NEWS LEXTTER

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MOZAMBIQUE - THE STATE BUSINESS SECTOR REGIME

GLM - Gabinete Legal Moçambique
Tomás Timbane
International Partner
tomas.timbane@glm-advogados.com

The State business sector plays an important role in the Mozambican economy and, as the State itself does not engage in business directly, it decided to create entities with their own legal personality and attribute the exercise of a range of activities to them. Many of these activities may only be exercised by entities with the support of the State and with powers and means at their disposal that are not normally enjoyed by private companies. Today, with a view to speeding up the development of the country, public companies play an essential role, not only in carrying on their traditional activities, but also, in the partnerships they may establish with private companies, whether Mozambican or foreign.

A range of legislation has been introduced over recent years in relation to the State business sector, but the new Public Companies Law (Lei das Empresas Públicas), Law no. 6/2012 of 8 February, (the "PCL") that came into force on its publication date is by far the most important. The goal of this law is to bring the legal rules on public companies up to date and into line with the demands and priorities facing the State in terms of management of the business sector. For example, recent developments in the natural resources, energy and infrastructure sectors mean that, when the State has a stake in the capital of companies that exploit these resources, it needs to be represented by companies governed by rules that do not restrict the flexibility they need to operate effectively.

The PCL introduces a number of innovations but we should first highlight the transitional arrangements it establishes, as well as need for new regulations. Although the new law creates a 90- day window for public companies to revise their existing articles of association ("articles" – US bylaws), it also expressly provides that the existing articles will remain in force during this same period and, after this, the rules provided for in the PCL will prevail. The regulation to be approved by the Government must establish the model for the articles to be adopted by public companies, the powers and functions the government entities responsible for finance and for the sector in question, the decision making process and the content and model for the public programme contracts, among other issues.

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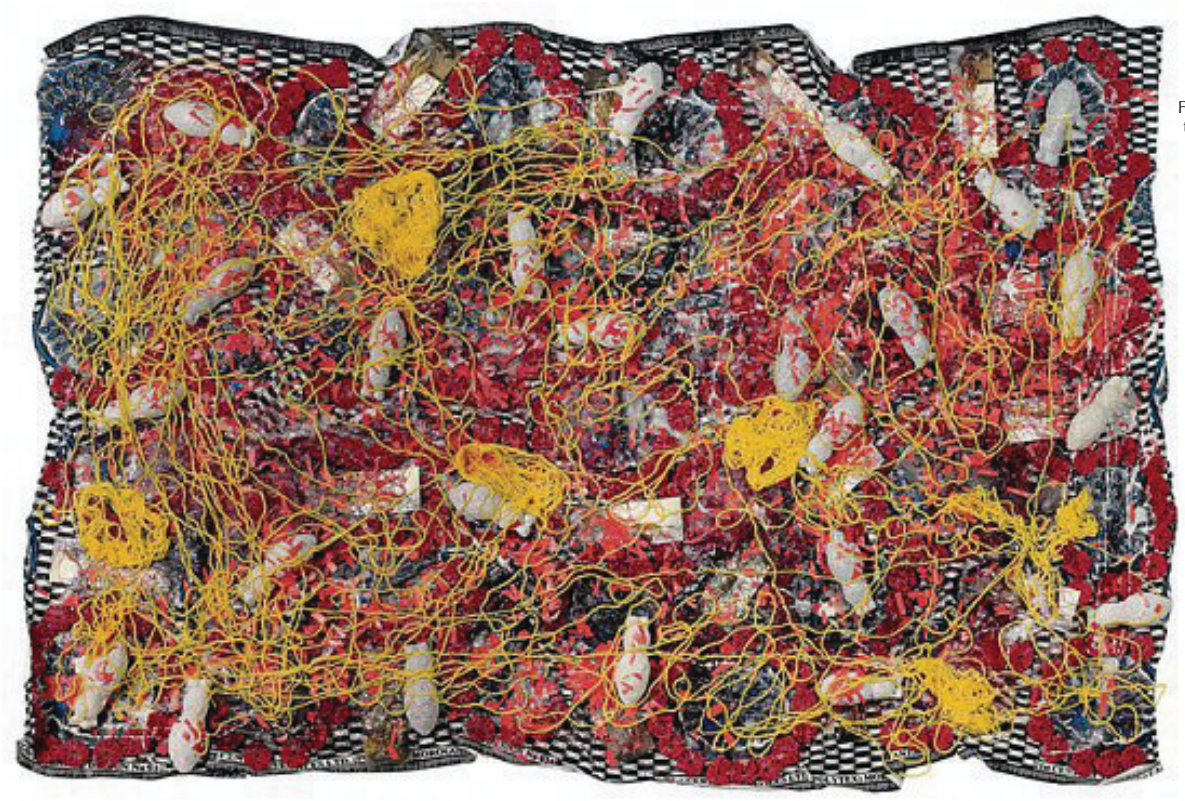

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Jorge Dias
Detail
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Many aspects of the previous regime are maintained in the new regime, but there are numerous innovations, above all in the relationship between the public companies and the Government which, as is well known, defines the State's economic policy. Public companies will now be subject to oversight in oversighting from the Government entities responsible for the sector and for finance and this approach replaces the previous regime of oversight and subordination. Oversight in terms of the sector will be exercised by the minister or other person responsible for the area of the corporate object of the public company, without prejudice to the independence of the management of the company and the powers legally conferred on it, while financial oversight remains in the hands of the minister in charge of the finance area.

The persons or bodies responsible for oversight carry out their duties and make decisions on the issues that are attributed to them by law jointly. Included in this oversight is the definition of the general policies for the development of the company, the policies for salaries, remuneration and other benefits of the members of the corporate bodies. These duties may be delegated to a remuneration committee as may the appraisal of the management reports and the accounts for the financial year.

As a result of this system of joint oversight, even when it has been approved by the person responsible for oversight of the sector, the internal regulation of a public company is still subject to a favourable opinion from the minister responsible for finance. Among other things, this regulation must include internal organisation, description of duties, organisation of work, career progression policies and remuneration status. In the same way, in order to open delegations and representations, it must not only be demonstrated that this is necessary and in compliance with the provisions of the articles, but also requires the authorisation of the institution responsible for oversight of the sector having heard the one responsible for financial oversight.

This means that whenever changes to the internal regulations of existing public companies to make them compatible with the new law can be justified, these changes will always require the favourable opinion of the minister responsible for the financial area, that is, the Minister of Finance.

In the same way, subscription to financial holdings is no longer authorised jointly by the head of the respective area of subordination and by the Minister of Finance. It now requires the authorisation of the minister responsible for the financial area, having heard the person responsible for oversight of the sector. This is not a joint decision but rather a decision of the entity responsible for financial oversight which will always have to hear whoever is responsible for oversight of the sector. The latter's position may, however, be different to that of the decision taken by the entity responsible for financial oversight. These financial holdings, which must be managed by the public companies, are subject to monitoring by the entity or institution to be appointed by the minister responsible for the financial area.

The share capital of public companies may be divided into units represented by securities in a form to be specified in the articles of association and the condition for this will be indicated in the legislation that creates the company.

As a shareholder in the public companies, the State is represented by the minister responsible for the financial area, who must decide on the application of the results of each financial year, although that minister must hear the minister or head of the body responsible for oversight of the sector.

In terms of oversight, the duty of information is broad. Public companies must provide a set of information to make it possible to supervise and control its activities. One important aspect of this duty is the requirement to present financial flow plans to the body responsible for financial oversight on a monthly basis. From an organisational point of view, public companies have a board of directors and a supervisory board. The former is made up of an odd number of executive members that may not exceed five, including the president, plus two non-executive directors, one appointed by the entity responsible for financial oversight and the other by the employees. One innovation that should be noted is related to the appointment of the president of the board of directors which, despite remaining in the power of the Council of Ministers, is made on the basis of a proposal from the minister or head of the entity responsible for oversight of the sector having heard the minister in charge of the financial area.

Another innovation relates to the term of office of the members of the board of directors which has been extended to four years from the previous three. The new period corresponds to the duration of the programme contract.

During the initial period after the entry into force of the Public Companies Law we will have to wait and see what the terms of office of the corporate bodies will be. This is because the law inadvertently failed to address this issue so, at this time, we can only conclude that the term of office of the board of directors will remain at three years, under the terms of the Public Manager Statute. For the members of the supervisory board the term of office remains at three years.

Even though the board of directors enjoys the powers necessary to ensure and control the day-to-day management and development of the company, it is subject to the (i) approval by the entities responsible for oversight of the sector and of the financial area of the activity plans (economic and financial), appraisal of the activities report and provision of accounts and (ii) appraisal and approval of the plan for application of results by the entity responsible for financial oversight. Besides this, the acquisition and disposal of securities and fixed assets is dependent on the approval of the entity responsible for financial oversight. Among the powers of the board of directors that do not need to be considered by either of the entities responsible for oversight are the approval of the management objectives and policies of the company, implementation of management of the company and appointment of the staff. The board also has power to create and manage the complementary social security system[1].

In the context of the powers he or she holds, within 90 days of his or her appointment the president of the board of directors[2] must submit the proposal for the programme contract that will serve as the basis for monitoring and evaluation of performance to the ministers responsible for finance and for planning and development, and to the minister responsible for oversight of the sector for their appraisal and approval. As is obvious, this monitoring and approval will be in respect of the programme contract that has been signed between these political leaders and the public company, the content of which is established by the law. From the point of view of supervision, in carrying out their duties the members of the supervisory board may attend the meetings of the board of directors and it will be mandatory for them to attend meetings at which the report accounts and budget proposal are considered.

In relation to their assets, public companies administer and dispose of the items that form part of the assets allocated to the company or acquired by it, which answer for its debts. Public companies also administer the assets that are in the public domain of the State that are allocated to the activities the company carries on, and it must keep the record of them up to date.

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[1] This situation strengthens the complementary character of the social security schemes for public companies, which, as in any private company, are subject to mandatory registration in the social security system. This complementary system depends, as a result of the application of the legal rules of the said system, on the ministers that supervises the areas of employment and finance and such companies must demonstrate their capacity for sustainability.

[2] In the event of his or her absence or incapacity, the president of the board of directors is substituted by the executive director with the longest period of service and, if more than one meets this requirement, by the oldest of them.

Public companies may be financed by the state budget, by subsidising the operating deficit or prices when public interest reasons justify the application of prices or tariffs or the provision of services below the respective cost.

Even though these are companies with independent management, because they are owned by the State, the law makes it possible for the Council of Ministers to formulate strategic guidance for all public companies. To complement the Government guidance, the entities responsible for oversight of the sector and the financial side may formulate general guidelines for all the companies in the same sector or specific guidelines for a specific company. These guidelines establish qualitative and quantitative targets and also set parameters or guiding principles for the determination of the remuneration of the managers.

Indebtedness or the assumption by public companies of liabilities of a similar nature, including the issue of bonds, are subject to authorisation from the entity responsible for financial oversight (whatever the amount of the debt), except in cases of current credits with a repayment obligation of up to two years.

From the point of view of revenue, public companies may be financed by the state budget, by subsidising the operating deficit or prices when public interest reasons justify the application of prices or tariffs or the provision of services below the respective cost. A system of financial control and prevention of tax risk is established which includes the analysis of the company's economic and financial sustainability as well as an assessment of the legality, cost-effectiveness, efficiency and effectiveness of the respective management. In this context, public companies must adopt procedures for internal control and auditing that are considered appropriate to guarantee the reliability of its accounts and other financial information, especially those recommended by the external auditors of the accounts, the supervisory board and the Inspectorate-General of Finance.

The external auditors are to be appointed by the minister responsible for financial oversight through a public tender procedure and on a rotational basis. The auditing costs are borne by the company that is being audited. The accounts of public companies are exempt from prior supervision, but they are subject to subsequent supervision in cases in which the Administrative Court considers this appropriate.

Besides the provisions appearing in the Public Companies Law, the legal framework for the State business sector will be supported by the regulations created under the law, which are to be prepared by the Government. In addition to this, there are various important instruments for the management and development of their activities, for example, the Public-Private Partnerships Law.

This newsletter was prepared by a multidisciplinary team made up of mozambican lawyers from GLM – Gabinete Legal Moçambique and Portuguese lawyers from PLMJ. This team was brought together under an agreement for international cooperation and membership of PLMJ International Legal Network, in strict compliance with applicable rules of professional ethics.