GCR INSIGHT

EUROPE, MIDDLE EAST AND AFRICA

ANTITRUST REVIEW 2020

EUROPE, MIDDLE EAST AND AFRICA

ANTITRUST REVIEW 2020

Reproduced with permission from Law Business Research Ltd
This article was first published in July 2019
For further information please contact Natalie.Clarke@lbresearch.com

LAW BUSINESS RESEARCH

Published in the United Kingdom
by Global Competition Review
Law Business Research Ltd
87 Lancaster Road, London, W11 1QQ, UK

www.globalcompetitionreview.com

To subscribe please contact subscriptions@globalcompetitionreview.com

ISBN: 978-1-83862-219-0

Printed and distributed by Encompass Print Solutions
Tel: 0844 2480 112

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.

Global Competition Review
London
June 2019

Mozambique: Overview

Miguel Mendes Pereira and João Francisco Barreiros
VdA

Competition law and policy are still somehow a novelty in Mozambique, despite being first addressed 12 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 enabling the Competition Act (Decree 97/2014 of 31 December, the Regulation) and the Bylaws 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 charges due to the Mozambique Competition Authority (MCA) for a number of services, including merger filings.

In May 2016, Mozambique signed a memorandum of understanding (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 intergovernmental organisation dedicated to promoting the politic and socioeconomic cooperation between Southern African countries. The MoU intends to serve as the basis for closer cooperation between national watchdogs 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.

In May 2018, the government enacted Decree 35/2018 of 30 May, establishing competition rules applicable to air transport services. The decree reinforces the prohibitions established in the Competition Act, providing examples of specific practices that may constitute anticompetitive arrangements or abuses of dominant position in the air transport sector. Moreover, the new decree provides that the MCA may, on request by an air service provider, approve measures destined to correct certain adverse effects that may affect air transport companies derived from the application of competition rules.

The approval of Decree 35/2018 was met by a wave of criticism. The Public Integrity Centre of Mozambique was one of the most vocal entities criticising the new rules, stating that it is not for the government to approve such an act and that the MCA is the only entity that may say what is or is not a competition infringement. Moreover, the Public Integrity Centre suggested that air service providers in the country may have lobbied and forced the government to approve Decree 35/2018 before the creation of the MCA.

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 awaits the decision from the Mozambican government.

Even though the operationalisation of the MCA is running behind schedule, once the Board members are appointed, no major obstacles seem to remain for the MCA to operate. In fact, Mozambique already secured an amount of close to 10 million meticais from the United States Agency for International Development (USAID) for the 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 occurred before its own creation. Hence, companies should carefully assess how their practices impact 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 bylaws of the Mozambican Competition Authority (the Bylaws) 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 that are typical 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.

The MCA's decision-making body is the Board. The Board is composed by 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. Lead by a director general appointed by the chairman of the Board, the Directorate-General consists of a number of departments, including the Mergers and Market Monitoring Directorate, the Antitrust Directorate, the Litigation Directorate and the Economic Studies Directorate.

Soon after their adoption, the Bylaws were amended by Decree 96/2014 of 31 December 2014. 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 expected to publish its enforcement priorities every year.

Until the Mozambican government appoints the members of the Board, the main challenge practitioners face consists in trying to guess exactly how 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 South 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, but in August 2010 they also signed a protocol for technical cooperation on 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 operationalised, 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 refuse 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 defines the concept by setting 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 that 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 European Union 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 for a limited period of time 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 2015, exemptions are subject to an annual fee of 150,000 meticais, on top of the 200,000 meticais 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 the grant of exemptions.

Merger Control

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

Concentrations between undertakings (ie, mergers, acquisitions of control and the creation of fully-function joint ventures) are subject to prior notification to the MCA 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 Mozambique in the previous financial year, is higher than 100 million meticais, net of taxes directly related to such turnover; or

- the undertakings involved in the concentration reached an aggregate turnover in Mozambique in the previous financial year higher than 900 million meticais, net of taxes directly related to such turnover.

In view of the low turnover thresholds in Mozambique (particularly in what concerns the third threshold, as 900 million meticais corresponds to approximately €12.5 million), undertakings with limited or occasional business activities in Mozambique may easily be caught by the obligation to file transactions with the MCA before being able to implement them. When a transaction is subject to the prior notification requirement, it must be filed within the seven days following the conclusion of the agreement or the acquisition project.

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 stops 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 when the Board of the MCA 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 European Union 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, of 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 2015 sets 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 the conclusion of the agreement 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 that 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 statements, or provides false statements, to the MCA during a merger control proceeding.

It should be noted that 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 Bylaws, the MCA's decisions are subject to judicial review. Decisions imposing 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 that could 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 Bylaws of the Mozambican Lawyers Bar Association (approved by Law 28/2009 of 29 September 2009) 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 that what it seems at first sight.

Miguel Mendes Pereira
VdA

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
VdA

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.

With a history of over 40 years, VdA is an leading international law firm, notable for cutting-edge innovation and top-quality legal advice. A profound business know-how coupled with a highly specialised cross-sector legal practice enable the firm to effectively meet the increasingly complex challenges faced by clients, notably in the aerospace, distribution, economy of the sea, green economy, energy, finance, real estate, industry, infrastructure, healthcare and life sciences, professional services, information technology, emerging technologies, telecoms, transports and tourism sectors.

VdA offer robust solutions based on consistent standards of excellence, ethics and professionalism. The recognition of VdA as a leading provider of legal services is shared with our team and clients and is frequently acknowledged by the major law publications, professional organisations and research institutions. VdA has consistently and consecutively received the industry's most prestigious awards and nominations.

Through VdA Legal Partners clients have access to a team of lawyers across 13 jurisdictions, ensuring wide sectoral coverage, including all African members of the Community of Portuguese-Speaking Countries and several francophone African countries, as well as East Timor.

The competition and EU practice of VdA comprises three partners, eight associates and a senior consultant. Its track record includes the successful defence of Portugal Telecom in all the abuse of dominance cases argued before the Portuguese Competition Authority and courts, as well as advice to the Portuguese government in the state aid case concerning the €7.5 billion recapitalisation of Portuguese banks. Telecoms, media, pharmaceuticals, air transportation, and banking are among the industries which VdA's competition practice advises on a daily basis. The practice has invariably been commended by colleagues and clients over the years.

Rua Dom Luís I, 28
1200-151 Lisbon
Portugal
Tel: +351 21 311 3400
Fax: +351 21 311 3406

www.vda.pt

Miguel Mendes Pereira
mig@vda.pt

João Francisco Barreiros
jfr@vda.pt

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.

Visit globalcompetitionreview.com
Follow @gcr_alerts on Twitter
Find us on LinkedIn

ISBN 978-1-83862-219-0