



# EUROPE, MIDDLE EAST AND AFRICA ANTITRUST REVIEW 2023

The 2023 edition of the *Europe, Middle East and Africa Antitrust Review* is part of the Global Competition Review Insight series, which also covers the Americas and Asia-Pacific. Each review delivers specialist intelligence and research designed to help readers – general counsel, government agencies and private practitioners – successfully navigate the world's increasingly complex competition regimes.

GCR 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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# 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 2023* 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 reviews covering the Americas and the Asia-Pacific region, this report provides an unparalleled annual update from competition enforcers and leading practitioners on key developments in both public enforcement and private litigation. In this latest edition, we have significantly expanded coverage of the European Union, with a specific focus on abuse of dominance and article 102 of the TFEU, a deep dive into the intersection between competition law and joint ventures, and analysis of vertical agreements under the new VBER. This features alongside updates from Angola, Cyprus, Denmark, Egypt, France, Germany, Greece, Israel, Switzerland, Turkey, the United Kingdom and Ukraine.

GCR has worked closely with leading competition lawyers and government officials to prepare this report. Their knowledge and experience – and above all their ability to put law and policy into context – are what give it such special value. We are grateful to all the contributors and their firms for their time and commitment.

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](mailto:insight@globalcompetitionreview.com).

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# Angola: a deep dive into the new competition regime

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## IN SUMMARY

This article sums up the Angolan competition regime. Driven by the president in order to establish a functioning market economy, as well as by incentives of the International Monetary Fund, it was introduced in 2018 and has since been complemented by a number of subsequent legal acts. Although the new framework mirrors, to a large extent, Portuguese competition law, it remains to be seen how some of its unclear provisions will be interpreted and effectively implemented by the Competition Regulatory Authority (CRA), which has been operational since 2019.

## DISCUSSION POINTS

- Legislative acts in the Angolan competition framework and the drivers for their approval
- Portuguese law as a source 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 powers 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 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 foundation stone for the adoption of a thorough competition legal regime in Angola was laid down in the middle of 2018, when Parliament issued Law 5/18 of 10 May, approving the Angolan Competition Act (the Competition Act). By the end of 2018, the legal framework was fully in force, and the newly established Competition Regulatory Authority (CRA) was set to enforce it.

Once the legislative framework was in force and the CRA established, the appointment of the CRA board members was the only missing piece. In January 2019, the members of the CRA board were appointed by the Angolan president. Since then, the CRA has been fully operational and is currently a member of the International Competition Network and the Lusophone Competition Network.

Following a profound change in the Angolan government in September 2017, with current President João Lourenço replacing former President José Eduardo dos Santos (who had been in the position for 38 years), new economic policies aimed at restoring Angolan macroeconomic stability, improving the business environment and incentivising investments started being implemented.

As monopolies and oligopolies were dominating key industries, João Lourenço prioritised adopting 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'.

Furthermore, the legal reforms also intended to align the national legal and regulatory frameworks with international standards, and with the requirements laid down by the International Monetary Fund for the granting of a US\$3.7 billion credit facility announced in December 2018.

Currently, the main legal acts composing the Angolan competition framework are as follows:

- Competition Act (approved by Law 5/18, published on 10 May 2018), providing for the prohibition of practices restrictive of competition (horizontal or vertical), abuse of dominant position and abuse of economic dependence; a merger control procedure; and a state aid framework;
- Competition Regulation (approved by Decree 240/18 of 12 October 2018), which complements the Competition Act by setting, inter alia, procedural rules of antitrust investigations and the relevant jurisdictional thresholds for merger control review;
- CRA 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 supervisory powers over the formation of prices;





- Merger Notification Form (approved by CRA 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 Instruction 7/20 of 25 September 2020), setting the rules governing the reduction of fines granted to whistle-blowers;
- Complaints Form (approved by CRA Instruction 8/20 of 25 September 2020); and
- Fees Regulation (approved by CRA Executive Decree 32/21 of 1 February 2021).

## Interpretation of Angolan competition law

Angolan Competition Law appears to have Portuguese competition law as its key source of inspiration, mainly due to the cultural, linguistic and historical ties between Portugal and Angola. For instance, similar to the Portuguese framework, the Angolan legislator provided for the prohibition of economic dependency, and a mixed market share and turnover threshold determining the obligation to notify concentrations. Furthermore, the Angola-approved notification form for operations of concentration is very similar to the Portuguese one.

EU competition law also appears to be a source of inspiration for Angolan competition law. For example, EU law is the source of the Competition Act provisions regarding the granting of state aids. It is, however, still unclear how this legal framework will be interpreted and applied in the absence of a single market policy.

The CRA is expected to consider the evolution of Portuguese and EU decisional practice and case law when applying competition rules. Nevertheless, Angolan legislation and enforcement will certainly have its autonomous development and outcomes, as a result of Angolan culture and the evolution of its economy and legal system.

The Angolan legislator seems to have drawn inspiration from Mozambican competition law as well; for instance, both legal systems establish:

- a presumption according to which undertakings holding a market share equal to or greater than 50 per cent have a dominant position;
- the possibility of certain restrictive agreements being temporarily exempted by decision of the competition authorities; and
- a concentration not meeting any of the jurisdictional thresholds may need to be nevertheless notified upon request of the competition authorities.



Finally, the CRA might follow the steps of other African competition authorities and start investigating and sanctioning undertakings for facts that occurred prior to its establishment. Therefore, it is advisable for companies active in the Angolan market to carry out a self-assessment on their commercial practices and thoroughly analyse planned initiatives that might affect competition.

## **CRA organisational structure**

Presidential Decree 313/18 of 21 December 2018, establishing the CRA and approving its by-laws, entrusts the competition authority with regulatory, supervisory and sanctioning functions. Circa one month after the publication of the by-laws, the board members of the CRA were appointed by the Angolan President, and since then, the CRA has had the tools to duly enforce competition law in Angola.

The CRA headquarters are located in Luanda. The law also provides for the possibility of establishing provincial delegations across the Angolan territory.

The CRA is composed of the board of directors and the supervisory board, each with three members. The board of directors decides on the opening and closure of proceedings. The supervisory board is responsible for ensuring compliance and monitoring the management of affairs of a financial or economic nature.

The board members of the CRA are appointed by the President of the Republic. Ms Eugénia Pereira was appointed for a three-year renewable mandate as president of the board in 2019. Ms Ana Ramalheira and Mr Nelson Lembe are currently the two remaining members of the board of directors.

The CRA is established as a public entity with administrative and financial autonomy. However, some provisions cast doubt on the independence of the CRA in relation to the Angolan government. Most notably, the by-laws provide that omissions and doubts on the interpretation of the by-laws shall be resolved by the President of Republic. The CRA is under the supervision of the President through the Ministry of Finance, which encompasses the power to appoint members of the board, set objectives and priorities for the CRA, as well as exercise disciplinary power over the members of the board.

The CRA has five executive departments that are responsible, inter alia, for investigating and sanctioning companies for antitrust infringements, reviewing concentrations and representing the CRA in Angolan courts:

- the Department for Investigation of Restrictive Practices;
- the Merger Control Department;
- the Department for Studies and Market Monitoring;
- the State Aid Department; and



- the Legal and Litigation Department.

The CRA has an online presence, with an official website and very active social networks (most notably, LinkedIn). According to its by-laws, the CRA shall publish all the information it finds relevant on its website, including non-confidential versions of its decisions and economic studies. There is still, however, poor access to information and enforcement, which could play a key role in increasing clarity on how the CRA interprets certain norms, and ultimately enhance legal certainty.

## **Prohibition of anticompetitive agreements**

The Competition Act and Competition Regulation prohibit agreements between undertakings, concerted practices and decisions by associations of undertakings of a horizontal (eg, price-fixing and market-sharing) and vertical (eg, resale price maintenance and exclusivity agreements) nature, as long as they restrict, by object or effect, competition in the Angolan market.

The Competition Act provides for an unusual and surprising reversion of the burden of proof, it being up to undertakings to prove that their behaviour does not restrict competition. It is still to be seen how the CRA will apply this provision in practice, and how the CRA will balance it with the principle of presumption of innocence laid down in the Angolan Constitution.

Like many competition law systems, the Competition Act provides that anticompetitive agreements may benefit from an ex ante exemption granted by the CRA. This does not appear to apply to other categories of competition infringements, such as abuse of dominant position or abuse of economic dependence.

To benefit from an exemption, undertakings must submit a request to the CRA for a prior assessment, and demonstrate that the following four conditions are met (like 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 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.



Whenever strong evidence of a restrictive practice is brought to the CRA's attention, it is obliged to initiate an investigation procedure. Pursuant to the Competition Regulation, an antitrust investigation procedure should be closed within 24 months from its opening. The CRA has 12 months from the adoption of the statement of objections to complete the investigation. Concerned companies have 20 business days to reply to the statement of objections.

The Competition Regulation allows the CRA to adopt and regulate a leniency framework, which the CRA did in December 2020, approving the Leniency Regulation (CRA Instruction 7/20 of 25 September 2020). Similar to the Portuguese and European programmes, the Angolan leniency programme is applicable to undertakings and individuals, as long as:

- their collaboration results in the identification of other participants of the infringement or in the collection of information and documents proving the infringement under investigation;
- the CRA does not have enough evidence for imposing a fine;
- the undertaking admits 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, full fine immunity is not granted. The first company may benefit from 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 provide for the possibility of settling antitrust cases.

## **Prohibition of abuse of dominance**

The Competition Act also prohibits abuse of dominant position (including refusal of access to essential facilities, breaking a commercial relationship in an unjustified manner and selling products below cost).

An undertaking is considered to have dominant position where it does not face significant competitive pressure or where it holds a prominent position in the market with regard to its competitors. The Competition Regulation establishes a presumption according to which an undertaking holding a market share equal to or greater than 50 per cent is regarded as enjoying a dominant position. If the market has significant entry barriers, undertakings holding a market share smaller than 50 per cent could nevertheless be considered to have a dominant position.



This means that, if the above criteria are met, there is a rebuttable presumption that the undertaking holds a dominant position, and the burden to prove otherwise falls on the undertaking. Accordingly, undertakings finding themselves close to the said threshold should prudently assess the impact of their commercial conduct in Angolan territory.

The Competition Act also provides for a prohibition of abuse of economic dependence (also known as relative dominance) of a commercial partner. This consists of 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 services to obtain or distribute certain goods.

## **Merger control review**

The Competition Act and Regulation provide a merger control framework resembling the one in force in Portugal. In 2020 (the year it published its merger notification forms), the CRA reviewed a total of five transactions, and in 2021 a total of six transactions.

## **Prior notification and standstill requirements**

Concentrations between undertakings that meet the notification thresholds provided for in the Competition Regulation (see below) are subject to CRA review prior to being implemented. A minority shareholding acquisition may constitute a concentration as long as it allows the acquiring company to exercise decisive influence over the target.

Pursuant to the Competition Act, the infringement of the prior notification obligation may be subject to a fine ranging from 1 to 5 per cent of the undertaking annual turnover, and a breach of the standstill obligation may be sanctioned with a fine ranging from 1 to 10 per cent of its annual turnover.

Therefore, a company implementing a transaction subject to CRA prior review without first notifying it may be punished with two fines, the combined amount of which can total 15 per cent of turnover. If a company notifies the concentration, but implements it prior to obtaining the clearance, the sanction may be only one fine of up to 10 per cent.

## **Jurisdictional thresholds**

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



1. as result of the concentration, a market share equal to or greater than 50 per cent of the domestic market in a specific product or service, or in a substantial part of it, is acquired, created or reinforced;
2. as a result of the concentration, a market share equal to or greater than 30 per cent but smaller than 50 per cent of the domestic market in a specific product or service, or in a substantial part of it, is acquired, created or reinforced, and the individual turnover of at least two of the undertakings involved in the concentration in Angola, in the previous financial year, is greater than 450 million kwanzas, net of taxes directly related to that turnover; or
3. the undertakings involved in the concentration have 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 light of the low turnover thresholds (most notably, the turnover threshold in point (3)), undertakings with negligible business activities in Angola may be covered by the obligation to submit a notification to the CRA before implementing the respective transaction.

However, if a concentration does not meet any of the above thresholds, a notification may be nonetheless required upon request of the CRA. Indeed, whenever it deems that a transaction might significantly restrict competition, the CRA is empowered to request the parties to notify it. In this case, the procedure is simplified (it concludes with a Phase I decision, in principle), although in the end nothing refrains the CRA from prohibiting the transaction.

The CRA is usually open to informal pre-notification discussions with undertakings intending to clarify jurisdictional matters, such as the relevant turnover to be considered and the exact delimitation of relevant markets (for the purposes of knowing whether the turnover or market share thresholds are met), as well as whether a transaction may be deemed to *prima facie* restrict competition in the market (and have to be notified to the CRA upon request even though it does not meet any of the jurisdictional thresholds).

Notifications must be submitted using the regular or simplified notification forms approved by the CRA Merger Notification Form. The regular form, which requires a larger amount of data and information, is to be used where the concentration meets any of the above-mentioned thresholds. The simplified form is used only to notify the transactions that, despite not fulfilling any of the jurisdictional thresholds, should be notified pursuant to a request of the CRA.

This solution has attracted some critics as it forces parties to a concentration that does not result in competition concerns (eg, because the parties' activities do not overlap or the market share increment is below 5 per cent) to spend resources collecting unnecessary information and data. Calls for the implementation of a 'simplified procedure' for unproblematic concentrations meeting one of the thresholds provided by the Competition Regulation have been heard.



A filing fee is due for the notification of concentrations to the CRA. The amount is set in Executive Decree 32/21 of 1 February 2021, and depends 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 substantive test of Angolan merger review is intended at determining whether a concentration is likely to create or reinforce a dominant position that might result in a significant impediment to effective competition in the domestic market or a substantial part of it. Unlike most EU merger control frameworks, Angolan law allows the CRA to take public interest reasons into consideration, such as the effect of a concentration on:

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

This means that the Competition Act confers on the CRA a wide margin of discretion to assess mergers in view of open criteria, encompassing economic, social and historical factors, including a nod to the promotion of national champions.

The CRA has been quite active in approving soft-law instruments with regard to merger control procedures. Indeed, in April 2020, the CRA approved the Guidelines on the Analysis of Questions of Concentration Notification Forms, aimed at providing companies with directives and clarifications regarding, inter alia, 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 August 2020, it approved the Guidelines on the Adoption of Commitments in Merger Control Procedures, aimed at providing general information on the procedures for the adoption of commitments.

In terms of procedure, the Angolan framework established an investigation divided into Phase I (which may last up to 120 days) and, when an in-depth investigation is necessary, Phase II (lasting up to 180 days). The average review period of the CRA in 2021 was around 90 days. The clock can be stopped for as long as the CRA considers necessary, if remedies are submitted by the parties. If a final decision is not adopted within the above-mentioned deadlines, the concentration is considered to be tacitly approved.



## The CRA investigation powers

The Competition Act grants the CRA a wide range of investigation powers, including to:

- carry out searches 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 to the progress of the investigation;
- seal off the premises of undertakings where there may be relevant documentation (if ordered by a judicial warrant); and
- request assistance from any service that is part of the public administration, including the police, as might be necessary for the fulfilment of the CRA functions.

Article 8(f) of the by-laws provides for the protection of business secrets. Legal privilege is not yet specifically protected under Angolan competition rules.

## Sanctions

Undertakings infringing Angolan competition law may be subject to severe penalties, including fines ranging from 1 to 10 per cent of the concerned undertaking annual turnover.

Furthermore, should they refuse to cooperate with the CRA, provide requested information or are found to have provided false, inaccurate or incomplete information, undertakings are subject to fines from 1 to 5 per cent of their annual turnover.

In merger control procedures, fines will be applied if the prior notification obligation is infringed (from 1 to 5 per cent of annual turnover), as well as if the standstill obligation is infringed (from 1 to 10 per cent). This means that an undertaking infringing its obligation to notify a concentration subject to the prior notification requirement before implementing it may be punished with two fines, which may amount to a total of 15 per cent.

In April 2020, the CRA published guidelines on the determination of the amount of fines (the Guidelines on the Application of Fines), which explain how certain circumstances may be factored in when the exact amount of a fine is determined (eg, the severity of the infringement, the company's degree of participation,





the economic situation of the undertakings, the effects on the market and the benefits they may have obtained from the infringement).

Furthermore, if the CRA finds that the severity of the infringement or public interest reasons justify it, it may also impose ancillary penalties, such as the publication of the application of a sanction in the national newspaper with the widest circulation at the expense of the infringing company and the prohibition of the participation in public tenders for up to three years. In this regard, it should be highlighted that the CRA is also empowered 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 CRA may also impose periodic penalty payments of up to 10 per cent of the concerned undertaking's average daily turnover when objectively necessary, in the following cases:

- the undertaking fails to comply with a decision imposing sanctions or ordering the adoption of specific measures; or
- the undertaking does not provide requested information or provides false information to the CRA during a merger control procedure.

CRA decisions are enforceable instruments, meaning that the CRA can require their judicial execution if an undertaking fails to comply with them.

Lastly, the Competition Act provides that all CRA decisions are subject to judicial review. No specific procedure for review of competition decisions has been put in force, and thus it shall follow the general applicable rules.



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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



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Ricardo was awarded Lawyer of the Year by Best Lawyers – European Competition Law (Lisbon) in 2021 and European Union Law (Lisbon) in 2020 and a Clients Choice Award from International Law Office in competition and antitrust in 2019.

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