

LEGAL ALERT

THE COMPETITION REGULATORY AUTHORITY OF MOZAMBIQUE BECOMES OPERATIONAL

Decree No. 6/2021, of 23 February, amending the Statute of the Competition Regulatory Authority of Mozambique (*Autoridade Reguladora da Concorrência* “ARC”), has recently been published.

This amendment comes at a time when there are growing indications that the ARC is already operational, which means that the provisions of the Mozambican Competition Law, in force since 2013, become fully applicable, in particular concerning the mandatory filing of mergers and other corporate transactions meeting the applicable notification thresholds.

Changes to the Statute of the ARC

The ARC was originally created by the Competition Law (Law No. 10/2013, of 11 April), and its Statute was approved by Decree No. 37/2014, of 1 August.

Pursuant to these instruments the ARC is an independent entity endowed with administrative and financial autonomy and broad supervisory, regulatory, investigatory and sanctioning powers. In particular, the ARC is charged with investigating and deciding antitrust cases (such as cartel agreements or abuses of a dominant position), as well as clearing and prohibiting concentrations between undertakings subject to mandatory filing in Mozambique.

The changes introduced by Decree No. 6/2021 concern mainly the internal functioning of ARC: notably, its board of directors is reduced from five to three members (the President and two executive directors), several departments’ names are changed, departmental competences are redistributed and the post of director general is abolished.

The ARC is becoming operational

Although its Organic Statute was approved in 2014, for several years there were no relevant developments regarding the entry into operation of ARC.

The President of the board of the ARC, Júlio João Pio, was appointed by Resolution No. 24/2020, of 21 April, and in recent months there have been several indications that ARC may already be operational. There are reports that the remaining members of the Board have already been appointed by the Government, although these appointments have not yet been published in the Official Journal. The ARC has also recently moved into its own offices and has hired some staff.

These developments are surrounded by some uncertainty, however, and despite several attempts it has not been possible to obtain confirmation from the ARC as to whether it is indeed operational. In any case, in light of this amendment to the ARC Statute, which came into effect immediately, and of the above-mentioned developments, it is advisable that companies and their advisors consider, as a matter of caution, that the ARC is already in operation, and that the provisions of the Competition Law are fully applicable, in particular those relating to merger control.

Merger notification criteria in Mozambique

Concentrations between undertakings meeting the jurisdictional thresholds are subject to mandatory filing to the ARC.

The following transactions are deemed to constitute a concentration between undertakings: (i) a merger between two or more hitherto independent undertakings; (ii) the direct or indirect acquisition of control, by one or more undertakings, over other undertaking(s) or part(s) of other undertakings; and (iii) the creation of a full-functioning joint venture on a lasting basis.

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

- a) The combined turnover of all the undertakings concerned in Mozambique in the preceding year is equal to or exceeds 900 million meticaís;

- b) 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
- c) 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, as long as each of at least two of the undertakings concerned achieved in the preceding year a turnover of at least 100 million meticals in Mozambique.

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 issued by the Authority.

The 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, as well as to other negative consequences.

It is therefore prudent to request specific legal advice in relation to each M&A and corporate transaction with an impact in Mozambican territory that may exceed the thresholds mentioned above.

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