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Corporate M&A 2023

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Law and Practice

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CS'Associados

Contents

CS'Associados has a highly experienced, market-leading team that provides companies with 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.

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1. Trends

1.1 M&A Market

While 2021 was a strong year for M&A activity in Portugal, mainly due to the macro-economic situation, 2022 saw a decrease in both number and value of deals. Although 2023 started with positive signs arising out of a certain normalisation of the effects of the COVID-19 pandemic, the war in Ukraine aggravated the global economy, affecting the restoration of supply chains disrupted by the pandemic and leading to an energy crisis, and suddenly accelerating inflation to unprecedented levels in recent times. The situation also caused huge volatility in the international financial markets, with the inherent challenges for leveraging M&A activity, despite the existing levels of liquidity in the market.

The current market expectation for 2023 is that M&A activity could pick up towards the middle of the year, taking into consideration that the availability of funds under the Recovery and Resilience Plans of the European Union is expected to foster M&A activity.

1.2 Key Trends

Private equity firms continued to play a key role in both international and domestic M&A throughout 2022, and are expected to continue to be present in the vast majority of M&A transactions.

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.

1.3 Key Industries

The key industries for M&A players in Portugal throughout 2022 were food services, infrastructure, energy and technology. Real estate and property transactions also 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

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.

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 provide the parties with legal certainty as to 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.

This legal framework will possibly be amended in 2023 in response to the European Commission's call for member states to reinforce their existing screening mechanisms.

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 a company's location) 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, and the transferor is jointly and severally liable for all obligations that may become due up to the transfer date and 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 the legal, economic and social consequences thereof, together with the proposed measures to be taken in respect of transferred employees (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 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. Under specific circumstances that precipitate a particularly protective regime, this participation may 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 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 warranties 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 not be understood as a contractual breach triggering an indemnification obligation, but as a 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.

Although a considerable number of questions remain unanswered, 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 at the end of January 2022, 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.

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, 1/2, 2/3 and 90% are reached or crossed (ie, whenever the relevant threshold is either reached, exceeded or ceases to be met).

Considering this, a shareholder reaching or crossing the 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 bylaws 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 1/2 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 stake-building.

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 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, 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 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 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.

Environmental, social and governance (ESG) matters have increasingly gained attention among investors when perusing potential business opportunities, justifying detailed legal and technical due diligence.

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

Apart from the foregoing, 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 Por-

tuguese 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 be assessed only 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 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.

Governmental measures taken to address the pandemic have 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, and this effect decreased during 2022.

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, MAC 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 whose fulfilment depends upon 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.

In spite of the effects of the pandemic, deal security measures have not changed significantly, 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 rights 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 agreements or non-solicitation provisions are also fairly common, with a view to safeguarding key employees of targeted businesses, although they tend to be deemed invalid under the applicable labour law.

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 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 of such amendments 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, 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 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 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% 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 the above, 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 information that must be included in the preliminary announcement of the bid, including:

- 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, 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.

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, 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 Secu-

rities 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. 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 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, 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 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 for registration and publication a merger project 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 the adequate availability, technical competences and 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 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) – added to the general perception that judges still struggle to assess business rationality criteria, and combined with 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 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, 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 – for instance, 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 non-compliance with corporate governance rules limiting their use.

Throughout 2022, 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 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 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 2022.

In the majority of transactions in 2022, the parties opted to find mutually agreeable solutions to deal with the consequences of the pandemic, which has been the trend since early 2020, by postponing long-stop dates or 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, 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 an increase in shareholder activism in 2022.

11.3 Interference With Completion

Although shareholder activism is not significant in Portugal, over the years there have been some cases where minority shareholders 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

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CS'Associados has a highly experienced, market-leading team that provides companies with 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.

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Corporate M&A in Portugal: an Overview

Introduction

The economy in Portugal was affected by the international landscape in 2022 in similar ways to many other countries.

The year started with positive signs arising out of a certain normalisation of the effects of the COVID-19 pandemic, but signs of rising inflation started to show from late 2021.

The war in Ukraine that started in February 2022 aggravated the global economy dramatically, affecting the restoration of supply chains disrupted by the pandemic and leading to a critical energy crisis, and suddenly accelerating inflation to unprecedented levels in recent times.

The situation also caused huge volatility in the international financial markets, with the inherent challenges for leveraging M&A activity, despite the existing levels of liquidity in the market.

M&A activity in 2022

2021 was a record-breaking year for M&A activity in Portugal, mainly due to the macro-economic situation, but 2022 saw a decrease in both number and value of deals. The beginning of 2023 has so far followed a similar trend, with the current market expectation being that M&A activity could pick up towards the middle of the year.

According to information reported by TTR Data during 2022, M&A activity levels in Portugal showed a significant decrease of 39.67% in value and an 8.32% decrease in number of deals.

In terms of foreign investment, and following tradition, inbound investment continues to outperform outbound investments, representing 55.43% of deal activity by value and 47.40% by number of deals, against 16.76% and 13.33% of outbound acquisitions.

In comparison with 2021, outbound investments suffered a slight decrease while inbound remained at the same levels.

Unsurprisingly, Spain continued to be the key contributor (15.74%), followed by France, the United States of America and the United Kingdom.

Confirming the trend of previous years, private equity houses have led M&A deals in number and value.

Sectors and industries

Real estate

The real estate sector is reported to account for 21.48% of transactions, with an increase of 20% in the number of deals in relation to the previous year.

Hospitality led the deals in 2022, particularly hotels and touristic accommodation, accounting for more than 30% of real estate activity, followed by office buildings with 27%. Investment in high-end housing and services complexes also continued to attract attention, with prices rising throughout 2022.

Although there were some concerns in the market due to high inflation in the construction sector, the real estate sector continued to be a centre of attention.

Technology

The TMT industries continued to be on the top of the list, representing 15.74% of deals in 2022, maintaining the same levels of activity as in the previous year.

In this particular field of activity, Portugal has stood out in recent years through the emergence of many technology start-ups and a particular investment focus on growth stages.

Energy
Not surprising given the international context, and although transaction levels have decreased slightly in comparison to 2021, there was a general increase of activity in the energy sector compared to other areas, with deals reaching third place by sector overall.

Regarding renewables, measures established by the European Union following the energy crisis arising out of the war in Ukraine have kept Portugal on the map for renewable energy investments in Europe, including new technologies such as floating solar, offshore wind and hydrogen.

The trend for renewable energy is expected to continue, if not increase, with the Portuguese government releasing new public energy auctions concerning offshore wind and hydrogen and biomethane.

Business and professional support
After a strong year in 2022, the business and professional support sector witnessed a 38% decrease in the number of M&A deals.

Banking and insurance
2023 may bring some consolidation activity in the financial and insurance sectors, with public news reporting on potential deals on the sector that are already ongoing.

Deal process
In spite of the challenges, 2022 was still a sellers' market in those sectors that attracted attention from investors. Consequently, there is a continuing trend of organised competitive sale processes led by vendors, normally reaching a successful outcome.

Although there were some proprietary bilateral transactions for significant deals, the trend was still resorting to the traditional structure of an organised process, including non-binding offers, due diligence and binding offers, exclusivity and signing and closing of transaction documentation. In this context, warranty and indemnity (W&I) insurance also continued to be a standard option in the market.

It is not surprising that this trend is increasing in the Portuguese M&A market, considering the majority of deals are seller-oriented. However, the market is following the international trend of increased demand for W&I insurance to be taken out by buyers so that they can be protected against fraud or misleading information provided by the seller, and have a direct right of action against the insurer, extended expiry periods, no concerns around the seller's financial condition, etc.

W&I insurance was first used in property transactions and is now becoming more common in Portuguese renewables and technology deals.

Price
2022 saw continuous concern over pricing and price fluctuations, whether in a preparatory phase – with relevant differences between prices in non-binding offers and the final prices at the stage of the binding offers – or at the final stages, with deals closing with a prevalence for completion accounts adjustments to the detriment of locked-box mechanisms, which had been market standard in the years preceding the pandemic.

Price deferral and escrow
Unlike in previous years, post-closing partial deferral of payment of the purchase price and retentions have appeared again in the market, although often associated with some form of guarantee, either proper security or escrow arrangements, with the latter becoming more common than before.

In some cases, this trend has been associated with the purchaser requirement for the seller to give guarantees against potential future claims for breach of representations, warranties or indemnities in connection with the business, often in an amount aligned with the general cap of liability agreed by the parties in the transaction documents.

Similar to previous years, price deferral and escrow mechanisms in 2022 were usually established for a maximum of two or three years.

The main difficulties in establishing partial price deferrals, retentions and escrow arrangements revolve around the additional negotiation efforts required and the increased transaction costs.

Completion accounts
Also related to price in M&A deals, completion accounts schemes for adjustment of the price have returned and have been used frequently (in lieu of locked-box mechanisms).

In a seller-side market with a predominance of private equity involvement, as in Portugal, the locked-box solution would be more common as it provides certainty of price pre-completion and a clean exit from the business by the seller, and also facilitates comparison in multiple bidding proceedings. However, there has been an increase of transactions opting instead for the completion accounts mechanism.

The completion accounts mechanism gives the purchaser the opportunity to review the accounts, granting a higher degree of certainty on the actual financial position of the company and the possibility of adjusting the purchase price by reference to the closing date, avoiding the anticipation of the transfer of the business risk to the buyer by reference to the locked-box accounts date.

Earn-outs
Earn-out mechanisms have been consolidated in M&A deals in Portugal, and have been emerging since the pandemic as a solution to bridge valuation gaps. They continue to be a helpful resource for players in times of increased uncertainty and are frequently used by private equity firm, which are particularly active in the Portuguese market.

For certain sectors and businesses, resorting to an earn-out price adjustment mechanism has allowed buyers to better manage the business risk while also allowing for the seller to defer payment of part of the price. The payment of said deferred price component (as well as timing and value) has been set to depend on the target business achieving certain key performance indicators or other events or milestones within a certain time (achieving certain billing of profit results, meeting certain regulatory or licensing requirements, meeting project milestones, securing extensions of relevant commercial or customer agreements, etc).

By setting the payment of part of the price to occur in the future, this mechanism has allowed for a more reliable price determination for the parties, with the allocation given to certain achievements or metrics, while also serving to mitigate uncertainty regarding the performance of certain businesses in the existing environ-

ment (considering, for instance, the increasing demand of some products on the one hand, and the shortage of stock in other areas on the other).

Lastly, arrangements typically involve ways to permit the seller to intervene and be incentivised to work on the fulfilment of the envisaged target events within the pre-agreed timeframe.

Carve-outs and corporate restructuring

Within the economic context, certain corporate groups have continued to review their structures and refocus on core activities or geographies, leading to carve-outs, spin-offs and other reorganisation options aimed at divesting non-core or less profitable businesses.

Carve-outs, mergers, demergers and lay-offs have been seen in connection with share or asset deals for business units or new investment opportunities, creating new M&A opportunities, which are expected to continue.

Distressed deals

As a legacy from the past, but also in light of international events, 2022 saw divestments and sales of assets in situations of distress. The Portuguese Recovery and Resilience Plan (the support programme created to mitigate the impacts of the COVID-19 pandemic in Portugal through the use of European funds) has tried to reduce these situations, but has not yet reached its goal.

The most common sectors for distressed deals were real estate and industry, particularly machinery and equipment manufacturing, automotive and transport, and industrial feed.

Clauses concerning sanctions

Considering the sanctions imposed on Russia by the European Union following the war in Ukraine, it has become common for M&A transactions to include documentation provisions concerning this matter.

Typical representations and warranties on the non-application of sanctions or embargoes or the non-existence of relations with sanctioned natural or legal persons are being discussed between players, to ensure compliance with the applicable law.

KYC requirements have also been reviewed and updated to confirm the origin of the parties and their corporate structure in order to ensure that sanctioned persons or entities are not involved in transactions.

Material adverse change (MAC) and force majeure clauses

With pandemic concerns decreasing rapidly during 2022, the Portuguese M&A picture has relaxed somewhat regarding certain key concerns and protections brought about by COVID-19, such as MAC and force majeure clauses. Although there has been a lot of discussion on these topics, in both the legal and business contexts, throughout 2022 investors were able to manage the risk and become comfortable with a lower level of protection in relation to MAC and force majeure.

The war in Ukraine was expected to bring further discussions on this matter, but there has actually been a reduction in the use of these mechanisms, and court activity concerning them has remained very low, mainly as a result of the resistance or heavy negotiation around the triggers and conditions of these clauses or the uncertainty of court decisions on the matter. Such drivers also led parties to be open to discussing and renegotiating agreements (through moratorium periods for closing, price revisions,

earn-out clauses, etc), preventing discussions from evolving into disputes in court.

In addition, there are legal grounds that progressively weaken the effects of the protection afforded by such provisions (such as the awareness raised after the beginning of the COVID-19 pandemic and/or the war in Ukraine), which should also account for the flexibility of the market in its approach to such matters.

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