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AFRICA GUIDE – COMPETITION

Introduction

This guide answers frequently asked questions relating to the competition law regimes in various African jurisdictions.

It has been prepared by competition law specialists in our Kenyan, Madagascan, South African, Tanzanian and Ugandan offices in collaboration with our best friend firms in a number of other African countries.

This chapter covers competition law in Mozambique.

RECENT AFRICAN COMPETITION LAW DEVELOPMENTS

Competition law in Africa is becoming increasingly active and, in certain respects, complex. The number of competition regimes, and the relationships among them, is on the increase.

Over the past 18 months, more than 10 memoranda of understanding (MoUs) have been signed by 25 competition regulators in Africa and BRICS, to facilitate the cooperation among competition regimes on issues of competition policy and enforcement. Regular contact among competition agencies occurs and in some instances, dedicated desk officers coordinate communication.

Competition regulatory development in Africa is ongoing. During the past year, various authorities have introduced new or amended competition laws, regulations, guidelines and/ or policies. These include:

- Common Market for Eastern and Southern Africa (COMESA) – draft guidelines on restrictive practices and abuse of dominance
- Egypt – new regulations
- Kenya – Competition Amendment Bill and draft exemption fee guidelines
- Morocco – new competition law
- Namibia – thresholds and restrictive practices guidelines
- Nigeria – two separate competition bills and a draft Companies and Allied Matters bill)
- South Africa – certain parts of the Competition Amendment Act and public interest guidelines
- Zambia – merger guidelines; and
- Zimbabwe – draft competition policy.

In some instances, a stricter enforcement of current provisions of existing competition laws has been observed. Two new competition agencies, the Madagascar Competition Council and the Morocco Competition Council, have commenced operations. As at the time of writing, the Mozambique Competition Regulatory Authority is reportedly close to becoming operational.

Both the Kenyan Competition Authority and the Namibian Competition Commission conducted their first dawn raids in 2016. To our knowledge, legislation and/ or policies of 13 competition jurisdictions in Africa now make provision for the granting of corporate leniency for cartel conduct.

The development of regional competition regimes is well on track. In the past year, the COMESA Competition Commission (CCC) has gone from strength to strength. It crossed the 100 merger mark in just over three years. Most of these mergers have occurred in the construction, information, telecommunications and financial services sectors. Conditions have been imposed in certain cases, so as to remedy the CCC's concerns in respect of competition and/ or public interest outcomes resulting from transactions.

The CCC has started to put in place measures for the consideration of conduct cases. Among others, the CCC 'workshopped' a number of draft guidelines with regulators and practitioners in Africa in 2016 and Bowmans was privileged to be part

of the workshop held in Cairo. Also during 2016, the CCC engaged actively with member and non-member states on the development of a common approach to competition law enforcement by judges and other decision-makers, based on the COMESA Treaty and global competition statutes.

Further, the Competition Authority of the Central African Monetary and Economic Community (CEMAC) (headquartered in Bangui, Central African Republic) has started to accept merger filings.

The *ad hoc* Competition Authority of the East African Community (EAC) (headquartered in Arusha, Tanzania) has been established and commissioners have been appointed. An MoU has been entered into and signed by 10 of the 15 competition authorities of the South African Development Community.

The consideration of mergers from both a competition and public interest perspective is becoming increasingly prevalent in Africa, with the recognition of the relationship between competition, trade and economic growth gaining traction across the continent.

Mozambique

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1. What is the relevant competition legislation and who are the enforcers?

The main piece of competition law legislation is Law 10/2013 of 11 April 2013 (the Competition Law). Further implementing rules are contained in the Competition Law Regulation, approved by Decree-Law 97/2014, of 31 December 2014.

Ministerial Diploma 79/2014, of 5 June 2014, establishes the fees applicable, in particular, to merger control notifications and requests for exemption of restrictive agreements.
The administrative authority with exclusive jurisdiction to enforce the Competition Law is the Autoridade Reguladora da Concorrência (Competition Regulatory Authority; the Authority), an independent entity endowed with administrative and financial autonomy and broad supervisory, regulatory, investigatory and sanctioning powers. The Statute of the Authority was approved by Decree 37/2014, of 1 August 2014.

2. Are there any proposed amendments or new regulations expected to come into force?

The Competition Law foresees that a number of implementing regulations are to be approved (eg setting out the applicable forms to submit merger control notifications and establishing a leniency programme), but no drafts or proposals are publicly available.

3. Is the law actively enforced?

The Authority is not yet operational, but it is expected to become so in the near future. Since the Authority has exclusive jurisdiction to enforce the Competition Law, the prohibitions of anti-competitive conduct and the merger control provisions of the Competition Law are not yet applicable in practice.

4. What are the current priorities or focus areas of the competition authorities?

N/A.

5. What kind of transaction constitutes a notifiable merger?

The Competition Law applies to transactions that (i) are considered to be 'concentrations between undertakings' and (ii) meet the jurisdictional thresholds.

The following operations are deemed to constitute a 'concentration between undertakings':

- a merger between two or more hitherto independent undertakings;
- the acquisition of control, by one or more undertakings, over other undertaking(s) or part(s) of other undertakings; and
- the creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity (full-function joint venture).

The concept of 'undertaking' encompasses all entities conducting an economic activity through the offer of goods and services on the market, regardless of their legal status.

The following exceptions do not constitute a concentration in the meaning of the Act:

- the 'temporary or transitional' acquisition of control over an undertaking;
- the acquisition of shareholdings or assets by an insolvency administrator within insolvency legal proceedings;
- the acquisition of a shareholding merely as a guarantee;
- the temporary acquisition by financial institutions or insurance companies of shareholdings in companies active outside the financial sector, insofar as the securities are acquired with a view to its resale, if the acquirer does not exercise the corresponding voting rights with a view to determine the competitive behaviour of the target (or only exercises them with a view to prepare the sale), and if the disposal of the controlling interest occurs within one year;

- two or more concentrations between the same undertakings in a period of five years that individually do not meet the jurisdictional thresholds. However, if the concentration resulting from the conclusion of the last agreement meets the jurisdictional thresholds, it should be notified to the Authority before closing.

6. What are the thresholds for mandatory merger notification (eg assets, turnover and/ or market share)?

Notification is mandatory whenever the concentration meets at least one of the following thresholds:

- The combined turnover of all the undertakings concerned in Mozambique in the preceding year is equal to or exceeds MZN 900 million;
- The transaction results in the acquisition, creation or reinforcement of a share of, or above 50% of, the national market of a given good or service or in a substantial part thereof;
- The transaction results in the acquisition, creation or reinforcement of a share of, or above 30% of, the national market of a given good or service or in a substantial part thereof, as long as each of at least two of the undertakings concerned achieved in the preceding year a turnover of at least MZN 100 million in Mozambique.

The Competition Law provides that, even when the concentration does not meet the jurisdictional thresholds, the Authority may nevertheless, within six months of it becoming public knowledge, open ex officio an investigation and request the filing of the concentration, in case it is deemed to appreciably impede, distort or restrict competition and does not benefit from a public interest exemption. Parties involved in a non-reportable transaction may voluntarily submit a filing to the Authority, which may well be advisable if there is any chance that the Authority will intervene *ex officio*.

7. Is there a prohibition on the pre-implementation of a merger? If so, does the legislation make provision for a penalty?

A concentration meeting the jurisdictional thresholds is subject to mandatory notification to the Authority within seven working days from the conclusion of the agreement or acquisition project, and cannot be implemented before a non-opposition decision is (expressly or tacitly) adopted by the Competition Authority.

Failure to file a concentration within the statutory deadline subject to prior notification exposes the merging parties to serious negative consequences. In particular:

- the breach of the notification deadline makes the undertakings concerned liable to fines reaching up to 1% of the previous year's turnover for each of the participating undertakings;
- the validity of any legal instrument related to the transaction is dependent upon the express or tacit clearance by the Authority;
- in case the Authority opens an ex officio investigation to the concentration, the statutory decision deadlines do not apply.

The early implementation of a concentration subject to mandatory filing without express or tacit clearance from the Authority, or in breach of a prohibition decision, makes the undertakings concerned liable to fines reaching up to 5% of the previous year's turnover for each of the participating undertakings.

8. What filing fees are required?

Pursuant to Ministerial Decree 79/2014, of 5 June 2014, the effectiveness of the notification is dependent on a payment of a filing fee by the notifying parties of '5% of the turnover of the previous year'.

As the value of the filing fee is significantly higher than the maximum fine for untimely notification (1% of turnover), and equal to the maximum fine applicable for implementation before clearance and to prohibited anti-competitive practices (5% of turnover), it is hoped that this value results from a typing error and will be rectified before the Authority begins operations.

9. Is it necessary to obtain approval for foreign-to-foreign mergers?

Foreign-to-foreign mergers are caught by the Competition Law to the extent that "they have, or may have, effects in the territory of Mozambique". Therefore, foreign-to-foreign mergers may be subject to mandatory filing whenever both parties or the target alone achieve, directly or indirectly,

sales in Mozambique (despite the fact that neither of the undertakings concerned is established in the country), and the jurisdictional thresholds are met.

10. Are pre-notification contacts with the authorities permitted and are pre-notification meetings normal practice?

The Competition Law Regulation provides for confidential and informal pre-notification contacts. As the Authority is not yet operational, there is no indication of whether pre-notification meetings will become standard practice.

11. To what extent are non-competition factors relevant to the assessment of a merger?

In its substantive analysis the Authority is bound to take into account public interest reasons which may justify any impediments or restrictions to competition resulting from the notified concentration. In particular, the Authority's public interest assessment should consider the effect of the transaction over:

- a specific sector or region;
- employment;
- the capacity of small enterprises, or enterprises controlled by historically disfavoured persons, to become competitive; and
- the capability of national industry to compete internationally.

12. Do the authorities contact customers and competitors of the merging parties as part of the merger review process? To what extent are the submissions of customers and competitors influential?

Following publication of a notice of the notification by the Authority in two national newspapers (which should be made within five days of filing), any interested third party may submit comments to the transaction within the deadline established by the Authority, which cannot be less than 15 working days.

Competitors should be also heard when the Authority takes into account non-competition public interest reasons (see question 11).

In addition, prior to the adoption of a final decision in the procedure, the Authority must hold a hearing of the notifying parties, as well as of third parties that have already intervened in the procedure and expressed an adverse opinion to the merger. The hearing suspends the time periods for the adoption of the decision.

13. Who else can make submissions to the authorities when a merger is being considered? Are employees contacted as part of the process and can employees make submissions?

While there is no specific reference in the Competition Law to employees, the Authority can request information from any relevant undertaking or individual. It may also be argued that employees can be considered 'interested third parties' and be allowed to intervene in the procedure (see question 12 above).

14. Are merging parties given an opportunity to make representations before a decision is issued where the authority intends to prohibit a merger or impose conditions?

As mentioned in question 11, prior to the adoption of a final decision in the procedure, the Authority must hold a hearing of the notifying parties, as well as of any interested third parties that have shown to be against the transaction. If no such third parties have come forward and if the decision is an unconditional clearance, the Authority can waive the hearing of the notifying parties.

15. What are the opportunities for judicial appeal or review of a decision in respect of a merger that the parties are dissatisfied with?

All of the Authority's decisions on merger control, either clearing or prohibiting a merger, are subject to judicial review.

The Statute determines that the Competition Regulatory Authority's decisions may be appealed in court, namely to the Judicial Court of the City of Maputo, in the case of procedures leading to the application of fines and other sanctions, and to the Administrative Court, with regard to merger control procedures and requests for exemptions relating to restrictive agreements.

16. Does the legislation apply to joint ventures?

Yes. The creation of, or the acquisition of control over, a jointly controlled undertaking constitutes a 'concentration' whenever the joint undertaking

fulfils the functions of an independent economic entity on a lasting basis (full-function joint venture), and is subject to the merger control rules of the Competition Law if the jurisdictional thresholds are met.

Where the creation of the joint venture has the object or effect of co-ordinating the competitive behaviour of undertakings that remain independent, such co-ordination is assessed under the rules applicable to prohibited agreements and practices (see Articles 15 to 18 of the Competition Law).

17. Does the legislation specifically prohibit cartel conduct? If so, are there examples of the authorities pursuing firms for engaging in cartel conduct?

The Competition Law specifically prohibits, *inter alia*, agreements and concerted practices between competing undertakings resulting in the adoption of a uniform or concerted commercial conduct, in fixing directly or indirectly prices or other business conditions, limiting production or distribution of products and services, and partitioning markets or supply sources.

As mentioned above, the Competition Law prohibitions have not yet been enforced.

18. What are the authorities' powers of investigation in relation to cartel conduct and other prohibited practices?

In the enforcement of its sanctioning and supervisory powers, the Competition Authority is able to interview any relevant persons, request documents, conduct searches and seizures in the premises of the undertakings concerned, and when necessary proceed to the sealing of business premises. Searches and seizures of business premises must be conducted with a warrant of the competent judiciary authority. The Competition Authority may request the assistance of the police force when necessary.

19. What are the penalties for cartel conduct? Is there a leniency policy in place? Does the legislation impose criminal sanctions?

Parties involved in prohibited anti-competitive practices (including cartels, other horizontal and vertical agreements, abuse of dominant position and abuse of economic dependence) are liable for fines of up to 5% of consolidated turnover.

The following ancillary sanctions may also be applied: (i) publication of the sanction in the Official Journal and/ or in a national or local newspaper; (ii) the interdiction of the infringing company to participate in public tenders for a period of five years; and (iii) the breakup of the company, transfer of shareholder control, sale of assets, the partial termination of a business entity, and any other act necessary for the elimination of the harmful effects to competition.

No criminal sanctions are foreseen in the Competition Law.

The Competition Law foresees that a leniency programme is to be established by a regulation of the Authority, but no draft has yet been made public.

20. Is there a provision in the legislation providing for a mechanism to apply for exemption from certain parts of the legislation?

The Competition Law establishes an administrative procedure for the issuance by the Authority of an exemption to the prohibitions in the law. The request for exemption should be submitted by one or more of the undertakings that are party to an agreement, according to a form to be approved by the Authority.

The conditions for exemption are as follows:

(i) The agreement should pursue one of the following objectives:

- contributing to improving the production or distribution of goods and services;
- reducing prices to consumers;
- accelerating economic development;
- incentivising the technological development of Mozambican companies;
- enabling a better allocation of resources;
- promoting national goods or services;
- promoting exports;
- promoting the competitiveness of small- and medium-sized national companies;
- contributing to the consolidation of national companies; and
- promoting the protection of intellectual property;

(ii) The agreement must not eliminate competition or contain restrictions that are not indispensable to the attainment of the relevant public interest objectives above.

Professional associations recognised by the government may also request exemption for its internal rules that have the effect of appreciably restricting competition. The exemption is granted when the rules in question are essential to maintain the 'professional standards' or the 'specificities of the profession'.

21. Is minimum resale price maintenance prohibited?

One of the prohibited vertical restraints expressly listed in the Competition Law is the imposition on distributors of resale prices, discounts, payment conditions, profit margins or any other commercial conditions in their dealings with third parties.

22. In what circumstances are exclusive agreements unlawful? If exclusive agreements raise concerns in specific circumstances, what factors are relevant to their lawfulness or unlawfulness?

Agreements with exclusivity provisions are not expressly prohibited by the Competition Law, but one of the examples of prohibited vertical conduct is the imposition of 'minimum or maximum quantities' on distributors in their purchases of contractual products. This prohibition, given its broad wording, is also likely to cover obligations to purchase all or a certain percentage of the buyer's requirements of such products. Such restrictions may benefit from exemption if all the legal criteria are met.

23. Does the legislation prohibit the abuse of a dominant position? If so, what is the threshold for dominance and what conduct amounts to an abuse?

The Competition Law prohibits the abusive exploitation, by one or more undertakings, of a dominant position in the national market or in a substantial part thereof, having as object or effect the impediment, distortion or restriction of competition.

The Competition Law Regulation establishes a rebuttable presumption of dominance for an undertaking, or collectively for two or more undertakings, whose market share equals or exceeds 50%.

The Competition Law sets out an extensive but non-exhaustive list of behaviours considered abusive, such as:

- refusing to provide a product or service or to grant access to essential infrastructure without cause;
- terminating a commercial relationship without justification;
- forcing or inducing a supplier or consumer not to deal with a competitor;
- selling below cost without justification;
- importing goods below their cost in the exporting country;
- price discrimination;
- tying;
- excessive pricing;
- any other conduct listed in Articles 17 and 18 as prohibited horizontal or vertical agreements.

The Competition Law also prohibits the abuse exploitation, by one or more undertakings, of the state of economic dependence of any supplier or client which does not have an equivalent alternative. Abusive conduct may take the form of any of the vertical agreements and practices prohibited by the Competition Law.

24. Are there examples of the authorities pursuing firms for abusing a dominant position?

As the Authority is not yet operational, the Competition Law prohibitions are not currently enforced.

25. Does the legislation impose penalties on firms for the abuse of a dominant position?

Parties involved in abuse of dominant position and abuse of economic dependence are liable for fines of up to 5% of consolidated turnover, as well as to the ancillary sanctions referred to in question 19.

26. Are there rules in relation to price discrimination?

Price discrimination is listed as a prohibited practice in the context of vertical agreements, the abuse of a dominant position and the abuse of economic dependence or a supplier or client.

Price discrimination is considered an abuse of dominant position provided that it:

- is likely to prevent, distort or restrain free competition;
- relates to equivalent transactions of goods and services of the same type and quality; and
- refers to sale prices, discounts, payment conditions, granted credit or other services rendered that relate to the supply of goods and services.

27. Does the authority publish its decisions and, if so, is there a website where such decisions are available?

Decisions of the Authority will be published in the Official Journal of Mozambique (Boletim da República). In addition, the Statute of the Authority provides that decided cases are published in the Authority's website, but this is not yet operational.

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