Chambers
AND PARTNERS

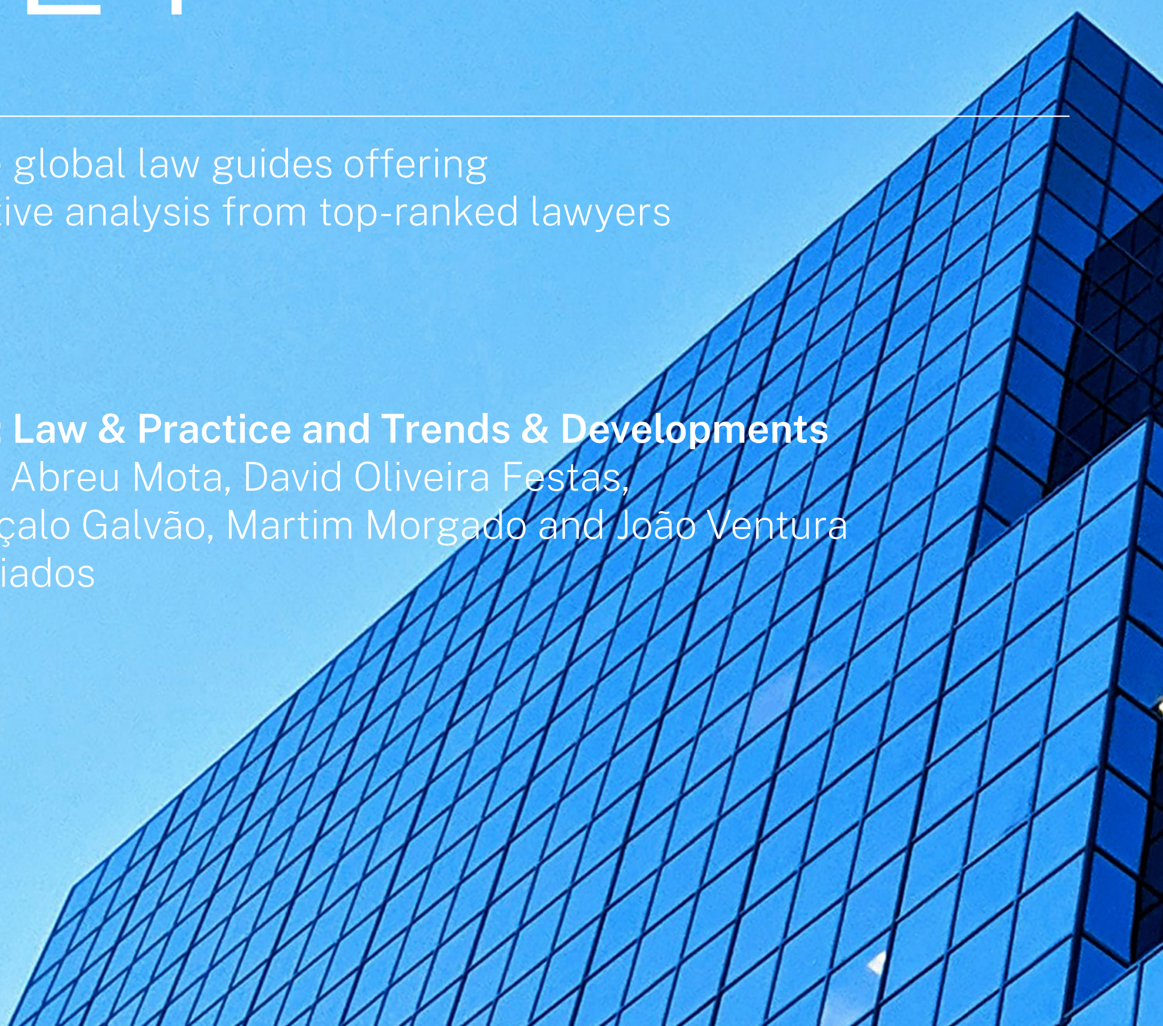
CHAMBERS GLOBAL PRACTICE GUIDES

Corporate M&A 2024

Definitive global law guides offering comparative analysis from top-ranked lawyers

Portugal: Law & Practice and Trends & Developments

Bernardo Abreu Mota, David Oliveira Festas,
João Gonçalo Galvão, Martim Morgado and João Ventura
CS'Associados



PORTUGAL

Law and Practice

Contributed by:
Bernardo Abreu Mota, David Oliveira Festas and João Gonçalo Galvão
CS'Associados

Contents

CS'Associados has a highly experienced, market-leading team that gives companies expert support in the growth of their business via M&A transactions involving complex and sophisticated legal structures. The firm also assists national and multinational corporate clients across all industrial sectors in the legal challenges facing their businesses. Such support includes advising on organisational, corporate governance and general corporate matters, as well as in the framework of new investments and respective regulation, particularly in connection with third-party association agreements, including partnerships, joint ventures and shareholders' arrangements.

Authors

Bernardo Abreu Mota is a partner in the corporate, M&A, private equity and restructuring and insolvency practices at CS'Associados. He has extensive experience in acquisitions in a number of different sectors, including financial, health and pharmaceutical, industry, retail, tourism and real estate, and in joint ventures and other arrangements between shareholders or other company stakeholders. He also focuses on corporate reorganisations, advising clients on key legal and strategic business and corporate governance matters.

David Oliveira Festas is a partner in the corporate, M&A and capital markets practices at CS'Associados. He advises on general corporate and corporate governance matters, joint ventures, M&A and capital markets transactions. David has extensive experience in representing investors and leading listed and private companies across a broad range of industries, and regularly handles complex corporate and capital markets transactions, including private equity transactions, business acquisitions, reorganisations and disposals, corporate restructurings, shareholder disputes, initial public offerings and takeovers. He is also a professor of contract law, company law and capital markets law at the Faculty of Law, University of Lisbon.

João Gonçalo Galvão is a partner in the real estate, M&A and private equity practices at CS'Associados. With more than 15 years' experience, he is a transactional lawyer who provides advice to domestic and international clients, including corporate clients, investment funds and real estate developers and investors, in complex M&A deals and real estate development projects. João also has experience in high street leases and shopping centre management and operation, and in providing ongoing assistance in the development and management of several real estate assets.

CS'Associados

Avenida da Liberdade, 249 - 8º
1250 143 Lisboa
Portugal

Tel: +351 211 926 800
Fax: +351 211 926 899
Email: geral@csassociados.pt
Web: www.csassociados.pt

1. Trends

1.1 M&A Market

Although 2023 started with positive signs arising out of a certain normalisation of the effects of the COVID-19 pandemic, the war in Ukraine and the Middle East conflict impacted the global economy, affecting the restoration of supply chains and leading to an energy crisis, and suddenly accelerating inflation to unprecedented levels.

M&A activity ramped up in the last quarter of 2023, and that upward trajectory is poised to continue in 2024, despite macroeconomic and geopolitical headwinds. M&A activity will likely grow at a steady pace in 2024, taking into consideration that the availability of funds under the Recovery and Resilience Plans of the European Union is expected to foster public investment and M&A activity, alongside the increasing volume of non-performing loans.

1.2 Key Trends

Private equity firms continued to play a key role in both international and domestic M&A throughout 2023, and are expected to continue to be present in most M&A transactions in 2024.

There was also a trend of transactions in non-core businesses and involving carve-outs, alongside the widespread use of W&I insurance following the international trend in the market. Environmental, social and governance (ESG), cybersecurity and AI shall also remain at the top of the agenda of M&A transactions in 2024.

1.3 Key Industries

The key industries for M&A players in Portugal throughout 2023 were real estate, technology (TMT), energy and infrastructure; substantial M&A activity is expected in those areas in 2024.

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

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

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

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

Listed Companies

The acquisition of a controlling stake in a listed company is normally implemented under the framework of a takeover offer (as further detailed in **4. Stakebuilding** and **6. Structuring**).

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* – CMVM) is a key regulator, and is responsible for the issuance of several soft law regulations that are relevant within a takeover scenario (eg, regulations on the contents of prospectuses and applicable takeover procedures). Depending on the business areas of the companies targeted by an M&A transaction, some sectoral regulators may also play 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 European Commission or the Portuguese Competition Authority (*Autoridade da Concorrência*), depending on the applicable rules, in particular through the enforcement of the antitrust or merger control legal frameworks.

However, regardless of their powers to oversee their relevant activity sectors, the intervention of the sectoral regulators in any M&A transaction would not invalidate any input from the competent competition agency if the relevant deal is likely to create significant impediments to effective competition, 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 on 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 a deviation from this general rule, the Safeguard of National Strategic Assets Regime (NSAR), adopted by Decree-Law No 138/2014 of 15 September, applies to acquisitions of control over the main infrastructure and assets pertaining to national defence and national security and/or the provision of essential services for the national interest in the areas of energy, transport and communications. Under the NSAR, the Portuguese government may scrutinise (and oppose) 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 national defence and security or the security of supply in services that are fundamental to the national interest. The NSAR sets out the procedural steps and deadlines that apply to the government's assessment.

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

2.4 Antitrust Regulations

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

- the 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;
- the 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, if 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 of more than EUR100 million, net of taxes directly related to such turnover, as long as the turnover in Portugal of at least two of these undertakings is above EUR5 million.

Required notifications may be submitted to the Portuguese Competition Authority at any time following an agreement on the concentration (there is no pre-determined deadline for the purpose), provided that the concentration is not implemented before clearance is granted by the Competition Authority. In certain instances, relevant undertakings may also voluntarily notify the proposed concentration before the triggering event. If the European Commission is competent to assess the projected concentration as per Council Regulation (EC) No 139/2004, of 20 January 2004, on the control of concentrations between undertakings (EU Merger Regulation), its competence prevails over that of the Portuguese Competition Authority.

2.5 Labour Law Regulations

Overall, employees' representatives and trade unions do not have any right to influence the conduct of an employer's business or its major business decisions, although they do have the right to be informed and consulted about specific material issues that affect employees (eg, the transfer of the employees' work place) and, in certain cases, to offer an opinion on the matter (such as in the restructuring of companies).

Transfer of a Business or Undertaking

In 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 remuneration. The acquirer is liable for the payment of fines applied for labour misdemeanours as from the transfer date but connected to breaches of labour obligations occurring before such date, and the transferor is jointly and severally liable for all obligations that may become due up to the transfer date and for two years 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 the legal, economic and social consequences thereof, together with the proposed measures to be taken in respect of transferred employees, if any (the application of which is subject to an agreement). However, this requirement is deemed inapplicable in the 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 the 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. Therefore, if the headquarters of the merging companies is in Portugal, the employees' participation shall be ruled under Portuguese law, which sets forth that the employees' participation in the company resulting from the merger is not mandatory.

Nonetheless, if any of the merging companies has had an average of 500 employees in the six months prior to the cross-border merger and operates an employee participation system, then the employees' participation may comprise their 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. This participation right will also be applicable if the Portuguese regime does not provide for the same level of participation as the regime applicable to the merging companies.

2.6 National Security Review

A national security review of acquisitions may exist in certain inbound foreign investments; 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 relevant in M&A-related disputes (partly because of the increased use of arbitration arrangements, which do not allow for decisions to be made public), a landmark ruling from the Supreme Court of Justice in 2016 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, with the rule being that the fault of the breaching party is a necessary prerequisite for liability. Therefore, one of the main points of dispute regarding representation and warranty clauses 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 such query positively, albeit with a significant technical contour, sustaining that the breach of a representation or warranty shall be understood not as a contractual breach triggering an indemnification obligation, but as a trigger of a contractual obligation to pay the purchaser (regardless of the existence or absence of fault of the seller) the amount corresponding to the financial/economic difference between the value of the company as represented and warranted by the seller and its actual value.

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

The following recent legal developments with relevance to M&A are worth highlighting.

- Decree-Law No 114-D/2023 of 5 December entered into force on 4 January 2024 and amended the existing regime for national and cross-border mergers, national demergers and national conversions, implementing Directive (EU) 2019/2121 and creating the legal framework for cross-border demergers and conversions. This regime is expected to add complexity to the acquisitions of companies and to corporate reorganisations in general as, on the one hand, it has introduced additional formal requirements and, on the other hand, it has increased the deadlines to execute these operations (for example, the deadline for creditors to claim their credits on a merger was increased from one month to three months).
- Law No 21/2023 of 25 May created the legal regime applicable to start-ups, scale-ups and business angels. To attract investment to Portugal, this regime grants several tax benefits to companies that have obtained this legal status.

3.2 Significant Changes to Takeover Law

Law No 99–A/2021 of 31 December 2021 came into effect at the end of January 2022 and amended a number of Portuguese laws and regulations, including the Portuguese Securities Code.

One of the most significant features of the law reform is that listed companies are now allowed to have multiple voting shares. Other significant amendments made to the Portuguese Securities Code include the following:

- open-ended companies (*sociedade aberta*) will no longer exist – Portuguese capital markets legislation now revolves solely around listed companies;
- Portuguese companies that issue shares admitted to trading on a regulated market or in a multilateral trading system are now allowed to issue multiple voting shares, up to a limit of five votes per share;
- the threshold of 2% of voting rights to disclose qualified shareholdings has been removed;
- the rules for taking part in shareholder meetings have been simplified;
- the minimum prospectus exemption threshold has been increased from EUR5 million to EUR8 million;
- underwriting by financial intermediaries is no longer mandatory in public offers;

- the requirement that a competing bid cannot be submitted "on less favourable terms" than a preceding offer has been removed;
- all shares subject to a takeover bid may now be acquired on a compulsory basis if the bidder and its associates hold at least 90% of the voting rights attaching to the company's share capital (a second threshold of 90% of the voting rights attaching to the shares that the bidder offered to acquire under the bid no longer needs to be met);
- the exemption from the duty to launch a mandatory offer where proof is provided that there is no control over the listed company will be admissible regardless of the percentage of voting rights held, and acquisitions made due to death (mortis causa) shall not trigger a duty to launch a mandatory offer if the articles of association set out which acquisitions are caught in this regard; and
- the rules on the amendment of bids will offer greater flexibility – the bidder may now amend the terms and conditions of the offer up to two days before the end of the offer period, provided that the revised offer is not less favourable overall for the addressees.

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.

The main stakebuilding strategies include the acquisition of minority stakes in the target through private deals and the execution of shareholders' agreements that initiate the 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 the amendment of the Portuguese Securities Code (see **3.2 Significant Changes to Takeover Law**), the disclosure of material shareholdings in Portuguese companies listed in the EU or in EU and non-EU companies listed in Portugal is required whenever the voting rights thresholds of 5%, 10%, 15%, 20%, 25%, 1/3, 50%, 2/3 or 90% are reached or exceeded, or cease to be met.

Considering this, a shareholder reaching or crossing a relevant threshold must inform the company and the 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 the vote aggregation rules set forth in the Portuguese Securities Code.

The above disclosure requirements must be met in accordance with the requirements set forth in CMVM Regulation No 5/2008, of 2 October 2008 (as amended 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, of 2 October 2008 (as amended by CMVM Regulation No 7/2018), on directors' dealings, and by CMVM Regulation No 4/2013, of 18 July 2013, on corporate governance.

4.3 Hurdles to Stakebuilding

Although this practice is not common, companies may introduce more stringent reporting thresholds in their articles of incorporation or by-laws than those set forth in the Portuguese Companies Code. However, it is not possible to opt out of mandatory disclosure requirements.

Other significant hurdles to stakebuilding under Portuguese law include the mandatory takeover bids regime, under which the crossing of the 1/3 or 50% voting rights thresholds in a listed 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 Sections 16(5) and 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, as amended by Regulation (EU) No 909/2014 and by Commission Delegated Regulation (EU) No 2022/27) impose duties concerning the disclosure of short positions held in connection with derivatives trading.

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

In light of the above, although the law is not clear, in certain cases (although not as a rule) market disclosure may only occur once a binding letter or definitive agreement has 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 obliges all parties involved (including the 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 may suspend trading of the relevant securities until the relevant information has been duly disclosed if 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.

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. With regard to legal due diligence specifically, the primary concern is to identify any contingencies or negative consequences that may be triggered by the business combination, particularly any change of control or ownership provisions that could motivate the termination of key agreements or the acceleration of debt due under credit facilities or loans. Legal due diligence also focuses on regulatory and licensing matters, particularly those regarding target businesses operating in highly regulated sectors (utilities, banking, insurance, etc), and on intellectual property issues, if the 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). 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 the potential for employees' restructuring and cost-saving measures in a post-transaction scenario.

ESG matters have increasingly gained attention among investors when perusing potential business opportunities, justifying detailed legal and technical due diligence. An example of this is the new chapter on sustainability added to the IPCG Corporate Governance Code in 2023.

In addition, following the approval of the European General Data Protection Regulation (GDPR) in 2016, and particularly the material revision of the potential sanctions in case of infringement, due diligence on GDPR compliance has become one of the most critical and key sections in any target review.

Other Areas of Focus

Legal due diligence also traditionally centres on:

- corporate matters, regarding the adequate incorporation and registration status of the target company and ownership of its share capital;

- real estate, mostly regarding the ownership and licensing of relevant real estate assets and any existing encumbrances;
- financing matters, with particular attention paid to compliance levels and cross-default and acceleration clauses under financing arrangements;
- insurance, assessing the existence of adequate insurance coverage under the 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 had an impact on due diligence, the main conclusion is that it did not hinder the ability to conduct due diligence. There was naturally a huge shift from the personal to the technology element, but the systems have generally been 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" that is unreasonably long could be deemed abusive and ultimately be reduced by a judicial decision at the request of any concerned party.

Exclusivity provisions are more common and are usually demanded for reasonable periods of time (normally from 60 to 120 days, although there is no standard rule on duration), particularly 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 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 an aggregation of voting rights, which may be especially sensitive in cases where any relevant thresholds may be involved, particularly 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 that are usual in 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 mark-ups of transaction documents from bidders 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, the timing for the 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 sectoral regulators and applicable legal provisions, a specific timeframe can therefore only be assessed on a case-by-case basis.

Furthermore, transactions will be subject to merger control proceedings with the EU Commission or the Portuguese Competition Authority (*Autoridade da Concorrência*) if the relevant legal thresholds are triggered, and cannot be implemented before a non-opposition decision is received. When the Portuguese Competition Authority is competent to assess the concentration, it has 30 working days after the notification of the concentration was formally submitted to issue a decision or to initiate an in-depth investigation, which should be completed within 90 working days from said notification. The timeframe may be suspended for different reasons, notably for formal requests of information and discussion of remedies.

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 a swift understanding on key transaction issues. 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, and by the requirement to address or remedy any material issues arising therefrom which are considered essential for the deal to take place. Resorting to W&I insurance is increasingly common if the time for the underwriting process is not factored into the transaction calendar, as it may amount to additional delays in the implementation of the transaction.

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

6.2 Mandatory Offer Threshold

The mandatory offer thresholds in Portugal are set at one third or one 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 the person under such duty proves that they do not control the target company.

6.3 Consideration

Consideration is usually paid in cash. However, an asset swap as consideration is not uncommon and has been used in some high-profile transactions. The Portuguese Securities Code also allows for shares or other securities (already issued or to be issued) to be awarded as consideration within public takeover offers, provided that they have suitable liquidity and may be easily evaluated.

In any event, and specifically in respect of mandatory takeover offers, there are stricter requirements for consideration to consist of shares or other securities, which 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 or undertaken to acquire 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 different deal environments or industries, the high valuation uncertainty tools used to bridge value gaps between the parties may vary and include, for instance, material adverse change clauses, price adjustment mechanisms or earn-outs.

6.4 Common Conditions for a Takeover Offer

The offeror is obliged to launch the offer under 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, excluding those that would need to be met by the offeror, as long as such conditions 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.

In mandatory bids, the Portuguese Securities Code imposes certain rules on minimum considerations to be provided, and it is understood that mandatory offers may not be subject to conditions (other than those that may result from mandatory law).

6.5 Minimum Acceptance Conditions

No minimum accepted condition is imposed by Portuguese 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 **6.4 Common Conditions for a Takeover Offer**.

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 the entire share capital of the company, 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 that 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.

Deal security measures have not changed significantly due to the pandemic, although there has been a clear trend of parties negotiating a deal to factor in additional time to cope with the existing level of uncertainty (eg, 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 transaction costs incurred) if a seller terminates negotiations at an advanced stage or elects another bidder. Although less common, break-up fees may also be agreed to protect the seller in cases where the sales procedure has a negative impact on ongoing businesses or on the overall value of the targeted asset.

Match Rights

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

Permanence Agreements/Non-solicitation Provisions

Permanence agreement provisions are also fairly common, with a view to retaining key employees of the targeted businesses, although they tend to be deemed invalid under the applicable labour law as the requirements for the retention of the employees are often not met. Non-solicitation covenants are usually deemed invalid as the Portuguese labour law states that companies cannot limit their employees' freedom to work. Nonetheless, such provisions are often agreed between companies and enacted as a gentleman's agreement.

Non-compete Provisions

Finally, non-compete provisions are also standard when trying to protect bidders against future competition from 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 relating to competition and labour.

6.8 Additional Governance Rights

Securing Governance Rights via Shareholders' Agreements

Regardless of 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 upon the 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 content and level of commitment, commonly setting forth rules regarding:

- the appointment of members of the corporate bodies;
- reserved matters requiring favourable votes from the contracting shareholders (if subject to shareholder resolution) or from appointed corporate bodies;
- conflict of interest rules stricter than those resulting from legal provisions; and
- the overall principles to be observed in the management of the company and the 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 above, it should be noted that shareholders' agreements are only binding on the contracting shareholders and may not be used to challenge or dispute actions of the company or of shareholders, 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, agreements will be invalid if they establish inadmissible limitations to shareholders' voting rights (such as the 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 companies, shareholders' agreements are able to determine 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 if the relevant thresholds are 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 such amendment is the establishment of voting rights limitations – eg, 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 (eg, 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. However, 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 listed companies, it is possible to initiate a squeeze-out of minority shareholders within the three months following the determination of the results of the offer. This mechanism is available to those shareholders who, as a result of a general takeover offer, reach or exceed 90% of the voting rights corresponding to the target's share capital, either directly or according to voting aggregation rules. The consideration must be paid in cash and the minimum consideration is the consideration provided in the offer or, if higher, the highest price paid by the offeror, or by any person whose votes are attributable to it, for the acquisition of securities of the same class, or that the offeror or any of said persons undertook to pay, between the determination of the results of the offer and the registration of the compulsory acquisition by the Portuguese Securities Commission.

The Portuguese Companies Code provides for a similar remedy in respect of non-public companies (without the intervention of the Portuguese Securities Commission), featuring a threshold of 90% of the share capital, but with 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% share capital threshold has been crossed. The consideration may be in cash or in own shares or bonds, and shall be substantiated by a report of an independent official chartered accountant.

Sell-Out

A 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 determination of the results of the offer, present a proposal for the sale of their shares to the target's controlling shareholder following a takeover offer that allows for a squeeze-out right (as mentioned above), 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, for the consideration set out according to the squeeze-out rules (as mentioned above).

The Portuguese Companies Code also provides for a sell-out mechanism in favour of minority shareholders if a controlling shareholder who is entitled to make a squeeze-out offer does not do so in the six-month period mentioned above.

Short-Form Mergers

Short-form mergers are also provided for in the Portuguese Companies Code. Although they 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 stock consolidation and other corporate restructuring transactions. These measures are seldom used due to their potential for the expropriation of minority shareholders.

6.11 Irrevocable Commitments

In listed companies, irrevocable commitments to tender by principal shareholders of the target company are not often seen, due in part to their potential to trigger 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 the 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 this, irrevocable commitments are likely to be undertaken immediately before the launching of the offer, so an opt-out for the principal shareholder is not feasible, even if a better offer is made. If the principal shareholder is a person whose voting rights are attributable to the offeror under Portuguese law, due to such irrevocable commitments or other cause, it will not be possible for them to launch a competing offer, unless authorised to do so by the Portuguese Securities Commission, provided that the situation that determines the attribution of the votes ceases before registration of the 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 through the publication of the preliminary announcement. Under Portuguese law, the offeror, the target company and its management, and any other parties involved must ensure the 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 the Portuguese Securities Commission, the target company and the entity managing the market 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 to up to 60 days in exchange offers).

7.2 Type of Disclosure Required

The Portuguese Securities Code lists the following information that must be included in the preliminary announcement of the bid:

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

A launching announcement and a prospectus are required for all public offers, and must be drawn up and published in accordance with the requirements set forth in Regulation (EU) No 2017/1129 of the European Parliament and of the Council, of 14 June 2017, on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, as amended by Regulation (EU) No 2021/337 (the EU Prospectus Regulation), and CMVM Regulation No 3/2006, of 11 May 2006.

Under the terms of the EU Prospectus Regulation, the prospectus must include key material information required for investors to perform informed assessments of their potential investments, including the assets, liabilities, profits and losses and a description of the overall financial position of the target. However, such information may vary in accordance with the target's specific characteristics.

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.

The disclosure requirements are substantially simplefor business combinations involving only privately held companies, but as a rule they involve the need for certain public registrations and publications, with the particular 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 the registration of the offer.

In the context of the registration of the offer with the Portuguese Securities Commission, the offeror must also 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. Therefore, financial information prepared in accordance with IFRS or the Portuguese agreed accounting standards (which are substantially in line with IFRS) will be acceptable.

In certain forms of business combinations (eg, mergers), the 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

There is no general legal obligation regarding full disclosure of the transaction documents, but 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). The Portuguese Competition Authority may also request the 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 to third parties by the requesting authorities. Under the Portuguese Securities Code applicable to listed companies, shareholders' agreements that are intended to achieve the acquisition, maintenance or reinforcement of qualified shareholdings or that are designed to affect the outcome of a takeover offer should be notified within three days of their execution to the Portuguese Securities Commission, which is 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 includes duties of care and fiduciary and loyalty duties, and 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 that are 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 its report, and act with loyalty and in good faith, particularly with regard to the accuracy of the information.

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

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 to launch a takeover offer for more than one third of the securities of the respective category (or to receive 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 on 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 implemented, either partially or totally. The issuance of shares or the entering into of agreements regarding the transfer of relevant assets, for example, are considered relevant changes to 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 a report describing the opportunities and conditions of the offer to the offeror and the Portuguese Securities Commission, and disclose said report to the public.

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 that they have adequate availability, technical competence and knowledge of the company's activity to enable them to discharge their functions appropriately. They must also act with diligence, in a judicious and organised manner. Directors are further 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 that are relevant to the company's sustainability, such as employees, clients and creditors.

As a general rule, directors may be held liable by third parties if they cause them losses resulting from 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, which is inspired by the "business judgement rule" and may be deemed to apply to potential breaches of duty of care, sets out that the liability of directors is to be excluded if 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 that arise following an approval taken in a meeting they did not attend, or in which they voted against the decision taken.

The nature of the current wording of Article 72, No 2 of the Portuguese Companies Code (in force since 2006) – combined with the general perception that judges still struggle to assess business rationality criteria, and added to the 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 any consistent jurisprudence or legal precedent in this respect.

8.4 Independent Outside Advice

Business combinations usually require specialised advice to be provided to directors, so that they may further consider the multidisciplinary 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 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, the public (with a higher emphasis on listed companies) and stakeholders, as well as the assessment of legal formalities and requirements to be complied with in connection with the 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 diligence exercises.

Outside advice may also be required in specific fields of expertise, depending on the business or activity sector of the targeted company (eg, where applicable technical opinions or due diligence 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 on any resolutions concerning matters in which they have a conflicting interest with the company, either directly or on behalf of a third party; the chair 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, entered into either directly or through third parties, must be approved in advance by the board of directors (without any conflicting directors' vote) and are subject to prior validation by the relevant supervisory corporate body. In certain cases, shareholders are also prevented from voting on resolutions concerning matters where they have conflicting interests, as specified in the Portuguese Companies Code.

Conflicts of interest have been raised in business combinations – perhaps the most common situation before the Portuguese Securities Commission is conflicts of interest 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, and 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 that 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 they are adopted for the purpose of performing previously assumed obligations or 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 that is subject to the same board neutrality rules or is not held by a company that is 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 the optional adoption of a breakthrough rule.

9.3 Common Defensive Measures

As discussed in **9.2 Directors' Use of Defensive Measures**, 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 of the "one share, one vote" principle, super-qualified majority requirements, cross-shareholding arrangements, dual-class shares (ie, multiple voting shares up to a limit of five votes per share are admitted) 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.

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, stating their opinion on the merits of the offer, although their opinion is not binding upon the target. The report contains information on the direction of the votes cast in the resolution of the board that approved the report, and mentions the existence or inexistence of potential conflicts of interest between directors and the offer recipients.

10. Litigation

10.1 Frequency of Litigation

Litigation is not common in Portugal in connection with M&A deals. If the parties involved in a transaction are not able to settle a dispute amicably, they tend to resort to arbitration so as to avoid the lengthier decision timings of common courts, and to some extent to ensure the 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 breaches 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 the 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 2024.

11. Activism

11.1 Shareholder Activism

Portugal does not have a significant tradition of shareholder activism, explained perhaps 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. Legal provisions awarding certain rights to minority shareholders (particularly on information and the appointment of members of the corporate bodies) also contribute to the lack of shareholder activism.

11.2 Aims of Activists

Although shareholder activism is not significant in Portugal, over the years there have been some cases where minority shareholders have attempted to pressure companies to enter into M&A transactions.

There were no signs of a significant increase in shareholder activism in 2023.

11.3 Interference With Completion

Although shareholder activism is not significant in Portugal, over the years there have been some cases where minority shareholders have struggled to stop or delay transactions. The most notorious example is Elliott's acquisition of 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 expert to set the minimum consideration in the context of certain mandatory bids and to assess the accuracy of the information 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.

Trends and Developments

Contributed by:
Martim Morgado and João Ventura
CS'Associados

CS'Associados has a highly experienced, market-leading team that gives companies expert support in the growth of their business via M&A transactions involving complex and sophisticated legal structures. The firm also assists national and multinational corporate clients across all industrial sectors in the legal challenges facing their businesses. Such support includes advising on organisational, corporate governance and general corporate matters, as well as in the framework of new investments and respective regulation, particularly in connection with third-party association agreements, including partnerships, joint ventures and shareholders' arrangements.

Authors

Martim Morgado is a partner in the corporate, M&A and private equity practices at CS'Associados. With over 20 years' experience, he advises on both domestic and cross-border M&A and private equity transactions covering a wide range of industry sectors, including financial and insurance, health and pharmaceutical, retail, and IT and electronic communications. Martim also handles property matters, including real estate projects and transactions. On the corporate side, he is often involved in handling company reorganisations and advising clients on key legal and strategic business matters, including joint ventures and other arrangements with shareholders and stakeholders.

João Ventura is a managing associate in the corporate, M&A and private equity practices at CS'Associados. He advises domestic and international clients, particularly in M&A transactions, shareholders' agreements and corporate restructurings. João also has experience in corporate governance matters, corporate compliance issues and the negotiation of commercial agreements, notably in the financial services, transport and supply chain sectors.

Contributed by: Martim Morgado and João Ventura, **CS'Associados**

CS'Associados

Avenida da Liberdade, 249 - 8º
1250 143 Lisboa
Portugal

Tel: +351 211 926 800
Fax: +351 211 926 899
Email: geral@csassociados.pt
Web: www.csassociados.pt

CS'ASSOCIADOS

Corporate M&A in Portugal: an Introduction

During 2023, the main goal of Portugal's M&A market was to stay resilient amidst global economic challenges. The year started shrouded in uncertainty, with rising interest rates, geopolitical instability and recession concerns contributing to a general M&A slowdown. However, as the year progressed, deal volume in Portugal increased slightly and some recovery occurred by the end of 2023.

Despite the concerns raised by the escalation of the Middle East conflict, positive macroeconomic indicators such as effective control over inflation and public debt reduction (coupled with investors' existent levels of liquidity) allowed market players to achieve interesting levels of M&A activity in some of the country's most strategic sectors.

M&A activity in 2023

According to the information reported by TTR Data, 2023 saw an overall increase of M&A deals compared to 2022 in terms of both number (+16%) and value (+6%), with the last quarter of the year bringing a more expressive deal volume.

Following the trend of recent years, inbound investment continues to outperform outbound investment, more than doubling in terms of both number and value of deals, accounting for 36.97% of the total number of deals and 46.79% of deal activity by value.

Once again, Spain was the main contributor for both inbound (11.94%) and outbound (34.71%) acquisitions – these numbers evidence a notorious lead in the situations whereby Portuguese-based companies acquire targets in the Spanish market. Spain is followed in the inbound flow by the United Kingdom, France and the United States, and in the outbound flow by Brazil, the United States and the United Kingdom.

Sectors and industries

M&A activity in Portugal throughout 2023 can be split into the following major sectors.

Real estate

The real estate sector continued to play a critical role in the Portuguese economy in 2023, accounting for 20.72% of all transactions, with an increase of 10% in deal count in relation to 2022.

Last year was also marked by the Portuguese government's enactment of Law 56/2023, of 6 October – the so-called "More Housing Programme" (*Programa Mais Habitação*). This transformative initiative has introduced substantial limitations in matters such as lease agreements, local accommodation and golden visas. It also approved specific tax measures impacting the full investment cycle (from construction to the reinvestment of capital gains).

The Portuguese government also approved Decree-Law 10/2024, of 8 January, commonly named the "Urban Simplex Initiative", aimed at reforming and simplifying licensing procedures on planning, zoning and industry activities.

There is still some uncertainty as to the application of these new legal frameworks, but so far the real estate sector has continued to show signs of resilience, mostly backed by foreign direct investment.

Technology (TMT)

The TMT sector also maintained its relevance in the Portuguese market, with 14.1% of deals in 2023 representing an 8% increase in number of deals compared to 2022.

Portugal has been promoting several initiatives to create a friendly ecosystem not only to attract tech start-ups but also to incentivise multinational tech entities to anchor specific business units in the country (eg, data centres or innovation factories), with a particular focus on artificial intelligence (AI). In a clear demonstration of these efforts, the European Commission named Lisbon the 2023 European Capital of Innovation.

Energy

In line with global trends, the energy sector continues to generate relevant M&A activity, amounting to almost 10% of reported transactions and evidencing an increase of 11% in absolute numbers compared to 2022.

In particular, renewables have kept Portugal on the radar for investors. This was driven not only by the mainstream subsectors (eg, photovoltaic parks and wind farms) where total deal values are becoming more expressive, but also by the rise of new technologies such as floating solar, offshore wind, hydrogen, biomethane and lithium.

In one prominent example relating to the offshore wind segment, the Portuguese government launched the initial phase of an offshore wind auction in November 2023, with 50 entities from more than ten countries submitting their interest in obtaining licences for the development of offshore wind projects in Portugal.

Business and professional support

Finally, regarding the wide-ranging category of business and professional support, 2023 witnessed a significant increase of 24% in deal flow, helping to strengthen the overall M&A outlook in Portugal.

Deal trends

2023 saw a mixture of a sellers' market (particularly for companies operating in the most trending industries) with increased influence from buyers due to a general reduction of auction sales.

For undertakings above a certain valuation threshold, vendors have still been able to organise competitive sale tenders with the participation of several bidders. In these processes, the traditional flow characterised by non-binding offers, due diligence, binding offers, exclusivity, signing and closing of the transaction is still standard, even though this sequence is not exactly followed in all cases.

For lower valuation thresholds, or in the context of a niche sector, those transactions are often conducted on a bilateral basis and with exclusivity being granted since day one, thereby providing more leverage to the buy-side.

As a general remark, M&A transaction timings are getting more extended, independently of the market sector. This can be explained by a range of factors, such as the growing complexity of the due diligence exercise, the higher compliance thresholds being required by third parties and the challenges in negotiating debt conditions in a high interest rate environment (especially when resorting to external financing).

Valuation gaps

During 2023, market operators continued to use a range of different structures to bridge valuation gaps. To tackle these mismatches, the most common contractual options pursued by market operators are still deferred consideration schemes, escrow arrangements, completion accounts mechanisms and earn-out structures.

Although these measures can initially be seen as more buyer-friendly (notably, deferred consideration and completion accounts), their main purpose is to find a common ground between parties on pricing. All in all, they tend to increase certainty as to the actual financial position of the target and flexibility to adjust the final purchase price according to post-closing fluctuations, when required.

W&I insurance

Access to W&I insurance in M&A transactions in Portugal is also becoming more frequent, and is no longer seen as an option for high-value deals only. Market providers have been able to simplify and accelerate the contracting process, adjusting policies' terms and conditions for different counterparties.

As a novelty, the first signs of a development in W&I policies appeared, expanding coverage to specific issues identified by buyers in their due diligence exercises which, as a rule, are exclusions to the policies. Such expansions are still in the early stages but are apparently already in the market for certain types of contingencies such as those of a tax nature.

Broadly speaking, W&I insurance policies are usually taken out to protect buyers against fraud or misleading information provided by sellers, and grant a direct right of action against the insurer.

Whenever private equity companies are involved as sellers, W&I insurance is of particular importance to ensure the buyer's protection regardless of the fund stage – indeed, even when a potential contractual breach takes place after the fund liquidation, the insurer is still the one called to provide adequate coverage to the buyer.

Foreign direct investment (FDI) and the Foreign Subsidiaries Regulation (FSR)

Over recent years, EU regulation has been consolidating both the FDI regime and more recently the FSR; together with the long-established merger control assessment, they now form the three topical layers of precedent assessment for cross-border M&A deals.

In Portugal, Decree-Law 138/2014, of 15 September (which remains unchanged), establishes the national FDI regime, creating a screening process for foreign investment concerning strategic assets that are essential to guaranteeing national defence and the supply of services in the areas of energy, transport and communications.

Although the Portuguese FDI regime does not mandate the notification of any transaction, the prospective purchaser may voluntarily request an ex-ante confirmation that an opposition decision will not be issued – with confirmation being tacitly given if the Portuguese government initiates no investigation within 30 working days. Differing from other European countries, this regime does not often lead to filings in practice.

On 24 January 2024, the European Commission adopted five initiatives to strengthen the EU's economic security at a time of growing geopolitical tensions and profound technological shifts. One of these initiatives proposed an improved screening of foreign investment into the EU. As such, the legislative process to update the Portuguese FDI regime should be triggered in 2024.

The FSR (Regulation (EU) 2022/2560 of 14 December 2022) entered into force on 12 July 2023, enabling the European Commission (the sole enforcer of the FSR) to address distortions caused by foreign subsidies in favour of companies operating in the single market. In addition, since 12 October 2023, concentrations and bids made in public procurement procedures must be notified in certain cases, if foreign subsidies that distort the internal market have been granted.

Given this outlook, both FDI and FSR concerns are expected to have a significant impact on the timings and costs of cross-border deals, becoming increasingly frequent conditions precedent to be included in the transactional documentation.

The Portuguese Recovery and Resilience Plan (RRP)

The RRP is expected to have a transformative effect on the national economy and to influence the course of M&A in upcoming years. It aims to implement a set of reforms and investments that will enable Portugal to resume sustained economic growth, ensuring recovery from the pandemic crisis and a resilient future for the country.

The RRP has been structured according to three main dimensions: economic and social resilience, climate transition and digital transition. On 17 October 2023, the RRP was updated to add a new REPowerEU chapter, now also including six reforms and 16 investments aimed at reducing Portugal's reliance on fossil fuels.

Given the tight timeframe to implement all RRP measures (milestones and targets should be met by mid-2026), 2024 shall bring greater public investments, along with new business opportunities for the private sector.

Within this context, Portugal has identified certain strategic projects aimed at promoting economic growth, innovation, sustainability and social development, such as the so-called National Railway Plan. This ambitious country-wide infrastructure plan shall bring together the country's top ten cities and deliver high-speed rail connections to each of them.

Governance challenges

Environmental, social and governance (ESG), cybersecurity and AI are expected to remain on top of the agendas for the governance bodies of both listed and non-listed companies in 2024.

ESG

Nowadays, it is widely recognised that ESG factors are key in instructing corporate decision-making processes. Investors and companies cannot overlook the alignment of their actions with the values of diversity, social responsibility and environmental sustainability, with market pressure and incentives for green financing also influencing this status quo.

Those requirements are no longer just a matter of principles and general duties: they now translate into specific obligations, starting with reporting. The Corporate Sustainability Reporting Directive (CSRD) came into force at the start of 2023, followed by Commission Delegated Regulation (EU) 2023/2772 of 31 July 2023 at the start of 2024, complementing the CSRD and establishing the first set of EU sustainability reporting standards. These standards specify the sustainability-related information that companies will have to disclose (material impacts, risks and opportunities in relation to ESG matters) in the uniform presentation format specified in this legal framework.

In Portugal, a new chapter dedicated to sustainability was introduced in the most recent revision of the IPCG Corporate Governance Code (2023): companies must now explain how their long-term objectives contribute to the community at large and how the main policies and measures adopted contribute to the fulfilment of their environmental and social objectives. In terms of internal control, companies must have processes in place to collect and process data related to environmental and social sustainability – this allows the management body to become aware of the risks the company is incurring and to propose strategies to mitigate them.

Cybersecurity

Cybersecurity management will continue to be identified as a priority for companies. Indeed, the pandemic has compounded the omnipresence of cyber activity, as organisations moved away from data centre security to cloud security and expanded their digital footprint through digital transformation journeys. Furthermore, with workforces being distributed, cyber-attacks across platforms have been increasing widely, prompting senior leadership to place more emphasis on cyber-risks. Board members now look at cyber-risks as an enterprise-wide risk management issue, rather than a pure IT security issue.

In their oversight roles, governing bodies are also in charge of supervising overall cybersecurity management, including appropriate risk mitigation strategies, systems, processes and controls. From a governance perspective, board members shall ensure they have a clear view on how business will be affected in a scenario of a cyber-attack and also if the appropriate skills, resources and approaches are in place to minimise its impacts.

AI

Last but not least, executives cannot ignore the extraordinary contributions that AI can make to their businesses. Conversely, the challenge also lies in prohibiting the use of systems that may jeopardise fundamental rights.

The EU AI Act is expected to be finally approved in the first semester of 2024 and will be the first-ever comprehensive legal framework on AI worldwide. It aims to set a global standard for the use of AI by proposing a risk-based approach (from minimal risk to unacceptable risk). To ensure proper enforcement of this new legislation, it is essential that an efficient channel is established between the European AI Office (formed in February 2024) and the national supervisory authorities.

Although regulation in AI matters is still taking its first steps, board members already have enough elements to start answering AI challenges and to prepare their companies to comply with the upcoming legislation on this subject matter.

CHAMBERS GLOBAL PRACTICE GUIDES