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Corporate M&A

Portugal

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1. TRENDS

1.1 M&A Market

Although the very beginning of 2020 seemed promised in continuing the increase of the already high M&A activity coming from the previous years, still during the first quarter M&A activity dropped as a result of the high level of uncertainty resulting from the COVID-19 pandemic and the first lockdown.

In spite of such drop, high profile deals such as the EUR2.4 billion sale of a 81% stake in the road concessionaire Brisa were actually signed still during the lockdown, and albeit the uncertainties the truth is that M&A activity started to pick up from mid-2020 reaching peak levels by the end of the year comparable to 2019, with the lower number of deals being compensated by an increase of the value of transactions.

Looking at the outcomes of 2020, and with the vaccination process underway, the expectations for 2021 are high in terms of M&A deal flow, notwithstanding the concern that the impact from the pandemic may have not yet hit economy in full given the governmental transitional measures in force. On this front, there is a high expectation that the EU recovery programme may mitigate such adverse economic impact.

1.2 Key Trends

In spite of the effects of the COVID-19 pandemic, especially during the first semester, M&A activity ended 2020 at high levels benefiting from a significant acceleration in the second half of the year.

Throughout 2020, private equity firms continued to play a key role in M&A, both international and domestic, which have been and are expected to continue to be present in the vast majority of M&A transactions.

Transactions on non-core businesses and involving carve-outs also continued to be a trend, alongside the widespread use of W&I insurance following the international trend in the market.

While it is true that the pandemic caused changes in the M&A deals, this seems to have been more relevant in the process – in particular in due diligence – rather than in the documentation itself, which somehow unexpectedly has not changed substantially to deal with the COVID-19 risk.

1.3 Key Industries

Throughout 2020, in Portugal, the key industries for M&A players were infrastructure, energy and IT. Also, real estate and property transactions remained active in the market through the year.

2. OVERVIEW OF REGULATORY FIELD

2.1 Acquiring a Company

The acquisition of a company in Portugal may be achieved through different mechanisms.

Non-listed Companies

In non-listed companies, the most common way to acquire a company is to enter into a shares sale and purchase agreement with the existing shareholders, in order to acquire the entirety of the share capital or a controlling stake.

Acquisition of a company may also be achieved through the subscription of a share capital increase with a view to holding a controlling stake in a company; this has become particularly common for distressed companies seeking new investors, resulting in the simultaneous dilution of the stakes held by pre-existing shareholders. The latter is also the case with the conversion of credits held by third parties into equity contribu-

tions, thus entailing the acquisition by creditors of controlling stakes in distressed companies.

Mergers are also a suitable mechanism for the acquisition of companies, allowing for a target company to be merged into the absorbing company, against the acquisition by the shareholders of the absorbed company of a stake in the absorbing company.

Listed Companies

As for listed companies, acquisition of controlling stakes is normally implemented under the framework of takeover offers (as further detailed in **4. Stakebuilding** and **6. Structuring**).

Generally, business acquisitions may also take place in the form of asset deals, as opposed to share deals, although an asset deal structure is usually less straightforward from a continuity legal perspective.

2.2 Primary Regulators

In transactions involving listed companies, the Portuguese Securities Commission (*Comissão do Mercado de Valores Mobiliários*) is a key regulator, and responsible for the issuance of several soft law regulations relevant within a takeover scenario (for example, regulations on the contents of prospects and applicable takeover procedures). Depending on the relevant business areas of the companies targeted by an M&A transaction, some sectorial regulators may have an important role.

For instance, M&A deals involving credit or financial institutions will be supervised by the Portuguese Central Bank (*Banco de Portugal*), whereas transactions involving insurance companies will be monitored by the Portuguese Insurance Regulator (*Autoridade de Supervisão de Seguros e Fundos de Pensões*). M&A activity in Portugal is also primarily regulated by the Portuguese Competition Authority (*Autoridade da Concorrência*), in particular through the enforcement of the concentration and antitrust control regime.

However, regardless of the sectorial regulators' powers to oversee their relevant activity sectors, their intervention in any M&A transaction would not invalidate input from the Competition Authority if the relevant deal were to pose competition concerns, nor would it affect the opinion of the Securities Commission if the transaction were to involve listed companies.

2.3 Restrictions on Foreign Investments

As a general rule, in Portugal there are no restrictions to foreign investment, which is granted the same level of protection as domestic investment, so no specific registration or legal or regulatory protection measures apply. Other than in the sectors described below, there are no particular limitations on foreign investment, although a number of restrictions and/or consent requirements may apply to both foreign and domestic investments in regulated areas.

As deviation from this general rule, the Safeguard of National Strategic Assets Regime (NSAR), adopted by Decree-Law No 138/2014 of September 15th, applies to acquisitions entailing the control of companies acting within the main infrastructure and assets pertaining to the national defence and security or the provision of essential services in the areas of energy, transport and communications. Under the NSAR, the Portuguese government may scrutinise (and oppose to) a transaction entailing a direct or indirect acquisition of control over an asset that qualifies as strategic, if the acquirer is an entity from a country outside the European Union and the European Economic Area, provided that it may seriously and sufficiently jeopardise the national defence and security or the security of the supply in fundamental services to the national interest. The NSAR sets out the

procedural steps and deadlines applying to the government review.

To provide the parties with legal certainty as to the non-application of the opposition regime, the acquirer may request from the government a decision of non-opposition to the relevant acquisition; if the request remains unanswered, or no investigation is initiated within 30 working days of receipt of the request, confirmation is deemed as tacitly granted.

A final reference to Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019, establishing the framework for the screening of foreign direct investments into the European Union, setting forth a mechanism for cooperation between member states, and between the later and the European Commission, applicable from 11 October 2020.

2.4 Antitrust Regulations

Merger control provisions are highly relevant to M&A activity. For a business combination or concentration to become subject to prior control from the Portuguese Competition Authority (*Autoridade da Concorrência*), the following thresholds are to apply:

- acquisition, creation or reinforcement of a market share equal to or greater than 50% of the domestic market in a specified product or service, or in a substantial part of it;
- acquisition, creation or reinforcement of a market share equal to or greater than 30% but smaller than 50% 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 by at least two of the undertakings involved in the concentration exceeds EUR5 million (net of taxes directly related to such a turnover) in the previous financial year; or
- the undertakings involved in the concentration reach an aggregate turnover in Portugal in the previous financial year greater than EUR100 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 EUR5 million.

Submission of required notifications to the Portuguese Competition Authority may be made at any time following an agreement on the concentration (there is no pre-determined deadline for the purpose), provided that the concentration cannot be implemented before clearance by the competition authority. In certain instances, relevant undertakings may also voluntarily notify the proposed concentration, even before there is an agreement which will precipitate the obligation to notify.

2.5 Labour Law Regulations

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 (eg, the transfer of a company's location), and in certain cases, to offer an opinion on the matter (such as in the case of the restructuring of companies).

Transfer of a Business or Undertaking

In the event of the 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 transferor. This transfer entails the automatic acknowledgment of the rights acquired by the transferred employees under their employment relationship with the transferor, including those rights applicable to seniority and remunera-

tion. The acquirer is liable for the payment of fines applied for labour misdemeanours, and the transferor is jointly and severally liable for all obligations that may become due until the transfer date, for a period of one year from that date.

Regarding the formalities to be complied with, the transferor and acquirer of a business or undertaking are required to inform the employees' representatives or, in their absence the employees themselves, of the dates and reasons for the transfer, as well as of the legal, economic and social consequences arising therefrom, together with the proposed measures to be taken in respect of transferred employees (the application of which is subject to an agreement). However, the foregoing is deemed inapplicable in the case of total or partial transfer of the share capital of a company, as the target company remains the employer.

Merger and Demerger Proceedings

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.

In 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 aligned with European standards concerning employees' participation in the company resulting from the merger. This participation may, under specific circumstances that precipitate a particularly protective regime, 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.

2.6 National Security Review

A national security review of acquisitions may exist in certain inbound foreign investment; see **2.3 Restrictions on Foreign Investments**.

3. RECENT LEGAL DEVELOPMENTS

3.1 Significant Court Decisions or Legal Developments

Although court decisions and precedents in Portugal are not often in M&A related disputes (also because of the increased use of arbitration arrangements which do not afford publicity of decisions), in 2016 a landmark ruling from the Supreme Court of Justice set the view of the highest Portuguese court in relation to the use of representations and warranties in business acquisition contracts.

The Supreme Court of Justice sustained that the representations and warranties given in two share purchase agreements constituted guarantee obligations (*obrigações de garantia*), whereby the sellers fully assumed the risk of non-verification of what was represented and warranted. It was further sustained that, under such clauses, the sellers shall be liable for the divergences between what was represented and warranted and the true reality of the target company, regardless of their fault in such divergence. The Court deemed these clauses, and the "automatic guarantying system" created by them, to be valid under the parties' contractual freedom.

Under Portuguese civil law, objective liability, ie, liability independent of fault, is an exception, the rule being that the fault of the breaching party is a necessary pre-requisite for liability, thus one of the main points of dispute regarding

representation and warranties clauses was (is) whether there is an obligation to compensate in the absence of fault in the breach of the representations and warranties.

In this ruling, the Supreme Court of Justice seems to answer positively to such query, albeit with a significant technical contour, sustaining that the breach of a representation and warranty shall not be understood as a contractual breach triggering an indemnification obligation, but as trigger of a contractual obligation to pay to the purchaser (regardless of the existence or absence of fault of the seller) the amount correspondent to the financial-economic difference between the value of the company as represented and warranted by the seller and its actual value.

However, a considerable number of questions remain unanswered, but the singularity of the ruling should be considered as an important precedent related to M&A.

3.2 Significant Changes to Takeover Law

In general, the relevant legal framework applicable to M&A transactions has remained stable, with no significant changes being expected to occur in the coming 12 months.

4. STAKEBUILDING

4.1 Principal Stakebuilding Strategies

Although this cannot be viewed as an absolute rule, it would be unusual for a bidder not to engage in some degree of stakebuilding prior to an offer aimed at acquiring a controlling stake in the target, either directly or through a vehicle or related company.

In fact, in the Portuguese takeover market, most bidders are shareholders of the target for quite some time prior to launching a bid. This is true not only in the obvious case of mandatory takeovers, but also in the case of voluntary offers, and may be explained by the inclination of bidders to become acquainted with the target's business or their desire to consolidate their position as controlling shareholders.

Main stakebuilding strategies include the acquisition of minority stakes in the target through private deals and the execution of shareholders' agreements which initiate aggregation of voting rights, both coupled with open market acquisitions of smaller stakes. Derivatives and other complex stakebuilding strategies are seldom used prior to launching an offer.

4.2 Material Shareholding Disclosure Threshold

Following transposition of the Transparency Directive, in relation to Portuguese public companies, the Portuguese Securities Code requires disclosure of material shareholdings whenever the 10%, 20%, 33.33%, 50%, 66.66% and 90% voting rights thresholds are crossed (ie, whenever the relevant threshold is either exceeded or ceases to be met). The shareholder crossing the relevant threshold must inform the company and Portuguese Securities Commission of that fact and of any other events determining the attribution of voting rights attaching to securities held by third parties, in accordance with aggregation rules set forth in the Portuguese Securities Code.

Additionally, in respect of Portuguese companies listed in the EU or EU and non-EU companies listed in Portugal, the Portuguese Securities Code imposes additional disclosure requirements at the 2% (applicable only to Portuguese listed companies), 5%, 15% and 25% thresholds.

The above disclosure requirements must be made in accordance with the requirements set forth in CMVM Regulation No 5/2008 (as amend-

ed by CMVM Regulation No 7/2018) and complied with within four negotiation days following the occurrence of the events triggering disclosure or knowledge thereof (which is deemed to have occurred no later than two negotiation days following the occurrence of the relevant event).

Other disclosure and filing obligations are imposed by CMVM Regulation No 5/2008 (as amended by CMVM Regulation No 7/2018) on directors' dealings and by CMVM Regulation No 4/2013 on corporate governance.

4.3 Hurdles to Stakebuilding

Although this practice is not common, companies may introduce in their articles of incorporation or bylaws more stringent reporting thresholds than the ones set forth in the Portuguese Companies Code. However, opting out of mandatory disclosure requirements is not possible.

Other significant hurdles to stakebuilding under Portuguese law include the mandatory takeover bids regime, under which the crossing of the 33.33% or 50% voting rights' thresholds in a public company precipitates the duty to launch a takeover offer for all shares in such a company, as well as restrictions imposed by market abuse and insider trading rules.

4.4 Dealings in Derivatives

Dealings in derivatives enabling stakebuilding are not prohibited as such. However, in accordance with Section 16(5) and Section 20 (1), paragraphs e) and i) of the Portuguese Securities Code, such dealings are subject to disclosure requirements identical to those applicable to actual stakebuilding.

4.5 Filing/Reporting Obligations

Apart from the filing/reporting obligations referred to in **4.4 Dealings in Derivatives**, securities disclosure laws applicable in Portugal (including Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps, amended by Regulation (EU) No 909/2014) impose duties concerning disclosure of short positions held in connection with derivatives trading.

Furthermore, the importance of the disclosure initiatives relating to market infrastructure, which may allow, in the medium term, for greater transparency regarding the use of derivatives in connection with stakebuilding should be highlighted.

4.6 Transparency

There are no provisions under Portuguese law requiring shareholders to disclose the purpose of any acquisitions and/or their intention regarding control of the company prior to the launch of a takeover offer. It should be noted, however, that the Portuguese Securities Commission may, and often does, request further information on any acquisitions and filings made by shareholders, including the intended purpose and the origin of proceeds.

5. NEGOTIATION PHASE

5.1 Requirement to Disclose a Deal

Information concerning a deal which is being negotiated is usually considered as price-sensitive, confidential information.

As such, under the Portuguese Securities Code, information concerning a prospective deal must be immediately disclosed as soon as the target company becomes aware of the commencement of any negotiations or of their likely commencement, unless such disclosure may affect the disclosing party's legitimate interests (for instance, affecting the expected outcome of negotiations) or mislead investors. In the latter case, the target may withhold disclosure for the period required to complete the relevant nego-

tiations, as long as it ensures the confidentiality of such information. The Portuguese Securities Commission has published detailed guidance relating to disclosure of inside information and to the extent which withholding disclosure of negotiations may be an acceptable market practice.

In light of the above, although the law is not clear, market disclosure may, in certain cases (although not as a rule), only occur once a binding letter or definitive agreements have been signed, notwithstanding the need to disclose such information to the Portuguese Securities Commission on a strictly confidential basis.

In the event of a takeover offer, the Portuguese Securities Code provides for a duty of all involved parties (including target, if applicable) not to disclose any information until the preliminary announcement of the offer has been published.

5.2 Market Practice on Timing

Market practice is substantially aligned with legal requirements, as the Portuguese Securities Commission, in the event that it considers that material price-sensitive information relating thereto is being unreasonably withheld or if it believes that such withholding is not compliant with the applicable legal requirements or is likely to impair the market's regular functioning, may suspend trading of the relevant securities until the relevant information has been duly disclosed.

5.3 Scope of Due Diligence

Negotiated Business Combinations

Negotiated business combinations are normally preceded by due diligence, mostly focused on legal, tax and financial aspects. Specifically, with regard to legal due diligences, the primary concern is to identify any contingencies or negative consequences that may be triggered by the business combination, in particular any change of control or ownership provisions susceptible of motivating termination of key agreements or the acceleration of debt due under credit facilities or loans. In addition, legal due diligences also focus on regulatory and licensing matters, in particular those regarding target businesses operating in highly regulated sectors (such as utilities, banking, insurance, etc), and on intellectual property issues if relevant businesses are technologically driven.

Compliance Levels

Similarly, great emphasis is placed on the analysis and assessment of compliance levels under material business agreements or other arrangements deemed critical to the activity of the targeted company (eg, concession agreements or arrangements with key clients). Furthermore, labour matters are also a traditional concern in terms of assessing the legal framework applicable to the workforce allocated to the business, as well as potential for employees' restructuring and cost-saving measures in a post-transaction scenario.

Moreover, environmental matters have increasingly gained attention from investors when perusing potential business opportunities, justifying detailed legal and technical due diligences.

Also, as widespread concern following approval of the European General Data Protection Regulation (GDPR), and in particular the material revision of the potential sanctions in case of infringement, currently due diligence on GDPR compliance has become one of the most critical and key sections in any target review.

Corporate Matters

Apart from the foregoing, legal due diligences also traditionally centre on corporate matters (regarding adequate incorporation and registration status of the target company and ownership of its share capital), real estate (mostly regarding ownership and licensing of relevant real estate assets and any existing encumbrances), financ-

ing matters (with particular concern on compliance levels and cross-default and acceleration clauses under financing arrangements), insurance (assessing adequate insurance coverage under applicable legal provisions), and information technology matters (with a focus on software licensing).

Impacts of the Pandemic

While it is true that the COVID-19 pandemic impacted on due diligence, the main conclusion is that the same did not hinder the ability of conducting due diligence and allowing transactions to proceed.

There was naturally a huge shift from the personal to the technology element but systems have generally revealed able to cope with the challenge and due diligence teams were also able to rapidly adapt to the pandemic constraints.

5.4 Standstills or Exclusivity

Standstill provisions are not common in the context of negotiating possible business combinations, although they have been used in some more sophisticated M&A deals. In any event, these clauses are generally permitted under Portuguese law and, although there is no maximum permitted duration, according to the general principles of civil law any "standstill period" which is or is revealed to be unreasonably long could be deemed abusive and ultimately be reduced by a judicial decision at the request of any concerned party.

In comparison, exclusivity provisions are more common and are usually demanded for reasonable periods of time (normally from 60 to 120 days, although no standard rule on the duration thereof exists), in particular in transactions with several interested investors where one bidder seeks an exclusive negotiation period (in most instances combined with ongoing due-diligence procedures).

In deals involving publicly listed companies, due care should be placed on preliminary commitments such as standstills or exclusivity in order to establish in advance that they will not cause the parties to be considered as acting in concert, thus possibly precipitating aggregation of voting rights, which may be especially sensitive in cases where any relevant thresholds may be involved, in particular for the launch of a mandatory offer.

5.5 Definitive Agreements

Business proposals are commonly presented as non-binding or binding offers, depending on the status and progression of preliminary negotiations and due-diligence efforts. Typically, binding offers set out the main terms and conditions under which the offering party would be willing to complete the envisaged transaction, or make completion thereof conditional on the satisfactory negotiation of a definitive agreement containing clauses usual on similar transactions, including representations and warranties, compensation and indemnity mechanisms or even conditions precedent to be met (the most common of which are antitrust clearance or the granting of any authorisations required to avoid triggering change of control provisions).

Although permissible, it is not common for tender offers to be documented in a definitive agreement to be accepted by the counterparty, although the practice of requesting from bidders mark-ups of transaction documents is often used in private disposal competitive processes conducted by the seller.

6. STRUCTURING

6.1 Length of Process for Acquisition/Sale

There is no standard timeframe generally applicable to the sale or acquisition of a business in

Portugal, as the duration of any M&A deal will depend on a number of factors.

As a general rule, timing for completion of M&A transactions will naturally be impacted by the number of regulators that are required to authorise or intervene with respect to a transaction; considering the different sectorial regulators and applicable legal provisions, a specific timeframe can therefore be assessed only on a case-by-case basis.

Furthermore, any transactions posing specific competition law concerns will be subject to the antitrust and concentration control by the Portuguese Competition Authority (*Autoridade da Concorrência*) or by the EU Commission (whichever is relevant). In the first case, upon submission of the required notification, the Portuguese Competition Authority has 30 working days to issue a first-stage decision or to initiate in-depth investigations, which should be completed within 90 working days.

Regulatory considerations aside, the structuring of an M&A deal targeting a non-listed company can be implemented in a relatively short period of time (from 30 to 90 days), depending on the evolution of the underlying negotiations and the willingness of the parties to reach an understanding on key transaction issues swiftly. This timing will also be determined by the option to dismiss any due-diligence exercise or to conduct a high-level or in-depth due diligence, as well as by the requirement to address or remedy any material issues arising therefrom which are considered essential for the deal to take place. Being increasingly common the resort to W&I insurance, if the underwriting process is not timely factored in the transaction calendar, the same may amount to additional delays in the implementation of the transaction.

In the case of the acquisition of listed companies, specific timing requirements regarding takeover procedures should be considered. In particular, it should be noted that, in accordance with the Portuguese Securities Code, the offer period lasts between two and ten weeks. However, should any unusual circumstances arise, this period may be extended well beyond its statutory maximum.

In relation to timing impacts arising from governmental measures taken to address the pandemic, naturally that the whole environment – including lockdowns – has transitionally affected the traditional deal-closing process, but ultimately no major practical delays or impediments seem to have been caused by the COVID-19 pandemic.

6.2 Mandatory Offer Threshold

The mandatory offer thresholds in Portugal are set at one third or half of the voting rights representing a public company's share capital, calculated in accordance with the relevant voting aggregation rules.

However, the duty to launch a mandatory offer will not be precipitated if, at the one-third threshold, the person under such duty does not exert any control over the target company and/or is not in a group relationship with it. It should be noted that the one third of voting rights threshold may be suppressed by the articles of association of non-listed public companies.

6.3 Consideration

Usually, consideration is paid in cash. However, an asset swap as consideration is not uncommon and has been used in some high-profile transactions.

Furthermore, the Portuguese Securities Code also allows that shares or other securities (already issued or to be issued) may be awarded as consideration within public takeover offers,

provided that they have suitable liquidity and may be easily evaluated.

In any event, specifically in respect of mandatory takeover offers, there are stricter requirements for consideration to consist of shares or other securities, as these must be of the same type as those targeted by the offer, and must also be listed in a regulated market or be of the same category as securities of proven liquidity listed in a regulated market. Furthermore, the offering bidder or any related entity must not have acquired any shares of the targeted company against consideration in cash within the six months prior to the preliminary takeover announcement and until the offer is completed.

In a deal environment or industry with high valuation uncertainty tools used to bridge value gaps between the parties may vary and include, for instance, MAC clauses, price adjustment mechanisms or earn-outs.

6.4 Common Conditions for a Takeover Offer

The offeror is obliged to launch the offer in similar or more favourable terms and conditions than those described in the preliminary announcement of the offer.

Nonetheless, the offeror may subject the offer to certain conditions, including those whose fulfilment depends upon the offeror, as long as they correspond to a legitimate interest of the offeror and are not deemed to affect the regular functioning of the market. All conditions must be set out in the preliminary announcement of the offer.

The Portuguese Securities Commission may restrict or limit the use of offer conditions if, in its opinion, the above requirements are not met. Additionally, in mandatory bids, the Portuguese Securities Code imposes certain rules on minimum consideration to be provided, and mandatory offers may not be conditional.

6.5 Minimum Acceptance Conditions

Under Portuguese law, there is no minimum accepted condition imposed by law concerning the percentage of voting rights acquired following the offer. Such a condition may, however, be imposed by the offeror, subject to the requirements detailed in the answer to the preceding question.

The existence of the mandatory bid regime (under which the offeror must launch a bid for the entire share capital of the target company) implies that, from a practical standpoint, any offeror acquiring a controlling stake in a company is usually inclined to launch an offer for its entire share capital, unless this acquisition fails to trigger the duty to launch a mandatory bid.

6.6 Requirement to Obtain Financing

In general, within the structuring of transactions the parties are free to agree on the terms and conditions under which a business combination may occur, including completion of a transaction which is conditional on the bidder obtaining financing. However, from a practical perspective, it is not common for parties to progress in negotiations and enter into binding commitments if prior comfort on available funds or feasible financing was not provided by the bidder.

6.7 Types of Deal Security Measures

Typical deal security measures are deployed by bidders when preparing and negotiating M&A transactions in Portugal, often in conjunction with exclusivity negotiation periods.

In spite of the effects of the pandemic, deal security measures have not changed significantly, although there was a clear trend for parties negotiating a deal to afford additional time

to cope with the existing level of uncertainty (for instance, by extending exclusivity periods).

Break-up Fees

Break-up fees are relatively common in sophisticated transactions, mostly seeking to protect the bidder (and provide some level of reimbursement for incurred transaction costs) if a seller terminates negotiations at an advanced stage or elects another bidder. Although less usual, break-up fees may also be agreed to protect the seller in the cases where the sales procedure has a negative impact on ongoing businesses or on the overall value of the targeted asset.

Match Rights

Match rights' undertakings may also be set forth in some transactions, normally to allow bidders the opportunity to meet or match competitive offers presented by other interested parties.

Permanence Agreements/Non-solicitation Provisions

Permanence agreements or non-solicitation provisions are also fairly common with a view to safeguarding key employees of targeted businesses, although under applicable labour law the latter tend to be deemed invalid.

Non-compete Provisions

Finally, non-compete provisions are also standard when trying to protect bidders from future competition of sellers with relevant knowledge that is capable of disrupting the overall competitiveness or client base of the acquired business, although these provisions are also required to abide by the applicable legal framework for competition and labour.

6.8 Additional Governance Rights

Securing Governance Rights via Shareholders' Agreements

Whether or not they are seeking to hold the entire share capital of a target company, bidders may aim to secure specific governance rights or mechanisms, under shareholders' agreements, to be entered into with the remaining or major shareholders of the target. In fact, it is not uncommon for bidders to include negotiation and simultaneous execution on completion of shareholders' agreements when structuring the transaction, in order to safeguard their overall position in the target company.

These agreements may be varied in terms of contents and level of commitments, commonly setting forth rules regarding the appointment of members of the corporate bodies, reserved matters requiring favourable votes by the contracting shareholders (if subject to shareholder resolution) or from appointed corporate bodies, conflict of interest rules stricter than those resulting from legal provisions, as well as the overall principles to be observed in the management of the company and conduct of its business. Shareholders' agreements also usually contain typical tag-along, call or put option clauses, as well as pre-emption rights regarding stakes held by other shareholders, or even lock-up provisions.

Challenging Shareholders' Agreements

Without prejudice to the foregoing, it should be noted that shareholders' agreements are only binding to the contracting shareholders and may not be used to challenge or dispute actions of the company or of shareholders before it, which means that a breach thereof only triggers contractual liability towards the non-defaulting parties.

Furthermore, under the Portuguese Companies Code, shareholders' agreements may not regulate the conduct or actions of members of the corporate bodies when performing their office; moreover, these agreements will be invalid if inadmissible limitations to shareholders' voting rights are established (such as, for instance,

exercise of voting rights pursuant to instructions issued by the company or against the awarding of specific benefits or advantages).

Finally, it should also be noted that under the Portuguese Securities Code applicable to listed or public companies, shareholders' agreements are susceptible of determining the allocation of the voting rights of all contracting shareholders to their counterparties, which may as a consequence precipitate mandatory disclosure of shareholdings or even the duty to launch a takeover offer should relevant thresholds be met.

Amending Articles of Association

Apart from shareholders' agreements, a bidder may also seek to secure additional governance rights via the amendment of the articles of association of the target company. The most common of these is the establishment of voting rights limitations; for instance, trying to limit the votes awarded to a number of shares (provided that at least one vote is awarded to each EUR1,000 of share capital) or determining that votes issued by a single shareholder (either on their own behalf or in representation of other shareholders) above a certain number will not be considered.

Share Classes

A final reference should also be made to the possibility of bidders subscribing to a specific class of shares that entitles them to special governance rights insofar as permitted by the Portuguese Companies Code (for instance, the appointment of a number not exceeding one third of the members of the board of directors may require approval by the majority of the votes awarded to certain shares).

6.9 Voting by Proxy

Shareholders are entitled to be represented in general meetings of a company by proxy. In SA companies (share companies or *sociedades anónimas*), the articles of association may not set forth any constraints to this right. Differently, in Lda companies (quota companies or *sociedades por quotas*), representation by proxy is permitted only if the proxy holder is the spouse or a relative in the ascending or descending line of the shareholder, unless the articles of association permit otherwise.

6.10 Squeeze-Out Mechanisms

Squeeze-Out

Under the Portuguese Securities Code, with regard to Portuguese public companies, it is possible to initiate a squeeze-out of minority shareholders within the three months following acceptance of the offer in exchange for fair compensation (which is generally assumed to be the consideration provided in the offer), calculated in accordance with the rules applicable to compensation in mandatory offers. This mechanism is available to those shareholders who, as a result of a general takeover offer, hold 90% of the target's share capital (according to the relevant aggregation rules) during the term of the offer period and 90% of the voting rights included in the offer.

Sell-Out

Sell-out is also provided for in the Portuguese Securities Code, and is construed as a minority shareholder-driven remedy, under which a minority shareholder may, within the three months following acceptance of the offer, present a proposal for the sale of their shares to the target's controlling shareholder following a takeover offer in which 90% of the target's share capital and voting rights are acquired, which, if not accepted by the controlling shareholder, entitles the minority shareholder to sell their shares to the controlling shareholder, irrespective of the latter's acceptance, with the intervention of the Portuguese Securities Commission.

In respect of non-public companies, the Portuguese Companies Code provides for a similar remedy, also featuring a 90% of share capital threshold, but which has an extended deadline for triggering a squeeze-out of minority shareholders of six months after notice is served on the target company that the 90% of share capital threshold has been crossed.

Short-Form Mergers

Short-form mergers are also provided for in the Portuguese Companies Code. Although these do not require shareholder approval if a 90% share capital threshold is met, minority shareholders who hold at least 5% of shares may still require a general meeting to be convened to ensure their right of exit in exchange for fair consideration.

Other Mechanisms

Other mechanisms for acquiring the shares of shareholders who have not tendered following a successful tender offer include, inter alia, stock consolidation and other corporate restructuring transactions. These measures are seldom used due to their potential for expropriation of minority shareholders.

6.11 Irrevocable Commitments

Irrevocable commitments to tender by principal shareholders of the target company are not often seen, in part due to their potential for triggering the obligation to launch a mandatory offer if the relevant thresholds are met. In fact, such irrevocable commitments will most certainly be regarded as acting in concert, thus precipitating aggregation of voting rights under the Portuguese Securities Code. Moreover, if such commitments are enshrined in a shareholders' agreement, they should be disclosed to the Portuguese Securities Commission, leading to the same conclusion.

In light of the above, irrevocable commitments are likely to be undertaken immediately before the launching of the offer, therefore an opt-out for the principal shareholder is not feasible, even if a better offer is made. In the event that the principal shareholder is considered to be an offeror under Portuguese law, due to such irrevocable commitments, it will not be possible for them to launch a competing offer.

However, it should be noted that irrevocable commitments are usually tailor-made to suit the parties' needs and their nature and terms tend to vary widely in accordance with the particular circumstances of the transaction.

7. DISCLOSURE

7.1 Making a Bid Public

A takeover bid is typically made public with the publication of the preliminary announcement. Under Portuguese law, the offeror, the target company and its management, as well as other involved parties, must ensure confidentiality of any information relating to the offer until the preliminary announcement has been disclosed.

The preliminary announcement of a bid must be sent by the offeror to Portuguese Securities Commission, the target company and to the market managing entity where the target is listed. The offeror must then register the offer with the Portuguese Securities Commission within 20 days (this deadline may be extended for up to 60 days in exchange offers).

7.2 Type of Disclosure Required

The Portuguese Securities Code lists the information which must be included in the preliminary announcement of the bid. As a rule, the preliminary announcement must contain all relevant information concerning the identity of the offeror, the target company and the financial intermedi-

ary in charge of the offer, the securities covered by the offer, the consideration offered, the stake held by the offeror in the target and a summary of the offeror's goals and prospects for the target and group companies, if applicable, as well as a description of the offeror's status for purposes of application of board neutrality rules (reciprocity and breakthrough).

A launching announcement and a prospectus are required for all public offers, to be drawn up and published in accordance with the requirements set forth in the Portuguese Securities Code and CMVM Regulation No 3/2006.

The prospects of carrying out an issuance of shares following a successfully completed business combination should be mentioned in both the preliminary announcement and the prospectus, as this is deemed material information regarding the offeror's goals and prospects for the target company, and its group companies, if applicable.

For business combinations involving only privately held companies, the disclosure requirements are substantially simpler, but as a rule they involve the need for certain public registrations and publications, in particular with the intention of safeguarding creditors' information and protection.

7.3 Producing Financial Statements

Bidders are not expected to disclose their own financial statements in the offer documents. However, the Portuguese Securities Commission usually requests disclosure of the offeror's (and its subsidiaries') audited and certified report and accounts of the previous three financial years for purposes of registration of the offer.

Additionally, in the context of registration of the offer with the Portuguese Securities Commission, the offeror must provide the Portuguese Securities Commission with the target company's audited and certified financial statements.

If the consideration of the offer consists of securities or a mix of cash and securities, pro forma financial information, if available, or audited and certified financial statements must be provided regarding the issuer of the securities offered as consideration.

Financial statements must be prepared in accordance with the requirements set forth in the EU Prospectus Regulation. Thus, financial information prepared in accordance with IFRS or with the Portuguese agreed accounting standards (which are substantially in line with IFRS) will be acceptable.

In certain forms of business combinations (eg, mergers) financial statements of all participating companies will have to be disclosed, in the context of the merger project to be subsequently approved by the respective shareholders.

7.4 Transaction Documents

No general legal obligation exists regarding full disclosure of transaction documents. However, such disclosure may be required by the Portuguese Securities Commission in cases where the underlying transaction leads to a mandatory takeover offer (for which the prospectus must provide summarised details on the main terms and conditions). However, the Portuguese Competition Authority may also request disclosure of transaction documents for the purposes of antitrust and merger control.

In both cases, the relevant transaction parties may request that commercial data or other sensitive information is not disclosed or otherwise divulged by the requesting authorities to third parties. With reference to shareholders' agreements, under the Portuguese Securities Code applicable to listed or public companies, any

such agreements intended to achieve the acquisition, maintenance or reinforcement of qualified shareholdings or designed to affect the outcome of a takeover offer should be notified within three days of their execution to the Portuguese Securities Commission, who are entitled to determine full or partial public disclosure thereof.

8. DUTIES OF DIRECTORS

8.1 Principal Directors' Duties

Directors are subject to a generic duty of diligence which is detailed in duties of care and in fiduciary and loyalty duties, and, as described below, requires that, further to the best interests of the company considering the long-term interests of the shareholders, directors must also take into consideration the interests of other stakeholders relevant to the company's sustainability, such as employees, clients and creditors.

Following the publication of the preliminary announcement, and until the results of the offer are determined, the management of the target company must provide certain information to the Portuguese Securities Commission (eg, daily reports on the transactions carried out by its members concerning securities issued by the target), inform the workers of the content of the offer documents and of its report and act with loyalty and in good faith, in particular with regard to the accuracy of the information.

In the case of any other type of business combination, such as a merger, the directors of the merging companies are required to prepare and submit for registration and publication a merger project which will provide information, inter alia, on the type, motives, purposes and conditions of the merger, to which the creditors may be opposed. The merger will generally be subject to the approval of the shareholders of the merging companies.

The Portuguese Securities Code

For instance, in the case of a business combination such as a public offer, the Portuguese Securities Code subjects the directors of the offeror to a duty of secrecy in respect of the preparation of the offer until the preliminary announcement is made. This statute also determines that, upon becoming aware of a decision of launching of a takeover offer over more than one third of the securities of the respective category (or of receiving the relevant preliminary announcement) and until either the offer result is determined or the offer lapses, whichever occurs first, the target company's board of directors cannot perform any actions outside the ordinary course of business that are likely to have a material effect in the net equity of the target and that may significantly jeopardise the objectives announced by the offeror.

Such prohibition extends to resolutions taken prior to the decision to launch the offer that have not yet been either partially or totally implemented. The issuance of shares or the entering into of agreements regarding the transfer of relevant assets, for example, are considered as relevant changes in the net equity of the target.

The Neutrality Rule

The neutrality rule contains exceptions, for instance, it can be avoided by a resolution of the shareholders' meeting (approved with at least two thirds of the votes cast) and it does not prevent the target's board of directors from seeking a "white knight" (ie, alternative offers). The directors of the target company are also subject to other duties, such as the dissemination of information. For instance, they must submit to the offeror, to the Portuguese Securities Commission and disclose to the public a report describing the opportunities and conditions of the offer.

8.2 Special or Ad Hoc Committees

There is neither a legal obligation nor a significant tradition of establishing ad hoc or special committees for the purposes of preparing business combinations. In practice, transitional steering committees may be agreed and set up by the participating companies.

8.3 Business Judgement Rule

The fundamental duties of directors in Portugal are set out in Article 64 of the Portuguese Companies Code, pursuant to which, and as part of the general duty of care, directors must demonstrate the adequate availability, the technical competences, and the knowledge of the company's activity that enables them to discharge their functions appropriately. They must also act with diligence, in a judicious and organised manner. Directors are also bound by a duty of loyalty, and must act in the best interests of the company, mindful of the long-term interests of the shareholders but also taking into consideration the interests of other stakeholders relevant to the company's sustainability, such as employees, clients and creditors.

As a general rule, directors may be held liable by third parties should they cause them losses as a result of actions or omissions in breach of the legal and contractual duties to which they are subject. Nonetheless, such liability may be prevented in certain ways. For instance, Article 72, No 2 of the Portuguese Companies Code, inspired by the "business judgement rule", which may be deemed to apply to potential breaches of duty of care, sets out that the liability of directors is to be excluded, to the extent that the relevant director can provide evidence that they have acted:

- on duly informed terms;
- without having any personal interests; and
- in accordance with criteria of business rationality.

Directors are also not to be held liable for damages and losses which arise following an approval taken in a meeting which they have not attended, or in which their vote was against the decision taken.

The nature of the current wording of Article 72, No 2 of the Portuguese Companies Code (in force only since 2006), added to the general perception that judges still struggle to assess business rationality criteria, and combined with a strong neutrality rule in force in Portugal, which significantly constrains the actions of a target company's directors during a takeover offer in comparison to other jurisdictions, may contribute to the view that there is not yet a consistent jurisprudence or legal precedent in this respect.

8.4 Independent Outside Advice

Business combinations usually require specialised advice to be provided to directors, in order that they may further consider the multi-disciplinary scope and potential implications of modern M&A transactions. Normally, mid to high-profile business combinations are accompanied by and set out with the assistance of investment banks, auditors, accountants, tax advisers, strategic consultants, etc.

As a rule, directors also seek legal advice on the various aspects of the transaction, including the structuring of the deal, due-diligence procedures, the drafting of all transactional documentation and the management of information to be provided to regulatory authorities, to the public (with a higher emphasis on listed companies) and to stakeholders, as well as the assessment of legal formalities and requirements to be complied with in connection with implementation of the transaction. Legal advice on the structuring of the transaction also extends to tax matters, in conjunction with the input of accounting and auditing firms, which also usually perform dedicated due diligences.

Outside advice may also be required in specific fields of expertise, depending on the business or activity sector of the targeted company (for instance, where applicable technical opinions or due diligences may be advisable on environmental, technological or IP matters). In high-profile transactions, communication agencies also play a role in advising directors throughout the transaction.

8.5 Conflicts of Interest

Directors are prohibited from voting in any resolutions concerning matters in which they have, directly or on behalf of a third party, a conflicting interest with the company; the chairman of the board of directors must be informed of any such conflict. As a rule, contracts between the company (or group-related companies) and its directors, either entered into directly or through third parties, must be approved in advance by the board of directors (without any conflicting directors' vote) and are subject to a prior validation by the relevant supervisory corporate body. Shareholders are also in certain cases prevented from voting in resolutions concerning matters where they have conflicting interests, as specified in the Portuguese Companies Code.

Conflict of interests have been raised in case of business combinations, for instance before the Portuguese Securities Commission, perhaps the most common situation being conflicts of interests between large and small(er) shareholders.

9. DEFENSIVE MEASURES

9.1 Hostile Tender Offers

Hostile tender offers are permitted and have taken place in Portugal, especially in areas deemed more vulnerable, as recently occurred in the banking sector.

9.2 Directors' Use of Defensive Measures

In accordance with the Portuguese Securities Code, during the period of the offer, in respect of any offers for at least one third of the company's share capital, the target company's board of directors is required not to engage in the adoption of defensive measures which may impair the company's financial condition or hinder the offeror's goals, as disclosed in the offering documents.

However, certain measures may be allowed if adopted for performing previously assumed obligations, for attracting competing offers or if such measures are approved by the target company's general meeting of shareholders held specifically for that purpose. The transposition of the Takeover Directive in Portugal included the adoption of a reciprocity provision under which board neutrality is not required if the offeror is not a company subject to the same board neutrality rules or held by a company subject to such rules.

Some defensive measures may assume the form of control enhancement mechanisms (CEMs) designed to reduce contestability, and are enshrined in the company's articles of association and enacted prior to the launching of a takeover offer. It should be noted that the Portuguese Securities Code caters for optional adoption of a breakthrough rule.

9.3 Common Defensive Measures

In light of the above, virtually no defensive measures are adopted during the offer period.

CEMs in existence prior to the launching of a takeover offer are usually enshrined in the target company's articles of association, and typically include voting ceilings, deviations to the "one share, one vote" principle, superqualified majority requirements, cross-shareholding

arrangements, dual class shares and pyramidal structures.

Although many of these CEMs are not strictly forbidden under Portuguese corporate law, their use is strongly discouraged from a corporate governance perspective, and listed companies are required to disclose the existence of any such arrangements and to explain their noncompliance with corporate governance rules limiting their use.

Throughout 2020, there were no signs that defensive measures changed as a result of the pandemic.

9.4 Directors' Duties

Despite the limited room for defensive measures provided under Portuguese law, the management of the target company must exercise its duties without impairing the company's financial condition or hindering the offeror's goals as disclosed in the offering documents.

9.5 Directors' Ability to "Just Say No"

The directors of the target company should prepare a report on the offer to be disclosed to the market. In that report, the directors may give their opinion on the merits of the offer, although their opinion is not binding upon the target unless a general meeting of shareholders is convened specifically to resolve on the rejection of the offer and unless that resolution is approved by the required majority (a situation which is by no means common).

10. LITIGATION

10.1 Frequency of Litigation

Litigation is not usual in Portugal in connection with M&A deals. In any event, in cases where the parties involved in a transaction are not able to settle a dispute amicably, the main tendency has been to resort to arbitration so as to avoid the lengthier decision timings of common courts, and to some extent to ensure confidentiality of the proceedings. However, due to rising arbitration costs, underlying transactional documents are increasingly stipulating that any related disputes should be settled by the competent common courts.

Alternative dispute resolution methods such as mediation are not commonly used.

10.2 Stage of Deal

Although scarcely seen, litigation between parties involved in M&A transactions is often brought at a post-completion stage, in most instances concerning disputes regarding breach of representations and warranties, and the application of price adjustment mechanisms.

In addition, there have been some cases where minority shareholders have filed judicial proceedings seeking to prevent completion of M&A transactions and/or challenging the validity of underlying acquisition agreements or procedures. Employee litigation related to M&A deals is also not common, although in asset deals some lawsuits have been brought by employees in connection with the automatic transfer of their employment to the entity acquiring the relevant undertaking.

10.3 "Broken-Deal" Disputes

So far, there have been no signs of major litigation driven by "broken deals" during 2020, except the frustrated offer made in the first quarter of 2020 by Cofina over TVI media group then held by Prisa, but the issue involved were not limited to the effects of the pandemic and the transaction was finally completed with the acceptance of another offer.

Although it may be soon to say, the sense is that in the majority of the pending transactions in ear-

ly 2020 the parties opted to find mutually agreeable solutions to deal with the consequences of the pandemic, either by postponing long stop dates, reviewing price or payment terms, thus avoiding disputes and in numerous cases allowing for pending transactions to close following a stand still period.

11. ACTIVISM

11.1 Shareholder Activism

Portugal does not have a significant tradition of shareholder activism. The absence of such activism is perhaps explained by the fact that large-block shareholders control the majority of Portuguese listed companies, therefore decreasing the perceivable influence or prospects of a successful outcome of minority shareholder activism. Furthermore, legal provisions awarding minority shareholders with certain rights (namely on information and appointment of members of the corporate bodies) also contribute to mitigate the tendency for shareholder activism.

11.2 Aims of Activists

Although shareholder activism is not significant in Portugal, there have been some cases where minority shareholders attempted to pressure companies to enter into M&A transactions, such as in the case of Elliot in the electrical company EDP supporting a divestment plan of Iberian assets, partially followed by EDP in the recent sale to Engie of a group of hydroelectric assets in one of the major deals of the year.

Throughout 2020, there were no signs that shareholder activism was impacted by the pandemic.

11.3 Interference with Completion

Although shareholder activism is not significant in Portugal, there have been some cases where minority shareholders struggled to stop or delay transactions. An example is the entry of Elliot in EDP share capital and the attempt to frustrate the takeover offer from China Three Gorges.

In recent years, there has also been evidence of increased activism on the part of investor associations, such as ATM. The main issues raised by activists include the need to appoint an independent auditor for setting the minimum consideration in the context of certain mandatory bids and inaccuracy of information which is included in the prospectus concerning dividend distribution in a post-combination scenario.

Activism in Portugal is sometimes followed by litigation attempts, including class actions, although this type of investor-driven initiative is more likely to be the exception than the rule.

Campos Ferreira, Sá Carneiro – CS Associados has a market-leading, highly experienced team with capacity to provide companies with expert support in the growth of their business via M&A transactions, involving complex and sophisticated legal structures. The firm also provides its national and multinational corporate clients across all industrial sectors with permanent support in the legal challenges that they face in their business. That support includes advice on organisational, corporate governance and general corporate matters, as well as in the framework of new investments and respective regulation, in particular in connection with third-party association agreements, including partnerships, joint ventures or shareholders' arrangements.

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Trends and Developments

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Introduction

The COVID-19 pandemic confronted the world with a completely new and unprecedented situation. Now, a year on, it is important to assess the impact of the COVID-19 pandemic in the pace of deal activity and whether new trends in respect of businesses' structuring and negotiation have emerged in the market.

Despite the initial profound effect in the Portuguese M&A environment, mainly caused by the feeling of widespread uncertainty of the actual repercussions of the pandemic (both on a health, economic and social level), the most pessimistic scenarios have not come true and by the end of 2020 deal activity was at levels comparable to 2019 (although with a smaller number of deals, but an increase in deal value).

In fact, the huge expectation and distress in the market resulting from the emergence of the pandemic initially caused a sharp slowdown in the business flow, leading in some cases to the suspension or even the break of ongoing negotiations, with special incidence at the end of the first quarter and during the second quarter of 2020.

However, from the third quarter onwards there were signs of recovery and many of the deals that had been placed on hold (or that proceeded at a much slower pace) were resumed and in the last quarter of the year the market bounced back and it was possible to achieve results in line with the previous years.

Impact on Deal Structuring

In terms of transaction approach and structuring model, although deal security measures have been intensively discussed, being even prepared in advance several contractual protection clauses (mostly around the concept of Material Adverse Change (MAC) clauses) to be inserted in COVID-19's tailor made drafts of share purchase agreements (and similar agreements), in practice this type of defensive measures and clauses ended up having little acceptance in the contractual documentation package of the transactions that were effectively signed in the course of 2020.

As mentioned, after the initial slowdown period, a great part of the ongoing transactions resumed, the main impact of the pandemic not being translated so much into contractual defence measures very different from those corresponding to the normal terms and conditions of the contractual package usually applicable to pre-pandemic transactions of a similar nature, but having mainly led to an adjustment of expectations in terms of the value of the targets causing a strong impact in terms of valuation and price.

Thus, although there were no deep changes in the deals' modelling approach, in several transactions there was a marked adjustment of the price initially offered, namely in competitive processes, a pronounced difference between the price offered at the stage of the non-binding offers (pre-pandemic) and the final price (substantially lower) offered at the stage of the binding offers.

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Impact on Process and Negotiation

There was initially a huge degree of uncertainty as to project management and handling, in particular in respect of the due diligence and the negotiation of the contractual documents, especially considering the increasing mobility restrictions and the periods of full lockdown.

These constraints required an enormous adaptation effort on the part of the various players in the transactions, including the parties themselves and all the several different teams of advisers involved. Conducting due diligence in a remote or virtual environment can be challenging, but it has also led to some creative ways to use technology. The use of existing technologies made it possible to overcome the constraints and obstacles without a significant impact in terms of the due diligence scope, depth or timeline.

For example, travel restrictions made in person meetings and on-site visits harder to complete, however, dealmakers adapted, using videoconferencing to replace face to face meetings and, in some cases, using drones to inspect facilities. Also, pandemic has made clear the need for tools to help manage the M&A process effectively and efficiently and the resource to SaaS service providers specialised in organising and preparing the files needed for review by potential investors or purchasers, became an essential part of the preparation of an M&A process.

Even so, despite the obvious disadvantages of not being possible to have face-to-face negotiations and the challenges arising from virtual closings, several transactions which were remotely conducted from the very beginning have been successfully completed throughout 2020.

MAC Clauses

Although at the end of the day, this kind of clauses did not have in practice the weight initially expected, the COVID-19 pandemic has actually forced parties to consider the contractual provisions of their M&A contracts from a different perspective, in particular in respect of material adverse change provisions.

Concept

Context wise, MAC clauses are commonly included in commercial contracts, particularly in M&A transactions, affording a party (usually the purchaser or investor) the opportunity to pull-out, terminate a transaction or exercise some other right, if a material change in circumstances occurs to negatively affect the operations or financial conditions of the target company. Notably, the definition of a MAC is unique to each contract since it is negotiated by the parties to that agreement taking into consideration the specific circumstances of the transaction and each relevant party.

Practical relevance

The lack of actual applicability of these clauses after the emergence of the COVID-19 pandemic can be explained by the fact that MAC termination triggers and conditions are (and continued to be during the pandemic) often resisted or heavily negotiated by sellers given the conditionality brought to the deal. This did not change and is unlikely to change in the context of the negotiation of MAC provisions to address the impact of the COVID-19 pandemic, particularly given that, while difficult to quantify, the adverse impact on businesses is now known.

In any case, this will depend on the bargaining power of the parties which will vary on a case by case basis and considering the specificities of each transaction and of the parties involved. From a buyers' perspective, contracts should expressly state that COVID-19 can invoke a MAC clause and the wording of the contract should clearly state when a MAC has occurred (for example, by resorting to quantitative thresh-

olds such as change in financial metrics, eg, EBITDA, fall in revenue or increases in debt).

On the contrary, from a sellers' point of view COVID-19 events should be clearly excluded from the contract or the contract should circumvent the ability to invoke a MAC clause when the target is affected the same as its peers due to global or industry downfalls. Also, the MAC clause should be limited to the specified and pre-defined financial impact the MAC will have and not left open to the buyers' consideration.

Enforceability of pre-existing MAC clauses

Besides the fact of up till now there were no significant differences in the type and contents or in the frequency of use of this kind of clauses in the agreements executed during the pandemic, it should be also noted that though there was a larger scrutiny of MAC Clauses included in agreements entered into previously to the COVID-19 pandemic, the conclusions reached so far are that such clauses cannot be used to justify a valid withdraw from the executed agreements and consequently, the termination of the ongoing transactions.

Notwithstanding the fact that MAC clauses turn to be very specific, their terms and conditions being dependent on the characteristics of each particular transaction, not existing, therefore, a straightforward answer whether or not the same can be invoked due to COVID-19, it should be also noted that the vast majority of MAC clauses are construed narrowly and are only enforceable if they are clear, specific and objectively measurable. Additionally, traditional MAC clauses entered into before the outbreak, typically exclude industry-wide or generic market factors such as pandemics.

In view of the above and considering:

- that the further development and implications of the pandemic are not yet predictable; and
- the above described typical contents of a so-called traditional MAC clause, most likely a very relevant part of the existing clauses in agreements executed prior to the outbreak will not cover the impact of the COVID-19 pandemic on the target business.

Moreover, the lack of cases where Portuguese courts have interpreted MAC clauses increases this uncertainty.

Enforceability of MAC clauses entered after the COVID-19 outbreak

A distinction should be made between MAC provisions entered into before the COVID-19 outbreak and the ones entered into thereafter. In relation to agreements already executed during the pandemic situation and considering that usually awareness is a factor which disqualifies the application of a typical MAC clause (and that will hardly change), it will be more difficult to invoke a MAC clause (due to COVID-19), on a contract entered during the pandemic. Therefore, any party who seeks to invoke a MAC clause on a new deal, after the proliferation of COVID-19 pandemic, should do so on some other basis.

Actually, parties who entered into transactions after the start of the COVID-19 pandemic may find it harder to invoke a MAC clause as they will need to show that there has been a material change that they did not know about at the time they entered into the agreement ie that while they were aware of the pandemic, the circumstances surrounding it have themselves materially changed. The difficulty in proving so together with the risk of becoming liable to the other party for a repudiatory breach of contract (in case of wrongfully declaration of a material adverse change) with the inherent serious con-

sequences, discourage the resource to this type of mechanism and the triggering of MAC Clauses in the context of the COVID-19 pandemic.

Force majeure

Lastly, it should be noted that irrespective of the inclusion of MAC clauses in the agreements, under Portuguese law any of the parties to an agreement may invoke a cause of force majeure, or change of circumstances, in order to change the conditions of the underlying transaction or even to terminate it. The change of circumstances relevant for this purpose may have had an impact either on the target of the transaction or on the party itself arguing such change of circumstances. However, a cause of force majeure is defined, in broad terms, as an unexpected, insurmountable event out of control which, without any provision, prevents the normal fulfilment of contractual obligations.

Determining whether an event qualifies as a cause of force majeure implies the use of broad worded concepts which can only be applied and understood in the light of specific circumstances. Being an undetermined concept there is no Portuguese law in force that indicates which cases it applies and does not apply to. The Portuguese courts have not yet had the opportunity to rule on the case in the light of the COVID-19 pandemic, but in the past these clauses have been applied to very restricted cases.

In any case, considering that the unpredictable and unforeseeable nature of the circumstance are key elements for the application of this rule, this will exclude contracts which were entered into during the pandemic, since the parties were already aware of the situation and of its potential serious consequences.

W&I Insurance

Impact on M&A deal flow

While a number of transactions are proceeding as usual, several deals have been put on hold or delayed in particular in the sectors of tourism, F&B and hospitality and logistics and supply chain.

Conversely, and regardless of the COVID-19 restrictions imposed globally, the real estate sector, the technology sector, the infrastructure and renewable energy sectors continue to show healthy levels of deal activity.

Transactional risk – insurer appetite

Even though insurers are not signalling a significant change in their appetite for insuring M&A transactions as a result of COVID-19, there are notably fewer new W&I enquiries. As a consequence, and although insurers are taking a more cautious approach to the jurisdictions and target sectors currently most affected by COVID-19, they have had to become more commercial than ever when providing terms (as competition between insurers will intensify amid lower deal flow), which resulted, among others and in certain jurisdictions, in a sharp decrease of the premium rates (especially in the real estate sector).

Other areas where insurers are showing flexibility due to the mobility constraints include the signing formalities and the deliverables under the policy, for example, by accepting the execution of no claims declarations by way of worded confirmation emails and extending periods to provide policy deliverables.

Specifically concerning Portuguese market, at the end of 2020 there were more than 20 insurers available to underwrite W&I in Portugal and as a consequence the market capacity, per deal, was estimated to surpass €1bn. In relation to premiums, despite a modest reduction on the real estate sector, premiums remained generi-

cally stable but certain insurers are no longer practicing minimum premiums (considering the appetite for lower EV deals). Yet, one of the most recent developments on W&I policies in Portugal was the application of Nil or Tipping to Nil retentions.

Finally, it should be mentioned that confirming the already stabilized trend buy-side policy represents nearly 98% of policies bounded.

COVID-19 coverage concerns and exclusions

In this context, the approach to COVID-19 has been constantly evolving. Initially, insurers applied a broad COVID-19 exclusion covering all industry sectors. However, certain insurers are now taking a more pragmatic view and instead of adopting the approach of a general exclusion are considering the appropriateness of the same during the underwriting process, depending on the nature of the target business and the warranty type. In fact, insurers have started to take a more commercial approach with respect to a mandatory COVID-19 exclusion. Such blanket exclusion may not be required where an insurer can tailor specific warranties to be amended to address the existing concerns.

For COVID-19 exclusions, underwriters are focusing on the following specific areas: material contracts, supply chain issues, stock and assets, employees and business continuity. For an insurer to cover operational warranties (which could be impacted by the current situation), they will need to be satisfied that the buyer has been provided with up-to-date and detailed disclosure on the position by the seller. Insurers may also consider including additional and specific limitations for individual warranties that directly relate to matters impacted by COVID-19 and are usually now flagging from the outset the potential need for exclusions from cover in the event they are unable to gain comfort on the impact of the pandemic on the warranties, particularly in relation to warranties to be given at completion. Conversely, if it can be demonstrated that the target business is not significantly exposed to such threats, said exclusions may be removed.

Ultimately, if a COVID-19 exclusion is insisted upon by insurers, insureds will need to ensure that it is drafted as narrowly as possible so as to address the underwriters' specific concerns, but avoiding it applying too broadly across the entire set of warranties.

Areas of increased underwriting focus

With the progression of the pandemic, the underwriting focus was intensified in areas such as general supply chain risks, financial stability, business continuity and disaster recovery plans. Employment issues, such as coverage for unpaid wages, sick leave and data protection related to employees and health, has also become a key area of focus. For transactions structured with a split signing and completion, insurers are considering the target company's material contracts, with a focus on the ability of performance, together with the consequences of non-compliance. Also, in this kind of transaction, insurers are expecting, as a minimum, relevant COVID-19 due diligence to be undertaken prior to signing.

Subject to such due diligence being undertaken, insurers are expected to consider limiting any COVID-19 exclusion to only those warranties repeated at completion. Should further COVID-19 due diligence be conducted in the interim period, insurers may be able to remove such exclusion, subject to further approval. Furthermore, where a transaction was signed but completion is pending, some insurers are seeking to recommend policies to include a COVID-19 exclusion against the warranties repeated at completion (in the absence of additional COVID-19 due diligence or other underwriting comfort).

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Impact on Key Sectors

From the industries traditionally experiencing significant M&A activity the most affected by the pandemic were retail, industry and tourism and hospitality sectors. As regards the real estate sector, although in the beginning of 2020 its future was a question mark, the same managed to remain neutral all through 2020.

The sectors clearly less affected and where the deal flow has remained pretty much the same are the infrastructures, IT, health and renewable energy sectors which continued to attract a lot of interest.

Worth mentioning that continuing the already existing trend, international and domestic private equity firms played a key role in the current M&A activity, being a part in the majority of the M&A deals. In addition, venture capital remained very active, venture capital firms told to hold significant stores of available dry powder.

Final Notes

To conclude, although the Portuguese M&A environment during 2020 has been active, with several large transactions involving players from several markets, at this point it is still too early to assess the real impact of the COVID-19 pandemic in the economy and global markets for 2021 and it cannot be set aside the advent of a serious economic recession, currently disguised or, at least, postponed by the moratoriums offered by the Portuguese State.

With little doubt, 2021 will yet be another challenging year, with the persistence of a prevailing sense of deep concern with the progression of the COVID-19 pandemic and its impact on economies, businesses and individuals in Portugal, as well as across the world.

Campos Ferreira, Sá Carneiro – CS Associados has a market-leading, highly experienced team with capacity to provide companies with expert support in the growth of their business via M&A transactions, involving complex and sophisticated legal structures. The firm also provides its national and multinational corporate clients across all industrial sectors with permanent support in the legal challenges that they face in their business. That support includes advice on organisational, corporate governance and general corporate matters, as well as in the framework of new investments and respective regulation, in particular in connection with third-party association agreements, including partnerships, joint ventures or shareholders' arrangements.

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