Angola merger control

Produced in partnership with Morais Leitão, Galvão Teles, Soares da Silva

A conversation with Pedro Gouveia e Melo, partner at Morais Leitão, Galvão Teles, Soares da Silva on key issues on merger control in Angola.

NOTE–to see whether notification thresholds in Angola and throughout the world are met, see Where to Notify.

1. Have there been any recent developments regarding the Angolan merger control regime and are any updates/developments expected in the coming year? Are there any other 'hot' merger control issues in Angola?

Law 5/2018 of 10 May 2018 (the Competition Act) established a modern legal framework for competition in Angola and created the Competition Regulatory Authority (the Authority) to enforce it. The Competition Law Regulations were approved by Presidential Decree 240/18 on 12 October 2018, and the government approved further rules establishing the Authority in December 2018. More recently, the notification forms regulation was approved in January 2020 and the filing fees regulation was adopted in February 2021.

The Authority became operational in 2019 and since then has been regularly receiving merger notifications. 5 clearance decisions were issued in 2019, 2 in 2020 and 6 in 2021. In December 2021, the Authority adopted its first Phase 2 decision, when it cleared the acquisition by Angolan oil company Sonangol of Puma Energy subject to structural and behavioural commitments.

The Authority is responsible for the application of a competition enforcement system inspired by existing competition regimes in the European Union and in particular Portugal.

2. Under Angolan merger control law, is the control test the same as the EU concept of 'decisive influence'? If not, how does it differ and what is the position in relation to minority shareholdings?

Yes. The definition of 'control' under the Competition Act closely follows the EU Merger Regulation and is inferred from all the relevant legal or factual circumstances that confer the ability to exercise decisive influence on the target's activity.

3. Are joint ventures caught by the national merger control provisions (including non-structural, cooperative joint ventures)?

Yes, especially in the cases of change of control over joint ventures. The acquisition of control over a previously jointly-controlled undertaking that has an existing market presence in the Angolan market will be subject to the merger control rules of the Competition Act when the jurisdictional thresholds are met, irrespective of whether it was full-function prior to the transaction.

There is less clarity in transactions setting up a joint venture. In principle, if the parent companies contribute to the JV companies or assets to which a turnover in Angola can clearly be attributed, then it will likely be a concentration. The law is not clear on whether in such cases only full-function joint ventures are caught, but in view of the practice under EU and Portuguese competition law (on which the Angolan merger control rules are based), such interpretation would make sense.

4. What are the merger control thresholds and would a purely foreign-to-foreign transaction be caught (commenting on any 'effects' doctrine/policy if relevant)?

A transaction will require notification if:

- there is the acquisition, creation or reinforcement of a share equal to or higher than 50% in the Angolan market or in a substantial part of it
- there is the acquisition, creation or reinforcement of a share between 30% and 50% in the Angolan market or a substantial part of it, and at least two of the undertakings concerned achieved individually in Angola a turnover the exceeds AOA 450m in the last financial year
- the combined turnover of all undertakings participating in the concentration in Angola in the last financial year exceeds AOA 3.5bn.

Purely foreign transactions may be caught by the Competition Act to the extent that they have effects in Angola and meet the relevant jurisdictional thresholds.

5. Are there any specific issues parties should be aware of when compiling and calculating the relevant turnover for applying the jurisdictional thresholds?

The Competition Law Regulations establish detailed rules on determining the turnover and market shares relevant for jurisdictional purposes, which should take into account the whole economic group of each of the undertakings concerned. Turnover includes revenues from sale of goods and services to clients in Angolan territory, net of turnover-related taxes, but excludes intra-group revenues. Specific rules exist for calculating the turnover of banks and insurance companies.

6. Where the jurisdictional thresholds are met, is notification mandatory and must closing be suspended pending clearance?

Yes, a concentration which meets the jurisdictional thresholds is subject to mandatory notification and cannot be implemented before a clearance decision is issued by the Authority.

7. Is there any discretion to review transactions that fall below the notification thresholds?

Yes, the Competition Act provides that the Authority may initiate an ex officio filing on transactions that do not meet the jurisdictional thresholds in cases where such transactions are deemed to impede, distort or restrict competition and were not exempted under the provisions of the Act on restrictive agreements and practices.

8. Is it possible to close the deal globally prior to local clearance?

A 'local carve out' would have to be analysed on a case-by-case basis, but to date there are no detailed rules on when this would be possible.

9. Is there a deadline for filing a notifiable transaction and what is the timetable thereafter for review by the Competition Regulatory Authority?

The Competition Act does not have a deadline for filing, although merging parties should are advised to file as soon as possible after signing, since the implementation of the transaction will only be possible with clearance or the expiry of the waiting period.

Phase 1 of the procedure starts when, subsequent to filing, the Authority publishes a notice of the transaction in two national newspapers within 20 business days, following which interested third parties may submit observations within 10 business days. The Authority should then complete the initial investigation, and either clear the transaction or initiate an in-depth investigation (Phase 2). At the end of Phase 2, the Authority should adopt a decision either clearing or prohibiting the merger. There is no specific deadline to complete Phase 1, but whole review procedure (including Phase 2) must be completed within 120 working days from notification, or otherwise the transaction is deemed to be tacitly authorised.

In the course of the review the Authority can request information to the notifying parties, as well as to any public and private entities. Any final decision in the procedure should be preceded by a hearing of the notify-

ing parties and of any interested third parties that expressed themselves to be against the transaction. It is unclear whether additional information requests and the hearing of the parties suspend the decision deadline, but this cannot be excluded.

10. Who is responsible for filing a notifiable transaction (noting also whether there is a specific form/document used and an applicable filing fee)?

In principle, the filing of a full merger must be jointly made by the merging parties, and acquisitions of control over one or more undertakings should be filed by the party(ies) acquiring control, but this should be confirmed once the Authority approves the notification form.

A filing fee is due from the notifying party, without which the notification is not effective, and should be paid by local firms (international payments are not currently possible. The level of the filing fee is:

- for transactions where the combined turnover is greater than AOA 450m but not greater than AOA 3.5bn, the fee payable is AOA 2,418,944.15
- for transactions where the combined turnover is greater than AOA 3.5bn, the fee payable is AOA 3,627,916.96.

There is no stipulation for a fee where the turnover thresholds are not met but the combined market share is greater than 50%.

11. Please comment on the penalties for failing to notify or suspend transactions pending clearance and the record/stance of the Competition Regulatory Authority in terms of pursuing parties for failing to notify relevant transactions (commenting, if relevant, on any statute of limitations regarding sanctions for infringements of the applicable law).

Parties to a concentration subject to mandatory filing in Angola should consider carefully the potentially serious consequences of implementing the transaction without notifying or waiting for a clearance decision from the Authority.

In particular, heavy fines may be imposed, which in theory may reach up to 10% of the previous year's turnover for each of the merging parties for gun-jumping (failure to file may attract a fine of up to 5% of turnover), and the uncertainty as to the effectiveness of the transaction may harm the parties' normal course of business. The Authority can also initiate an *ex officio* investigation into a concentration implemented in violation of the Competition Act, which may even entail the break-up of the merged entity.

The limitation period set out for the fines applicable for gun-jumping is five years.

12. Are there any other 'stakeholders' other than the Competition Regulatory Authority (for example, any 'sector regulators' who might have concurrent powers)?

In industries subject to sectoral regulation the relevant regulators must, upon request of the Authority, issue a non-binding opinion on the merger before a final decision is adopted.

Interested third parties to a transaction, such as competitors, suppliers, customers or consumer associations, may play a significant role in merger review cases. First, any interested third-party whose rights or legitimate interests may be affected by the Authority may submit observations stating their position subsequent to the notice of the notification being published. In addition, prior to the adoption of a Phase 1 or Phase 2 decision the Authority must hold a hearing of the third parties which have already intervened in the procedure.