The Mergers & Acquisitions Review

Seventh Edition

Editors
Simon Robinson and Mark Zerdin

Law Business Research

The Mergers & Acquisitions Review

This article was first published in The Mergers & Acquisitions Review, 7th edition
(published in August 2013 – editors Simon Robinson and Mark Zerdin).

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Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.TheLawReviews.co.uk

ISBN 978-1-907606-75-5

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

PUBLISHER'S NOTE

In presenting this seventh annual edition of *The Mergers & Acquisitions Review*, the publisher would like to extend warm and heartfelt thanks to editor Simon Robinson, who has recently retired from Slaughter and May. Simon has held the position of editor of *The Mergers & Acquisitions Review* since its inauguration seven years ago, and Simon and his partners at Slaughter and May have been instrumental in the success of The Law Reviews series. Thank you Simon.

The publisher would like to welcome Mark Zerdin, also a partner at Slaughter and May, as current and future editor of *The Mergers & Acquisitions Review*. We are delighted to have Mark on board, and we look forward to future editions in Mark's very capable editorial hands.

Gideon Roberton
Publisher, The Law Reviews
August 2013

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

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EDITOR'S PREFACE

This past year has seen some surprising twists and turns, not only in the mergers and acquisitions markets but also in the economic and political environments. November saw the re-election of Barack Obama, although this had less of an impact on the markets than an announcement by Ben Bernanke in May that the US Federal Reserve would consider a slowdown in its programme of quantitative easing. On the other side of the Pacific, Xi Jinping has outlined a new communist doctrine – the 'Chinese dream'. The doctrine reflects the changing economic outlook in China where growth will be increasingly consumer rather than investment-led. A new political rhetoric has also emerged in Japan as Shinzo Abe, elected in a landslide December victory, seeks to reinvigorate the Japanese economy. Both rebrandings flirt with nationalist sentiment and the attitude of these two countries towards one another will continue to bear on the region's business environment.

In Europe, despite an awkward Cypriot bailout, the sovereign debt crisis showed signs of stability and government bond yields are falling. Europe also improved its attractiveness in the eyes of investors and remains the largest destination for foreign direct investment. However, there has yet to be a return to growth. Investors seem split fairly evenly between those who believe Europe will emerge from the crisis in the next three years, and those who believe it will take five years or more. In any event, a return to the boom years is unlikely in the near future, particularly as the emerging markets see a relative slowdown. The IMF data for 2012 shows that the combined growth rate of India and China is at its lowest in over 20 years while global growth fell below 2.5 per cent in the second half of 2012. This global slowdown continues to pull M&A figures down making 2012 the fifth consecutive year in which deal values fell globally.

There are reasons for optimism though, particularly in the US market which has seen some substantial deals (the acquisitions of Heinz and Virgin Media being particular highlights). These deals have been made possible by the return of debt financing where the right deal can attract very favourable terms. Equities have also performed much more strongly over the past year. In May 2013 both the Dow Jones and the FTSE 100 hit record highs – validating to some extent the aggressive monetary policies pursued in the US and the UK. Whether political will can start to lift the markets more broadly still remains to be seen.

I would like to thank the contributors for their support in producing the seventh edition of *The Mergers & Acquisitions Review*. I hope that the commentary in the following chapters will provide a richer understanding of the shape of the global markets, together with the challenges and opportunities facing market participants.

Mark Zerdin
Slaughter and May
London
August 2013

Chapter 56

PORTUGAL

Martim Morgado and João Galvão[1]

I OVERVIEW OF M&A ACTIVITY

2012 in Portugal was slow in M&A activity, the trend being for lower deals in terms of number and value. This was the expected outcome from the economic and financial crisis, the recession and the limitations on growth resulting from the constraints arising out of the memorandum of understanding of 17 May 2011 with the European Commission, the European Central Bank, and the International Monetary Fund, as amended (MoU).

The implementation of the MoU led to some M&A activity, driven mainly by divestments of state-owned or controlled companies and assets. Of particular note within the privatisation programme is the completion in the beginning of the year of the privatisations of EDP – Energias de Portugal, SA (EDP) and REN – Redes Energéticas Nacionais, SGPS, SA (REN), as well as the successful outcome of the process concerning the airport operator ANA – Aeroportos de Portugal, SA (ANA) in late 2012, in spite of the frustrated attempt on the sale of the holding controlling the national airline TAP Portugal (TAP).

In an environment of low M&A activity, a reference should be made to a few significant transactions targeted at public companies, in particular the successful takeover offers for the cement company Cimpor – Cimentos de Portugal, SGPS, SA (Cimpor) and for the road concessioner Brisa – Autoestradas de Portugal, SA (Brisa). Deals involving the bank BPI and the announced merger between telecommunications operators ZON and Sonaecom are also worth mentioning.

1 Martim Morgado is a partner and João Galvão is a senior associate at Campos Ferreira, Sá Carneiro & Associados. The authors would like to thank Antonio Rocha Mendes, head of tax at the firm, for his contribution to Section VIII on tax law and André Fernandes Bento, senior associate in the firm's banking and finance practice group, for his contribution to Section VI on financing of M&A.

See Section V, *infra* for further details on the main transactions and deals that caught investors' attention in 2012.

II GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

Portugal is a civil law jurisdiction, with extensive written legislation and a tradition of compiling codes of the main statutes governing several areas of the law.

The centrepiece of the legal framework for M&A is contained in the Civil Code, the Commercial Code, in particular the relevant sections of the law of contract, and the Companies Code, the key legislation for company law. In transactions involving public companies, the Securities Code is fundamental, especially concerning takeover rules.

These key statutes aim to set the fundamental framework of the legal system and ideally remain in force for a significant period of time without regular material changes.

Notwithstanding the civil law nature of the system, M&A legal practice in Portugal has been influenced by common law jurisdictions, such as the United Kingdom and the United States.

While it may be true that in less significant, complex or sophisticated private transactions, the parties may still use relatively simple contractual documentation, relying heavily on the detailed statutory provisions in force applying by default, as a result of common law practice inspiration, the truth is that currently any meaningful M&A transaction will closely follow such practice, both in what concerns methodology (use of preliminary agreements, due diligence investigations, etc) and the contents of contractual documentation (use of representations and warranties, indemnities, disclosures, etc).

This practical aspect is of key importance, as it explains the reason certain matters of contract law, such as pre-contractual liability, misrepresentation, mistake, limitation of liability, breach of contract, *inter alia*, are identified as critical in the legal framework applying to M&A. All such matters of contract law are found in the Civil Code, along with a civil law regime applying generally to sale and purchase agreements; the Commercial Code (in force since the late 19th century, although substantially amended) still contains particular relevant provisions on this matter.

The Companies Code extensively lays down the regime applying to companies covering constitutional documentation and requirements, corporate governance, etc. This regime is complemented by the Securities Code in certain matters specifically applying to public companies and, in particular, by soft regulations issued by the securities regulator.

The Securities Code is also the statute setting out the key regime for takeovers, again complemented by soft law from the regulator and EU relevant legislation (e.g., on prospects).

The legal framework for M&A also comprises key topics in other areas of law, such as labour (with specific employees' protection in transfer of undertakings), tax (including on tax neutrality of certain mergers and divisions), and competition (in particular pre-merger control), see Sections VII, VIII and IX, *infra*.

III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

Although no major innovations have been recently introduced to corporate and takeover legislation, a number of amendments in other legal areas are nevertheless expected to have some impact on upcoming M&A activity.

On securities law, the transposition of the Prospectus Directive[2] introduced several amendments on prospectus exemptions and contents, aiming to reduce the costs associated with its disclosure obligations in case of public offers of securities or admission to trading in regulated markets. Overall, changes to the Portuguese securities law are expected to benefit securities' issuers and offerors that are small or medium enterprises, as well as enterprises of reduced market capitalisation.

Where insolvency and recovery procedures are concerned, a number of relevant amendments to the Portuguese Insolvency Code were inserted in 2012, such as the creation of a special revitalisation procedure to ensure the recovery of debtors in economical distress or in imminent insolvency.

These revitalisation procedures have become increasingly popular, together with the tendency for debtors to provide additional security and sale mandates to creditors over their assets, in order to obtain the necessary means to continue performing their businesses. This trend may generate in the future a wave of business opportunities for the acquisition of several assets currently in the hands of distressed debtors.

A new legal emigration framework was approved in 2012 to attract foreign investment by awarding potential investors a Portuguese residence permit (the golden permit), removing the need for a prior residence visa. The added appeal of the golden permit is that, pursuant to Schengen regulations, its beneficiaries (any nationals of a state that is not a member of the EU or a party to the Schengen application treaty or otherwise covered by it) will be able to freely cross EU borders so long as they hold a valid residence permit issued by an EU member state (in this case, Portugal).

Relevant foreign investment activity for the purposes of applying for a golden permit can be any activity, which meets the value and timing thresholds legally set out, performed individually by the applicant or through a company in which it holds a stake (provided it has registered offices in Portugal or in another EU state but with a permanent establishment in Portugal). Whenever made via a company, the value of the eligible investment to be allocated to the applicant shall be proportional to its stake in the capital of the investing company. As for value thresholds, the following investments in Portuguese territory are eligible under the golden permit programme: transfer of capital in an amount equal to or exceeding €1 million (including investment in stakes

2 Directive 2010/73/EU of the European Parliament and of the Council of 24 November 2010, that amended prior directives, including on the prospectus to be published when securities are offered to the public or admitted to trading. The considerable delay in its transposition to national law led the Portuguese Securities regulator to issue in mid-2012 a generic opinion on the direct application of several provisions of the directive even without the required legal transposition.

representing the registered capital of Portuguese companies); or creation of a minimum of 10 jobs; or acquisition of real estate assets with a value equal to or exceeding €500,000.

So far there is still no clear indication of the level of success of this measure in attracting foreign investment.

IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

Given the poor economic and financial situation of the country and the absence of internal investment, one of the government's key objectives has been the attraction of foreign investment with a view to stimulating the economy and creating employment. In spite of such aspirations, Portugal is struggling to become a destination of choice for foreign investment.

According to the available data, in 2012 the gross inbound foreign investment was above €39 billion (a reduction of 8.9 per cent in relation to 2011), and the net inbound foreign investment was of €6.9 billion (a reduction of 13.5 per cent in relation to 2011).

The preferred sectors of investment were distribution (wholesale and retail) (34 per cent), financial and insurance (22 per cent), and transforming industries (19 per cent).

The EU countries, especially the major economies, remain the main origin of inbound foreign investment in Portugal (91 per cent in 2012), led by Spain, France, the United Kingdom, Luxembourg and the Netherlands (73 per cent of the total).

Regarding outbound foreign investment, recent figures are modest – €9 billion in 2012, representing a major reduction from the nearly €20 billion in 2011, but in line with the figures of previous years. The net outbound foreign investment in 2012 was of €1.5 billion, following a similar trend.

The leading sector for outbound foreign investment was financial and insurance (76 per cent).

The main destination country was the Netherlands (59 per cent), followed by Spain (13 per cent), Brazil (7 per cent), and Angola (4 per cent).

Specifically regarding M&A the picture was not very different, and the current recession is not a welcome card for foreign investment.

Notwithstanding, investment from Portuguese speaking countries, in particular Angola and Brazil, has continued, with significant acquisitions in the banking, construction and telecoms and media sectors, thus continuing the trend of more recent years for the increase of M&A transactions led by investors from emerging markets.

As set out in Section V *infra*, there were a few investments aiming for the acquisition of a majority or controlling stake in public companies, which had not been the case so far, and the privatisation programme also attracted interest from various foreign investors.

V SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES

Throughout 2012 M&A activity in Portugal remained low, as a result of the economic and financial crisis. In contrast with the general landscape, there were, however, a few significant deals in 2012 that are worth mentioning.

The year started with the announced results of the tender processes for the privatisation of stakes in EDP and REN, the first two of the privatisation programme agreed under the MoU.

The 2011–2012 process was the eighth stage of EDP's[3] privatisation, consisting of the direct sale of a 21.35 per cent stake in its respective capital, which attracted a lot of interest from various foreign investors, and was ultimately awarded to the Chinese state-owned power company China Three Gorges Corporation, that acquired the stake in EDP for close to €2.7 billion (€3.45 per share), completing the transaction in May 2012.

Already in February 2013 the state sold its last (indirect) stake of 4.14 per cent in EDP through a private offer to institutional investors, by a reported value of €356.1 million (€2.35 per share).

As for REN,[4] the process concluded in 2012 was the second stage of REN's privatisation, aiming for the direct sale of a 40 per cent stake in the respective capital. Following the government's decision in February 2012, the Chinese State Grid International Development was awarded a stake of 25 per cent, and Oman Oil Company acquired the remaining 15 per cent stake in REN.

State Grid acquired the 25 per cent stake for slightly over €387 million (€2.9 per share), and Oman Oil paid €205 million for the 15 per cent stake (€2.56 per share), in an aggregate transaction value of almost €600 million. The transaction completed in May 2012. The state still holds (indirectly) a stake of 11 per cent in REN, and the government previously announced its intention of divesting such interest by means of a public offer, which, however, remains to be confirmed.

Still in the context of privatisations, throughout 2012 the government launched the processes for the holding controlling the national airline TAP and for the airport operator ANA, and although the first one was aborted, the successful outcome of the ANA sale was announced by the year end.

In a process aimed at the sale of up to 100 per cent of ANA,[5] comprising also the change of the regulatory framework and the execution of a new concession agreement with the state, the procedure involved several international bidders and was particularly competitive with five bidders short-listed, ending with the award to the France-based concessionaire and construction group VINCI. In February 2013 the government and

3 EDP is one of the key European operators in the energy sector, and one of the largest in the Iberian Peninsula, being also the largest Portuguese industrial group and the world third-largest producer of wind energy.

4 REN is also a key player in the energy sector, in particular operating under concession the electrical and natural gas grids in Portugal.

5 ANA is the company operating under concession the Portuguese airports, and was ultimately fully owned by the state.

VINCI signed the agreement for the sale of 95 per cent of ANA for a reported value of €3.08 billion, and the transaction should complete in the course of 2013.

In addition to these high-profile transactions, others also took place throughout 2012 following additional divestments in the public sector, such as the agreement for the sale by the state-owned bank Caixa Geral de Depósitos of the hospital business HPP Saúde to the Brazilian health group Amil for €85 million.

In this context, we should also mention the sale of Banco Português de Negócios (BPN), which had been bailed out and nationalised by the government in late 2008, in what became a well-known legal case for the several alleged financial irregularities leading to the bailout.

Resolving the BPN situation became a priority under the MoU, and ultimately it was sold in March 2012 for a reported price of €40 million to Banco BIC SA, established in Portugal in 2008 with Angolan and Portuguese investments. Certain assets and bad debts of BPN have been grouped in state-owned vehicles and carved out of BPN, since then leading to additional divestments either already closed, pending or still to be made. These include *inter alia* businesses in the banking, asset management, real estate and insurance sectors, in Portugal and abroad.

Further from the deal flow resulting from divestments in the public sector, 2012 M&A activity in Portugal was also marked by two high-profile successful takeover offers, one for Brisa and the second one for Cimpor.

The offer for Brisa[6] was launched by Tagus Holdings – a joint venture between the shareholders José de Mello group and UK-based fund manager Arcus Infrastructure Parners – and successfully closed in August 2012 increasing their joint participation in Brisa from 53.8 per cent on the date of the prospectus (16 July 2012) to 84.8 per cent, corresponding to 92 per cent of voting rights.

The transaction involving Cimpor, a leading international player in the cement industry, comprised a takeover offer launched by InterCement, the cement unit of the Brazilian conglomerate Camargo Corrêa, and a subsequent swap of assets also involving Brazilian group Votorantim. InterCement's offer closed in June 2012, and following a double swap of assets with Cimpor and Votorantim closed in December 2012, InterCement increased its minority stake in Cimpor of 32.9 per cent before the offer to 94.1 per cent, thus acquiring control of the target.

Other deals worth mentioning involving public companies are the increase of the stakes held by Spanish group La Caixa and by Santoro controlled by the Angolan investor Isabel dos Santos both in BPI, to 46.2 per cent and 19.5 per cent respectively (completed in the course of 2012), and the merger in the telecommunications sector between the two key players ZON and Sonaecom finally announced in December 2012, following insistent and prolonged rumours in the market.

6 Brisa is one of the largest European tolled motorway operators and the largest transport infrastructure company in Portugal, owning and operating six major road concessions in Portugal comprising a portfolio that represents about 50 per cent of the Portuguese motorway network.

A clear trend has also been developing in Portugal as a result of the economic and financial crisis and the high flow of insolvencies sometimes affecting entire economic sectors. In some of these cases, the banks as main creditors have favoured solutions whereby funds are set up using their non-performing loans and the businesses are managed by independent professionals. This has happened, for instance, in the construction and tourism sectors, and the results will be seen in the future, but it may be that opportunities for M&A appear when such businesses are divested.

VI FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

During 2012, Portuguese banks showed reluctance to finance national companies, owing to the higher risk profile of most of them in the current crisis, as well as to reduced liquidity, higher regulatory capital requirements and increased financing costs. When banks do agree to lend, applied interest rates continue to be rather high, as compared with the market practices followed before the crisis.

Security packages associated with M&A transactions have not suffered structural changes, but the banks are being more stringent and less open to negotiate the terms of their supporting documentation. In existing financing transactions, additional security is often required when the value of secured assets is reduced, as a consequence of the triggering of margin calls.

In spite of this scenario, the financing of some recent M&A (see Section V, *supra*) transactions must still be highlighted: the successful takeover of Brisa was financed by the Portuguese banks CGD, BCP and BES, and the Cimpor takeover was financed by international banks. Moreover, along with the acquisition of relevant stakes in EDP and REN by foreign investors within their respective privatisation, some international banks, notably from China, have started to show interest in the Portuguese market. This interest led the Bank of China (through its Luxembourg subsidiary) to open a branch in Lisbon in 2012.

There are various private equity players (and some potential newcomers) that are showing interest and investing in Portuguese companies, with a special focus on distressed companies in need of equity, which demonstrate long-term potential. These players are taking into consideration a number of factors in their investment decisions, such as the international exposure of target companies, the possibility to export traded assets, as well as expected Portuguese state or EU subsidies and support.

There are also private equity vehicles supported by Portuguese banks, which are being used mostly for debt restructuring purposes, with the receivables created in financing transactions being transferred to such vehicles.

VII EMPLOYMENT LAW

The Portuguese Labour Code and related legislation have recently been subjected to several amendments to introduce more flexibility to national employment law standards, as well as to, indirectly, counteract increasing unemployment rates. Further to allowing the extension of fixed-term employment agreements for additional extraordinary periods, recent amendments also focused on decreasing the amount of compensations due to employees upon termination of the respective agreements.

Nonetheless, the Portuguese employment framework applicable to M&A transactions remains rather stable since 2009.

In case of transfer of a business or undertaking, in whole or in part, all employees allocated thereto are automatically transferred to the acquirer of the business or undertaking, via the assignment by law to the latter of the employer's contractual position held by the seller. This transfer entails the automatic acknowledgment of the rights acquired by the transferred employees under their employment relationship with the seller, including in what concerns seniority and remuneration.

The acquirer is liable for the payment of any fines applied for labour misdemeanours, whereas the seller shall be jointly and severally liable for all obligations that may become due until the transfer date, for a period of one year as of such date.

In what concerns applicable formalities, the seller and acquirer of the business or undertaking should inform the employees' representatives or, in the absence thereof, the employees themselves of the dates and reasons for the transfer, as well as of the legal, economical and social consequences arising thereof, together with the projected measures to be taken in respect of transferred employees (application of which is subject to an agreement). This information should be provided to the employees at least 10 days prior to any consultation to be made with their representatives for the purposes of reaching an agreement concerning the projected measures.

In case of total or partial transfer of the share capital of a company, the preceding has not been considered to apply, since the target company remains the employer.

Within merger and demerger proceedings, employees' representatives are entitled to consult relevant documentation (including the respective project, corporate accounts and reports), and to issue an opinion regarding the merger or demerger procedure, such opinion having to be attached to the relevant procedural documentation.

As for cross-border mergers comprising at least one Portuguese company and a company incorporated in accordance with the laws of another EU Member State (which has registered offices, central management or its main establishment within the EU territory), Portuguese legal provisions are in line with European standards concerning employees' participation in the company resulting from the merger. This participation may, in certain circumstances that trigger the application of a particularly protective regime,[7] comprise the employees' right to appoint or elect members of the corporate bodies or of committees thereof, or the right to recommend or oppose the appointment of members of the management or supervision bodies of the company.

7 In case at least one of the merging companies has, in the six months preceding publication of the merger project, an average number of employees exceeding 500 and is managed in accordance with a specific employees' participation regime, or the default's employees' participation regime set out under national law does not provide for a level of participation similar to the one applicable in other merging companies or does not comprise the right of employees from other establishments located in EU member states to exercise the same participating rights as the ones employed in the member state of the registered offices.

Finally, it should be noted that overall employees' representatives and trade unions do not have any right to influence either the conduct of an employer's business or its major business decisions, although they have the right to be informed and consulted about specific material issues that affect the employees (e.g., transfer of a company's location), and in certain cases to issue an opinion on the matter (such as in the case of the restructuring of companies).

VIII TAX LAW

The following tax legal framework should be considered for M&A transactions.

i General acquisitions

Acquisition of assets

Gains arising on the transfer of fixed assets by a Portuguese-resident company, including shares in other companies, are taxable at the general corporate income tax rate (which varies between 25 per cent and 31.5 per cent, depending on the amount of the company's profits and its geographical location within Portuguese territory).

The taxable gain is equivalent to the excess of the consideration received (net of selling expenses) over the tax basis on the assets. The tax basis may be adjusted for inflation.

Transfer of real property is subject to a local tax (real property transfer tax) levied at a maximum rate of 6.5 per cent on the consideration paid for the property or its registration value, whichever is higher.

Transfer of assets may also be subject to VAT, although transfer of a going concern is exempt from this tax.

Acquisition of shares

The acquisition of shares in exchange for cash or shares does not generally have tax implications in the target company, in particular because the company maintains its tax basis on its assets. However, the company may lose the right to carry forward its unused tax losses if more than 50 per cent of its ultimate shareholders change.

As for shareholders, gains arising from the transfer of shares by a Portuguese-resident company are taxable at the general corporate income tax rate. As a rule, capital gains arising from the transfer of shares in Portuguese companies by foreign-resident shareholders are exempt from tax in Portugal. This exemption has some exceptions; in particular, it does not apply where the majority of the target company's assets consist of Portuguese real property assets or where the seller is resident in a low-tax jurisdiction.

The transfer of more than three-quarters of the share capital of Lda companies[8] is subject to real property transfer tax, which is levied on the value of any real property owned by these entities. This tax does not apply on the transfer of shares in SA companies.[9]

Transfers of shares are exempt from VAT.

8 *Sociedades por quotas* or quota companies.

9 *Sociedades anónimas* or share companies.

ii Tax-neutral mergers and divisions

Portugal has implemented the provisions of the Merger Directive regarding mergers, exchanges of shares, transfers of assets and business divisions, as well as transfers of registered offices of European companies (SEs) and European cooperative societies (SCEs) between Member States.

In addition, from 1 January 2011, the scope of the tax neutrality regime for shareholders of companies subject to other merger or demerger operations covered in Council Directive 2009/133/EC was expanded.

Companies

Gains arising from the transfer of assets, including shares, by the transferring companies are exempt from corporate income tax in Portugal provided that the acquiring entities:

a carry over the tax basis of the transferred assets;

b calculate the depreciation and amortisation allowances on such assets in accordance with the regime applied by the transferring company; and

c the provisions, impairment losses and inventory adjustments transferred remain subject to the tax regime applied by the transferring company.

Where the receiving company holds shares in the transferring company, any gains or losses accruing to the acquiring company derived from the cancellation of its holding are not subject to taxation.

Upon request, the Minister of Finance has discretionary powers to allow the acquiring company to use the transferring company's unused tax losses, provided that valid (sound) economic reasons for the merger or division exist. Permission is normally given, but a specific deduction scheme can be imposed by tax authorities.

A specific domestic anti-abuse provision denies, in whole or in part, the benefits provided under the tax-neutral regime in conditions similar to those established under the Merger Directive's anti-abuse provision.

In addition, upon the taxpayer's request, mergers and contributions of assets in exchange for shares may be exempted by the Minister of Finance from real property transfer tax and stamp duties.

Shareholders

Should a transaction qualify for the tax neutrality regime, the shareholders of the acquired company are exempt from tax on their capital gains or losses provided that the tax basis on the transferred assets is carried over to the shares acquired in the transaction. Any cash received on the transaction is subject to tax.

IX COMPETITION LAW

In general, the Portuguese legal regime on competition matters follows EU legislation and is condensed in the local Competition Act (the Competition Act).

Pursuant to the MoU, the Competition Act suffered extensive revision and amendment in March 2012, entering into force in July 2012. The MoU required *inter alia* a revision of the Competition Act 'making it as autonomous as possible from the

Administrative Law and the Penal Procedural Code and more harmonised with the European Union competition legal framework'.[10]

The revision of the Competition Act put in place in 2012 therefore aimed to satisfy a variety of competition-related issues, including on the role and powers of the competition authority, on matters of a procedural nature, etc.

Among these, a particular note should be made of the merger control regime, inherently linked to the M&A activity, in relation to which the following changes to the Competition Act should be highlighted:

i Thresholds

The thresholds that need to be met for a concentration to become subject to prior control are now as follows:

a acquisition, creation or reinforcement of a market share equal to or greater than 50 per cent (against the previous 30 per cent) of the domestic market in a specified product or service, or in a substantial part of it; or

b acquisition, creation or reinforcement of a market share equal to or greater than 30 per cent but smaller than 50 per cent of the domestic market in a specified product or service, or in a substantial part of it, in the case where the individual turnover in Portugal in the previous financial year, by at least two of the undertakings involved in the concentration is greater than €5 million, net of taxes directly related to such a turnover; or

c the undertakings involved in the concentration have reached an aggregate turnover in Portugal in the previous financial year greater than €100 million (against the previous €150 million), net of taxes directly related to such a turnover, as long as the turnover in Portugal of at least two of these undertakings is above €5 million (against the previous €2 million).

ii Substantive test

While under the previous regime the test used in the concentration was the 'creation or reinforcement of a dominant position', which, if met, would determine prohibition of the concentration, following the 2012 changes, such test was replaced by the test of 'creation of significant impediments to effective competition', which is wider and able to prohibit concentrations that could otherwise (under the previous and narrower test) be

10 In particular, and as per Section 7.20 of the MoU, the Competion Act should 'simplify the law, separating clearly the rules on competition enforcement procedures from the rules on penal procedures with a view to ensure effective enforcement of competition law; rationalise the conditions that determine the opening of investigations, allowing the competition authority to make an assessment of the relevance of the claims; establish the necessary procedures for a greater alignment between the Portuguese law on merger control and the EU Merger Regulation, namely with regard to the criteria to make compulsory the *ex ante* notification of a concentration operation; ensure more clarity and legal certainty in the application of procedural administrative law in merger control; evaluate the appeal process and adjust it where necessary to increase fairness and efficiency in terms of due process and timeliness of proceedings'.

cleared. This change is aligned with the EU Merger Regulation and the test used therein, as required under the MoU.

iii Timings

Unlike the previous regime (which imposed a deadline of seven working days following the relevant agreement on the concentration, or preliminary public takeover or acquisition announcement for submission of the required notification), currently there is no pre-determined deadline for the purpose, and the undertaking(s) responsible for the filing shall be entitled to submit the notification at any time following an agreement on the concentration, provided, however, that the concentration cannot be implemented before clearance by the competition authority.

In certain instances, the relevant undertakings may also voluntarily notify the envisaged concentration, even before there is an agreement triggering the obligation to notify.

The subsequent procedure maintains the deadlines previously in force – 30 working days for a decision in first stage or to trigger in-depth investigation, in this latter case to be closed within 90 working days.

Finally, it is worth mentioning that the national Competition Authority plans to publish its guidelines for the economic assessment of horizontal mergers soon (similarly to what the EU Commission has already made at the European level), which were under public consultation until very recently.

X OUTLOOK

Current M&A trends should continue, as the momentum of the privatisation programme resulting from the MoU will keep driving divestments in state-owned or controlled companies and assets, which is likely to attract foreign investors' attention.

In particular, regarding privatisation there are the upcoming divestments in CTT – Correios de Portugal (in charge of establishing, managing and utilising the public postal service infrastructure), and in CP Carga (a rail-based logistical operator that carries out its activity mostly in the Iberian Peninsula, being the leader of cargo rail transportation in Portugal and the second-largest rail-based logistics operator in the Iberian Peninsula).

Also in the pipeline is the sale of the state's insurance sector currently managed by the holding Caixa Seguros e Saúde, SGPS, SA and that comprises a vast array of insurance services (including life, health and auto insurance).

Current trends relating to distressed assets (in particular, in the construction and tourism sectors) should also continue, and the proliferation of mandates to sell assets given to creditor banks may well serve as potential drivers for M&A activity in the future.

A number of measures and initiatives have been announced to support and revive investment and competition and, subsequently, expected M&A activity. However, their ability to jump-start the economy is still to be proven, and with the latest indicators showing a decrease in economic confidence and an apparently enduring recession, current trends are expected to linger.

Appendix 1

ABOUT THE AUTHORS

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Martim Morgado is a partner of Campos Ferreira, Sá Carneiro & Associados and focuses his practice in Corporate/M&A and Private Equity.

He finished his law degree in 1995, in the University of Lisbon, Faculty of Law and started his career as a trainee lawyer in PLMJ - AM Pereira, Sáragga Leal, Oliveira Martins, Júdice & Associados.

Ten years later Martim Morgado became a partner of the firm and left in 2009 to participate in the founding of the current firm.

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João Galvão is a senior associate lawyer at Campos Ferreira, Sá Carneiro & Associados and is part of the firm's Corporate/M&A and Private Equity practice areas.

In 2003, he finished his law degree in the University of Coimbra, Faculty of Law and joined PLMJ - AM Pereira, Sáragga Leal, Oliveira Martins, Júdice & Associados as a trainee lawyer where he worked for six years until joining the current firm.

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