

Decree 97/2014

Of 31 December

As there is a need for the passing of regulations on the Competition Law, Law 10/2013 of 11 April, in terms of Article 68 of that Law, the Council of Ministers decrees:

Article 1. The Regulations on the Competition Law, which are attached to this Decree and form an integral part of it, are approved.

Article 2. This Decree enters into force immediately.

Approved by the Council of Ministers on 2 December 2014.

For publication.

The Prime Minister, Alberto Clementino António Vaquina

REGULATIONS ON THE COMPETITION LAW

CHAPTER 1

General Provisions

ARTICLE 1

(Subject)

These regulations establish the general provisions necessary for the implementation of the Competition Law, Law 10/2013 of 11 April.

ARTICLE 2

(Scope of Application)

These Regulations apply to all economic activities conducted in the national territory by private or public businesses, or which have an effect in it.

ARTICLE 3

(Entities forming an economic unit)

1. An economic unit is deemed to exist when the bonds of interdependence between entities result from:
 - a) majority participation in the capital;
 - b) a participation with a right to vote on strategic matters, in particular, plans of activity, investment policies, budgets and the appointment of high-level staff teams;
 - c) the holding of more than half of the votes allocated to corporate participations;
 - d) the possibility of appointing more than half of the members of an administrative body or body with financial oversight;
 - e) power to manage the respective business dealings.

2. For the purposes of what is set out in Article 3 of Law 10/2013, of 11 April, entities forming an economic unit are deemed to constitute a single business, irrespective of their juridical independence.
3. Agreements concluded between entities forming an economic unit, and which relate to the distribution of tasks or other matters which are internal to that business, shall not constitute agreements for the purposes of the application of Articles 15 and following of Law 10/2013, of 11 April.
4. An entity which is not able to determine its commercial policy independently or to manage the respective business dealings shall be deemed to form part of an economic unit, along with the entity on which these matters depend.

CHAPTER II

Anti-Competitive Practices

ARTICLE 4

(Subject of vertical agreements)

The prohibition on vertical agreements contained in Article 18 of Law 10/2013, of 11 April, shall be subject to the same general conditions for the prohibition contained in Article 17 of the same Law, if the subject or effect of such agreements is the total or partial prevention, falsification or restriction of competition, to an appreciable extent, on the national market.

ARTICLE 5

(Dominant Position)

1. A dominant position shall be deemed to exist when the market share held by a business, or by two or more businesses, collectively, is equal to or larger than 50%. The existence of significant barriers to market entry by competitors may indicate that one or more businesses with market shares which are smaller than 50% still hold a dominant position.
2. One or more businesses may demonstrate that they do not hold a dominant position, irrespective of their market share, by proving that market conditions are competitive because significant competition exists or is arising, or that they do not predominate over their competitors in that market.

ARTICLE 6

(Purpose of abuse of a dominant position)

The abuse of a dominant position – when one company, which predominates over other competitors and third parties, behaves as set out in Articles 17 and 18 of Law 10/2013, of 11 April – is prohibited.

ARTICLE 7

(Economic dependence)

1. A supplier or client of one or more companies is economically dependent on it/them if it has no equivalent alternative.

2. A supplier or client has no equivalent alternative when, because of the characteristics of the market in which it operates, or of the commercial relationships which it has with other companies, the following circumstances exist:
 - a) The supply of the goods or services in question, and the distribution service, is provided by a restricted number of companies; and
 - b) The supplier or client cannot obtain equivalent terms from other commercial partners within a reasonable time period.
3. The abusive exploitation of a state of economic dependence may consist of any of the behaviours set out in Article 18 of Law 10/2013, of 11 April, as well as of the behaviours set out in Article 19(3)(c) and (d) of the same Law.

ARTICLE 8

(Simplified exemption procedure)

1. Justification of prohibited practices which are proven to be in pursuit of the objectives referred to in Article 21(1)(a), (d) and (f) of Law 10/2013, of 11 April, shall be subject to a simplified exemption procedure, to be approved by way of regulations from the Competition Regulator.
2. Interested businesses shall be required to demonstrate, to the Competition Regulator, that the restrictive practice in question is aimed at the pursuit of one of the objectives referred to in the previous sub-article, and shall be deemed to be justified, without the need for a prior application, except if the Competition Regulator concludes that the restrictive practice in question:
 - a) does not comply with all of the conditions set out in Article 21(2) of Law 10/2013, of 11 April; or
 - b) does not reserve an equitable part of the benefit which results from it for the users of the goods and services in question.

ARTICLE 9

(Professional Associations)

1. Professional associations shall be deemed to constitute business associations, whose decisions and internal rules are subject to Law 10/2013, of 11 April.
2. Decisions of professional associations shall be exempt, in terms of Article 64 of Law 10/2013, of 11 April, and Article 4(2) of these Regulations, when they are proven, in accordance with the principles of necessity and proportionality, to safeguard the professional interests of the profession, provided that the conditions referred to in Article 21(2) of Law 10/2013, of 11 April, are met.

CHAPTER III

Business concentration operations

Article 10

(Control of concentrations)

1. Operations which imply a temporary or transitional change of control, and which do not result in an effective concentration of economic power in the acquiring entity and the acquired entity, nor a change in market structure, are excluded from Article 23 of Law

10/2013, of 11 April, because they do not constitute a concentration operation for the purposes of the said Law.

2. Equally, the following are not considered to be business concentrations:
 - a) The acquisition of participations or assets by an insolvency administrator, in the context of insolvency proceedings;
 - b) The acquisition of participations for guarantee purposes;
 - c) The acquisition of participations by credit institutions, financial companies or insurance companies, in companies with business objectives which are distinct from their own, merely temporarily, and for the purpose of resale, provided that they do not hold the voting rights which are inherent to these participations, with the objective of determining the competitive behaviour of the said companies, or which only exercise such voting rights with the objective of preparing for the total or partial alienation of the said businesses or their assets, or the alienation of such participations, and provided that such alienation occurs within a period of one year, calculated from the date of the acquisition.
 - d) Two or more concentration operations effected within a period of five years, among the same individual or juristic persons, and which are not, when taken individually, subject to a duty of prior communication, in terms of Article 24(1) of Law 10/2013, of 11 April.
3. The concentration operation referred to in paragraph (d) of the previous sub-article shall be communicated to the Competition Regulator after the conclusion of the agreement in respect of the last operation, and prior to it being implemented.
4. The provisions of the previous sub-article shall not, in any of the situations described in Article 57(1) of Law 10/2013, prevent the Competition Regulator from commencing its own proceedings for the control of concentrations, in respect of operations which have taken place less than five years previously, and of which the Competition Regulator was aware.

ARTICLE 11

(Communication of operation)

1. Business concentration operations are subject to prior notification when they meet one of the following conditions:
 - a) As a result of the operation being effected, a share of 50% or more is acquired, created or reinforced, on the national market or in a substantial part of it, for particular goods or services;
 - b) As a result of the operation being effected, a share of 30% or more, and less than 50%, is acquired, created or reinforced, on the national market or in a substantial part of it, for particular goods or services - provided that the turnover achieved, individually, in Mozambique, in the last tax year, by at least two of the companies which participate in the concentration operation, exceeds 100 million Meticaís, net of directly related taxes;
 - c) The set of businesses which participate in the concentration have achieved, in Mozambique, in the last tax year, turnover exceeding 900 million Meticaís, net of directly related taxes.
2. Prior communication of concentration operations shall be given by completing the form referred to in Article 49 of Law 10/2013, of 11 April, which shall be submitted to the Competition Regulator:
 - a) jointly by the parties participating in the merger, acquisition of joint control or creation of a common business, or by their legal representative; or

- b) individually by that party acquiring exclusive control of the whole, or a part, of one or various businesses, or by its legal representative.
- 3. Prior to the submission of the form, the entities referred to in the previous sub-article may commence an informal and confidential pre-notification procedure, with a view to obtaining assistance with the completion of the notification form, and clarifying questions relevant to the notification, in particular, the need and obligation to notify.
- 4. The assistance provided by the Competition Regulator, during the pre-notification procedure, shall not imply, not be interpreted as the taking of a position, on its part, with respect to the viability of the concentration.

ARTICLE 12

(Market share and turnover)

- 1. For the calculation of the market share and turnover of each business involved in the concentration, as envisaged in Article 11(1), the following turnover shall be taken into account, cumulatively:
 - a) The turnover of the business involved in the concentration, in terms of Article 23 of Law 10/2013, of 11 April;
 - b) The turnover of the business which has, directly or indirectly:
 - i) a majority participation in the capital;
 - ii) more than half of the votes;
 - iii) the possibility of appointing more than half of the members of the administrative body, or body having financial oversight;
 - iv) the power to manage the respective business dealings.
 - c) Businesses which have the rights or powers listed in the previous sub-article, in the business in question, whether in isolation, or jointly;
 - d) The turnover of the businesses in which any of the businesses referred to in the previous sub-article, have the rights or powers listed in paragraph (b);
 - e) The turnover of those businesses in which the various businesses referred to in paragraphs (a) to (d) have, jointly, among themselves, or with third party businesses, the rights or powers listed in paragraph (b).
- 2. In the case of one or various businesses which participate in the concentration operation having, jointly, among themselves or with third party businesses, the rights or powers listed in paragraph (b) of the previous sub-article, one must, in the calculation of the turnover of each of the businesses involved in the concentration operation:
 - a) not take into consideration the turnover resulting from the sale of products or the provision of services between the common business and each of the businesses involved in the concentration operation, or any other business linked to them, in the sense of paragraphs (b) and (e) of the previous sub-article;
 - b) take into consideration the turnover resulting from the sale of products or the provision of services between the common business and any other third party business, which shall be imputed to each of the companies involved in the concentration operation, in a portion corresponding to its division, in equal parts, between all of the businesses which control the common business.
- 3. The turnover referred to in the previous sub-articles includes the values of products sold and of services provided to businesses and consumers in the national territory, net of taxes which are directly related to turnover, but does not include transactions concluded between the businesses referred to in sub-article 1.

4. In derogation from the provisions of sub-article 1, if the concentration operation consists of the acquisition of parts of the assets of one or more businesses, the turnover to take into consideration, as regards the transferor, shall be only that relating to those parts which are the subject of the transaction.
5. Turnover shall be replaced:
 - a) in the case of credit institutions and financial companies, with the sum of the following income items, as defined in applicable legislation:
 - i) interest and equivalent income;
 - ii) income from securities: income from shares and other variable income securities; income from participations; income from parts of capital, in affiliated companies;
 - iii) commissions received;
 - iv) net profit flowing from financial operations;
 - v) other operating income;
 - b) in the case of insurers, with the value of gross premiums issued, paid by Mozambican residents, which include all amounts received and to be received in terms of insurance contracts effected by those companies, or for their account, including premiums ceded to re-insurers, with the exception of taxes or fees charged on the basis of the amount of the premiums, or their total volume.

ARTICLE 13

(Publication of act of communication)

1. Within a period of five days, calculated as from the date on which the communication is submitted, the Competition Regulator shall publish notice of its essential elements, in two newspapers with wide circulation, at the expense of the authors.
2. Interested parties or opposing parties may submit comments, which shall not bind the Competition Regulator, within a period of 15 days.
3. In the case of the interested or opposing parties referred to in Article 19 of these regulations, including the regulator for the sector, the Competition Regulator shall notify them to state their position in writing, within a period of 15 days, or to request a hearing in relation to the concentration operation.
4. For the purposes of sub-article 1 of this article, “essential elements” shall mean the following:
 - a) date of notification;
 - b) nature of operation and applicability of Law 10/2013, of 11 April;
 - c) businesses involved;
 - d) activities conducted by the businesses.

ARTICLE 14

(Withdrawal)

Notified or notifying parties may, at any time, withdraw from the proceedings, or from any request formulated, or renounce their rights or legally protected interests, except in those cases set out in the law.

ARTICLE 15

(Suspension of public offers)

1. After the communication of a concentration operation, effected in violation of the provisions of Article 25(1) of Law 10/2013, of 11 April, and prior to it being the object of a decision, whether express or tacit, or non-opposition on the part of the Competition Regulator, the individual or juristic persons who will acquire control shall immediately suspend their rights to vote, and the administrative body shall be obliged not to do anything which does not fall within the normal management of the business, and shall be prohibited from alienating participations or parts of the corporate assets of the acquired business.
2. The making of a public offer of purchase or exchange, of which the Competition Regulator has been notified, shall not be subject to an obligation to suspend the operation, provided that the acquiring party does not exercise the rights to vote which are inherent to the participations in question, or exercises them only with a view to protecting the full value of its investment.
3. Without detracting from the provisions of the previous paragraph, the Competition Regulator may, in the context of Article 25(3) of Law 10/2013, of 11 April, authorise derogation from the obligation to suspend the operation in cases in which, following submission of a substantiated request, the participating business or businesses provide evidence of the negative effect which this would have on the implementation of the operation, or on competition in general, and the derogation may, if necessary, be accompanied by conditions or obligations intended to ensure effective competition.

ARTICLE 16

(Request for information)

1. For the purposes of the investigation of the matter, in terms of Article 51 of Law 10/2013, of 11 April, a request for information must include the following:
 - a) the basis for the request for information;
 - b) the objective and relevance of the requested information;
 - c) a specification of the requested information;
 - d) the time period within which the information should be provided;
 - e) a statement that the recipient of the request for information should indicate, in a substantiated manner, which information is considered to be confidential, and in such case, attach a copy of the documents in question with the confidential information duly removed; and
 - f) the sanctions applicable in the absence of a response, or in the event of the provision of false or incomplete information.
2. A request for information must comply with the principles of legality, necessity and proportionality, and the Competition Regulator shall not request information which is outside of the scope of the evaluation of the concentration operation, which is not necessary for evaluation of its viability, or which manifestly exceeds that which is necessary, for the evaluation of the concentration operation.
3. Information gathered in the context of an investigation shall be used only for the purposes of the investigation, and all office bearers, employees and staff of the Competition Regulator are bound to a duty of confidentiality in relation to the collected information.

ARTICLE 17

(Simplified evaluation procedure)

1. The simplified evaluation procedure shall be applicable to those operations for which the market share or turnover is below the limits set out in Article 11(1).
2. The simplified procedure shall dispense with the in-depth investigation of the concentration operation, set out in Article 52(1)(c) of Law 10/2013, of 11 April, except when the Competition Regulator deems that, after a duly substantiated preliminary evaluation, there are particular circumstances involved in the concentration operation in question which make it likely to create significant impediments to competition.
3. Concentration operations which are subject to a simplified evaluation procedure shall be communicated, on a standard form, containing the turnover relating to the year prior to that in which the operation is undertaken.

ARTICLE 18

(Evaluation of concentration operation)

1. The evaluation of the concentration operation shall be aimed at determining whether it is likely to create or reinforce a dominant position which may give rise to significant impediments to effective competition on the national market, or in a substantial part of it.
2. In order to undertake the analysis referred to in the previous sub-article, the Competition Regulator shall determine the effect of the concentration operation on the competition structure, taking into account the need to preserve and develop effective competition on the national market, or in a substantial part of it.
3. In the evaluation referred to in the previous sub-article, the following factors shall be taken into account, in particular:
 - a) The structure of relevant markets and the existence or not of competition on the part of businesses established in those markets, or in distinct markets;
 - b) The position of the businesses in question in the relevant markets, and their economic and financial power, in comparison with that of their principal competitors;
 - c) The market power of the purchaser to prevent the reinforcement of situations of economic dependence, in light of the business resulting from the concentration;
 - d) The competition potential, and the existence, in law or in fact, of barriers to market entry, including customs and regulatory barriers;
 - e) The possibility of choosing suppliers, clients and users;
 - f) Access by different businesses to sources of supply, and market outlets;
 - g) The structure of existing distribution networks;
 - h) The development of the offering of, and demand for, the products and services in question;
 - i) The existence of special or exclusive rights conferred by law, or resulting from the nature of the products transacted or the services provided;
 - j) The control of essential infrastructure on the part of the businesses in question, and the possibility of access to that infrastructure offered to competing businesses;
 - k) The development of technical and economic progress, provided that the concentration operation results directly in efficiency gains, which benefit consumers;
 - l) The existence of exceptional and persistent financial difficulties which clearly demonstrate that, in the absence of the concentration operation and of other businesses interested in its acquisition, the acquired business would be obliged to withdraw from the market within a short time period;

- m) Other efficiencies resulting from the concentration operation which may have a demonstrable beneficial effect, or one which can be expected, for consumers, in particular, on those with lower income;
 - n) The real and potential level of competition as regards market imports;
 - o) Concentration levels and trends, and the history of collusion, on the market;
 - p) Market characteristics and dynamics, including the growth, innovation and differentiation of products;
 - q) The nature and extent of vertical integration on the market;
 - r) Whether the business dealings, or part of the business dealings of a party involved in the merger or proposed merger have failed, or will probably fail;
 - s) Whether the merger will result in the removal of an effective competitor from the market.
4. The provisions of Chapter II of these Regulations are applicable to businesses which, instead of having a concentrative character, are revealed to be intended to coordinate competitive behaviour among businesses which remain independent.
 5. When it is verified that the concentration is likely to impede or substantially diminish competition, the Competition Regulator shall determine:
 - a) Whether the concentration is likely to result in any technological, efficiency or other gain in competitiveness, which will be greater than the effects of any prevention or diminution of competition, which may result or is likely to result from the merger, and would probably not be obtained if the merger was avoided;
 - b) Whether the concentration operation may or may not be justified by reason of public interest.
 6. When determining whether a concentration operation may or may not be justified, by reason of public interest, the Competition Regulator may consider the effect which the operation will have on:
 - a) A specific or regional sector;
 - b) Employment;
 - c) The capacity of small businesses, or businesses controlled or belonging to historically disadvantaged persons, to become competitive;
 - d) The capacity of national industry to compete on the international market.
 7. Business concentrations shall be authorised when they are not likely to create significant barriers to competition on the national market, or in a substantial part of it.
 8. Business concentrations shall not be authorised when they are likely to create significant barriers to effective competition on the national market, or in a substantial part of it, in particular, if these barriers result from the creation or reinforcement of a dominant position.

ARTICLE 19

(Interested or opposing parties)

The provisions of sub-article 6 of the previous article shall imply the participation of the following interested or opposing parties:

- a) The ministry which oversees the sector involved, or the sectorial regulator, when the sector is regulated;
- b) The ministry which oversees the area of labour;
- c) The trade union for the sector, or trade unions for the sectors of activity, in relation to employment issues;
- d) The ministry which oversees the area of small and medium-sized businesses;

- e) The competitors of the businesses involved in concentration operations.

ARTICLE 20

(Commitments, conditions and obligations)

1. The parties authoring the notification may, at any time, make commitments, with a view to ensuring the maintenance of effective competition.
2. The submission, by the parties authoring the notification, of commitments referred to in the previous sub-article shall result in the suspension of the deadline for the taking of a decision, for a period of 30 working days, the suspension commencing on the first working day following the submission of the commitments, and terminating on the day of communication, to the notifying party, of the decision to accept or to refuse such commitments.
3. During the suspension of the deadline referred to in the previous sub-article, the Competition Regulator may request, in terms of Article 51 of Law 10/2013, of 11 April, information which it deems to be necessary for the evaluation of whether the submitted commitments are sufficient and adequate for ensuring the maintenance of effective competition, or any other information which may be necessary for the investigation.
4. The Council of the Competition Regulator shall refuse commitments whenever it deems that their submission is of a merely dilatory nature, or that the conditions or obligations to be incurred are insufficient or inadequate for preventing the impediments to competition which may result from the concentration, or that their enforceability is uncertain.
5. The refusal referred to in the previous sub-article may be the subject of an appeal to the Council of the Competition Regulator.

ARTICLE 21

(Revocation of decisions)

Without detracting from the applicability of the corresponding sanctions and invalidities envisaged in Law 10/2013, of 11 April, decisions of the Competition Regulator may be revoked when the concentration operation:

- a) Has been effected in disrespect for a decision of non-opposition, accompanied by obligations or conditions;
- b) Has been authorised on the basis of information which is false or inaccurate, in relation to the essential circumstances for the decision, supplied by the parties authoring the notification;
- c) Its approval has been obtained fraudulently.

CHAPTER IV

(Proof, fines, execution and appeal)

ARTICLE 22

(Proof)

1. All facts which are legally relevant for the demonstration of the existence or non-existence of the infraction, whether or not the target of the proceedings is punishable, the

determination of the applicable sanction, and the extent of the fine, shall be the object of proof.

2. All proof which is not prohibited by law shall be admissible, except when the law provides differently, and the proof shall be evaluated in accordance with rules based on experience, and the free conviction of the Competition Regulator.

ARTICLE 23

(Executive title and execution)

1. A decision to impose a fine shall constitute executive title.
2. In the absence of the payment of the fine within the time period indicated in the decision, the Competition Regulator shall request the relevant execution, from the Fiscal Execution Judge.

ARTICLE 24

(Determination and destination of fines)

1. Without detracting from the provisions of Article 30 of Law 10/2013, of 11 April, the Competition Regulator shall issue guidelines regarding the determination of fines which are applicable because of the violation of the said Law, which shall be made public.
2. Income from imposed fines shall be allocated as follows:
 - a) 40% to the State Budget;
 - b) 60% to the Competition Regulator.

ARTICLE 25

(Appeals)

1. Appeals against the decisions of the Competition Regulator shall have suspensive effect.
2. However, appeals against decisions which impose fines shall comply with the provisions of the Criminal Procedure Code, and shall have merely devolutive effect. The affected party may request, when instituting the appeal, that it shall have sufficient effect when the execution of the decision causes it considerable prejudice, if it offers to put up security in substitution, and the attribution of this effect shall be conditional upon the effective putting up of that security, within the time period set by the court.
3. An appeal may not be instituted against decisions of mere expediency, and decisions to close a case, with or without the imposition of conditions.

CHAPTER V

Legislation and Complementary Regulations

Article 26

(Clemency rules)

1. The Competition Regulator shall publish Clemency Rules, reducing the fines applied to businesses or individuals, provided that their collaboration results in:
 - a) The identification of others involved in the infraction, and

- b) The obtaining of information and documents which prove the infraction under investigation.
- 2. The applicability of these rules shall presuppose that the following requirements are met, cumulatively:
 - a) The first business which provides information and proof of significant additional value shall be granted a reduction of from 70% to 50% of the amount of the fine;
 - b) The second business which provides information and proof of significant additional value shall be granted a reduction of from 50% to 30% of the amount of the fine;
 - c) The third business which provides information and proof of significant additional value shall be granted a reduction of from 10% to 30% of the amount of the fine;
 - d) A business shall completely terminate its involvement in the infraction under investigation, as from the date of its submission;
 - e) The Competition Regulator shall not have sufficient evidence to ensure the imposition of the fine on the business of individual, at the time when the agreement is proposed;
 - f) The business shall confess its participation in the illegality, and cooperate fully, and on an ongoing basis, with the investigations, making an appearance, at its own expense, whenever this is requested, in all proceedings, until their closure.

ARTICLE 27

(Inquest Regulations)

The exercise of sanctioning and supervisory powers, the possibility of establishing commitments, as well as the rights of businesses, other parties to proceedings and interested parties, including rights of defence and rights of access to case files, shall be regulated by the Competition Regulator.

ARTICLE 28

(Regulations on automatic exemptions)

The Competition Regulator shall approve the Regulations on Automatic Exemption, defining categories of prohibited practices which shall benefit from automatic justification, in accordance with the conditions defined therein.

ARTICLE 29

(Publication of decisions, regulations and decisions)

1. The decisions and regulations of the Competition Regulator shall be published, mandatorily, in Series II of the *Boletim da República* (Government Gazette), and on its electronic page.
2. The Competition Regulator shall have a duty to publish, on its electronic page, a non-confidential version of decisions, and shall refer to those cases in which an appeal is pending.
3. The Competition Regulator shall also publish, on its electronic page, judicial decisions on instituted appeals.
