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Mozambique

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Introduction

Competition law has only recently arrived in Mozambique. Law 10/2013 of 11 April 2013 (the Competition Law), established a modern legal framework for competition in Mozambique and created the Competition Regulatory Authority (the Authority) to enforce it. This took place in the context of a significant increase of foreign investment into Mozambique and the government's recent efforts to streamline economic initiatives and to liberalise some key sectors, such as communications, ports, railways and financial services.

With the Competition Law still lacking provisions in several areas, a further step towards the implementation of competition law in Mozambique was taken with the publication of the Statute of the Competition Regulatory Authority on 1 August 2014 (the Statute). Once it becomes fully operational, the Authority will be responsible for the application of a competition enforcement system inspired by existing competition regimes in the European Union and in particular Portugal.

Competition Regulatory Authority

The Authority is an independent entity endowed with administrative and financial autonomy and broad supervisory, regulatory, investigatory and sanctioning powers, pursuant to which it is able to interview relevant persons, request documents and conduct searches and seizures and the sealing of business premises.

As set out in the Statute, the Authority is headed by a five-member board, appointed by the government to serve for a five-year term, which may be renewed once. The board is the decision-making body for decisions of substance. The board is assisted by the Directorate General, which is composed of the restrictive practices, merger control and economic studies departments (as well as other administrative bodies). The Directorate General is responsible, in particular, for investigating anti-competitive behaviour and analysing merger notifications.

The Authority is directed to closely coordinate its activities with those of the other Mozambican sectoral regulatory authorities, such as the banking, insurance, communications, oil, water, land transport and civil aviation regulators.

The Authority may assign different priorities to certain practices or sectors, and in the last quarter of each year should publish its enforcement priorities for the following year.

As of 25 November 2014 the government is yet to appoint the president and the members of the board, and therefore at present the Authority is not yet fully operational.

Anti-competitive practices

The Competition Law has a wide scope, applying to both private companies and state-owned companies, and covers all economic activities which produce effects in Mozambican territory. The law foresees a number of exemptions, concerning among others: practices with no commercial purpose, pensions and social security

funds and services of general economic interest. However, pursuant to a draft regulation these exemptions are to be narrowly interpreted.

The Competition Law prohibits agreements and practices between two or more independent undertakings that have the object or effect of restricting competition. The law distinguishes between horizontal agreements and practices between competitors, such as price fixing or market allocation; and vertical agreements between companies and their suppliers or customers, such as price discrimination, refusal to deal, tying or resale price maintenance.

The law also prohibits abusive practices by dominant undertakings, including the refusal to grant access to essential infrastructure, the unjustified termination of a business relationship, predatory pricing or price discrimination. A draft regulation released by the government on 11 June 2014 implementing the Competition Law proposes to presume individual or collective dominance above a 50 per cent market-share threshold.

The abuse of economic dependence is also prohibited in the context of vertical relations. Pursuant to the draft regulation, a supplier or a client is considered to be economically dependent from its counterpart when it does not have an 'equivalent alternative' (either because the good or service at issue is supplied by a limited number of companies or the dependent company cannot obtain from other counterparts equivalent conditions within a reasonable deadline). Abuses of economic dependence may take the form of any of the prohibited practices in vertical agreements, as well as the unjustified termination of a business relationship or exclusivity arrangements.

Any of the prohibited practices may be justified (including abuses of dominance and of economic dependence) pursuant to the Competition Law and the Competition Regulatory Authority may issue individual exemption decisions, further to a request by the parties. Restrictive conduct may be justified if it leads to economic efficiencies, as well as for a number of public-interest reasons, such as the promotion of the competitiveness of Mozambican small and medium-sized enterprises, the promotion of national products, the consolidation of the national economy and the protection of intellectual property. In the case of professional associations, an exemption may also be granted to maintain professional standards. However, an agreement or practice will only be justified if the restriction to competition is indispensable for such objective to be attained, and as long as the conduct does not eliminate competition in the relevant market, which may arguably limit their practical application in abuse-of-dominance cases.

In terms of procedure, investigations can be initiated by the board of the Authority ex officio or following a complaint. After an investigation is opened, it is conducted in three stages. During the first stage the Authority carries out all necessary inquiries, within the scope of its broad investigation powers, to identify the relevant anti-competitive conduct and the relevant parties and to collect evidence. At the end of this stage the director-general takes a decision to either close the investigation or to issue a statement of objections to the defendant and open the second stage of the procedure. The

defendants may then submit their defence, present evidence and request additional inquiries to be made, and may also request an oral hearing.

At the end of these proceedings, and following final allegations by the defendants, the director-general issues a decision to either close the investigation (with or without conditions or issuing a warning), or to submit the case to the board for a final decision, opening the third phase. One of the members of the board will be the case rapporteur and may conduct further inquiries, as well as hear the competent sectoral regulator (in the case of a regulated sector), which must be involved throughout the procedure. The full board must then adopt a final decision on the case, either: (i) declaring the existence of an infraction, imposing fines and ancillary sanctions (discussed below) or issuing a warning; or (ii) authorising an agreement, with conditions and obligations. Decisions imposing fines and other sanctions may be appealed to the Judicial Court of the City of Maputo.

Merger control

The Competition Law introduces merger control in Mozambique. All concentrations meeting the relevant market share and turnover thresholds (yet to be determined) will be subject to mandatory filing to the Competition Regulatory Authority, and cannot be implemented before an express or tacit clearance decision is adopted (the validity of all legal instruments depends on approval by the Authority).

The concept of 'concentration' broadly follows that of EU and Portuguese competition law, and covers full mergers, acquisitions of control by one or more undertakings over an undertaking or assets of an undertaking, as well as (pursuant to the draft regulation), the creation of a full-function joint venture. Control will result from the acquisition of a majority share capital, of all or certain assets of the target, or of contractual rights which confer on the acquirer a decisive influence over the decision-making of the target.

The criteria establishing the jurisdiction of the Authority over a concentration have not yet been approved. Pursuant to the draft regulation, notification will be mandatory where the undertakings concerned have a market share equal to or above 20 per cent and an annual turnover above 100 million meticaïcs. If approved, these very broad criteria likely mean that many transactions with effects in Mozambique may be subject to mandatory filing to the Authority, and one would hope that the final regulation would clarify that at least two of the undertakings concerned must achieve a reasonable turnover in Mozambique to avoid companies meeting the turnover threshold by themselves having to file all acquisitions they make, irrespective of the size of the target.

The Competition Law also 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 impede, distort or restrict appreciably 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.

Concentrations subject to mandatory filing must be filed to the Competition Regulatory Authority within seven working days after conclusion of the agreement. The merger control procedure also encompasses three phases: a 30-day initial investigation by the Directorate General (phase 1), which, if the case raises serious competition concerns, may be followed by a 60-day in-depth investigation (phase 2). If the director-general submits a report to

the board for final decision, either in phase 1 or phase 2, the board has a further 30 days to clear the transaction, with or without commitments from the parties, or (in phase 2) to issue a prohibition decision. (In a case of gun jumping, if the Authority initiates an ex officio investigation, the procedural deadlines do not apply.)

The substantive test for the assessment of a concentration in Mozambique is the 'dominance test' of the former EC Merger Regulation (4064/89), pursuant to which concentrations should be blocked if they are likely to create or strengthen a dominant position that may significantly impede effective competition in the relevant markets.

Sanctions

Violation of the substantive prohibitions contained in the Competition Law (either entering into an illegal agreement or practice or implementing a concentration subject to mandatory filing) makes infringing firms liable to heavy fines, which may amount up to 5 per cent of the turnover of each company in the previous year. In addition, a breach of the duty to notify concentrations within the statutory period and to cooperate with the Authority is punishable with fines of up to 1 per cent of annual turnover.

Where the parties breach a prohibition decision, or in case of a failure to comply with an information request within a merger control procedure, the law also provides for penalty payments. Penalty payments may reach up to 5 per cent of the average daily turnover of the infringing companies in the previous year.

Ancillary sanctions may also bring serious consequences to infringing companies, not only because the offender may find itself excluded from participating in public tenders for five years, but because it can even find itself confronted with the possible break-up of the offending undertaking or mandatory divestitures, if such measures are deemed necessary to eliminate the restrictive effects to competition.

Finally, agreements concluded in breach of the Competition Law (including those related to a concentration that violate a prohibition decision or a clearance decision with commitments) are null and void, and may be so declared by a court of law at the request of any interested party.

Appeals

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.

Conclusion

The Competition Law entered into effect in July 2013. This means that, even though the Competition Authority has not yet started operations, the prohibitions of the law on restrictive agreements and practices, abuse of dominant position and abuse of economic dependence may be enforced by the courts of Mozambique, notably in the context of damages actions brought by parties harmed by competition law infringements.

Companies with a presence in Mozambique are therefore advised to carefully consider the impact of the new law on their activities, in order to avoid the risk of their business conduct being found contrary to the Competition Law.

More generally, however, the enforcement of competition law in Mozambique will depend largely on the organisation and functioning

of the Competition Regulatory Authority and the priorities it will set for the enforcement of competition law. If the new authority follows the example of most national competition authorities, among priority cases there will be cartels, distribution agreements fixing resale prices, abuses foreclosing competitors by dominant firms, and the implementation of an effective merger control system.

Developments over the next year should therefore be closely monitored, not only regarding the appointment of the Authority's managing bodies and the setting up of its services, but also the approval of the regulation implementing the Competition Law, further to which merger control in Mozambique will become a reality.



Fabrícia de Almeida Henriques
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Fabrícia de Almeida Henriques, a member of the Mozambican and Portuguese Bars, has relevant experience in Mozambican law, having advised clients on corporate and energy law in this jurisdiction. Fabrícia is one of the founding partners of MLC Advogados, founded in 2012. She participated in several privatisations involving Portuguese companies, as well as in transactions in the area of project finance. Recently, her activity has been primarily focused on assisting international clients in all features of foreign investment in Mozambique, as well as in the negotiation of PPPs. Fabrícia has been lecturing both in Portugal and in Mozambique for the past 14 years, has participated in several conferences and seminars and is also author and co-author of several articles on oil and gas issues.

Fabrícia has previously worked in the Lisbon office of Morais Leitão, Galvão Teles, Soares da Silva & Associados and is currently counsel of the firm for matters related to Mozambique.



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Pedro de Gouveia e Melo is a senior lawyer with the EU and competition law practice group of Morais Leitão, Galvão Teles, Soares da Silva & Associados (MLGTS). Pedro has a broad practice of EU and competition law, both at the national and European levels, in a wide range of industries, in particular energy, financial services and food and beverages. His experience includes both merger cases and anti-trust and state aid investigations before the Portuguese Competition Authority and the European Commission. He has represented both the Portuguese government and private parties before the EU Courts, as well as private parties before the Portuguese courts.

Further to the entry into force in 2013 of the first Competition Act in Mozambique, which closely follows Portuguese law, Pedro is an active member of MLGTS Africa Team.

Pedro joined the firm in 2002. In 2007 he was seconded to Latham & Watkins LLP in Washington, DC. He received an LLM from the College of Europe in Bruges in 2002 and a law degree from the Catholic University Law School (Lisbon) in 2001. He has written several articles on European and Portuguese competition law and been invited to speak on EU law and on EC competition law at the Catholic University. He is admitted to the Portuguese Bar.



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Mozambique Legal Circle Advogados, a member of the international network MLGTS Legal Circle, was founded with the ambition of becoming a leading law firm in Mozambique by offering clients a new perspective of the Mozambican market and a broad range of expertise. Today the team is composed of a group of Mozambican lawyers with a solid background and local and international experience, which allows the firm to provide legal services of international standards to clients.

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Morais Leitão, Galvão Teles, Soares da Silva & Associados (MLGTS) is one of the leading firms in Portugal, with more than 180 lawyers and offices in Lisbon, Porto and Funchal (Madeira). The firm has a significant international practice in all major areas of law and represents multinational and domestic corporations and financial institutions, as well as sovereign governments and their agencies. In view of the global assistance MLGTS provides to its clients the firm has developed a consistent network of associations with local firms in Angola, Mozambique and Macau (China), which forms the MLGTS Legal Circle.

The firm's EU and competition law team, based in Lisbon and Porto, is one of the leading practices in Portugal. The team advises and represents clients in most of the high-value national and cross-border transactions, disputes and competition agencies' investigations in or concerning Portugal. The team has an extensive experience representing clients on a wide range of industries, such as energy, financial services, communications, pharmaceuticals, broadcasting, advertising, land, sea and air transportation, retail distribution, logistics, mining, food and beverages, tourism and agriculture. The EU and competition law team is active in the MLGTS Africa Team.



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