The Mergers & Acquisitions Review

Eighth Edition

Editor
Mark Zerdin

Law Business Research

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THE MERGERS AND ACQUISITIONS REVIEW

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THE PRIVATE COMPETITION ENFORCEMENT REVIEW

THE DISPUTE RESOLUTION REVIEW

THE EMPLOYMENT LAW REVIEW

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EDITOR'S PREFACE

There is cause for optimism and caution in light of the past year's events.

First, we can be tentatively optimistic about Europe. The possibility of a euro breakup appears to have faded, and European equities markets performed, on the whole, exceptionally well in 2013. Indeed, the euro/dollar basis swap has moved sufficiently to open up euro capital markets to borrowers wishing to swap proceeds to dollars; the World Bank sold its first euro benchmark bond for more than four years in November 2013, and non-European companies like Sinopec and Korea Natural Gas have issued large euro bonds in recent months. If the European economy continues to grow (and analysts are expecting growth to quicken), it is hoped that the prospect of crisis will continue to fade.

Second, though 2013 was a comparatively languid year for global M&A, the buoyancy of the credit and equity markets cannot be ignored. In terms of financing, the seeming willingness of banks to allow for looser borrower constraints, to underwrite jumbo facilities in small syndicates, and to offer flexible and fast bridge-financing for high-value acquisitions, presents a financing climate that should be particularly amenable to corporate M&A. It is also notable that continued political and economic instability did not impede the completion of some standout deals in 2013, including the *Glencore/Xstrata* tie-up and Vodafone's disposal of its shareholding in Verizon Wireless. These deals show that market participants are able, for the right deal, to pull out all the stops. After a period of introspection and careful balance sheet management, corporates may be increasingly tempted to put cash to work through M&A.

There remains, however, cause for prudence. There is considerable uncertainty as to how markets will process the tapering of quantitative easing (QE) by the US Federal Reserve. The merest half-mention by Ben Bernanke, in May 2013, of a possible end to QE was enough to shake the markets, and to nearly double the 10-year US Treasury yield in a matter of months. Emerging markets are particularly sensitive to these shocks. The oncoming end of QE may already have been priced into the markets, but there is a possibility that its occurrence will cause further, severe market disruption. In addition, there are concerns around how the funding gap left by huge bank deleveraging will be filled, and centrifugal pressures continue to trouble European legislators. Finally, there are broader concerns as to the depth of the global economic recovery as growth in the BRIC economies seems to slow. Optimism should, therefore, be tempered with caution.

I would like to thank the contributors for their support in producing the eighth 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 2014

Chapter 54

PORTUGAL

Martim Morgado and João Galvão[1]

I OVERVIEW OF M&A ACTIVITY

Similarly to 2012, M&A activity in Portugal during 2013 remained relatively moderate, although showing some signs of growth when compared with the previous year. From an overall perspective, M&A performance was still severely hindered, both in the number and value of relevant deals, as a consequence of the economic and financial crisis, the recession and the limitations on growth resulting from the constraints of the memorandum of understanding of 17 May 2011 between Portugal and the European Commission, the European Central Bank, and the International Monetary Fund, as amended (MoU).

If scarce M&A activity in 2012 was mainly driven by divestments of state-owned or controlled companies and assets, perhaps the most positive sign in 2013 was the resurfacing of some M&A activity outside of the privatisation spectrum, evidencing added dynamism in line with a more optimistic outlook on economic growth during 2013 – especially towards the end of the year – and an increase in exports leading to new investment opportunities for Portuguese companies and the economy.

Section V, *infra* provides details on the main transactions and deals that marked 2013.

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 the financing of M&A.

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 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), as detailed in Sections VII, VIII and IX, *infra*.

III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

2013 was not a year of significant developments in corporate and takeover law, relevant legal frameworks remaining unaltered.

A reference should in any case be made to a number of legal amendments carried out in 2013 that continued to pave the way for the implementation of the privatisations programme agreed under the MoU, these having a direct impact in M&A activity. That was the case, for instance, of Law 35/2013 of 11 June, that amended Law 17/2012 of 26 April, concerning private initiative access to certain economic activities, so as to permit private players' access to waste management systems, thus preparing the sector to the upcoming privatisation of EGF (see Section X, *infra*).

Furthermore, other amendments to the legal landscape are worth mentioning due to their potential to ultimately trigger M&A activity in the future. This is notably the case of the reforms undertaken in tax law aiming to promote competitiveness, employment and the internationalisation of Portuguese companies, as well as to stimulate both national and foreign investment in Portugal, together with Portuguese investment abroad. In particular, under Decree-law 82/2013 of 17 June, the tax benefits statute was amended, setting forth that investment projects in production units carried out until the end of 2020, in an amount equal to or exceeding €3 million, may benefit from contractually awarded tax incentives for up to 10 years, if such investments are relevant for the development of sectors of strategic interest for the national economy and for the reduction of regional asymmetries, as well as to create job positions and contribute to advancing technological innovation and national scientific research. Similarly, Law 49/2013 of 16 July passed the extraordinary tax credit to investment (ETCI) granting to companies developing commercial, industrial and agricultural activities a tax benefit. This benefit is to make deductible from corporate income tax 20 per cent of investment expenses performed from June to December 2013 in assets allocated to their operation. Relevant assets consist of fixed tangible assets and non-expendable biological assets acquired new and that enter into operation up to the end of the financial year starting on or after January 2014. The deductibility threshold is of €5 million per company, with the tax abatement being made until a limit of 70 per cent of the corporate income tax due in the financial year starting in 2013.

With the ETCI attracting investments between €1.3 and €1.7 million in the second semester of 2013, together with other positive outcomes from similar tax incentive measures (such as SIFIDE, the tax incentives system to research and development, or RFAI, the tax regime to investment support), tax incentive reforms should press even further in 2014, with the Law Proposal 229/XII already approved and in the final stages of coming into force, aiming to approve a new Investment Tax Code, as wel as to amend the tax benefits regimes applicable to productive investments and to the reinvestment of profits and reserves, and also to amend the regime for conventional equity remuneration, and to integrate a second tax incentives system to research and development (SIFIDE II).

IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

Given the still poor economic and financial situation of the country and the anaemic internal investment in 2013, the government continued to focus on attracting foreign investment so as to stimulate the economy and create employment.

According to available data, in 2013 the gross inbound foreign investment was above €30 billion (a reduction of 36.8 per cent compared with 2012), and the net inbound foreign investment was of €2.3 billion (a reduction of 66.5 per cent when compared to 2012).

The preferred sectors of investment were distribution (wholesale and retail) (31.9 per cent), transforming industries (22.5 per cent) and financial and insurance (20.8 per cent), the latter being surpassed by the transforming industries' sector, which was trailing in third place during 2012.

The EU countries, especially the major economies, remained the main origin of inbound foreign investment in Portugal (93 per cent in 2013, gaining 2 percentage points when compared with 2012), led by Spain, France, the United Kingdom, Germany and Belgium (jointly representing 78.4 per cent of the total). Switzerland (3 per cent) and Brazil (0.6 per cent) are the first non-EU countries originating inbound foreign investment in Portugal.

Regarding outbound foreign investment, recent figures remained modest – €14.1 billion in 2013, representing a slight decrease of 12 per cent in comparison with 2012, but overall in line with the figures of previous years albeit with a tendency to decline. The net outbound foreign investment in 2013 was of about €1 billion, following a similar trend.

The leading sector for outbound foreign investment remained financial and insurance (85.3 per cent), followed by distribution (wholesale and retail) (4.5 per cent). Investment in EU countries also remained as the major trend, representing 93 per cent of all outbound Portuguese investment, the main destination continuing to be the Netherlands (63 per cent), followed by Germany (16.1 per cent) and Spain (8.4 per cent). With 2.6 per cent, Brazil lead the non-EU countries targeted by Portuguese outbound investment.

Specifically regarding M&A the picture was not very different from 2012, as the ubiquitous bailout programme tempered foreign investment appetites. Notwithstanding this, there were some signs of a more consolidated recovery, with several acquisitions in Portugal carried out by foreign entities. Spanish players spearheaded foreign M&A activity in Portugal (with 12 transactions), most notably the acquisition by private equity firm N+1 Mercapital of Probos – Plásticos, SA, a plastics manufacturer formerly held by the asset manager Explorer Investments, in a transaction with a value of €75 million. The decrease in interest from players based in Portuguese-speaking countries (such as Brazil and Angola) was compensated by a number of M&A deals carried out by UK players – such as the acquisition to BNP Paribas Personal Finance of the non-core Effico Portugal's portfolio by Arrow Global, a purchaser of defaulted consumer debt – with deals driven by US and French entities following closely.

As set out in Section V *infra*, the privatisation programme also attracted interest from various foreign investors.

V SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES

Similarly to the 2012 trend, the privatisation programme agreed by the Portuguese state under the MoU was one of the main drivers for M&A activity during 2013.

Within the process launched in 2012 and aimed at the sale of up to 100 per cent of ANA,[2] in 2013 the Portuguese government completed the sale of ANA to the France-based concessionaire and construction group VINCI, in a transaction with a reported value of €3.08 billion.

The divestment of the Portuguese state in CTT – Correios de Portugal (CTT)[3] was one of the most relevant privatisations throughout 2013, causing the sale of 70 per cent of CTT's share capital (the remainder being retained by the state holding Parpública). This sale was carried out via an initial public offering to retail investors in general and to CTT's employees in particular, as well as via direct sale to institutional investors for subsequent dissemination, with an announced turnover to the state of approximately €579 million, as a result of which over 50 per cent of CTT's share capital is estimated to be in free-float.

Also within the privatisation pipeline was the sale of a majority stake in the state's insurance sector holding Caixa Seguros e Saúde, SGPS, SA (Caixa Seguros),[4] which was won by the China-based Fosun International with an offer of €1 billion for the acquisition of 80 per cent of the share capital of Caixa Seguros, thus awarding it a 30 per cent stake over the national insurance market. Overall proceeds for the Portuguese state were accrued of an extra €208.9 million referring to the anticipated distribution of dividends by Caixa Seguros.

Also in the insurance sector, the Portuguese state sold to Patris Investimentos, for a reported consideration of €27 million, the entire share capital of Real Vida Seguros, an insurance company specialising in life and capitalisation insurance, formerly held by Banco Português de Negócios (BPN), a bank that had been bailed out and nationalised by the government in late 2008 (with many of its assets in the banking, asset management, real estate and insurance sectors having been carved out of BPN and grouped in state-owned vehicles).

In the telecommunications sector, 2013 was also an active year, with the announced merger between Zon Multimédia and Optimus SGPS (a Sonae group company) closing on August and creating a new telecommunications player with purported combined revenues of around €1.6 billion and an EBITDA of €543 million, holding 26 per cent of the national telecommunications market. In an associated transaction, Sonae – SGPS, SA announced in August 2013 that it would exercise a call option over 20 per cent of the share capital of Sonaecom, SGPS, SA held by a subsidiary of France Telecom.

Also worth noting is the high-profile cross-border merger between national telecommunications giants Portugal Telecom and the Brazilian-based Oi, which is expected be completed in mid-2014, both companies giving way to a new international player. For this purpose, a major step was taken in April 2014, when Portugal Telecom,

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

3 In charge of establishing, managing and utilising the public postal service infrastructure.

4 Caixa Seguros provides a vast array of insurance services including life, health and auto insurance via its subsidiaries Fidelidade, Multicare and Cares.

SGPS, SA subscribed a share capital increase of Oi via the contribution of all the shares it held representing the share capital of PT Portugal, SGPS, SA.

As for the energy sector, EDP – Energias de Portugal, SA (EDP) increased its stake in the share capital of Hidroeléctrica Del Cantábrico SA, one of the largest Spanish electric operators. The acquisition entailed the purchase to Liberbank SA of a 3.13 per cent stake for €106 million, thus raising EDP's stake to 99.87 per cent (including own shares held as treasury stock) of the share capital of the Spanish company.

Still within the energy sector, the EDP subsidiary EDP Renováveis SA sold a 49 per cent equity shareholding (together with 25 per cent of outstanding shareholders loans) in EDP Renováveis Portugal, SA to CITIC CWEI Renewables, SCA, a China Three Gorges group company, for a final consideration of €368 million.

Following the announcements made in late 2013, February 2014 was marked by the initial public offering of Espírito Santo Saúde – the health sector holding of the Espírito Santo group in charge of managing 18 health units – this IPO comprising a share capital increase and resulting in the stock trading of 49 per cent of its share capital (39.20 per cent being with institutional investors), with a reported turnover of about €149 million.

As for hot industries, tourism is seen as a safe bet, thriving on the government's strategy for promoting Portugal's versatility as a travel destination. In fact, an upsurge in internal and external demand pressed the tourism sector to continue growing, performing a key role in the decrease of unemployment rates since mid-2013.

Although the real estate market is arguably showing some signs of slow recovery, cautious investors should continue to steer away from the construction sector until market trends become clearer. In any event, the vast and depreciated offer of available real estate assets in Portugal presented tempting opportunities for investors without funding constraints, confirmed by some high-profile real estate deals executed in 2013.

VI FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

With scarce available financing and a regulatory climate averse to the leveraging of the economy, companies have become increasingly dependent on equity or quasi-equity instruments for their funding, therefore relying more on shareholder commitment.

Traditional financing by banks is still possible, albeit mostly to exporting companies or other players relatively immune to the uncertainties of the national market. However, given the general constraints around traditional bank financing (with stringent conditions, higher financing costs and more demanding security packages), there has been the tendency for large companies to resort to capital markets seeking financing alternatives, in particular by issuing bonds with considerable demand and success.

Particularly worth mentioning is also the setting up by the state of the so-called 'Fundos Revitalizar', three venture capital funds with an aggregate financial endowment of €220 million, seeking to promote the development of small and medium-sized enterprises (SMEs) that have sustainable business models and promote growth and expansion strategies, thus contributing to the development of new services and products, internationalisation and the increase of exports.

SME companies executing expansion, innovation or modernisation strategies with registered offices in the Portuguese mainland are therefore eligible for the benefits awarded by these funds, investment being made via typical venture capital operations, requiring the acquisition or subscription of equity or quasi-equity instruments, together with the possible granting of additional financing.

Apart from the bailout framework, a number of private equity players have continued to show interest in investing in Portuguese companies, particularly in distressed companies with long-term potential but that lack the required equity. These investment decisions are supported by the careful consideration of several key aspects, such as the possibility to export traded assets, together with potential Portuguese or EU subsidies and support.

VII EMPLOYMENT LAW

For the past recent years the Portuguese Labour Code and related legislation have been subjected to several amendments to introduce more flexibility to national employment law standards, as well as to, indirectly, counteract increasing unemployment rates. Similarly to 2012, further to allowing the extension of fixed-term employment agreements for additional extraordinary periods, recent amendments in 2013 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 has remained rather stable.

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, economic 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[5], 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.

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 are taxable at the general corporate income tax rate of 23 per cent. A municipal surcharge may apply, depending on the municipality, up to a maximum of 1.5 per cent.

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 the transfer of a going concern is exempt from this tax.

5 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.

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, under the rules implemented on the Corporate Income Tax Reform of early 2014, gains on the transfer of a participation representing more than 5 per cent of the share capital are generally exempt from tax. Otherwise, those gains are subject to the general corporate income tax rate. Also, 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[6] 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.[7]

Transfers of shares are exempt from VAT.

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.

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.

In general, the acquiring company may use the transferring company's unused tax losses, within certain limitations.

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.

6 *Sociedades por quotas* or quota companies.

7 *Sociedades anónimas* or share companies.

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).

The Competition Act suffered extensive revision and amendment in 2012, as the MoU required *inter alia* a revision so as to make it as autonomous as possible from the Administrative Law and the Penal Procedural Code and more harmonised with the European Union competition legal framework.[8]

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, the merger control regime has been subject to the following changes in the Competition Act:

i Thresholds

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

a the 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 the 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 a case where the

8 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'.

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 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.

X OUTLOOK

With 2014 marking the end of the bailout programme implemented under the MoU and with the return of the country's access to debt markets at affordable interest rates, there are high expectations for economic recovery even though the first quarter of the year evidenced an unexpected decrease in exports and a drop in GDP against the positive results of the end of 2013. Amidst the uncertainties of a clean exit from the bailout programme and lingering austerity policies and measures with arguable outcomes on the long-term sustainability of the economy, M&A activity is expected to continue to rekindle throughout 2014, still fuelled by the privatisation undertakings made in the MoU.

The privatisation of Empresa Geral do Fomento, SA (EGF), a company responsible for municipal solid waste management and treatment activities in mainland Portugal, is certainly one of the most anticipated for 2014. EGF's activities are performed by its 11 subsidiaries (such as Valorsul, ERSCU or Resinorte) that operate under concession agreements awarding them the exclusivity in waste management services for the municipalities within their territorial area. With EGF subsidiaries treating approximately 3.1 million tonnes of waste and generating revenues of €173 million and an EBITDA of €66 million in 2013, it is no wonder that national and international bidders are lining up to what should be a very disputed tender.

Also under the spotlight is the ongoing procedure for the privatisation of up to 11 per cent of the share capital of REN – Redes Energéticas Nacionais, SGPS, SA (REN)[9] to be achieved via a public offering to retail investors in general and to REN's employees in particular, as well as via direct sale to institutional investors for subsequent dispersal. This new round may therefore entail the total divestment of the Portuguese state in REN, completing the second stage of REN's privatisation programme, under which a 40 per cent stake of REN's share capital was already sold in 2012 (with the Chinese State Grid International Development being awarded a stake of 25 per cent, and Oman Oil Company acquiring the remaining 15 per cent stake).

Likewise, the privatisation of the holding controlling the national airline TAP Portugal – the main Portuguese airline in operation since 1945 and standing out as an international leading carrier in flight operations to Brazil and other Portuguese-speaking destinations – appears to be back on the agenda, with new rumours renewing the interest of foreign investors in what should be a transaction worth billions of euros.

A trend worth mentioning that may trigger M&A activity is the exit strategies undertaken by several non-Portuguese banks that have decided to drop their local retail banking business. This is the case of Barclays bank, which already announced its intention to sell its business in lieu of closure. Similarly, rumours have also been quite insistent regarding the exit of the Spanish bank BBVA, following three consecutive years of losses, although no official confirmation has been given. The telecommunications sector should also continue to be active, as recent mergers are not expected to go unanswered.

Finally, other deals are also expected to be sparked by the tendency for several Portuguese groups to refocus on their main activities, disposing of a number of assets and diversified business areas lacking anticipated profitability or requiring further investments to regain competitiveness.

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

Appendix 1

ABOUT THE AUTHORS

MARTIM MORGADO

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Martim Morgado is a partner of Campos Ferreira, Sá Carneiro & Associados and focuses his practice on 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.

JOÃO GALVÃO

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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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