Act 5/18, published on 10 May 2018; the Competition Act). A few months afterwards, the President passed Decree 240/18, of 12 October 2018, approving the Competition Regulation (Competition Regulation), which complements the Competition Act by establishing and implementing procedural rules. Just before the year was over, the Angolan administration adopted Decree 313/18, of 21 December 2018, creating the CRA and approving its bylaws.

The last piece of the Angolan competition legal regime was put in place in early January 2019, when the members of CRA's board were appointed by the President of the Republic of Angola. Eugénia Pereira was chosen for a three-year (renewable) mandate as president of the Angolan watchdog. She started her career at KMPG Africa, having later worked at Unitel, the largest telecom company in the country. Afterwards, she was deputy director general of the Prices & Competition Institute, from which the CRA inherited both ongoing cases and personnel. The two other members of the board are Ana Zulmira Ramalheira and José Peres Mamede.

The new legislation is inspired to a large extent by the EU competition framework and particularly the Portuguese competition regime; the identifiable source of notions such as the prohibition of economic dependency or mixed market share and turnover jurisdictional thresholds for merger control review. EU law seems to have inspired the power of the CRA to grant Angolan companies state aid, although it remains to be seen how these rules will be applied in the absence of a single market objective as in the European Union.

The Angolan legislature seems to have also drawn some inspiration from the Mozambican competition legal regime. For instance, both legal systems establish:

- a presumption that companies holding a 50 per cent or higher market share have a dominant position;
- the possibility that certain restrictive agreements may be exempted by the CRA for a period of time; and

- that competition authorities may request that a concentration not meeting the jurisdictional thresholds is nevertheless notified.

The impetus for the adoption of a competition regime arose in the last quarter of 2017, when João Lourenço took office as President, replacing José Eduardo dos Santos, who led the country for almost 40 years. João Lourenço vowed to adopt legislation aimed at tackling the imperfections of the Angolan economy, notably 'the cement and telecom monopolies that negatively impact the Angolan consumers' welfare'.

The fast-paced approval process of a comprehensive Angolan competition framework has been perceived as an important sign that President João Lourenço intends to make reforms in the country and is determined to implement a fully fledged market economy in the country. The adoption of the new legislation is also thought to please the International Monetary Fund, to which the adoption of antitrust rules was an essential requirement for the granting of the US$3.7 billion credit facility announced in December 2018.

The application of competition rules in Angola is currently surrounded by a significant degree of uncertainty, fuelled by the wording of some provisions of the Competition Act and the Competition Regulation. It is expected that the enforcement by the CRA will, to a certain extent, consider the evolution of EU and Portuguese caselaw. However, it bears emphasis that in other domains the Angolan legal system has shown a strong willingness to develop in a completely autonomous and often creative manner.

If the CRA follows the steps of other competition enforcers in Africa, it can be expected that it will start prosecuting undertakings for facts occurred before its own creation. Accordingly, the most advisable approach for undertakings operating in Angola 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 Bylaws of the Competition Regulatory Authority (the Bylaws) entrust the CRA with regulatory, supervisory and sanctioning powers. Its institutional design follows the known structure of many other competition authorities.

Pursuant to the Bylaws, the CRA is a public agency said to enjoy both administrative and financial autonomy, even though it is subject to the supervision of the President through the Ministry of Finance. This supervision comprises the power to appoint members of CRA's board, the establishment of its goals and priorities, and the exercising of disciplinary powers over the board members. The latter, coupled with the rule that provides that omissions and doubts as to the interpretation of the Bylaws are decided by the President, may raise doubts as to the genuine independence of the CRA in relation to the Angolan administration.

The CRA is composed of two bodies, the board of directors and the supervisory board. Each of these bodies is composed of a president and two other members, appointed by the government for a three-year (renewable) term. The board of directors is the decision-making body, the one

determining the opening and closing of cases, and its president has the power to appoint and dismiss the heads of the directorates. The supervisory board is in charge of ensuring compliance and supervising all management in matters of a financial or economic nature.

Regarding enforcement, the CRA will have five executive directorates, responsible for investigating and fining companies for infringements of the Competition Act and Regulation, reviewing merger transactions and representing the CRA in appeal courts, among others:

- the Directorate for Investigation of Restrictive Practices;
- the Merger Control Directorate;
- the Directorate for Studies and Market Monitoring;
- the State Aid Directorate; and
- the Legal and Litigation Directorate.

The CRA's headqurters will be located in Luanda, although the law provides for the possibility of provincial branches of the CRA being established throughout the Angolan territory. The main office of the CRA will have a staff of 100 officials, most of who previously worked at the Prices & Competition Institute, the predecessor of the CRA.

The Competition Act and the Bylaws establish that the CRA is financed through the annual state budget and that it will receive 7 per cent of the fees charged by a number of sector-specific regulators.

The CRA holds powers that are typical powers of competition watchdogs, including the power to interview the legal representatives of companies involved in alleged breaches of competition law, to request documents and other items of information, to carry out unannounced inspections (dawn raids), to seize documents in the premises of undertakings under investigation and to seal-off their premises when necessary.

Anticompetitive agreements

The Competition Act prohibits agreements between undertakings, concerted practices and decisions by associations of undertakings, both those of a horizontal (such as price fixing agreements and market sharing agreements) and of a vertical nature (resale price maintenance, exclusivity agreements and discriminatory pricing), insofar as they substantially restrict competition in the Angolan market.

Articles 12 (2) and 13 (2) contain puzzling provisions regarding the enforcement of the prohibition of anticompetitive arrangements between undertakings. According to both provisions, it is incumbent upon the undertakings to show that their behaviour does not constitute restrictions of competition, rather than for the CRA to prove the existence of one. The fact that the burden of proof relies on the undertakings under investigation seems to clash directly with the principle of the presumption of innocence enshrined in the Angolan Constitution. Only time will tell how these provisions will be applied by the CRA and judged by the courts.

Like many competition law systems (most notoriously that of the European Union until 2004), the Competition Act allows for the granting of temporary exemptions from the prohibition of the anticompetitive agreements. Exemptions cannot be granted for other infringements like abuse of dominant position or abuse of economic dependence.

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

- the agreement contributes to improving the production or distribution of certain goods or services, or to promoting technical or economic progress;
- an equitable part of the benefits is passed on to the users of these goods or services;
- the agreement does not impose any restrictions that are not indispensable to the attainment of those objectives; and
- the agreement does not allow for the elimination of competition.

While the Angolan competition framework does not foresee the possibility of settling antitrust cases, article 25 of the Competition Regulation empowers the CRA to adopt and publish a leniency regime. The application of said leniency regime will be applicable to both undertakings and individuals, if:

- their collaboration results in the identification of other participants of the infringement or in the collection of information and documents that prove the infringement under investigation;
- the CRA does not have sufficient evidence to back up the imposition of a fine;
- the undertaking admits to its participation in the infringement and cooperates fully; and
- the undertaking ceases participation in the infringement under investigation as of the day it submits the leniency application.

Total immunity from fines is off the table, even for the first undertaking blowing the whistle. The first company may be granted a 50–70 per cent fine reduction, the second a 30–50 per cent fine reduction and and the third a 10–30 per cent fine reduction. So far, however, the CRA has not adopted rules setting the Angolan leniency regime.

Abuse of dominance and economic dependence

The Competition Act also prohibits the abuse of a dominant position, notably for the refusing of access to an essential facility, for breaking a commercial relation in an unjustified manner and for selling goods below cost.

The Competition Act considers an undertaking to hold a dominant position where it operates in the market without facing significant competition or when it holds a prominent position in the market. The Competition Regulation sets out that an undertaking is deemed to hold a dominant position if its market share is above 50 per cent. 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, where 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 that find themselves close to such threshold should carefully assess the impact of their commercial tactics in Angola.

The Competition Act also prohibits the abuse of economic dependence (often also known as relative dominance) 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.

Merger control

The Competition Act and Regulation put forward a merger control regime similar to those in force in the European Union.

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

- as a consequence of the concentration, a market share equal to or higher than 50 per cent in the domestic market of a specific product or service, or in a substantial part of it, is acquired, created or reinforced;
- as a consequence of the concentration, a market share equal to or higher than 30 per cent but lower than 50 per cent in the domestic market of a specific product or service, or in a substantial part of it, is acquired, created or reinforced and the individual turnover of at least two of the undertakings involved in the concentration in Angola in the previous financial year, is higher than 450 million kwanzas, net of taxes directly related to such turnover; or
- the undertakings involved in the concentration reached an aggregate turnover in Angola in the previous financial year higher than 3.5 billion kwanzas, net of taxes directly related to such turnover.

In view of the low turnover thresholds in Angola (particularly the third threshold, since 3.5 billion kwanzas correspond to €10 million), undertakings with limited or occasional business activities in Angola may easily be caught by the obligation to file transactions with the CRA before being able to implement them.

In terms of procedure, the Angolan regime provides for an investigation divided into Phase I (which may last for up to 120 days) and, when deemed necessary, a Phase II (which may last for up to 180 days). Such time limits are suspended in case of submission of remedies by the parties, which stop the clock for the time considered necessary by the CRA.

As regards the substantive test, the Angolan regime aims at determining whether a transaction is likely to create a substantial hindrance of competition in the domestic market or in a substantial part of it. Public interest criteria is also taken into consideration by the CRA, such as the effect of a concentration on:

- a specific region or economic sector;
- employment level;
- the ability of small enterprises or enterprises pertaining to historically disadvantaged individuals becoming competitive; or
- the ability of national industry to compete on the international market.

In other words, the CRA holds a very wide margin of discretion to assess mergers in the light of fluid criteria comprising economic, social and historical factors, including an explicit nod to the creation of national champions.

One of the most notorious (and striking) aspects of the merger control regime is the fact that the CRA may, of its own motion, require the notification of a concentration that does not meet the thresholds for mandatory filing. It is entitled to do so if it deems that the transaction may significantly restrict competition. The procedure in this case is of a simplified nature, although in the end nothing stops the CRA from deciding to prohibit the transaction.

Penalties

As in most jurisdictions, in Angola competition law infringements may be subject to severe penalties. Undertakings may be subject to fines of between 1 per cent and 10 per cent of their annual turnover if they are found to have entered into a restrictive agreement or other restrictive practices (such as abuse of dominance or of economic dependence), or to have implemented a notifiable concentration before being cleared by the CRA.

Undertakings are further liable to fines of between 1 per cent and 5 per cent of their annual turnover if they refuse to cooperate with or provide information to the CRA, or are found to have provided false, inaccurate or incomplete information.

While the Competition Act explicitly sets out the circumstances that may be factored in when the exact amount of the fine is being determined (eg, seriousness of the infringement, the degree of participation of the companies and the potential benefits they may have obtained in result of the infringement), the CRA is due to publish more specific guidelines.

Moreover, should the CRA conclude that the infringement is of particular severity, it may also apply ancillary penalties, including the publication of the fine in the national newspaper with the highest circulation and restrictions on the participation in public tenders for a period of up to three years. More striking, however, is the fact that the CRA (like the Mozambican Competition Authority) is entitled to impose the spin-off of an undertaking, the transfer of shareholder control, the disposal of assets, the winding-down of activities or to take any other act or measure that it deems necessary to eliminate harmful effects on competition.

The Competition Act further allows the CRA to impose periodic penalty payments on undertakings of up to 10 per cent of their average daily turnover. Such measures 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 CRA during a merger control proceeding.

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

Business secrets, legal privilege and judicial review

The protection of business secrets is ensured by article 8 (f) of the Bylaws. However, the protection of legal privilege is still critically absent from Angolan competition review.

Further to article 4 (3) of the Competition Act, all decisions from the CRA are subject to judicial review, according to the general rules. No specific rules concerning competition law investigations have been put in place so far.

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Miguel Mendes Pereira has a law degree from the faculty of law of the University of Lisbon; an LLM in European legal studies from the College of Europe, Bruges, Belgium; and a master's in European legal sciences from the faculty of law of the University of Lisbon. He is a lecturer at the faculty of law of the University of Lisbon in EU law and competition law (postgraduates).

He joined VdA in 2011 and is currently a partner in the competition and EU practice. He is also active in the field of copyright, electronic communications, media and advertising.

Before joining the firm, he was a partner at Abreu Advogados (2008–2011), lead legal counsel at the Portuguese Competition Authority (2006–2008), legal secretary at the chambers of the Portuguese judge at the General Court of the EU in Luxembourg (2004–2006), administrator at the Directorate-General for Competition of the European Commission in Brussels (2000–2004), head of legal affairs at Lusomundo and Warner Lusomundo (1997–2000) in Lisbon and an associate lawyer, as well as trainee, with Athayde de Tavares & Associados (1992–1997) also in Lisbon.

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.

João Francisco Barreiros
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João Francisco Barreiros has a law degree from Nova University of Lisbon and an LLM in European Union law from the College of Europe, Bruges, Belgium.

He joined VdA in 2017 and is currently a trainee in the competition and EU practice, where he has been actively involved in several transactions in a wide range of sectors, notably the telecommunications, banking, insurance and air transportation sectors. He regularly advises clients in a broad range of antitrust subjects before both the Portuguese Competition Authority and the European Commission.

Before joining the firm, he was a trainee in the competition law team of the European Commission's Legal Service. João also worked in the Brussels office of Cleary Gottlieb Steen & Hamilton LLP, both as a trainee and as an associate lawyer. During his studies in Lisbon, he concluded a traineeship at the merger control department of the Portuguese Competition Authority.

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