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The Legal 500 Country Comparative Guides

Portugal

MERGERS & ACQUISITIONS

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This country-specific Q&A provides an overview of mergers & acquisitions laws and regulations applicable in Portugal.

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1. What are the key rules/laws relevant to M&A and who are the key regulatory authorities?

In Portugal, acquisitions, mergers and demergers operations are mainly governed by the provisions of the Portuguese Companies Code and, to a smaller extent mostly public M&A, of the Securities Code.

However, these codes do not govern all matters on M&A operations and related matters and other rules may be found in the following Portuguese legislation: Commercial Registry Code, Civil Code, Competition Legal Act, Corporate Income Tax Code and Personal Income Tax Code, Stamp Duty Code and Chart, Beneficial Owner legal regime, as well as rules regarding specific regulated industries (e.g., Banking, Insurance and Media Laws).

The most relevant regulatory authorities are the Portuguese Competition Authority, the Securities Market Commission, the Insurance Supervisor and the Bank of Portugal.

2. What is the current state of the market?

Geopolitical risks, economic uncertainty, inflation, financing constraints and other external factors had an impact on deal activity in 2023, in Portugal. Nonetheless, the balance was better than 2022, which was still marked by Covid.

From 587 M&A deals registered in Portugal in 2022, 2023 registered 632 (+7.7%). Specifically, during the first semester of 2023, 267 deals were registered and in the second semester of 2023, Portugal registered around 365 M&A deals.

In respect of the value of transactions in the national market, there was an increase from around €12 billion in 2022 to €13.9 billion in 2023.

It should be noted that quite a few deals are not of public record and some deals are probably transactions at intra-group level or related parties restructures. So, these numbers should always be taken into consideration with "a pinch of salt".

Despite widespread uncertainty and major headwinds from instability and war-related supply chain issues the future of the Portuguese M&A activity is cautiously aiming at a continued growth.

Navigating the markets in 2024 will require overcoming the difficulties of 2023 and additional financing difficulties, but also facing investors reshaping their portfolios, increasing fluctuating valuations and increasingly complex deals.

Looking for alternative routes will be key: alternatives in financing (such as private equity or investment funds), focusing on core business investments and strategic divestments will successfully lead companies in 2024.

3. Which market sectors have been particularly active recently?

The most attractive sectors should be Real Estate and Construction, Energy and Renewable Energies and Technology and Communications.

These sectors will continue to provide new opportunities for foreign investors, as well as the IT and tourism sectors.

When considering a particular type of investment, Portugal remains an increasingly attractive destination for investments, due to its favorable business environment, skilled workforce and strategic location within the European Union.

Portugal is a very dynamic market in the renewable energies, specifically solar energy projects, having the world's second largest solar power station. Solar will remain decisive together with hybridization, hydrogen and methane projects. Soon Portugal should be in the target of off-shore windfarms investors due to the ambitious concessions to be launched of up to 10

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gigawatts.

When looking into the Real Estate and Construction sector, Portugal is a much sought after tourist destination, which leads to a dynamic market for investing (and rolling over of assets) in hotel units, rentals and tourist developments. Additionally, Portugal has just implemented a new program aiming at simplifying and expediting the real estate licensing process, the SIMPLEX.

4. What do you believe will be the three most significant factors influencing M&A activity over the next 2 years?

It is impossible to single out three decisive factors.

Stability, continued growth of the economy, improvement of the rating of Portuguese sovereign credit, opportunities to buy and to sell, very good professionals, continued support of the government and focus on the growth of the economy, growth of exports and lower dependency on imports, improvement of infrastructures and energy transition. These are some of the driving factors behind the growth of FDI in Portugal and M&A.

5. What are the key means of effecting the acquisition of a publicly traded company?

The acquisition of a publicly traded company can be affected by a public takeover bid, either voluntary or imposed by the Securities Market Commission. This process of acquisition is simpler due to amendments in the Securities Code from December 2021 (Law 99-A/2021). For example, the takeover bids regime is restricted to offers for the acquisition of shares and securities which grant the right to subscribe or acquire shares issued by companies which shares are admitted to trading on a regulated market in Portugal. Also, the takeover bid will now extinguish in six months (if administrative authorizations are required) or three months (if such authorizations are not required). Finally, pending the takeover bid, it is also foreseen that the trading of securities of the type that are targeted by the bid or that comprise the consideration outside a regulated market will be subject to CMVM's prior authorization, releasing the target company from the obligation to issue a prior opinion to each application and allowing a greater celerity in the authorization process.

6. What information relating to a target company will be publicly available and to what extent is a target company obliged to disclose diligence related information to a potential acquirer?

The Portuguese Commercial Registry has the following information available on every company: name, share capital, registered office, taxpayer number, directors' and statutory auditors' identification, mergers and demergers and approved financial statements. If the target is a limited liability company, the shareholders' identity, any transfers and pledges over the *quotas* are also disclosed.

In addition, a potential acquirer may obtain from the Commercial Registry extensive corporate information such as copies of the by-laws, deed of incorporation, minutes of shareholders' and board of directors' meetings and resolutions approving the financial statements.

The Ultimate Beneficiary Owner Registration will provide info on the target's name, taxpayer number, country where the registered office is located, type of company, Economic Activity Code, registered address and e-mail. Also, the name and other info of the UBO and the reason why it is considered so may be consulted. Restrictions may apply.

The ownership of any patents, trademarks or designs can be found at the Portuguese Institute of Industrial Property website and World Intellectual Property Organization website. The registered domains can be found at the DNS.PT Association website.

Additionally, there are platforms such as *Base Geral* and *Citius* which within certain limitations may be used to confirm pending legal proceedings.

Also, it is possible to obtain information regarding real estate and vehicles ownership before the Real Estate Registry, Tax authorities and Registry and Notary Institute.

In companies with special disclosure obligations, such as listed companies, it will be possible to assess quarterly and yearly financial statements.

Under Portuguese legislation there is no general duty of information upon the seller. However, Portuguese legal doctrine has been interpreting articles 227 and 762, paragraph 2 of the Portuguese Civil Code in the sense that sellers should act in good faith prior to the conclusion of the transaction and certain information should be disclosed. Also, all information disclosed

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should be correct, clear and true, otherwise, sellers may ultimately be held liable for damages.

The scope of this information duty depends on the specific contract to be concluded and the target's structure and activity, the risk involved, amongst others. For instance, any obstacle that may prevent the transaction from being concluded should be communicated, as well as any circumstances that may affect the profitability of the target in the long term or any other circumstances deemed essential in the buyer's decision of acquiring the target.

Also, seller and buyer can enter into several preparatory agreements in which they foresee and address this duty of information such as NDAs, Letters of Intent or MoUs.

7. To what level of detail is due diligence customarily undertaken?

Usually, legal due diligence is a part of any transaction and covers the following areas: corporate, commercial, insurance, labour, tax, real property, regulatory, licensing, environment, litigation, data privacy and intellectual property. Other aspects may be covered considering the specificities of the parties involved or the scope of the transaction.

Soon Due Diligence processes shall also cover environmental, social and governance factors ("ESG"). It is becoming increasingly important to verify whether the target pursues sustainability and global environmental goals or whether it is socially responsible and inclusive. Also, it is important to understand if there is any human rights violation, environmental ruthlessness from which financial and reputational risks can arise.

8. What are the key decision-making organs of a target company and what approval rights do shareholders have?

In limited liability LDA companies, shareholders take part in the negotiation and the acquisition operation needs shareholders' approval. Asset deals typically will also require the approval of the shareholders.

In joint stock corporations, the management has a more important role, also in the negotiations, but shareholders' approval remains necessary.

Mergers, demergers and other reorganizations, spin-offs or transformations require the approval of shareholders. Asset deals may also require shareholder's approval depending on the size and nature of the assets and the impact of their disposal in the company or provisions in the by/laws requiring their intervention.

9. What are the duties of the directors and controlling shareholders of a target company?

According to article 64 of the Portuguese Companies Code – which foresees the commonly known "duty of care" – directors are required to act with diligence in an orderly manner while discharging their duties

Moreover, directors must observe a duty of loyalty, in the company's interest, taking into account the long-term interests of the shareholders and weighing up the interests of other subjects relevant to the company's sustainability, such as its employees, clients and creditors. This particular duty also comprehends *non facere* duties, which include, among others, the prohibition to disclose corporate secrets, taking advantage of business opportunities for one's own benefit and compete with the company.

Directors may be held liable for damages caused by the breach any of their duties, pursuant to article 72 of the same Code.

Regarding controlling shareholders, there is no similar legal provision, but it has been argued by some Portuguese scholars that they also have loyalty duties, which means that they should not cause damages to the company and are obliged to pursue the company's social interest.

10. Do employees/other stakeholders have any specific approval, consultation or other rights?

In the case of mergers and demergers, the Portuguese Companies Code obliges the management to register and make public the project of merger or demerger and for at least 30 days from publication, employees or their representatives may analyze it and present an opinion and it may be challenged by creditors.

In what regards cross-border mergers and demergers, as of 4 January 2024[1], the Board of Directors is obliged to present a report aimed to the shareholders and employees of the company setting out the legal and economic grounds for the cross-border operation.

The above-mentioned report shall have an explanation on whether there would be any material change to the employment conditions laid down by law, collective agreements or to transnational company agreements.

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According to article 286 of the Portuguese Labour Code, employees and their representatives should be informed on the date and reasons for the transfer, its legal, economic and social consequences for employees and the projected measures in relation to them, as well as the content of the contract between seller and buyer.

Additionally, the existing representatives of the respective employees should be consulted, prior to the transfer, with a view to reaching an agreement on the measures intend to be applied to employees following the transfer.

Footnote(s):

[1] Directive (EU) 2019/2121 of the European Parliament and of the Council which amends Directive (EU) 2017/1132 which has been approved in November 27th 2019 and transposed into the Portuguese legislation by Decree-Law no. 114-D of December 5

11. To what degree is conditionality an accepted market feature on acquisitions?

In private M&A deals, it is frequent that completion of the share deals are subject to conditions precedent, for instance, when an authorization from a regulatory authority is needed of fulfillment of conditions precedent.

It is also not unusual to foresee specific material adverse change clauses (a general principle of law foreseen in the civil code and which may be argued even in the absence of specific provisions on the subject), bring-down certificates regarding representations and warranties, and the execution of ancillary agreements, for example.

12. What steps can an acquirer of a target company take to secure deal exclusivity?

In private deals, parties are free to agree on exclusivity. The acquirer often obtains exclusivity in the letter of intent, which prevents the seller during a certain period of time from engaging in negotiations with other potentially interested entities. Break out and penalty clause may be foreseen to justify and harden the exclusivity. A court may reduce a contractual penalty, should it be considered excessive.

13. What other deal protection and costs coverage mechanisms are most frequently used by acquirers?

The potential acquirers frequently enter preliminary contracts such as an MoU, including confidentiality undertakings, guaranteeing the exclusivity of the negotiations when allowed, and/or imposing penalties in case of abandoning of the negotiations (*break-up fees*).

Also, according to article 227 of the Portuguese Civil Code, if the seller unjustifiably breaks off the negotiations, the potential acquirer under certain conditions could be entitled to compensation claims based on *culpa in contrahendo* (violation of pre-contractual obligations).

14. Which forms of consideration are most commonly used?

The most common payment consideration is cash payment via wire transfers. However, it is not unusual to find other forms of payment such as assets delivery, issuance of convertible bonds, etc.

Acquirers often seek to have a part of the purchase price in escrow as security for potential claims of the buyer.

Also, earn-out clauses have become more frequent by which a part of the purchase price is only paid out post-closing, if certain milestones are achieved over a defined time period.

15. At what ownership levels by an acquirer is public disclosure required (whether acquiring a target company as a whole or a minority stake)?

The public disclosure of ownership depends on the type of company. In private limited companies any transfer of quotas is subject to registration and will consequently be made public. In joint stock companies, transfers of shares are not subject to public registration, only communication to the company and tax administration is necessary. If any transfer of quotas or shares leads to the change of the UBO, it will be necessary to update the UBO Registry.

Under the Portuguese Securities Code, a shareholder that reaches or exceeds a participation of 5%, 10%, 15%, 20%, 25%, 1/3, 1/5, 2/3 and 90% of the voting rights of a company issuer of shares admitted to trading on a regulated market and that reduces its holding below any of these thresholds, has to communicate that fact to the target company and to the Securities Market Commission, within four trading days after the occurrence of the fact or of its knowledge.

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Further to this, transactions meeting certain thresholds (both with regards to annual turnover of the involved companies and/or with regards to market shares) must be mandatorily notified before the Portuguese Competition Authority, under Law 19/2012. More than public disclosure, the implementation of the transaction stays on hold until the Competition Authority: (i) gives its non-opposition decision or (ii) proposes amendments or changes to the intended transaction which will make it less likely to create significant obstacles to effective competition on the market. Mandatory notification before the European Commission may also be triggered if the substantial thresholds are met, as set forth in Regulation no. 139/2004.

Besides, Decree-Law 138/2014 currently determines that investments made in strategic sectors have to be notified to the Council of Ministers that, within 30 days after the acquisition, can oppose to its execution. Moreover, and within the current trend for foreign investment screening, the Foreign Subsidies Regulation – Regulation 2022/2560 – requires that large investments from companies benefiting from State support from non-EU countries have, when the thresholds are met, must be notified to the European Commission.

16. At what stage of negotiation is public disclosure required or customary?

In share or asset deals, the operation is disclosed when the operation is completed or prior to completion when the intervention of a regulatory authority is required or when the registration of the operation is mandatory.

In the case of all mergers or demergers (national and cross-border), the registration of the project of merger or demerger before the Commercial Registry is mandatory, therefore, it is made public before its completion.

In the case of public takeover bids, it is mandatory to disclose the offer when launched.

17. Is there any maximum time period for negotiations or due diligence?

There are no maximum time limit, which nonetheless is usually agreed.

The takeover bid will extinguish in six months (if administrative authorizations are required) or three months (if such authorizations are not required). In this way, an excessive extension of the situation of uncertainty generated by the bid after its preliminary announcement is prevented.

18. Are there any circumstances where a minimum price may be set for the shares in a target company?

As a rule the acquisition price may be freely agreed.

As to the acquisition of shares in listed stock corporations, mandatory offers – and voluntary offers aimed at acquiring control – are subject to mandatory regulations regarding price.

19. Is it possible for target companies to provide financial assistance?

Under 322 of the Portuguese Companies Code, target companies are prohibited from financing or providing assistance in the financing of the acquisition of their own shares. Target companies cannot supply funds or issue guarantees on behalf of a third party so that it may purchase shares representing its share capital. Under this rule it has been considered that target companies cannot provide financial assistance to the acquirers of its shares, except in limited situations.

20. Which governing law is customarily used on acquisitions?

Transactions involving Portuguese companies are usually governed by Portuguese law and competent courts will usually be Portuguese. Arbitration clauses often specify foreign chambers specially the ICC and that the arbitration court will meet outside Portugal.

21. What public-facing documentation must a buyer produce in connection with the acquisition of a listed company?

The buyer shall prepare a preliminary announcement of the bid, a bid announcement and a prospectus.

22. What formalities are required in order to document a transfer of shares, including any local transfer taxes or duties?

In the case of private limited companies the document should be a written agreement and the transfer is subject to registration before the Commercial Registry. As a rule the transaction is subject to prior approval by the company.

From a tax perspective, we note that:

a. As a rule, the transfer of a company, including

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the transfer of shares in public limited companies, is not subject to transfer taxes unless the following conditions are met: (i) the assets of the company consist in more than 50% of real estate located in Portugal; (ii) such real estate is not directly allocated to a commercial, industrial or agricultural activity (except resale); and (iii) by virtue of such acquisition one of the shareholders becomes the owner of at least 75% of the share capital (or the number of shareholders is reduced to two married persons or in a non marital partnership);

b. Further to the above, the transfer of a company may trigger capital gains at the level of the shareholder (possibly taxed under income tax rules depending on whether the shareholder is an individual or company, resident or non-resident and, if non-resident, a DDT may apply;
c. The transfer of a joint stock company carried out via a private agreement (i.e., not concluded before a notary) must also be reported to the Tax Authorities within 30 days after the transfer both by the acquirer and seller.

The transfer of shares in public limited companies is achieved by title endorsement or notice to the entity in charge of the title account in the case the shares are in a book entry form and communication to the company so as to update the shares registry book.

If the UBO changes it is necessary to update the relevant registry.

23. Are hostile acquisitions a common feature?

No, they are not common. Records and experience show that most hostile acquisitions were not successful.

24. What protections do directors of a target company have against a hostile approach?

Directors are not truly protected against hostile approaches, only the company and the shareholders. Hostile takeovers are contractual proposals towards the target´s shareholders, therefore, only they can take a decision about it.

In fact, once the target's management becomes aware of the decision to launch a public offering over 1/3 of the securities of the respective class, and until the outcome is determined or the respective process is terminated at an earlier time, the management may not carry out any acts susceptible of significantly changing the net worth of the company outside the normal management of the company and which may significantly affect the objectives announced by the offeror.

25. Are there circumstances where a buyer may have to make a mandatory or compulsory offer for a target company?

A compulsory offer has to be made by those to which are attributed 1/3 or more than 1/2 of the voting rights in the case of listed companies.

26. If an acquirer does not obtain full control of a target company, what rights do minority shareholders enjoy?

As a rule all shareholders, including minority ones, have some rights, such as the right to take part in the shareholders meetings. Depending on the stake they hold they may have the right to consult certain documentation of the company and include items in the agenda of shareholders meetings.

The company's articles of association may provide that a minority of shareholders with more than 10% of the registered capital who voted against the winning proposal in the election of directors of a joint stock company has the right to appoint at least one director.

At the request of shareholders holding shares of at least 1/10 of the share capital, submitted within 30 days of the shareholders meeting that elected the members of the board of directors and the supervisory board, the court may appoint an additional effective member and one alternate member of the supervisory board, provided that the requesting shareholders have voted against the winning proposals and had their vote recorded in the minutes.

27. Is a mechanism available to compulsorily acquire minority stakes?

Under the Portuguese Companies Code, a company which by itself or jointly with other companies or persons hold(s) at least 90 % of the shares of another company may within the period of six months after reaching such threshold make an offer to acquire the holdings of the remaining shareholders, for a consideration in cash or shares or other values/assets. The value has to be justified by a report prepared by a certified accountant

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independent of the companies involved, which will be deposited in the Commercial Registry and made available to interested parties at the headquarters of the two companies.

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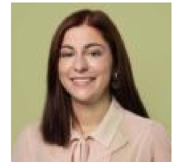

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