

LEGAL ALERT

AMENDMENT OF THE MERGER NOTIFICATION FEE IN MOZAMBIQUE

Ministerial Decree no. 77/2021, of 16 August 2021, was published yesterday, amending the rules concerning the fee applicable to merger control notifications in Mozambique.

Under the Competition Law of Mozambique, the notification of concentrations between undertakings to the Competition Regulatory Authority (“**CRA**”) is subject to the payment of a fee by the notifying parties.

Ministerial Decree no. 77/2021 sets the value of the filing fee at **0.11% of the turnover** in Mozambique in the year prior to notification, with a maximum limit of **2.25 million meticais**.

The filing fee was initially set by Ministerial Decree no. 79/2015 at 5% of the turnover of the year prior to the year of the request for examination of the transaction. This amount raised significant concerns, as it had no correspondence with the costs incurred by CRA in the assessment of concentrations, being five times higher than the maximum amount of the fine applicable to the breach of the obligation to file (set at 1% of turnover), and equal to the maximum amount of the fine applicable to the most serious breaches of competition law (which cannot exceed 5% of turnover). This level of fees was without parallel to those practiced in the countries closest to Mozambique (nor, as far as we know, in any other country). Its amendment was essential for the proper functioning of the Mozambican merger control system and is therefore very welcome.

While the new Ministerial Decree does not clarify which are the companies whose turnover is relevant for the calculation of the notification fee (an omission which was meant to be made clear during the legislative procedure), a systemic interpretation of the relevant provisions of the Competition Law Regulation supports the understanding that the **relevant turnover is the one**

achieved in Mozambique in the last financial year by all the companies participating in the operation, determined according to Article 12 of the Competition Law Regulation.

Ministerial Decree no. 77/2021 entered into force yesterday, and therefore should be immediately applied by the CRA, including in pending cases where the filing fee has not yet been paid. Under the Regulation establishing the notification forms, approved by CRA Resolution no. 1/2021, of 22 April, notification only becomes effective when it is accompanied by the payment of the filing fee. Several notifications have already been submitted to the CRA in which the parties have not yet paid the notification fee because they considered the regime in force to be incompatible with the Constitution of Mozambique. With the entry into force of the revised fee, notifying parties are now able to pay the filing fee according to the revised rate, allowing the CRA to resume its assessment of pending cases.

The obligation of prior notification of concentrations to the CRA

Following the entry into operation of the CRA at the beginning of this year, the provisions of the Competition Act became fully applicable, in particular those relating to control of concentrations between undertakings.

Under the Competition Act, concentrations that meet the legal criteria are subject to mandatory prior notification to the CRA. “Concentrations” are defined as mergers, acquisition of direct or indirect control over an undertaking or parts of an undertaking (notably as a result of the acquisition of a majority share capital or of rights conferring a preponderant influence over the commercial strategy of the undertaking concerned) or the creation of a joint company performing on a lasting basis the functions of an autonomous economic entity.

According to the Competition Law Regulation, such transactions are subject to mandatory prior notification to the CRA when they meet at least one of the following criteria:

- a) The companies in the transaction achieve a combined turnover in Mozambique in the previous year equal to or greater than 900 million meticaís;
- b) The operation results in the acquisition, the creation or the reinforcement of a quota equal to or greater than 50% in the domestic market of a certain good or service;

- c) The operation results in the acquisition, the creation or the strengthening of a quota equal to or greater than 30% in the domestic market of a particular good or service, provided that at least two companies involved in the operation have individually achieved a turnover of 100 million meticaís in Mozambique in the previous year.

Transactions subject to prior notification must be notified within seven working days of the conclusion of the agreement or acquisition project giving rise to the concentration, using the form approved by the CRA, and may not be implemented before express or tacit approval, under penalty of a fine of up to 5% of turnover in the previous year, as well as other negative procedural consequences.

Parties to transactions which may have effects in Mozambique are therefore well advised to seek specific legal advice to confirm whether the merger control thresholds are met and the transaction is subject to filing to the CRA.

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