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Corporate M&A 2022

Portugal: Law & Practice

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Portugal: Trends & Developments

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1. TRENDS

1.1 M&A Market

2021 witnessed a continued growth in M&A activity, particularly in the second semester, after Portugal stepped out of a second COVID-19 lockdown that lasted from January 15th to May 1st.

The market is yet to reach the level of transactions of 2019, but the lower number of deals is being compensated by an increase in the value of transactions.

The expectations for 2022 are high in terms of deal flow. The decreasing impact of the pandemic and the availability of funds under the Recovery and Resilience Plans of the European Union are expected to foster M&A activity.

1.2 Key Trends

Throughout 2021, 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.

1.3 Key Industries

Throughout 2021 in Portugal, the key industries for M&A players were infrastructure, energy and IT. Further, real estate and property transactions remained active in the market throughout 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 contributions, 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 prospectus and applicable takeover procedures). Depending on the relevant business areas of the companies targeted by an M&A transaction, some sectorial regulators may 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 the sectorial regulators' powers to oversee their relevant activity sectors, their intervention in any M&A transaction would not invalidate 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 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 15 September, applies to acquisitions entailing the control of the main infrastructure and assets pertaining to the 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 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's assessment.

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.

This legal framework will probably be amended in 2022 in response to the European Commission's call for member states to reinforce their existing screening mechanisms.

A final reference to Regulation (EU) No 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.

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 is not implemented before clearance by the competition authority. In certain instances, relevant undertakings may also voluntarily notify the proposed concentration before the triggering event. Should the European Commission be 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 the one of the Portuguese Competition Authority.

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 remuneration. 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

Law No 99–A/2021 of 31 December 2021, which came into effect 30 days after its publication date, amended a number of Portuguese laws and regulations, including the Portuguese Securities Code.

Allowing listed companies to have multiple voting shares is one of the most significant features of the law reform.

Some of the most significant amendments made to the Portuguese Securities Code are described below.

- Open-ended companies (*sociedade aberta*) will no longer exist. Portuguese capital markets legislation now only revolve 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 was removed.
- The rules for taking part in shareholder meetings were simplified.
- The minimum prospectus exemption threshold was 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 is removed.
- All shares subject to a takeover bid may 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 need no longer 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. In addition, acquisitions made due to death (mortis causa) shall not trigger a duty to launch a mandatory offer provided that the articles of association set out which acquisitions are caught in this regard.
- Rules on the amendment of bids will offer greater flexibility. The bidder may amend the terms and conditions of the offer up until 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.

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 the amendment of the Portuguese Securities Code (mentioned above), disclosure of material shareholdings in Portuguese companies listed in the EU or EU and non-EU companies listed in Portugal is required whenever the 5%, 10%, 15%, 20%, 25%, 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).

Considering the above, 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 vote aggregation rules set forth in the Portuguese Securities Code.

The above disclosure requirements must be made 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 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 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 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, as amended by Regulation (EU) No 909/2014 and by the Commission Delegated Regulation (EU) No 2022/27) 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 negotiations, 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, social and governance (ESG) matters have increasingly gained attention from investors when perusing potential business opportunities, justifying detailed legal and technical due diligences.

In addition, following the approval of the European General Data Protection Regulation (GDPR) in 2016, 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), financing 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 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, transactions will be subject to the merger control proceedings with the EU Commission or the Portuguese Competition Authority (*Autoridade da Concorrência*) if triggering the relevant legal thresholds and cannot be implemented before the latter's non-opposition decision. When the Portuguese Competition Authority is the competent agency to assess the concentration, the same 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 the same notification. The timeframe may be suspended for different reasons, notably 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 an understanding on key transaction issues swiftly. This timing will also be determined by the option to dismiss any due-diligence exercise or to con-

duct 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 the person under such duty proves that it does not control the target company.

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 or undertook 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 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, excluding 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 func-

tioning 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 consideration 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

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 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 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, directly or according to voting aggregation rules, 90% of the voting rights corresponding to the target's share capital. 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 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.

In respect of non-public companies, the Portuguese Companies Code provides for a similar remedy (without intervention of the Portuguese Securities Commission), 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. 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

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 which 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 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 make so in the six months period mentioned above.

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 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

In listed companies, 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 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, except if authorised 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 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 intermediary 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 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, namely, among others, the assets, liabilities, profits, losses and a description of the overall financial position of the target. Such information may, however, 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.

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 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, 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 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 arrange-

ments, dual class shares (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.

Throughout 2021, 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, directors should give 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 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 2021.

The sense is that in the majority of the transactions in 2021 the parties opted to find mutually agreeable solutions to deal with the consequences of the pandemic – which has been the trend since early 2020 – 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 over the years some cases where minority shareholders attempted to pressure companies to enter into M&A transactions.

Throughout 2021, there were no signs of an increase on shareholder activism.

11.3 Interference with Completion

Although shareholder activism is not significant in Portugal, there have been some cases over the years where minority shareholders struggled to stop or delay transactions. The most notorious 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 expert 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.

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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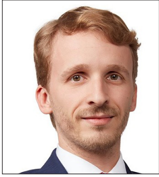

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Trends and Developments

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Introduction

In 2021, the COVID-19 pandemic entered a new stage, marked by a more stable environment and increased confidence in the markets. The steady and effective rollout of the vaccine in Portugal, which topped European and global charts, allowed the easing of restrictions and the resumption of most economic activities. However, the diffidence between the easing and tightening of health measures (namely due to the emergence of new virus variants) had businesses navigating a patchwork of conflicting guidance and best practices, which undoubtedly negatively impacted the recovery of the economy.

Notwithstanding, even in this context, the Portuguese M&A market showed signs of resilience and dynamism, staying on track with the recovery trend emerging from the third quarter of 2020 onwards, whereby many of the transactions that had been placed on hold (or that proceeded at a much slower pace) were resumed, and with a flow of new deals reaching levels in line with the pre-pandemic years. Liquidity has not been a problem, on the contrary, and the level of "dry powder" in the market, alongside the diversity of investors, have pushed for the deployment of the funds at their disposal (investors and companies have, as a rule, built up unprecedented pools of liquidity through the pandemic, with private equity (PE) firms, in particular, feeling the need to deploy the significant capital raised in order to deliver the desired returns).

The M&A activity has rebounded through the year, the number of deals raising by around 30% and the deal value registering a more modest increase of circa 2%. Although the increase in the deal value hasn't been as steep as global figures, it has shown a promising improvement, with sectors like TNT, agribusiness and real estate presenting impressive aggregate deal values in comparison to previous years.

In contrast, cross-border M&A transactions in Portugal registered a significant decrease, continuing a trend since 2019. In addition to global geopolitical tensions, subsisting pandemic-related restrictions made it difficult for companies to contemplate large cross-border acquisition integrations or complete due diligence spanning country borders. Spanish investors leading in the number of deals in Portugal, followed by the USA and France.

At the time of writing, the conflict in Ukraine has been damaging economies at a global level, being highly uncertain what the future will bring but issues such as aggravation of inflation, the energy challenge and geopolitical tensions are not expected to have a neutral effect on M&A activity.

Impact on Deal Structuring

In terms of deal structuring model, though in 2020 deal security measures were intensively discussed, notably 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), it has become evident that in practice this type of defensive measures and clauses came to have little acceptance in the contractual documentation package of the transactions that were effectively signed in the pandemic context.

The main impact of the pandemic ended up 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 an adjustment of the price initially offered, namely in competitive processes, and 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.

Impact on Process and Negotiation

The overall pandemic context continued to strongly impact project management and handling, in particular in respect of the due diligence and the negotiation of the contractual documents.

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.

In fact, it has become evident that the remote approach to some processes has come to stay, with virtual deal making (including remote closings) set to become part of the post-pandemic status-quo.

Furthermore, the pandemic's impact on due diligence site visits and in-person meetings has, in some cases, been overcome by the preparation of vendor due diligence reports, in order to facilitate due diligence.

Also, pandemic has made clear the need for tools to help manage the M&A process effectively and efficiently and the resource to SaaS 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 missing out on 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 2021.

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. Considering the outcome of the extensive discussions held in the context of the pandemic it is unlikely that such discussions be reopened as a consequence of the conflict in Ukraine, but it is still too soon to reach any conclusions in respect thereof.

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. Nota-

bly, 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 war in Ukraine, 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 or war related disruptions can constitute cause to invoke a MAC clause and the wording of the contract should clearly state when a MAC has occurred (for example, by resorting to quantitative thresholds 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 or war 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 MAC clauses

Up until now, there have been 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.

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.

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.

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.

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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.

Conversely, considering the recent geopolitical tension generated by the war in Ukraine and the likely resulting aggravation of inflation, it is worth mentioning that, in the past, case law considered high rates of inflation as part of the accepted risk of the contract and, therefore, not susceptible of triggering the application of a cause of force majeure. However, considering the current environment, the negotiation and express regulation of the effect of inflation in M&A deals may likely become a trend in the near future.

Earn-Out Clauses

As aforementioned, one of the main impacts of the pandemic in respect of M&A transactions was reflected in the valuation and price of the deals, which suffered a pronounced decrease caused by the more conservative approach of the purchasers, based on the uncertainty of the actual repercussions of the pandemic in the business and future performance of the acquisition targets.

As such, parties in M&A deals have been implementing innovative solutions to bridge valuation gaps, with the use of earnouts mechanisms registering a significant increase in M&A transactions, such trend being expected to increase and consolidate in the near future, also as a consequence of the disruption in the markets that will likely arise from the war in Ukraine.

Concept

An earn-out clause establishes a purchase price adjustment mechanism in share purchase agreements (or similar agreements), whereby part of the purchase price due to the seller will be paid in the future. The payment of said price component (as well as its timing and value) will depend on the target company achieving certain performance indicators within a certain time.

In the aftermath of the COVID-19 pandemic period and the atypical performance showcased by most companies therein, the valuation criteria based solely on past performance of the targets often proved unreliable and increases valuation gaps between buyer and seller. Therefore, the use of the earn-out mechanism gains importance as a means of confirmation of durable industry and company-wide impacts and structural changes.

Negotiating Earn-out Clauses

The structure of an earn-out depends, first and foremost, on payment thresholds and frequency, which can, typically, assume one of two forms: frequent milestones with periodic payments or a single milestone with a bullet payment.

When negotiating earn-out clauses, the parties shall seek a balance between assuring that the buyer can freely manage the acquired company according to its own discretion, and protecting the seller from potential buyer actions detrimental to the achievement of the earn-out (ie, by deferring results until after the end of the relevant period or anticipating significant investments).

Performance metrics

The earn-out shall be dependent on the achievement of certain benchmarks, which must be adequate and determined in the agreement. The metrics should be readily defined and the result indicators easily measured.

The chosen specific metrics to apply to each transaction shall consider the characteristics of that transaction in particular, but also sector considerations. Certain sectors have sector specific metrics which are often relevant when negotiating earnout clauses (ie, in the energy sector, production targets, turnover, megawatt output and costumer growth are often used metrics).

Impact on Key Sectors

From the industries traditionally experiencing significant M&A activity the most affected by the pandemic were, not unexpectedly, retail, industry and tourism and hospitality sectors.

The sectors clearly less affected and where the deal flow has remained pretty much the same are infrastructure, ICT (Information and Communications Technology), health and renewable energy sectors, which continued to attract a lot of interest. Renewable energy in particular has become the centre of the European concern due to the dependency of the Russian gas and oil, and will foreseeably trigger significant investment opportunities.

Worth mentioning that continuing and even strengthening 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 holding significant stores of available dry powder.

Final Notes

While the apparent stabilisation of the pandemic in Portugal, together with the ease of restrictions both national and internationally offer some reasons for optimism for the M&A market in 2022, new causes for uncertainty and market instability threat to affect the economic recovery.

The conflict in Ukraine brings about severe consequences for international trade, Europe being especially affected, contributing to a breakdown in trust of a truly systemic scale.

On top of accelerating the rise of interest rates, the galloping inflation, and disruptions to global supply chains will undoubtedly affect the M&A activity in the year to come, especially on the demand side. Furthermore, the currency volatility and economic and political sanctions put in place (reciprocally) between western countries and Russia generate an additional level of instability.

In particular, M&A deals in the oil and gas industry are expected to be reduced to a minimum in the coming times, due to its particular exposure to geopolitical tensions. Conversely, the energy sector is expected to see an increase in activity as players will try to lock energy supply into more geopolitically stable jurisdictions.

Overall, expected changes include increased due diligence, focusing on monitoring of targets' supply chains, imports and exports, including to comply with existing embargoes, as well as industry specific R&W regarding the possible compliance and valuation contingencies. M&A insurance is also set to be a hot topic in the coming months, as to whether the indemnities arising from the present situation will be deemed to be covered by existing policies. In this regard, it should be noted that it is common for policies to foresee exclusions related to wartime, political sanctions, among others.

On a positive note, Portugal will soon benefit from the funds allocated by the Recovery and Resilience Plan, which aims to contribute to the acceleration of economic activity by injecting funds into the economy. This should encourage investment in services, equipment and innovation tools necessary to increase digital

qualification, allow advances in terms of energy and climate transition and the decarbonisation of the economy, strengthening the health system, among others. It is expected that the investments will consequently lead to increased opportunities for the private sector.

To conclude, although the Portuguese M&A environment during 2021 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 2022, also (and specially) considering the conflict in Ukraine and related geopolitical tensions, not being possible to 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, 2022 will yet be another challenging year, with multiple uncertainty factors with unknown impact on economies, businesses and individuals in Portugal, as well as across the world.

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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