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EUROPE, MIDDLE EAST AND AFRICA

ANTITRUST REVIEW 2022

Europe, Middle East and Africa Antitrust Review 2022

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This article was first published in June 2021
For further information please contact Natalie.Clarke@lbresearch.com

Published in the United Kingdom
by Global Competition Review
Law Business Research Ltd
Meridian House, 34-35 Farringdon Street, London, EC4A 4HL

www.globalcompetitionreview.com

To subscribe please contact subscriptions@globalcompetitionreview.com

ISBN: 978-1-83862-584-9

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

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Preface

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

GCR's *Europe, Middle East and Africa Antitrust Review* 2022 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 region, this book provides an unparalleled annual update from competition enforcers and leading practitioners on key developments in both public enforcement and private litigation. In this edition, we have added a specific focus on the digital economy and vertical agreements in the European Union, as well as private litigation in France and merger control in Russia, alongside updates from the European Commission, Cyprus, Denmark, France, Germany, Greece, Norway, Portugal, Sweden, Spain, Switzerland, Turkey, the United Kingdom, Ukraine, COMESA, Angola, Israel and Mauritius.

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 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 during 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 2021

Angola: Growing from EU Inspiration

Ricardo Bordalo Junqueiro and João Francisco Barreiros
VdA

IN SUMMARY

This article summarises the recently adopted Angolan competition regime. Driven by the president's wishes to establish a fully fledged market economy, and by certain incentives of the International Monetary Fund, it was introduced in 2018 and has since been completed and complemented by several subsequent legislative acts. Although the new framework mirrors, to a large extent, EU competition law, it remains to be seen how a few of its unclear provisions will be interpreted and effectively implemented by the Competition Regulatory Authority (CRA), which has been up and running since 2019.

DISCUSSION POINTS

- Legislative acts in the Angolan competition framework and the drivers for their approval
- EU law – in particular Portuguese law – as sources of inspiration
- Organisational structure and investigative powers of the CRA
- Burden of proof being on undertakings to show that their behaviour does not constitute a restriction of competition
- CRA's power regarding prior notification of transactions
- Fines for infringement of competition rules

REFERENCED IN THIS ARTICLE

- International Competition Network
- Angolan Competition Act (Law 5/18, published on 10 May 2018)
- Competition Regulation (Decree 240/18 of 12 October 2018)
- CRA's By-laws (Presidential Decree 313/18 of 21 December 2018)
- Merger Notification Forms (CRA's Instruction 1/20 of 27 January 2020)
- Decree Setting the Value of Fees (Executive Decree 32/21 of 1 February 2021)
- Leniency Regulation (approved by CRA's Instruction 7/20 of 25 September 2020)

Adoption of a comprehensive competition framework

The first step towards the adoption of a comprehensive competition legal regime was taken in April 2018, when Parliament approved the Angolan Competition Act (the Competition Act). Before the end of 2018, the legal framework was fully in effect and ready to be enforced by the newly established Competition Regulatory Authority (CRA).

With the legislative framework in place, the only missing piece of the Angolan competition regime was the appointment of the board of the CRA. In January 2019, the members of CRA's board were appointed by the Angolan president. Since then, the CRA has been fully operational, and it is already a member of the International Competition Network and the Lusophone Competition Network.

The animus for adopting a competition regime in the country arose in the last quarter of 2017, when João Lourenço took office as president, vowing to make structural economic reforms through the implementation of a complete market economy. Just a few months into his presidency, João Lourenço promised to adopt legislation aimed at addressing the challenges faced by the Angolan economy, such as 'the cement and telecom monopolies that negatively impact the Angolan consumers' welfare'.

The fast-paced approval process of a comprehensive Angolan competition framework was also incentivised by the International Monetary Fund, to which the adoption of antitrust rules was an essential requirement for the granting of a US$3.7 billion credit facility announced in December 2018.

At the time of writing, the primary legislative acts that form the Angolan competition framework are the following:

- Competition Act (approved by Law 5/18, published on 10 May 2018), establishing the prohibition of practices restrictive of competition (whether horizontal or vertical), abuse of dominant position and abuse of economic dependence; a merger review control procedure; and a state aid regime;
- Competition Regulation (approved by Decree 240/18 of 12 October 2018), which complements the Competition Act by setting, among other things, important procedural rules of antitrust investigations and the relevant jurisdictional thresholds for merger control review;
- CRA's By-laws (Presidential Decree 313/18 of 21 December 2018), which formally created the Angolan competition authority: the By-laws were subsequently amended by Presidential Decree 110/19 of 16 April 2019, which eliminated from the By-laws any reference to the CRA's supervision powers over the formation of prices;

- Merger Notification Forms (approved by CRA's Instruction 1/20 of 27 January 2020): this act approves a regular notification form and a simplified notification form;
- Decree Setting the Value of Fees (Executive Decree 32/21 of 1 February 2021), fixing, among other things, the amount of fees due for the notification of concentrations to the CRA;
- Leniency Regulation (approved by CRA's Instruction 7/20 of 25 September 2020), setting the rules governing the reduction of fines granted to whistle-blowers; and
- Complaints Form (approved by CRA's Instruction 8/20 of 25 September 2020).

Despite only recently taking the first steps, the CRA announced that, during 2020, it dealt with eight antitrust investigations and reviewed five concentrations.

Interpretation of Angolan competition law

Angolan competition law seems to draw inspiration from EU competition law as the first source; for example, EU law is the source of the CRA's powers in respect of the grant of state aid measures to companies. It remains to be seen how the rule on this matter will be applied effectively in the absence of a single market objective (as in the European Union).

Portuguese competition law – owing to the cultural and linguistic ties that bind both countries – appears to be the second source of inspiration. From this regime, the Angolan legislator took, for example, the prohibition of economic dependency, and the mixed market share and turnover jurisdictional threshold determining the obligation to notify concentrations.

It is expected that the CRA will consider, to a certain extent, the evolution of EU and Portuguese decisional practice and case law when enforcing competition rules. Nevertheless, there is still a significant degree of uncertainty regarding its application to specific cases, not only because of a few unclear provisions of the Competition Act and the Competition Regulation, but also in view of the fact that, in other domains, the Angolan legal system has shown a strong resolve in developing in an autonomous – and often creative – manner.

The Angolan legislator seems also to have drawn inspiration from the Mozambican competition legal regime; for instance, both those legal systems establish:

- a presumption that companies holding a market share of at least 50 per cent have a dominant position;
- the possibility that certain restrictive agreements may be exempted by decision of the competition authorities for a certain period; and

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

Finally, it is conceivable that the CRA will follow in the steps of other competition enforcers in Africa and start prosecuting undertakings for facts that took place before its establishment. It is, therefore, advisable for companies operating in Angola, wishing to guarantee compliance, to carry out a self-assessment of their commercial practices and thoroughly analyse future initiatives that might affect competition in the country.

Authority's organisational structure

Presidential Decree 313/18, of 21 December 2018, creating the CRA and approving its By-laws, entrusts the CRA with regulatory, supervisory and sanctioning powers. Approximately a month after the publication of the Decree, the leaders of the CRA were appointed by the president, and since then the CRA has all the conditions to enforce the competition regime.

The CRA is composed of two bodies: the board of directors and the supervisory board.

The board is the decision-making body, determining the opening and closing of cases. Its president has the power to appoint and dismiss the heads of the directorates. Eugénia Pereira was appointed for a three-year (renewable) mandate as president of the board. Eugénia Pereira started her career at KMPG Africa, having later worked at Unitel, the largest telecommunications company in the country. Later, she was deputy director general of the Prices and Competition Institute (an entity from which the CRA inherited both ongoing cases and personnel, now extinct). The two other members of the current CRA board are Ana Zulmira Ramalheira and Nelson Lembe.

Similar to the board of directors, the supervisory board is composed of a president and two other members, appointed by the government for a three-year (renewable) term. The supervisory board is in charge of ensuring compliance and supervising all management in matters of a financial or economic nature.

Pursuant to the By-laws, the CRA is a public agency enjoying both administrative and financial autonomy. At the same time, a few provisions raise doubts on the genuine independence of the CRA in relation to the Angolan administration. In particular, the By-laws declare that any omissions, and any doubts regarding the interpretations, of the By-laws are to be solved by the Angolan president; and the CRA 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 exercise of disciplinary powers over CRA's board members.

The Competition Act and the By-laws 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 has five executive directorates, which are responsible, among other things, for investigating and fining companies for infringements of the Competition Act and Regulation, reviewing merger transactions and representing the CRA in appeal courts:

- 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 headquarters are located in Luanda, although the law provides for the possibility of provincial branches being established throughout the Angolan territory. The main office of the CRA has a staff of approximately 100 officials, most of whom previously worked at the Prices and Competition Institute (the CRA's predecessor).

Finally, the CRA has an online presence. According to its By-laws, the CRA is obliged to publish on its website all the information it considers relevant, including non-confidential versions of its decisions and economic studies; however, at the time of writing, few decisions – which would definitely play a crucial part in enlightening companies and other stakeholders on how the CRA interprets certain norms, to the benefit of legal certainty – have been made available online.

Prohibition of anticompetitive agreements

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

The provisions of articles 12(2) and 13(2) of the Act are nothing short of puzzling in what concerns the enforcement of the prohibition of anticompetitive arrangements between undertakings. According to those norms, undertakings are charged with showing that their behaviour does not unlawfully restrict competition, rather

than the CRA having to prove the existence of wrongdoing. The fact that the burden of proving compliance appears to fall on the undertakings being investigated seems to be a direct clash with the principle of presumption of innocence enshrined in the Constitution. It remains to be seen how this contradiction will play out in future cases.

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

To obtain an exemption, undertakings must submit a request for prior assessment by the CRA. Exemptions may be granted for a limited period if the undertaking is able to demonstrate successfully that it fulfils four cumulative conditions (similar to those provided in article 101(3) of the Treaty on the Functioning of the European Union):

- 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 benefit 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.

Any person or company that is aware of the existence of competition wrongdoing may submit a complaint to the CRA. The information must be filled out in the form approved by CRA's Instruction 8/20 of 25 September 2020 and may be submitted electronically to the CRA. The CRA ensures the anonymity of complainants and that the content of the complaint is regarded as confidential. If the CRA decides to open a formal investigation, or to close an investigation initiated following a complaint, it informs the complainant and grants him or her a reasonable period to submit any observations.

Article 25 of the Competition Regulation empowers the CRA to adopt and publish a leniency regime, and in 2020 the CRA did just that, approving the Leniency Regulation (CRA's Instruction 7/20 of 25 September 2020). The application of this regime is 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.

As in Mozambique, total immunity from fines is off the table, even for the first undertaking blowing the whistle. The first company may be granted a fine reduction of between 50 and 70 per cent, the second a fine reduction of between 30 and 50 per cent and the third a fine reduction of between 10 and 30 per cent.

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

Prohibition of abuse of dominance

The Competition Act also prohibits the abuse of dominant position (eg, refusal of access to essential facilities, breaking a commercial relationship in an unjustified manner and selling at a cost without a legitimate justification).

The Competition Act considers an undertaking to hold a dominant position if 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 of less than 50 per cent could still be considered to hold a dominant position.

In practical terms, if the criteria are fulfilled, there is a rebuttable presumption that the undertaking holds a dominant position, and the burden is on the undertaking to prove otherwise. Accordingly, undertakings that find themselves close to the 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 that trading partner has no 'equivalent alternative' to the undertaking's services to obtain or distribute certain goods.

Merger control review

The Competition Act and Regulation put forward a merger control regime similar to those in force in the European Union. In 2020 – the year it published its merger notification forms – the CRA reviewed a total of five transactions.

Prior notification and standstill requirements

Certain concentrations between undertakings (ie, mergers, acquisitions of control and the creation of joint ventures) will be caught by the prior notification requirement in Angola, in which case they must be approved by the CRA before being implemented. Minority shareholdings may amount to a concentration if it allows the possibility to exercise decisive influence over the target company.

Pursuant to the Competition Act, violation of the prior notification requirement may be sanctioned with a fine of between 1 per cent and 5 per cent of the undertaking's annual turnover, and an infringement of the standstill obligation may be subject to a fine of between 1 per cent and 10 per cent of the undertaking's annual turnover.

It appears, therefore, that a company implementing a transaction that is subject to clearance by the CRA without first notifying the CRA may be punished by the imposition of two fines, the combined amount of which can be as much as 15 per cent of turnover; if there is notification but implementation before clearance, then the sanction may be only one fine of up to 10 per cent.

Jurisdictional thresholds

Pursuant to the Competition Regulation, concentrations are subject to prior notification to the CRA when they fulfil one of the following conditions:

1 as a consequence of the concentration, a market share of at least 50 per cent in the domestic market of a specific product or service, or a substantial part of it, is acquired, created or reinforced;
2 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 that turnover; or
3 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 that turnover.

In view of the low turnover thresholds in Angola (particularly the threshold in point (3)), 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.

However, even if a concentration does not meet any of the above-mentioned thresholds for mandatory filing, it may still have to make a notification if the CRA so decides. This is one of the most striking aspects of the Angolan merger control regime. Whenever it deems that a transaction might significantly restrict competition, the CRA is entitled to request the parties to notify it. The procedure in this case is simplified (it concludes with a Phase I decision, in principle), although in the end nothing will prevent the CRA from deciding to prohibit a transaction.

The CRA is generally open to pre-notification contacts with the undertakings concerned to discuss jurisdiction matters, including the exact delimitation of relevant markets (for the purposes of knowing whether the market share threshold is met) and whether a transaction may be deemed to prima facie restrict competition in the market (and have to be notified to the CRA, pursuant to article 15 of the Competition Regulation, even though it does not meet any of the jurisdictional thresholds).

Notifications must be submitted using the regular or simplified notification forms approved by CRA Instruction 1/20 of 27 January 2020. The regular form, more demanding in terms of the information and data required, is to be used for notification purposes whenever the concentration meets any of the above-mentioned thresholds. The less burdensome, simplified form is used to notify only those transactions that, although not meeting any of the Angolan jurisdictional thresholds, are to be notified pursuant to a request of the CRA.

This is an unfortunate decision by the CRA, since it obliges parties to a concentration that does not originate competition concerns (eg, because the parties' economic activities do not overlap or the increment in market share is below 5 per cent) to spend a considerable amount of time and resources gathering needless information and data. This unnecessary inconvenience could be avoided by creating a true 'simplified procedure' for unproblematic concentrations that meet one of the thresholds set by the Competition Regulation.

The notification of concentrations to the CRA is subject to the payment of a fee, the amount of which is set in Executive Decree 32/21 of 1 February 2021, and will vary depending on the turnover of the undertakings concerned:

- 2,418,944.15 kwanzas, if turnover exceeds 450 million kwanzas; or
- 3,627,916.96 kwanzas, if turnover exceeds 3.5 billion kwanzas.

Substantive test and procedure

The aim of the substantive test of Angolan merger control is determining whether a transaction is likely to lead to the creation or reinforcement of a dominant position capable of hindering competition in the domestic market or a substantial part of it. Public interest criteria are also taken into consideration by the CRA, such as the effect of a concentration on:

- a specific region or economic sector;
- the 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 has a very wide margin of discretion to assess mergers in light of fluid criteria comprising economic, social and historical factors, including an explicit nod to the creation of national champions.

In April 2020, the CRA approved the Guidelines on the Analysis of Questions of Concentration Notification Forms, aimed at providing companies with a few important directives and clarifications regarding, among other things, the merger control procedure, the meaning of certain terms used in the notification forms and the substantive analysis to be carried out by the CRA.

In terms of procedure, the Angolan regime provides for an investigation divided into Phase I (lasting up to 120 days) and, when deemed necessary, Phase II (which may last for up to 180 days). The average review period of the CRA in 2020 was approximately 96 days. The clock can be stopped for as long as the CRA considers necessary, in the event that remedies are submitted by the parties. If a final decision was not adopted at the end of the statutory time limit, the concentration will be deemed tacitly cleared by the CRA.

The Authority's investigative powers

The CRA has investigative powers that are typical of competition watchdogs, including those to:

- carry out unannounced inspections at the premises of undertakings or associations of undertakings;
- examine, copy and seize documents;
- question legal representatives of undertakings or associations of undertakings, or any other person;

- request from legal representatives of the undertaking or association of undertakings, or any other person, documents and other items of information, if deemed relevant for the progress of the investigation;
- seal off the premises of undertakings where relevant documentation may be located (if authorised by a judicial warrant); or
- request assistance from any service of the public administration, including the police, as might be necessary for the attainment of the CRA's goals.

Article 8(f) of the By-laws provides for the protection of business secrets. In contrast, legal privilege is not yet specifically protected under Angolan competition rules.

Sanctions

As in most jurisdictions, infringements of competition law 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 (eg, abuse of dominance or of economic dependence).

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 the CRA, provide requested information, or are found to have provided false, inaccurate or incomplete information.

In the field of merger control, fines will be applied if the prior notification obligation is infringed (between 1 per cent and 5 per cent of annual turnover) and if the standstill obligation is infringed (between 1 per cent and 10 per cent); therefore, a company that does not notify a concentration subject to the prior notification requirement before implementing it may be punished with two fines (a combined total of 15 per cent).

In April 2020, the CRA published guidelines on the determination of the amount of fines (Guidelines on the Application of Fines), which explain how certain circumstances may be factored in when the exact amount of a fine is being determined (eg, the seriousness of the infringement, the degree of participation of the companies, the economic situation of the undertakings, the effects on the market and the potential benefits they may have obtained as a result of the infringement).

Moreover, should the CRA conclude that the infringement is particularly severe, it may also apply ancillary penalties, including publication of the imposition of a fine in the national newspaper with the highest circulation and restrictions on participation in public tenders for up to three years. More striking, however, is the fact that the CRA (like the Mozambique Competition Authority) is entitled to sanction the

spin-off of an undertaking with a transfer of shareholder control, disposal of assets, winding down of activities, or to take any other act or measure that it deems necessary to eliminate the 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. Those 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, does not provide requested information or provides false statements to the CRA during a merger control proceeding.

The CRA's decisions are enforceable titles, which means that the CRA may require its judicial execution if an undertaking fails to comply with them.

Finally, under the terms of article 4(3) of the Competition Act, all decisions from the CRA are subject to judicial review, following the general procedures. No specific procedure for review of competition decisions has been put in place.

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Prior to joining the firm in 2018, he was a partner (2017) and an of counsel (2013–2016) at Cuatrecasas law firm. Between 2002 and 2013, he was a lawyer at VdA's competition and EU practice. His educational qualifications include a law degree from the Portuguese Catholic University, Faculty of Law; an LLM in EC Law from the University of Essex, Department of Law; postgraduate studies in European Competition Law at King's College, University of London and an advanced programme in regulatory economy and competition from the Portuguese Catholic University, Faculty of Economics.

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Before joining the firm in 2017, João was a Blue Book trainee in the competition law team of the European Commission's Legal Service. He also worked in the Brussels office of Cleary Gottlieb Steen & Hamilton LLP, both as a legal consultant and as an associate lawyer.

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Global Competition Review works exclusively with leading competition practitioners in each region, and it is their wealth of experience and knowledge – enabling them not only to explain law and policy, but also to put it into context – that makes this report particularly valuable to anyone doing business in Europe, Africa and the Middle East today.

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ISBN 978-1-83862-584-9