The Competition Law Regime of Angola

The competition law regime of Angola was enacted by Law No 5/18, of 10 May, which approved the Competition Act, and by the Presidential Decree No 240/18, of 12 October, which approved the Competition Law Regulation ("Competition Regulation").

The Angolan Competition Act entered into force on 10 May 2018. It is applicable to the economic activities, whether permanent or occasional, carried out in Angola by public or private companies, cooperatives or professional associations, or whenever these activities have or may have an effect in Angola.

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Presidential Decree No 313/18, of 21 de December, approved the bylaws of the Competition Regulatory Authority ("CRA"). The CRA is overseen by the President of Angola, also having been granted autonomy to carry out its functions. The first members of the CRA's administration board have been appointed by the President of Angola on 25 January 2019.

The first members of the CRA's board were appointed in January 2019.

Restrictive Practices

The Competition Act prohibits:

- The abuse of a dominant position (Article 9);
- The abuse of economic dependence (Article 11); and
- Agreements between undertakings, concerted practices and decisions by associations of undertakings which have as their object or effect the restriction of competition.

The Competition Act prohibits the abuse of dominant position, the abuse of economic dependence and agreements, concerted practices and decisions by associations of undertakings.

The Competition Act provides a non-exhaustive list of examples of conduct that may restrict competition, falling under such categories.

There are some specificities to the Angolan law when compared with the examples of restrictive conduct laid down in the Portuguese competition regime (and with Articles 101 and 102 of the Treaty on the Functioning of the European Union, which is the model regime adopted in the Portuguese Act).

Abuse of a Dominant Position

The Competition Act defines 'dominant position' as the power of an undertaking or undertakings to act in a way that disregards their competitors, buyers or suppliers. The Competition Regulation, in its turn, establishes a presumption of dominance when an undertaking or the undertakings acting together have a 50% or above share of the market.

There is presumption of dominance when an undertaking has 50% or above share of the market.

The Competition Act provides a number of examples of abusive conduct which are not expressly mentioned by the Portuguese or the European Union rules, in particular, the Angolan law prohibits:

- "Any conduct that results in an agreement meant to restrict competition", which confirms the broad scope of conduct that may be considered abusive; or
- "Terminating a commercial relationship without justification", a conduct which is not easily discernible from the 'abuse of economic dependence' as has been debated in other jurisdictions.

Abuse of Economic Dependence

The 'abuse of economic dependence' is also a distinctive feature of the Angolan law, as such conduct is not prohibited by most competition law regimes, in particular by the European Union rules.

As mentioned above, the 'abuse of economic dependence' is not easily discernible from the 'abuse of a dominant position'. It is also widely considered that prohibiting such conduct serves the purpose of protecting undertakings that are in a situation of economic dependence rather than serving the purpose of fostering competition, therefore departing from the remit of competition law.

The 'abuse of economic dependence' is not easily discernible from the 'abuse of a dominant position'.

The Angolan regime provides examples of conduct that may fall under this type of abusive conduct, mirroring the Portuguese competition regime which also prohibits the 'abuse of economic dependence'.

Horizontal and Vertical Agreements

In what concerns horizontal agreements and the examples of prohibited conduct set forth in the Angolan regime, it is worth stressing that the Competition Act expressly mentions conduct that restricts competition in the context of public procurement, in particular "coalitions or other concerted practices carried out to seek advantages, interfere or influence the outcome of public tenders for the procurement of goods or services".

The Competition Act expressly mentions conduct that restricts competition in public procurement.

As to vertical agreements, excessive prices are laid down as an example of restrictive conduct. In one hand, excessive prices tend to be seen as a form of abuse of dominance in other jurisdictions, as is the case of the European Union, and, on the other, have not been included among the investigative priorities of most competition regulators.

Restrictions by Object or by Effect

Similar to the Portuguese and the European competition law regimes, reference to restrictions *by object*[1] or *by effect* is only made regarding agreements, concerted practices or decisions by associations of undertakings. The fact that there is no such reference regarding other restrictive practices laid down by the Angolan regime supports the expectation of an *effects* based approach to abusive conduct.

Reference to restrictions 'by object' or 'by effect' is only made regarding agreements, concerted practices or decisions by associations of undertakings.

Justification for Agreements, Concerted Practices and Decisions by Associations of Undertakings

Restrictive agreements, concerted practices and decisions by associations of undertakings may be considered justified provided they also generate efficiencies.

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Such justification requires that: a) an equitable part of the benefits is passed on to the users of the relevant goods or services; b) any restrictions which are not indispensable to the attainment of the efficiencies are not imposed on the undertakings concerned; and c) such undertakings are not afforded the possibility of eliminating competition from a substantial part of the market.

Undertakings should obtain prior approval from the CRA in order for such practices to be justified, which constitutes a distinctive feature of the Angolan regime compared with the Portuguese and the European Union regimes, which no longer require prior approval from regulators.

Undertakings should obtain prior approval from the CRA for such practices to be justified.

Reversal of the Burden of Proof

Articles 12 and 13 of the Competition Act which prohibit horizontal and vertical agreements, state that "the undertakings or association of undertakings bear the burden of proving that their conduct does not fulfil the conditions [laid down in such provisions]".

The burden of proving anti-competitive agreements seems to have been reversed.

The burden of proving the above mentioned infringements seems to have been reversed, being the undertakings' responsibility to prove that they did

[1] Restrictions that, due to their very nature, have a high potential of negative effects on competition, making it unnecessary to demonstrate any actual or potential effects on the market.

not enter into any anti-competitive agreements. The courts will have to determine how the burden of proof that lays on the undertakings is to be reconciled with the principle of the presumption of innocence.

Undertakings claiming justifications for agreements, concerted practices and decisions by associations of undertakings also bear the burden of proving any efficiencies generated by such practices and that all the remaining conditions described above related to justifications are fulfilled.

Undertakings claiming justification of restrictive practices also bear the burden of proving efficiencies.

Administrative Proceedings Regarding Restrictive Practices

Administrative offence proceedings regarding restrictive practices comprise an investigative phase, which should last up to 24 months, and an administrative phase, which should last up to 12 months.

Investigative Phase

At the end of the investigative phase, the CRA may decide to: a) end the proceedings; or b) issue a statement of objections, whenever it concludes that there exists a reasonable likelihood of a decision imposing a sanction.

Contrary to other competition regimes such as the Portuguese and the European ones, the Angolan law does not lay down the possibility of putting an end to the investigative phase with commitments or with a settlement.

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Administrative Phase

The administrative phase begins with the statement of objections. At the end of this phase, the CRA may decide to: a) end the proceedings; b) end the proceedings by imposing conditions; c) issue an admonition; or d) take a "final decision".

The "final decision", in its turn, "should include: (i) the finding of an infringement; (ii) an admonition; (iii) the imposition of fines and other sanctions; (iv) authorize an agreement imposing terms and conditions".

Further guidance is needed on how the CRA will proceed when "ending proceedings by imposing conditions" and how "agreements imposing terms and conditions" (in a final decision) will work in practice. In particular, further clarification is needed as to whether or not undertakings will have the option of offering commitments and whether or not undertakings will be required to admit their responsibility for an infringement if they enter into an "agreement imposing terms and conditions".

It is not clear if undertakings may offer commitments in the administrative phase or if they have to admit responsibility for infringements when entering into "agreement with terms and conditions".

Powers of the CRA

The CRA may, *inter alia*, enter and search the premises of undertakings or

associations of undertakings, to search, examine and seize copies of accounting data or of other documents. The Competition Act does not require the CRA to obtain a warrant from the judicial authorities authorizing it to enter and search any premises. However, under the Competition Act, the CRA is required to obtain a warrant in order to seal off the premises of undertakings for obtaining evidence.

The CRA may conduct dawn raids.

Sanctions

Where the CRA finds that there is a restrictive practice, it may impose fines assessed between 1% and 10% of the turnover in the "preceding year" for each of the undertakings concerned or, in the case of associations of undertakings, the aggregate turnover of the associated undertakings.

The CRA may impose fines of 1% - 10% of the turnover for restrictive practices.

The lack of prior notification of a concentration, when legally required, is subject to a fine assessed between 1% and 5% of the turnover in the "preceding year" for each of the undertakings.

Lack of prior notification of a concentration, when legally required, is subject to a fine of 1% - 5% of the turnover.

The CRA may also impose a fine assessed between 1% and 10% of the turnover in the "preceding year" in case a concentration subject to prior notification has been implemented before a decision has been taken by the regulator.

The CRA can also apply a number of accessory sanctions, including a ban on the right to participate in public procurement procedures for a period of up to three years.

The CRA can exclude undertakings from participating in public procurement procedures for a maximum period of three years.

Criminal Sanctions

The Competition Act does not lay down criminal sanctions for competition law infringements.

Responsibility of Natural Persons and Undertakings

There are no specific provisions laying down the terms on which natural persons (e.g., members of the board or directors) may be held responsible for competition law infringements, or on which undertakings may be held responsible for infringements committed by such natural persons.

Reduction of fines (leniency)

Under the Competition Regulation, the CRA may approve a leniency regime setting out the framework to reduce fines which would otherwise have been imposed to undertakings (or natural persons). Undertakings (or natural persons) that submit significant information and evidence to the CRA may

The CRA may approve a leniency regime.

have their fines reduced as follows:

- Reduction of 50% - 70% for the first applicant;
- Reduction of 30% - 50% for the second applicant;
- Reduction of 10% - 30% for the third applicant.

The Angolan regime also requires undertakings to admit to their participation in a restrictive practice.

There is no immunity for undertakings (or natural persons) collaborating on an investigation.

There is no immunity from fines.

Leniency is not expressly limited in scope to agreements and concerted practices. Further clarification is needed as to whether or not leniency is also available to undertakings engaged in unilateral conduct.

Mergers

Under the Competition Act and the Competition Regulation, concentrations between undertakings are subject to prior notification when they fulfil one of the following conditions:

The Competition Regulation established the merger control thresholds which are based on the market shares and / or the annual turnover.

- As a consequence of the concentration, a market share equal to or greater than 50% of the market in a specific product or service is acquired, created or reinforced;
- As a consequence of the concentration, a market share equal to or greater than 30% but smaller than 50% of the market in a specific product or service is acquired, created or reinforced, in case the individual turnover in Angola in the previous financial year, by at least two of the undertakings involved in the concentration is greater than 450.000.000 Kwanzas directly related to such market;
- The undertakings that are involved in the concentration have reached an aggregate turnover in Angola in the previous financial year greater than 3.500.000.000 Kwanzas directly related to the specific market.

Notifications shall be submitted according to a form to be approved by the CRA. The CRA shall then issue its decision within 120 days. After that deadline expires and in the absence of a decision, the concentration will be deemed approved. The deadline to issue a decision is extended to 180 days in case the CRA conducts an in-depth investigation.

The CRA will conduct an in-depth investigation in case it considers that a concentration may create a dominant position with a negative impact on

competition.

The notifying parties may offer commitments at any time, with a view to ensuring that effective competition is maintained.

Appeals

The decisions handed down by the CRA are subject to appeal to the Administration and the courts.

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