Merger Control

The international regulation of mergers and joint ventures
in 71 jurisdictions worldwide

Consulting editor
John Davies

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Merger Control 2019

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John Davies

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Preface

Merger Control 2019

Twenty-third edition

Getting the Deal Through is delighted to publish the twenty-third edition of *Merger Control*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes Costa Rica, Egypt and Malaysia.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the consulting editor, John Davies of Freshfields Bruckhaus Deringer, for his continued assistance with this volume.

GETTING THE
DEAL THROUGH

London
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Mozambique

Fabrícia de Almeida Henriques and Mara Rupia Lopes Henriques, Rocha & Associados
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Legislation and jurisdiction

1 What is the relevant legislation and who enforces it?

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.

Further steps towards the implementation of competition law in Mozambique were taken with the publication of the Statute of the Authority, approved by Decree No. 37/2014 of 1 August, as amended, and of the Competition Law Regulation, approved by Decree No. 97/2014 of 31 December. Once the Authority becomes fully operational, it will be responsible for the application of a competition enforcement system inspired by existing competition regimes in the European Union and in particular Portugal.

The Authority is an independent entity endowed with administrative and financial autonomy and broad supervisory, regulatory, investigatory and sanctioning powers. 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 analysing merger notifications.

As of 31 July 2018, 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 near future.

Because the Authority has exclusive competence to enforce the provisions of the Competition Law, the merger control rules described below will only become enforceable on the day the Authority becomes operational. In particular, concentrations meeting the jurisdictional thresholds will be subject to filing as of the date when the Authority begins operating. Merging parties and their advisers are therefore well advised to follow developments in this area closely.

Further, the Ministerial Diploma No. 79/2014 of 5 June 2014 establishes the fees applicable, in particular, to merger control notifications and requests for exemption of restrictive agreements.

2 What kinds of mergers are caught?

The Competition Law applies to concentrations between undertakings that 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 undertakings or parts of other undertakings; and
- the creation of a full-functioning joint venture on a lasting basis.

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; and
- 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.

3 What types of joint ventures are caught?

The creation of, or the acquisition of control over, a jointly controlled undertaking is subject to the merger control rules of the Competition Law whenever the joint undertaking fulfils the functions of an independent economic entity on a lasting basis and the jurisdictional thresholds are met.

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

4 Is there a definition of 'control' and are minority and other interests less than control caught?

The definition of 'control' under the Competition Act is inferred from all relevant legal or factual circumstances that confer the ability to exercise decisive influence on the target's activity, in particular through the:

- acquisition of all or part of the share capital;
- acquisition of rights of ownership or use of all or part of an undertaking's assets; and
- acquisition of rights or the signing of contracts, which grant a decisive influence over the composition or decision making of an undertaking's corporate bodies.

The acquisition of a minority shareholding will only constitute a concentration if the shareholding acquired confers on the acquiring company the right to exercise, alone or (more probably) jointly with other companies, notably through a shareholders' agreement or a similar arrangement, control over the acquired company.

5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

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

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- the combined turnover of all the undertakings concerned in Mozambique in the preceding year is equal to or exceeds 900 million meticais;
- the transaction results in the acquisition, creation or reinforcement of a share of or above 50 per cent of the national market of a given good or service; or
- the transaction results in the acquisition, creation or reinforcement of a share of or above 30 per cent 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 meticais 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 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 simplified filing to the Authority, which may well be advisable if there is any chance that the Authority will intervene ex officio.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

All concentrations meeting the relevant market share and turnover thresholds 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).

Other than the excepted transactions mentioned in question 2 above, no other exceptions are foreseen in the Competition Law.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

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, the Act may apply 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.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

The Investment Act (Law 3/93 of 24 June 1993) establishes the legal framework for domestic and foreign investments that can benefit from the established guarantees and incentives (particularly the right to repatriate the invested capital and profits obtained, tax and customs incentives and the state's guarantee of security and protection of the investments and private property). The investments covered under the Investment Act must contribute to the sustainable economic and social development of Mozambique, subordinated to the principles and objectives of the national economic policy. The Act does not apply to investments in the areas of prospecting, research and production of oil and gas, mining of mineral resources or to public investments financed by funds from the General State Budget or investments of exclusively social nature. Investments covered by the Investment Act are regulated by the Investment Act Regulation (Decree 43/2009 of 21 August 2009, as amended by Decree 48/2013, of 13 September 2013).

In order for the foreign investors, whether natural persons or enterprises, to benefit from the guarantees and incentives set out in the Investment Act they must comply with the requirements and procedure set forth in the Act and in the Regulation.

Notification and clearance timetable

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

A concentration meeting the jurisdictional thresholds is subject to mandatory notification to the Authority within seven working days of the conclusion of the agreement or acquisition project, and cannot be implemented before a non-opposition decision is issued by the 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 per cent of the previous year's turnover for each of the participating undertakings; and
- the effects in Mozambique of any legal instrument related to the transaction are dependent upon the express or tacit clearance by the Authority.

In case the Authority opens an ex officio investigation into the concentration, the statutory decision deadlines do not apply.

10 Which parties are responsible for filing and are filing fees required?

Notification of a full merger must be jointly made by the merging companies. In case of acquisition of control over one or more undertakings, the notification must be filed by the undertakings (or persons) acquiring control.

Pursuant to Ministerial Decree 79/2015 of 5 June 2015, the effectiveness of the notification is dependent on a payment of a filing fee by the notifying parties of '5 per cent 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 per cent of turnover), and equal to the maximum fine applicable for implementation before clearance (5 per cent of turnover), it is hoped that this provision is amended, and the filing fee significantly reduced, before the Authority begins operations.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

In principle, the Authority must issue a final decision within a maximum of 120 working days from notification, after the conclusion of all procedure phases, although these deadlines can be extended by the Authority (see question 18). The absence of a decision within the statutory time period is deemed to form a tacit clearance decision.

A concentration subject to mandatory filing cannot be implemented before an express or tacit non-opposition decision is issued by the Authority.

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

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 per cent of the previous year's turnover for each of the participating undertakings.

The consequences for the validity of the transaction depend on whether the concentration is implemented before a clearance decision is adopted, or whether the parties breached a decision prohibiting the merger. A concentration implemented in breach of a prohibition decision by the Authority is null and void and may be so declared by a court. A transaction implemented before a clearance decision is adopted does not produce any legal effect. Parties to a concentration subject to notification will therefore only enjoy legal certainty as to its validity and effects following an express or tacit clearance from the Authority.

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 breakup of the offending undertaking or mandatory divestitures, if such measures are deemed necessary to eliminate the restrictive effects to competition.

In addition, the Authority may initiate an ex officio investigation into a non-notified concentration and order the parties to notify. Such investigations may also be opened if the Authority's clearance decision was based on false or incorrect information provided by the parties or when parties disregard conditions or obligations imposed by the Authority.

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As the Authority has not yet started operations, these provisions have not yet been applied in practice.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

See question 12.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

There are no legal provisions shedding light on the type of corporate structures needed to achieve such an objective. The possibility of suspending the completion of a global transaction in Mozambique, therefore, would only have to be analysed on a case-by-case basis. If the target carries out all its activities in Mozambique through a local subsidiary, carving out of such subsidiary from the transaction would seem possible. In other cases, it would appear to be difficult in practice, as the parties would have to convince the Authority that the concentration would not produce any effects in Mozambique until clearance had been received.

Nevertheless, the stand-still obligation may be exceptionally waived by the Authority following a reasoned request from the parties.

15 Are there any special merger control rules applicable to public takeover bids?

A concentration effected through a public offer meeting the jurisdictional thresholds is subject to the merger control provisions of the Competition Law.

As derogation to the general stand-still obligation, the Competition Law allows a public offer to be implemented prior to the clearance of the Authority if the acquirer does not exercise any voting rights or exercises those rights further only to the extent strictly necessary to protect its investment.

16 What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

The notification is to be submitted in accordance with a form to be approved by the Authority and shall contain the information and documents to be required therein. Note that, as of 31 July 2018, the Authority is not yet fully operational and, therefore, the form is yet to be approved.

Failure to provide or the provision of false, inaccurate or incomplete information, in response to requests from the Competition Regulatory Authority, in the use of its sanctioning or supervisory powers, constitutes an offense punishable by a fine that may not exceed, for each of the undertakings, 1 per cent of the previous year's turnover.

Non-reportable transactions, which can be voluntarily filed by the parties in order to enjoy legal certainty as to their compatibility with the Competition Law (see question 5) benefit from a simplified procedure and from a shortened form, which is also to be approved by the Authority.

17 What are the typical steps and different phases of the investigation?

After the notification to the Competition Regulatory Authority, the Competition Regulatory Authority shall, within a period of five days from the date on which the notice is received, promote the publication in two national newspapers, at the expense of the undertakings, of the communication of the essential elements of the notification. All interested parties may submit any comments within a maximum of 15 days.

At the end of the public consultation period, the merger control procedure encompasses three phases: a 30-working-day initial investigation by the Directorate General (Phase I), which, if the case raises serious competition concerns, may be followed by a 60-working-day in-depth investigation (Phase II). If the Director General submits a report to the board for final decision, either in Phase I or Phase II, the board has a further 30 working days to clear the transaction, with or without commitments from the parties, or (in Phase II) to issue a prohibition decision.

18 What is the statutory timetable for clearance? Can it be speeded up?

In principle, the Authority must issue a final decision within a maximum of 120 working days from notification, although these deadlines can be extended by the Authority. There is no legal requirement for the time periods to be used in full and therefore the Authority may accelerate the review and clear the transaction before the end of the decisional deadline.

In any event, the Authority cannot decide before 20 workings days have passed from the date of filing. As explained above and detailed in question 29 below, the Authority publishes a notice of the concentration in two national newspapers within five working days of filing, and interested third parties can submit observations within 15 working days of publication of the notice.

These deadlines are extended whenever the Authority asks further information of the parties, assesses commitments (see question 25 below) and conducts a hearing of the notifying parties and third parties who have expressed themselves against the transaction, before issuing a final decision on the procedure (see question 29 below). A hearing can be waived by the Authority in case of clearance decisions without commitments and in the absence of interested third parties.

In a case of gun jumping, if the Authority initiates an ex officio investigation, the procedural deadlines do not apply.

Non-reportable transactions benefit from a simplified procedure, which in principle does not include a Phase II investigation, except if the Authority considers that it raises competition concerns.

Substantive assessment

19 What is the substantive test for clearance?

Under article 18(1) of the Competition Law, the substantive test for the assessment of a concentration in Mozambique is the 'dominance test'. Concentrations will therefore be blocked if they are likely to create or strengthen a dominant position that may significantly impede effective competition in the relevant markets. The wording of the Competition Law Regulation, however, appears to empower the Authority to prohibit concentrations that give rise to a significant impediment of effective competition, even in the absence of a dominant position. It is hoped that the practice of the Authority will clarify the scope of the substantive test applied to mergers.

Concentrations are reviewed in order to determine their effects on the structure of competition in the relevant markets, taking into account the detailed criteria of articles 18(3) to 18(6) of the Regulation of the Competition Law, including efficiency and public interest criteria described in questions 22 and 23 below.

One of the criteria outlined therein is the existence of exceptional and persistent financial difficulties, which clearly demonstrate that in the absence of the concentration and of other undertakings interested in its acquisition, the acquired undertaking would be obliged to withdraw from the market in the short term. However, as the Authority has not yet started operations, these provisions and the 'failing firm' defence have not yet been applied in practice.

20 Is there a special substantive test for joint ventures?

Full function joint ventures are assessed both under the dominance test described above and also under the rules of the Competition Law on restrictive agreements and practices if its object or effect is the coordination of the competitive behaviour of undertakings that remain independent.

21 What are the 'theories of harm' that the authorities will investigate?

Under the Competition Law, the Authority is required to investigate whether the concentration creates or reinforces a dominant position in the relevant markets that significantly impedes effective competition in any of the relevant markets. In this context, depending on the concerns posed by the transaction, the Authority is likely to investigate both unilateral and coordinated effects as well as horizontal, vertical or conglomerate effects.

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22 To what extent are non-competition issues relevant in the review process?

In its substantive analysis the Authority, and according to articles 18(3) to 18(6) of the Regulation of the Competition Law, is bound to officially take into account public interest reasons that may justify any impediments or restrictions to competition resulting from the notified concentration. In its public interest assessment, the Authority 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.

Considering that the Authority has not yet started operations, these issues have not yet been assessed in practice.

23 To what extent does the authority take into account economic efficiencies in the review process?

In its substantive review, the Authority must also take into account any technological gain, efficiency or competitive advantage resulting from the transaction that would not be obtained absent the merger and outweighs the anticompetitive concerns identified in the investigation.

Note that these matters have not been assessed in practice yet, owing to the fact that the Authority has not yet started operations.

Remedies and ancillary restraints

24 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The procedure for the assessment of a concentration ends through a reasoned decision adopted by the Board of the Authority within the time periods described above, either approving or prohibiting a concentration. The concentration cannot be consummated before express or tacit clearance by the Authority.

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

The notifying parties, on their own initiative or following an informal invitation, may submit commitments in order to enable the Authority to clear the transaction, in any phase of the procedure.

The Authority will refuse the commitments when it considers that their purpose is merely dilatory or that commitments submitted are insufficient or inadequate to remedy the competition concerns. Parties may not appeal autonomously from a decision rejecting the commitments, as they will have the right to appeal against the prohibition decision that will close the procedure. The Authority does not formally have the powers to impose unilaterally remedies that were not proposed by the parties.

If the remedies are considered adequate and sufficient to address the competition concerns identified in the investigation, the Authority will include conditions or obligations in the final decision in order to ensure compliance with the commitments submitted by the notifying parties.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

As the Authority has not yet started operations, there are no guidelines or decisional practice as to detailed conditions and timing to be met by specific remedies.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

See question 26.

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

The Competition Law does not mention whether a clearance decision covers the competition restrictions directly related and necessary to the implementation of the concentration. Therefore, only the practice of the Authority, once operational, will confirm whether such restraints benefit from the legal certainty afforded by the clearance decision.

Update and trends

The Authority has exclusive competence to enforce the provisions of the Competition Law. Therefore, and considering that, as of 31 July 2018, the Authority is not yet fully operational, the rules described above will only become enforceable on the day the Authority becomes operational.

Recent statements from Mozambican officials suggest that the appointment of the president and the members of the board of the Authority by the Mozambican government will take place in the near future.

Involvement of other parties or authorities

29 Are customers and competitors involved in the review process and what rights do complainants have?

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

In addition, prior to the adoption of a final decision of the procedure, the Authority must hold a hearing of the 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.

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

A notice of the notification without confidential information is published by the Competition Authority in two national newspapers within five working days of filing.

Notifying parties should identify in the notification, and in responses to additional requests, information that in their view should remain confidential and submit a non-confidential version of these documents. Authority officials are subject to obligations of professional secrecy under the Statutes of the Authority.

In addition, a non-confidential version of final decisions on merger control should be published in the Authority's website.

31 Do the authorities cooperate with antitrust authorities in other jurisdictions?

Although the Authority is not yet operational, representatives of the Mozambican government were among the signatories of the recent memorandum of understanding among competition authorities of the member states of the Southern African Development Community on Cooperation in the Field of Competition Policy, Law and Enforcement, signed by representatives of nine southern African competition authorities in Gaborone, Botswana on 26 May 2016.

Judicial review

32 What are the opportunities for appeal or judicial review?

All 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.

Considering that the Authority has not yet started operations, no judicial review process has been initiated.

33 What is the usual time frame for appeal or judicial review?

Under the Law on the Procedure in the Administrative Courts, an annulment action against a decision based on its illegality must be lodged within three months of its notification, unless it is a tacit decision, in which case the time limit is 360 days, or the decision is null and void, in which case there is no time limit. Further appeals must

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be brought before the competent appeals court within 30 days of the appealed ruling.

Enforcement practice and future developments

34 What is the recent enforcement record and what are the current enforcement concerns of the authorities?

As mentioned above, it is expected that the Authority will become operational in the near future. At present Mozambican merger control provisions are not yet enforced, as the Authority has exclusive jurisdiction under the Competition Law.

35 Are there current proposals to change the legislation?

It is expected that, once it is operational, the Authority will approve several regulations, including those establishing the notification forms.

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