



The European, Middle Eastern and African Antitrust Review 2018

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Global Competition Review is delighted to publish 2018 edition of *The European, Middle Eastern & African Antitrust Review*, one of a series of three special reports that have been conceived to deliver specialist intelligence and research to our readers – general counsel, government agencies and private practice lawyers – who must navigate the world’s increasingly complex competition regimes.

Like its sister reports, *The Antitrust Review of the Americas* and *The Asia-Pacific Antitrust Review*, *The European, Middle Eastern & African Antitrust Review* provides an unparalleled annual update, from competition enforcers and leading practitioners, on key developments in the field.

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 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.

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Mozambique: Overview

Miguel Mendes Pereira and Pedro Saraiva
Vieira de Almeida & Associados

Mozambique remains en route, albeit at a slow pace, to a comprehensive enforcement of competition rules. It bears emphasis that competition law and policy is still a novelty in the country as it was first addressed only 10 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 putting in place the Competition Act (Decree 97/2014 of 31 December) and the Statutes 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 of the linguistic and historic ties between the two countries, and also 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 fees.

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. The MoU intends to serve as groundwork for closer cooperation between national watchdogs in order 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 clearly shows that competition policy was not totally sidelined within the country's busy political and economic agenda.

Despite being in force as a matter of law, in practice Mozambique's Competition Act is still to be applied as the MCA is yet to become operational and 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, public information indicates that it will soon be fully operational. Once the board members are appointed, in principle no obstacles remain for the MCA to operate. In fact, Mozambique already secured an amount of close to 10 million meticais from USAID for hiring and training 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 their practices producing effects in Mozambique.

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 is to carry out thorough self-assessment exercises in regard to their commercial practices and to judiciously analyse future steps with potential impact on competition.

Institutional framework

The statutes of the Mozambican Competition Authority (the statutes) 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 typical of competition watchdogs, including the power to interview the legal representatives of companies involved in a suspected breach of competition law, to request documents and other items of information, to carry out searches (dawn raids), examinations and seizure of documents in the premises of companies and to seal-off the premises of undertakings.

MCA's decision-making body is the board, composed of the president and four other members, appointed by the government for five-year terms (renewable solely once). However, day-to-day activities will likely be in the hands of the directorate-general, its investigation branch. Led by a director-general appointed by the president of the board, the directorate-general will comprise a number of departments, including the mergers and market monitoring department, the antitrust department and the economic studies department.

Soon after their adoption, the statutes were amended by Decree 96/2014 of 31 December. The amendment aimed at increasing the independence of the MCA by means of clarifying its financing mechanisms. It was set that the MCA would receive 5% 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 parliament. The MCA is also due to publish, on an annual basis, its enforcement priorities.

Until the Mozambican government appoints the members of the MCA's board, the main question facing practitioners consists in second-guessing how exactly the MCA will apply 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 rely to a large extent on the decisional practice of the Portuguese Competition Authority rather than on that of its Southern 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, as in August 2010 they signed a protocol of technical cooperation in 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 anti-competitive 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 to refuse 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%. However, should the market have strong barriers to entry, undertakings holding a market share below 50% 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 in order to obtain or to distribute a certain good.

Like many competition law systems (most notoriously that of the EU until 2004), the Competition Act allows for temporary exemptions from the prohibition of the anticompetitive practices. However, practices deemed 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 if the undertaking is able to successfully demonstrate that:

- the objective of the practices 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.

In accordance with Decree no. 79/2015 of 5 June, exemptions are subject to an annual fee of 150,000 meticaais, on top of the fee of 200,000 meticaais 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 this kind of service.

Merger Control

The Competition Act and the Regulation put forward a merger control regime similar to those in force in the Europe Union and provide for mandatory filing should the thresholds be met.

Concentrations between undertakings (ie, mergers, acquisition of control and creation of fully functioning 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% of the domestic market in 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% but lower than 50% of the domestic market in a specific product or service, or in a substantial part of it, is acquired, created or reinforced in the case where the individual turnover in Mozambique in the previous financial year, by at least two of the undertakings involved in the concentration, is higher than 100 million meticaais, 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 meticaais, net of taxes directly related to such turnover.

In view of the low thresholds as regards the parties' turnover in Mozambique (particularly as concerns the last criteria in the above list), undertakings with limited or occasional business activities in Mozambique may easily be caught by the obligation to file transactions with the MCA.

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 the MCA with the requested information); submission of remedies by the parties (which stop 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 during which 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 EU 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 on 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, set the merger filing fee at 5% 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. Thus, 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% 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 in the latter case may be lower than the actual filing fee.

Undertakings are further liable to fines of up to 1% 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 its completion is also punishable with a fine of up to 1% 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 participate 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 which 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% of their average daily turnover. Such measure shall only be applied if objectively necessary and in cases where an undertaking either: fails to comply with a decision imposing either sanctions or the adoption of specific measures; or does not provide, or provides false statements, to the MCA during a merger control proceeding.

It should be noted that the MCA's decisions are enforceable titles. Accordingly, should an undertaking fail to comply with the decision within the deadline set, the MCA will be free to require the decision's enforcement before the Tax Enforcement Court.

Judicial review

Pursuant to article 45 of its Statutes, the MCA's decisions are subject to judicial review. Decisions including the application of 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 jurisdictions elsewhere in Africa demonstrates that newly created competition authorities often start investigations on undertakings for practices occurred prior to their own operationalisation. For a reason or another, the MCA may well choose to follow such approach. Accordingly, companies should carefully plan their future practices with impacts on 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, i.e. 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 statutes of the Mozambican Lawyers Bar Association (approved by Law 28/2009 of 29 September) establish 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 lawyer's 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 by the end of 2017. 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 and/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 than what it seems at first sight. However, for undertakings to be able to advocate the protection of their communications with their lawyers, a thorough communications plan must be set in advance by a lawyer experienced in Mozambican law. Hence, undertakings seeking to assess and/or ensure the compliance of their business practices with antitrust rules, must engage with a lawyer not only for the substantive analysis of the acts at stake, but also to accurately structure how client-attorney communication is to occur.



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His work has also been recognised by the most important international rankings, including *Chambers Europe*, *The Legal 500* and *Who's Who Legal*, in all of which Miguel Mendes Pereira appears as a leading and recommended lawyer.



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VdA has been named on the *Financial Times* lists of Game-Changing Law Firms in Continental Europe (2015) and Innovative Lawyers in Continental Europe (2013 and 2016). It was also named the Most Active Law Firm by Euronext (for six consecutive years); Portuguese Law Firm of the Year by *IFLR* (2015 and 2016); Portuguese Law Firm of the Year (2016) and Client Service Law Firm of the Year (2017) by *Chambers & Partners*; Iberian Firm of the Year (2017) by *The Lawyer*; and International Firm of the Year (2017) by *Legal Business*.

The competition practice of VdA comprises two partners and eight associates. Its track record includes the successful defence of Portugal Telecom in all the abuse of dominance cases argued before the Competition Authority and the 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 and banking are among the industries in which clients work with VdA on a daily basis. The practice has invariably been commended by colleagues and clients over the years.

VdA, through its VdA Legal Partners network is actively present in 11 jurisdictions that include all Portuguese-speaking African countries, as well as East Timor and a number of French-speaking African countries. The full list comprises Angola, Cape Verde, Congo, Democratic Republic of the Congo, East-Timor, Equatorial Guinea, Gabon, Guinea-Bissau, Mozambique, Portugal, and São Tomé and Príncipe.



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