

Vertical Agreements

Contributing editor
Patrick J Harrison



2016

GETTING THE
DEAL THROUGH 

GETTING THE
DEAL THROUGH 

Vertical Agreements 2016

Contributing editor
Patrick J Harrison
Sidley Austin LLP

Publisher
Gideon Robertson
gideon.roberton@lbresearch.com

Subscriptions
Sophie Pallier
subscriptions@gettingthedealthrough.com

Business development managers
Alan Lee
alan.lee@gettingthedealthrough.com

Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

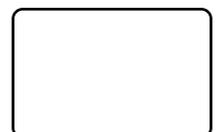


Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3708 4199
Fax: +44 20 7229 6910

© Law Business Research Ltd 2016
No photocopying without a CLA licence.
First published 2007
Tenth edition
ISSN 1753-9250

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of March 2016, be advised that this is a developing area.

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



CONTENTS

Antitrust Assessment of Most Favoured Nation Clauses in the European Union	6	Ireland	119
Marco Plankensteiner and Elise Créquer Kramer Levin		Helen Kelly and Darach Connolly Matheson	
Australia	9	Israel	127
Simon Snow, Dilys Teng and Bridget Liedig Gilbert + Tobin		Boaz Golan and Nimrod Prawer B Golan Law Firm	
Austria	18	Japan	134
Guenter Bauer and Robert Wagner Wolf Theiss		Nobuaki Mukai Momo-o, Matsuo & Namba	
Brazil	25	Malaysia	143
Alexandre Ditzel Faraco, Ana Paula Martinez and Mariana Tavares de Araujo Levy & Salomão Advogados		Sharon Tan and Nadarashnaraj Sargunraj Zaid Ibrahim & Co	
Bulgaria	33	Mexico	151
Ivan Marinov and Emil Delchev Delchev & Partners Law Firm		León Ricardo Elizondo Legal and Economic Avantgarde SC	
China	40	Mozambique	158
Lei Li Sidley Austin LLP		Fabricia de Almeida Henriques and Pedro de Gouveia e Melo Henriques, Rocha & Associados Morais Leitão, Galvão Teles, Soares da Silva & Associados	
Colombia	48	Norway	164
Ximena Zuleta-Londoño and Alberto Zuleta-Londoño Cardenas & Cardenas Abogados		Thomas Sando and Aksel Joachim Hageler Advokatfirmaet Steenstrup Stordrange DA	
Denmark	53	Poland	171
Christina Heiberg-Grevy and Laurits Schmidt Christensen Accura Advokatpartnerselskab		Krzysztof Kowalczyk and Jan Maciejewski BSJP Brockhuis Jurczak Prusak Spk	
European Union	61	Romania	178
Stephen Kinsella OBE, Patrick J Harrison, Rosanna Connolly and Kyle Le Croy Sidley Austin LLP		Carmen Peli and Oana Bucsa Peli Filip SCA	
France	73	Russia	188
Marco Plankensteiner and Elise Créquer Kramer Levin		Alexander Egorushkin and Igor Panshensky Antitrust Advisory	
Germany	80	Serbia	195
Markus M Wirtz and Silke Möller Glade Michel Wirtz		Guenter Bauer and Maja Stankovic Wolf Theiss	
Greece	90	Slovakia	202
Christos Golfinopoulos Golfinopoulos Law Office		Vladimír Kordoš and Peter J Heriban bnt attorneys-at-law	
Hong Kong	98	Sweden	208
Clara Ingen-Housz and Anna Mitchell Linklaters		Mats Johnsson Ashurst Advokatbyrå AB	
Hungary	104	Switzerland	213
Chrysta Bán Bán, S Szabó & Partners		Franz Hoffet, Marcel Dietrich and Magdalena Heyder Homburger	
India	111	Turkey	222
Amitabh Kumar, Farhad Sorabjee and Amit Kapur J Sagar Associates		Bora İnkiler Moroğlu Arseven	

Ukraine	229
Igor Svehkar and Oleksandr Voznyuk Asters	
United Kingdom	237
Stephen Kinsella OBE, Patrick J Harrison, Rosanna Connolly and Kyle Le Croy Sidley Austin LLP	
United States	248
Joel Mitnick and Alexandra Shear Sidley Austin LLP	

Mozambique

Fabília de Almeida Henriques and Pedro de Gouveia e Melo

Henriques, Rocha & Associados | Morais Leitão, Galvão Teles, Soares da Silva & Associados

Antitrust law

1 What are the legal sources that set out the antitrust law applicable to vertical restraints?

The main piece of legislation regarding the application of competition law to vertical agreements in Mozambique is Law 10/2013, of 11 April 2013 (the Competition Law), which was complemented by the Competition Law Regulation of 31 December 2014 (the Competition Law Regulation).

Both Law and Regulation broadly follow the provisions of Portuguese competition law, especially of Law 19/2012, of 8 May 2012 (the Portuguese Competition Act in force), and are therefore inspired by the competition law rules of the EU, in particular article 101 of the Treaty on the Functioning of the European Union (TFEU), although there are a number of important specificities, which will be detailed below.

Additional regulations and guidelines, notably on the procedure for exemption of (vertical and horizontal) agreements and practices restrictive of competition, will likely be adopted by the Competition Regulatory Authority (CRA) of Mozambique, once it becomes operational. Ministerial Decree 79/2015, of 5 June 2015, determines the fees payable to the CRA by applicants of exemption for restrictive agreements.

Types of vertical restraint

2 List and describe the types of vertical restraints that are subject to antitrust law. Is the concept of vertical restraint defined in the antitrust law?

Article 18 of the Competition Law expressly prohibits agreements between undertakings in a vertical relationship that have the object or effect of appreciably impeding, distorting or restricting competition in the whole or part of the Mozambican market.

The concept of 'vertical relationship' is defined in the law as the relationship between an undertaking producing or supplying goods or services and other undertakings throughout the supply chain, including consumers. The inclusion of agreements between undertakings and consumers in the Mozambican Competition Law prohibitions constitutes a significant departure from EU and Portuguese competition law, which is only applicable to relationships between undertakings.

The vertical restraints expressly prohibited by the Competition Law are the following:

- applying, systematically or occasionally, discriminatory conditions (on price or other) regarding equivalent transactions;
- refusing, directly or indirectly, without just cause, the purchase or sale of goods or the provision of services;
- making the conclusion of contracts subject to the acceptance of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts;
- conditioning the sale of goods or the provision of services to the acceptance of payment conditions which are different from or contrary to commercial usage;
- making commercial relationships subject to the acceptance of clauses and commercial conditions that are unjustifiable or anti-competitive;
- imposing on distributors resale prices, discounts, payment conditions, minimum or maximum quantities, profit margins or any other commercial conditions in their dealings with third parties;
- discriminating suppliers or consumers of goods or services through the fixing of differentiated prices or commercial conditions;

- conditioning the sale of a good or the provision of a service to the acquisition of another good or the procurement of a service; and
- imposing excessive prices, or increasing without just cause, the price of a good or a service.

Vertical agreements and practices restrictive of competition may nevertheless be exempted from the prohibition of the Competition Law by the CRA (see question 18).

Legal objective

3 Is the only objective pursued by the law on vertical restraints economic, or does it also seek to promote or protect other interests?

While the main objective of the Competition Law is the protection of competition, the law also pursues other public interests.

In particular, agreements restrictive of competition may be exempted, inter alia, if they:

- incentivise the technological development of Mozambican companies;
- promote national goods or services;
- promote exports;
- promote the competitiveness of small and medium-sized national companies; and
- contribute to the consolidation of national companies.

However, agreements that pursue the public interests above cannot be exempted if they result in the elimination of competition or contain restrictions that are not indispensable to the attainment of such interests (see question 47).

Responsible authorities

4 Which authority is responsible for enforcing prohibitions on anticompetitive vertical restraints? Where there are multiple responsible authorities, how are cases allocated? Do governments or ministers have a role?

The Competition Law prohibitions are enforced by the CRA.

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 of the Authority (approved by Decree 37/2014, of 1 August 2014), 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 1 February 2016 the authority is not yet fully operational. The government is yet to appoint the president and the members of the board, although recent statements from Mozambican officials suggest that these appointments will take place in the coming months.

Jurisdiction

- 5 What is the test for determining whether a vertical restraint will be subject to antitrust law in your jurisdiction? Has the law in your jurisdiction regarding vertical restraints been applied extraterritorially? Has it been applied in a pure internet context and if so what factors were deemed relevant when considering jurisdiction?**

The Competition Law is applicable to all economic activities exercised or producing effects in Mozambique. Although enforcement of the law by the CRA is yet to begin, it would be expected that the main nexus for application of the law is the effects of the vertical restraint in Mozambican territory, which may ultimately mean that the Competition Law prohibitions may apply to agreements between parties not domiciled in Mozambique.

Agreements concluded by public entities

- 6 To what extent does antitrust law apply to vertical restraints in agreements concluded by public entities?**

The Competition Law applies to both private and state-owned undertakings, and accordingly agreements concluded by public entities that restrict competition and cannot benefit from exemption under the law may be prohibited by the CRA.

However, the Competition Law lists a number of agreements to which it is not applicable (see question 8) and these may involve state-owned undertakings.

Sector-specific rules

- 7 Do particular laws or regulations apply to the assessment of vertical restraints in specific sectors of industry (motor cars, insurance, etc)? Please identify the rules and the sectors they cover.**

At present there are no competition laws or regulations applying to specific sectors of industry.

General exceptions

- 8 Are there any general exceptions from antitrust law for certain types of agreement containing vertical restraints? If so, please describe.**

The Competition Law is not applicable to:

- collective agreements entered into with workers' organisations under the applicable labour laws;
- practices intended to address a non-commercial objective;
- agreements resulting from international obligations that do not harm the national economy; and
- cases where there is a need for protection of a specific sector of the economy, in benefit of the national interest or the interest of consumers.

The article 18 prohibition only applies to vertical agreements that have the object or effect of appreciably restricting competition in the national market or a substantial part of it. For this reason, agreements with a minor impact on competition or the market (for instance, where the parties to the agreement have very low market shares) are outside the scope of the prohibition.

However, at present there are no guidelines for de minimis agreements, and in any event the most serious vertical restraints may be considered restrictions by object (as in EU and Portuguese competition law, on which the Competition Law is broadly inspired), and be prohibited regardless of the market shares of the parties or impact on the market.

Agreements

- 9 Is there a definition of 'agreement' – or its equivalent – in the antitrust law of your jurisdiction?**

The Competition Law does not define what constitutes an agreement for the purposes of article 17, which prohibits horizontal agreements and practices, and article 18, which prohibits vertical agreements and practices. Clarification on what constitutes an agreement will result from the future enforcement practice of the CRA, but it is likely that, as in EU and Portuguese competition law, it will be subject to broad interpretation, to which the form of the agreement will not be relevant.

However, articles 17 and 18 also prohibit 'concerted practices' between undertakings, which would likely cover any coordinated conduct between two or more independent undertakings that is not considered to constitute an agreement.

- 10 In order to engage the antitrust law in relation to vertical restraints, is it necessary for there to be a formal written agreement or can the relevant rules be engaged by an informal or unwritten understanding?**

While article 18 has not yet been enforced in Mozambique, it is likely that an informal or even unwritten understanding between two or more independent undertakings, from which a concurrence of wills can be inferred and demonstrated by the CRA, will be deemed to constitute an agreement. See question 9.

Parent and related-company agreements

- 11 In what circumstances do the vertical restraints rules apply to agreements between a parent company and a related company (or between related companies of the same parent company)?**

Two or more entities forming a single economic unit are considered as a single undertaking for the purposes of the Competition Law, regardless of their distinct legal personality.

The Competition Law also expressly provides that agreements between two companies within the same economic unit, that regard the distribution of tasks or other internal matters to the economic unit, do not constitute agreements in the meaning of articles 17 and 18.

Under the Competition Law, an economic unit is deemed to exist when the entities are interdependent, as a result of:

- a majority participation in the share capital;
- a participation to which veto rights are associated on strategic matters, such as business plans, investment policy, budget and appointment of the management;
- the holding of more than half the votes conferred on equity participations;
- the possibility to appoint more than half of the members of the management or supervisory body; or
- the power to manage the activity of the company.

Agent-principal agreements

- 12 In what circumstances does antitrust law on vertical restraints apply to agent-principal agreements in which an undertaking agrees to perform certain services on a supplier's behalf for a sales-based commission payment?**

Pursuant to the Competition Law, an entity that cannot independently determine its commercial strategy is considered to be integrated in a single economic unit with the entity on which it depends. This rule can be applied in principle to agent-principal agreements where the agent does not incur in any commercial or financial risks in relation to the activities for which it has been appointed an agent by the principal, in terms equivalent to those in force in EU competition law, which directly inspired this Mozambican provision. The concrete interpretation of the law will depend, like in other areas of Mozambican competition law, on the future practice of the CRA.

- 13 Where antitrust rules do not apply (or apply differently) to agent-principal relationships, is there guidance (or are there recent authority decisions) on what constitutes an agent-principal relationship for these purposes?**

No.

Intellectual property rights

14 Is antitrust law applied differently when the agreement containing the vertical restraint also contains provisions granting intellectual property rights (IPRs)?

One of the public interest criteria that allows a vertical agreement that appreciably restricts competition to qualify for exemption is the promotion of protection of intellectual property, and the law expressly provides that holders of IPRs may request an exemption for an agreement or practice related to the exercise of IPRs.

Analytical framework for assessment

15 Explain the analytical framework that applies when assessing vertical restraints under antitrust law.

The CRA, which has exclusive competence to impose sanctions for the violation of the article 18 prohibition and to issue exemptions, is yet to commence operations, and for that reason the analytical framework that it will apply is not known at present.

However, given that the Competition Law is broadly based on EU and Portuguese competition law, one would hope that the CRA will apply an analytical framework similar to that of article 101 TFEU and its national equivalents in EU member states.

16 To what extent are supplier market shares relevant when assessing the legality of individual restraints? Are the market positions and conduct of other suppliers relevant? Is it relevant whether certain types of restriction are widely used by suppliers in the market?

See question 15.

17 To what extent are buyer market shares relevant when assessing the legality of individual restraints? Are the market positions and conduct of other buyers relevant? Is it relevant whether certain types of restriction are widely used by buyers in the market?

See question 15.

Block exemption and safe harbour

18 Is there a block exemption or safe harbour that provides certainty to companies as to the legality of vertical restraints under certain conditions? If so, please explain how this block exemption or safe harbour functions.

The Competition Law Regulation provides that the CRA will approve regulations defining categories of prohibited practices that benefit from automatic (block) exemption.

However, since the authority is not yet operational, at present there is no block exemption or safe harbour that gives legal certainty to companies with activities in Mozambique as to the legality of their agreements and practices that contain vertical restraints.

Furthermore, since Mozambican law on vertical restraints is broadly inspired by EU and Portuguese competition law, in the present transitory period and until the CRA adopts decisions shedding light on its enforcement practice or issues guidelines, it may be helpful to assess the lawfulness of vertical restraints with an impact in Mozambique using the methodology and standards of the European Commission's Vertical Restraints Guidelines (2010/C 130/01).

Types of restraint

19 How is restricting the buyer's ability to determine its resale price assessed under antitrust law?

One of the prohibited vertical restraints expressly established in article 18 is the imposition on distributors of resale prices, discounts, payment conditions, minimum or maximum quantities, profit margins or any other commercial conditions in their dealings with third parties.

The broad wording of this prohibition certainly includes minimum resale prices and possibly maximum prices as well (although this would constitute a departure from EU and Portuguese competition law). The mere suggestion or recommendation of resale prices does not appear to be prohibited, unless it can be inferred from the concrete conduct of the

parties that the recommendation is accompanied by other measures that amount to an indirect strategy of resale price-fixing – either by incentivising the implementation of the recommendation or dissuading the buyer from applying different resale prices. The imposition of rebates or profit margins is also a prohibited conduct.

20 Have the authorities considered in their decisions or guidelines resale price maintenance restrictions that apply for a limited period to the launch of a new product or brand, or to a specific promotion or sales campaign; or specifically to prevent a retailer using a brand as a 'loss leader'?

As the CRA is not operational at present, there are no relevant guidelines or decisional practices in this regard.

21 Have decisions or guidelines relating to resale price maintenance addressed the possible links between such conduct and other forms of restraint?

See question 20.

22 Have decisions or guidelines relating to resale price maintenance addressed the efficiencies that can arguably arise out of such restrictions?

See question 20.

23 Explain how a buyer agreeing to set its retail price for supplier A's products by reference to its retail price for supplier B's equivalent products is assessed.

See question 20.

24 Explain how a supplier warranting to the buyer that it will supply the contract products on the terms applied to the supplier's most favoured customer, or that it will not supply the contract products on more favourable terms to other buyers, is assessed.

See question 20.

25 Explain how a supplier agreeing to sell a product via internet platform A at the same price as it sells the product via internet platform B is assessed.

See question 20.

26 Explain how a supplier preventing a buyer from advertising its products for sale below a certain price (but allowing that buyer to subsequently offer discounts to its customers) is assessed.

See question 20.

27 Explain how a buyer's warranting to the supplier that it will purchase the contract products on terms applied to the buyer's most favoured supplier, or that it will not purchase the contract products on more favourable terms from other suppliers, is assessed.

See question 20.

28 How is restricting the territory into which a buyer may resell contract products assessed? In what circumstances may a supplier require a buyer of its products not to resell the products in certain territories?

Agreements and practices 'that result in limiting or controlling the production or distribution of goods or the provisions of services' are only prohibited by article 17, which applies to horizontal agreements (those between undertakings competing in the same economic sector), and article 18 does not contain a similarly worded prohibition.

However, one cannot exclude that the CRA may interpret the very broad prohibition in article 18 with regard to imposing on the distributor 'any commercial conditions' with third parties as also including restrictions as to the clients, or territory, to (or into) which the buyer may resell the contractual products.

Therefore, the question of whether, and in which circumstances, territorial and customer restrictions in vertical agreements are admissible in Mozambican competition law will only be clarified by the future practice of the CRA.

29 **Have decisions or guidance on vertical restraints dealt in any way with restrictions on the territory into which a buyer selling via the internet may resell contract products?**

See question 28.

30 **Explain how restricting the customers to whom a buyer may resell contract products is assessed. In what circumstances may a supplier require a buyer not to resell products to certain resellers or end consumers?**

See question 28.

31 **How is restricting the uses to which a buyer puts the contract products assessed?**

See question 28.

32 **How is restricting the buyer's ability to generate or effect sales via the internet assessed?**

See question 28.

33 **Have decisions or guidelines on vertical restraints dealt in any way with the differential treatment of different types of internet sales channel? In particular, have there been any developments in relation to 'platform bans'?**

See question 28.

34 **Briefly explain how agreements establishing 'selective' distribution systems are assessed. Must the criteria for selection be published?**

See question 28.

35 **Are selective distribution systems more likely to be lawful where they relate to certain types of product? If so, which types of product and why?**

See question 28.

36 **In selective distribution systems, what kinds of restrictions on internet sales by approved distributors are permitted and in what circumstances? To what extent must internet sales criteria mirror offline sales criteria?**

See question 28.

37 **Has the authority taken any decisions in relation to actions by suppliers to enforce the terms of selective distribution agreements where such actions are aimed at preventing sales by unauthorised buyers or sales by authorised buyers in an unauthorised manner?**

See question 28.

38 **Does the relevant authority take into account the possible cumulative restrictive effects of multiple selective distribution systems operating in the same market?**

See question 28.

39 **Has the authority taken decisions (or is there guidance) concerning distribution arrangements that combine selective distribution with restrictions on the territory into which approved buyers may resell the contract products?**

See question 28.

40 **How is restricting the buyer's ability to obtain the supplier's products from alternative sources assessed?**

See question 28.

41 **How is restricting the buyer's ability to sell non-competing products that the supplier deems 'inappropriate' assessed?**

See question 28.

42 **Explain how restricting the buyer's ability to stock products competing with those supplied by the supplier under the agreement is assessed.**

See question 28.

43 **How is requiring the buyer to purchase from the supplier a certain amount or minimum percentage of the contract products or a full range of the supplier's products assessed?**

One of the prohibited vertical restraints expressly established in article 18 is the imposition of 'minimum or maximum quantities' on distributors in their purchases of contractual products, which, given its broad wording, is also likely to cover obligations to purchase a certain percentage of the buyer's requirements of such products. Such restrictions may benefit from exemption if all the legal criteria are met.

44 **Explain how restricting the supplier's ability to supply to other buyers is assessed.**

See question 28.

45 **Explain how restricting the supplier's ability to sell directly to end consumers is assessed.**

See question 28.

46 **Have guidelines or agency decisions in your jurisdiction dealt with the antitrust assessment of restrictions on suppliers other than those covered above? If so, what were the restrictions in question and how were they assessed?**

See question 20.

Notifying agreements

47 **Outline any formal procedure for notifying agreements containing vertical restraints to the authority responsible for antitrust enforcement.**

The Competition Law establishes an administrative procedure for the issuance by the CRA of an exemption to the prohibitions in the law, including the article 18 prohibition of vertical agreements.

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 CRA.

A notice of the request is subsequently published in a national newspaper, and the directorate general examines the request and whether the conditions for individual exemption are met.

Such conditions are set forth in article 21 of the Competition Law and are as follows:

- 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;
- 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'.

Update and trends

As of 1 February 2016 the CRA is not yet fully operational. The government is yet to appoint the president and the members of the board, although recent statements from Mozambican officials suggest that these appointments will take place in the coming months.

The directorate general submits its report to the board, which will then issue a reasoned decision granting the exemption, refusing the exemption, or declaring the agreement not covered by the Competition Law prohibitions. An exemption decision also states the duration of the exemption and any conditions that should be complied with by the parties. The decision is published in the Mozambican official journal *Boletim da República*.

The CRA may revoke an exemption, after having heard the parties, if it concludes that:

- the conduct produces effects which are incompatible with article 21;
- the exemption was granted on the basis of incorrect or misleading information;
- the market conditions in force at the time of the granting of the exemption have been altered; or
- the parties to the agreement did not comply with the conditions included in the exemption decision.

The law does not establish a time period for the CRA to decide on an exemption request.

The submission of an exemption request is subject to the payment of a fee of 200,000 meticaís, and of an annual fee for the duration of the exemption of 150,000 meticaís.

Authority guidance

48 If there is no formal procedure for notification, is it possible to obtain guidance from the authority responsible for antitrust enforcement or a declaratory judgment from a court as to the assessment of a particular agreement in certain circumstances?

Not applicable.

Complaints procedure for private parties

49 Is there a procedure whereby private parties can complain to the authority responsible for antitrust enforcement about alleged unlawful vertical restraints?

While a formal complaint procedure is not provided for in the Competition Law, complaints will likely be one of the main sources of investigations opened by the CRA.

The law nevertheless provides that the complainant must previously be heard if the CRA intends to close the investigation without adopting a prohibition decision or imposing a fine.

Enforcement

50 How frequently is antitrust law applied to vertical restraints by the authority responsible for antitrust enforcement? What are the main enforcement priorities regarding vertical restraints?

Since the CRA has not yet started operations, the prohibitions of article 18 are not presently enforced.

51 What are the consequences of an infringement of antitrust law for the validity or enforceability of a contract containing prohibited vertical restraints?

Pursuant to article 294 of the Mozambican Civil Code, agreements concluded in breach of imperative legal provisions, such as article 18 of the Competition Law, are null and void, and may be so declared by a court of law at the request of any interested party.

General civil law rules on severability apply, meaning that the declaration of nullity of part of an agreement does not determine the invalidity of the whole agreement except when the illegal clauses are essential to the agreement (ie, it is shown that the agreement would not have been entered into without such illegal clauses).

52 May the authority responsible for antitrust enforcement directly impose penalties or must it petition another entity? What sanctions and remedies can the authorities impose? What notable sanctions or remedies have been imposed? Can any trends be identified in this regard?

Violation of the article 18 prohibition makes infringing firms liable to heavy fines, which may amount to up to 5 per cent of the turnover of each company in the previous year.

Where the parties breach a prohibition decision or a decision requesting information, 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 also because it can even find itself confronted with the possible breakup of the offending undertaking or mandatory divestitures, if such measures are deemed necessary to eliminate the restrictive effects on competition.

Investigative powers of the authority

53 What investigative powers does the authority responsible for antitrust enforcement have when enforcing the prohibition of vertical restraints?

In terms of procedure, investigations can be initiated by the board of the CRA 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 investigative powers, to identify the relevant anti-competitive conduct and the relevant parties and to collect evidence.

In the context of an investigation, the authority can:

- request information from the parties under investigation, as well as from any other private entities and associations it considers necessary;
- question the legal representatives of the undertakings involved or of other undertakings and any other persons whose declarations it deems relevant;
- search and seal the premises of the undertakings involved, provided that a warrant is previously obtained from the competent judiciary authority; and
- collect all documents deemed relevant for the investigation.

The authority may require any other public or administrative entities, including criminal police, to provide the necessary cooperation.

At the end of the investigative 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 stage.

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 declaring the existence of an infraction (imposing fines and ancillary sanctions (discussed below), or issuing a warning), or 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.

Private enforcement

54 To what extent is private enforcement possible? Can non-parties to agreements containing vertical restraints obtain declaratory judgments or injunctions and bring damages claims? Can the parties to agreements themselves bring damages claims? What remedies are available? How long should a company expect a private enforcement action to take?

Damages actions for loss suffered as a result of breach of the Competition Law follow general civil law and civil law procedures.

Injunctions or claims can be brought before the Mozambican civil courts by any person who has suffered harm due to a breach of article 18.

The scope of claims that may be brought before the Mozambican courts for infringing the Competition Law include actions to obtain a declaration of nullity of the illegal agreement; actions to obtain compensation for the damages suffered in consequence of a specific clause or practice considered to be anti-competitive; and actions to obtain interim relief before the court.

Article 81 of the Constitution of Mozambique enshrines the rights for a representative action, which could be exercised in the context of damages actions for the breach of the Competition Law. However, at present the specific legislation implementing the representative action procedure has not yet been adopted.

The right to compensation under the tort liability regime is subject to a time limitation of three years from the moment that the injured party becomes aware of his or her right to make a claim for damages.

Other issues

55 Is there any unique point relating to the assessment of vertical restraints in your jurisdiction that is not covered above?

No.

HENRIQUES, ROCHA
& ASSOCIADOS
Sociedade de Advogados, Lda.

MORAIS LEITÃO
GALVÃO TELES
SOARES DA SILVA

Fabília de Almeida Henriques
fahenriques@hrlegalcircle.com

Pedro de Gouveia e Melo
pgmelo@mlgts.pt

Edifício JAT V-1
Rua dos Desportistas, 833, 6º, fracção
NN5 Maputo
Mozambique
Tel: +258 21 344000
Fax: +258 21 344099
www.hrlegalcircle.com

Rua Castilho, 165
1070-050 Lisbon
Portugal
Tel: +35 1213 817 400
Fax: +35 1213 817 499
www.mlgts.pt

Getting the Deal Through

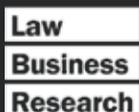
Acquisition Finance
Advertising & Marketing
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Arbitration
Asset Recovery
Aviation Finance & Leasing
Banking Regulation
Cartel Regulation
Class Actions
Construction
Copyright
Corporate Governance
Corporate Immigration
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Executive Compensation & Employee Benefits
Foreign Investment Review
Franchise
Fund Management
Gas Regulation
Government Investigations
Healthcare Enforcement & Litigation
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Labour & Employment
Licensing
Life Sciences
Loans & Secured Financing
Mediation
Merger Control
Mergers & Acquisitions
Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Client
Private Equity
Product Liability
Product Recall
Project Finance
Public-Private Partnerships
Public Procurement
Real Estate
Restructuring & Insolvency
Right of Publicity
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally



Online

www.gettingthedealthrough.com



Vertical Agreements
ISSN 1753-9250



THE QUEEN'S AWARDS
FOR ENTERPRISE:
2012



Official Partner of the Latin American
Corporate Counsel Association



Strategic Research Sponsor of the
ABA Section of International Law