Cartels

Enforcement, Appeals and Damages Actions

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Angola

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Overview of the law and enforcement regime relating to cartels

João Lourenço took office as the President of the Republic of Angola in September 2017. He replaced José Eduardo dos Santos, who led the country for 38 years. In October 2017, during one of his first speeches as President, João Lourenço announced that the Government was preparing legislation aimed at tackling the "imperfections that still exist in the Angolan economy".

On 18 April 2018, the Parliament approved the Angolan Competition Act, which came into effect on 10 May 2018 (Act 5/18, of 10 May, hereinafter "Competition Act"). A few months later, the President passed Decree 240/18, of 12 October 2018, approving the Competition Law Regulation ("Competition Regulation"). The Competition Regulation clarifies a number of concepts, establishes procedural rules and sets the relevant thresholds for merger control review.

The advent of competition law in Angola was widely perceived not only as a sign of the reforms the new President intends to bring about but also as the fulfilment of requirements laid out by the International Monetary Fund in exchange for the USD 3.7 billion credit facility announced in December 2018.

The declared aim of the adoption of a competition law regime is to contribute to the implementation of a fully-fledged market economy, the reinvigoration of the Angolan economy and the improvement of the country's place in the "Doing Business" international rankings.

The new legislation is largely inspired by the European Union competition framework and, in particular, the Portuguese Competition Act. Angolan competition law is applicable to all economic activities in both the private and public sectors, as well as to cooperatives and trade associations.

The Competition Act and the Competition Regulation will be enforced by the Competition Regulatory Authority ("CRA"). Once the CRA is up and running, it is expected that the enforcement of the Competition Act draws significant inspiration from the application of Portuguese competition law, given the historic and linguistic ties between both nations, particularly in light of the notorious influence played by the Portuguese Competition Act on the wording of the Angolan legislation. This means that EU competition law – mirrored to a large extent in Portuguese competition law – will also serve as a source of inspiration for the application of Angolan antitrust law. It would, however, be naive to think that Angolan authorities will simply transpose the law as applied by the Portuguese and EU courts and authorities. The evolution of the Angolan legal system in other domains has shown a keen willingness in developing autonomous, and often creative solutions for similar problems.

The Competition Act:

- prohibits anticompetitive agreements;

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- prohibits the abuse of a dominant position;
- prohibits the abuse of economic dependency; and
- establishes a merger control review procedure.

As regards multilateral behaviours, the prohibition set forth in Articles 12 and 13 of the Competition Act encompasses horizontal and vertical agreements between undertakings, concerted practices, and decisions by associations of undertakings, insofar as they substantially restrict competition in the Angolan market.

The Competition Act provides for a number of examples of anticompetitive practices such as price-fixing agreements, market-sharing agreements, output restrictions, resale price maintenance and discriminatory pricing to equivalent customers or suppliers.

The prohibition of restrictive horizontal and vertical agreements contains a puzzling provision in Articles 12 (2) and 13 (2) of the Competition Act, further to which the burden of proof is reversed: it is incumbent upon the undertakings to prove that their behaviour does not materialise a restriction of competition. It remains to be seen how exactly this provision is going to be applied by the CRA, namely in light of the principle of the presumption of innocence enshrined in the Angolan Constitution.

It bears emphasis that anticompetitive agreements may be exempted pursuant to Article 14 of the Competition Act (the equivalent to Article 101 (3) TFEU), provided the parties are able to show that:

- 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 which are not indispensable to the attainment of these objectives; and
- the agreement does not allow for the elimination of competition.

The exemption is granted *ex ante* by the CRA and is temporary in nature (Article 14 (4)).

Overview of investigative powers in Angola

In the context of an investigation for antitrust infringement, the CRA may:

- carry out dawn raids in the premises of every undertaking or association of undertakings, and seize documents;
- question legal representatives of the undertakings or associations of undertakings concerned, or any other persons, if found relevant for the progress of the investigation;
- request from legal representatives of the undertakings or associations of undertakings concerned, or any other persons, documents and other items of information, if found relevant for the progress of the investigation;
- when empowered by an order of the competent judicial authority, seal off the premises of undertakings where relevant documents may be located; and/or
- request assistance from any service that is part of the public administration, including the police, as necessary for the attainment of its goals.

Enforcement

On 21 December 2018, Presidential Decree 313/18 approving the Bylaws of the CRA was published, putting in place the last piece of the legal construction underlying the novel CRA.

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The CRA is designed as a public agency enjoying administrative and financial autonomy and is subject to the supervision of the President of the Republic through the Ministry of Finance. The supervision of the CRA comprises the power to appoint the members of the Board, the establishment of goals and priorities of the CRA and the exercise of disciplinary power over the members of the Board. The latter may raise doubts as to the future independence of the CRA *vis-à-vis* the President and the Government.

The CRA is built around two bodies: the Board of Directors and the Supervisory Board, each composed of three members. It is up to the Board of Directors to decide the opening and closure of cases, and the President of the Board has the power to appoint and dismiss the Heads of Departments. The Supervisory Board is in charge of ensuring generic compliance and supervising all management matters of a financial or economic nature.

As regards enforcement activity, the CRA will have a Merger Control department, a Conduct Investigation (i.e. antitrust) department, a Study and Market Follow-Up department and a Legal & Litigation department. Interestingly enough, the Bylaws also provide for a State Aid department, a division not often found outside the EU. It remains to be seen how Angola will develop a State aid policy in the absence of a Single Market goal that has underpinned the enforcement of State aid rules in the EU. The fact that in this field the CRA is mandated with controlling public subsidies in view of "price stabilization" might indicate that this was a way to accommodate one of the missions of the Prices and Competition Institute, from which the CRA inherits both ongoing cases and personnel.

The headquarters of the CRA are located in the capital Luanda, although the law provides for the possibility of provincial branches being established throughout the territory. The main office of the CRA will count with a staff of 100 officials.

The appointment of the members of the Board is now eagerly awaited for the CRA to become operational.

Key issues in relation to investigation and decision-making procedures

Whenever the CRA becomes aware of strong evidence of the existence of restrictive practices, it is obliged to open an investigation (Article 27 (1) of the Competition Act).

Pursuant to Article 18 (2) of the Competition Regulation, the antitrust investigation must be closed within 24 months from the opening of the proceedings. It remains to be seen whether compliance with the deadline is feasible or whether the two years should be considered a mere recommendation. Article 18 (4) provides that, following the adoption of a Statement of Objections, the CRA has a "maximum of 12 months" to conclude the investigation.

The undertakings accused of an infringement of competition law have 20 business days to submit their defence (Article 18 (5) of the Competition Regulation).

The Competition Regulation (Article 22) grants the investigated undertakings, their lawyers and economic advisers the right to access the CRA's case file. In addition, the Bylaws instruct the CRA to adequately state the grounds for its decisions and to comply with the duty of information.

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

Leniency regime

Article 25 of the Competition Regulation empowers the CRA to adopt a leniency regime

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applicable to both undertakings and individuals, insofar as their collaboration results in the identification of other participants of the infringement and/or in the collection of information and documents that prove the infringement under investigation.

The application of said regime is dependent on the fulfilment of the following conditions:

- 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 permanently with the investigations; and
- the undertaking ceases participating in the infringement under investigation as of the day it submits the leniency application.

Complete immunity is off the table. Pursuant to Article 25 (3) of the Competition Act, to the first undertaking coming forward, a 50–70% fine reduction may be granted, to the second 30–50% and to the third 10–30%.

Administrative settlement of cases

The Angolan competition framework does not foresee the possibility of settlement of antitrust cases.

Third party complaints

Any legal or natural person may submit to the CRA a complaint connected with anticompetitive practices. The complaint must be submitted by filling in a form previously approved by the CRA (Article 27, (2) and (3) of the Competition Act).

The CRA may not decide to close the investigation without first informing the complainant and providing the complainant with the opportunity to comment (Article 30 (2) of the Competition Act).

Right of appeal against civil liability and penalties

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

Civil penalties and sanctions

Undertakings are subject to fines of between 1% and 10% of their annual turnover if they are found to have entered into a restrictive agreement or other restrictive practice (Article 22 (2) of the Competition Act).

Moreover, should the CRA conclude that the infringement is particularly serious, it may impose ancillary sanctions, such as the publication of the punitive part of the decision in the Angolan newspaper with the highest circulation, and the prohibition of participation in public tenders for a period of up to three years (Article 24 of the Competition Act). The CRA is also empowered to impose structural measures such as the spin-off of an undertaking, the transfer of shareholder control, the sale of assets, the winding-down of activities, or any other act or measure which it deems necessary in order to eliminate harmful effects on competition.

The Competition Act further allows the CRA to impose daily penalty payments on undertakings of up to 10% of their average daily turnover, in cases where an undertaking fails to comply with a decision imposing either sanctions or the adoption of specific measures (Article 25 of the Competition Act).

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Criminal sanctions

Without prejudice to the application of Angolan criminal law, the Angolan competition framework does not foresee the imposition of criminal sanctions specific to antitrust infringements.

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He joined Vieira de Almeida 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.

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He joined Vieira de Almeida 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 telecommunications and air transportation. 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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