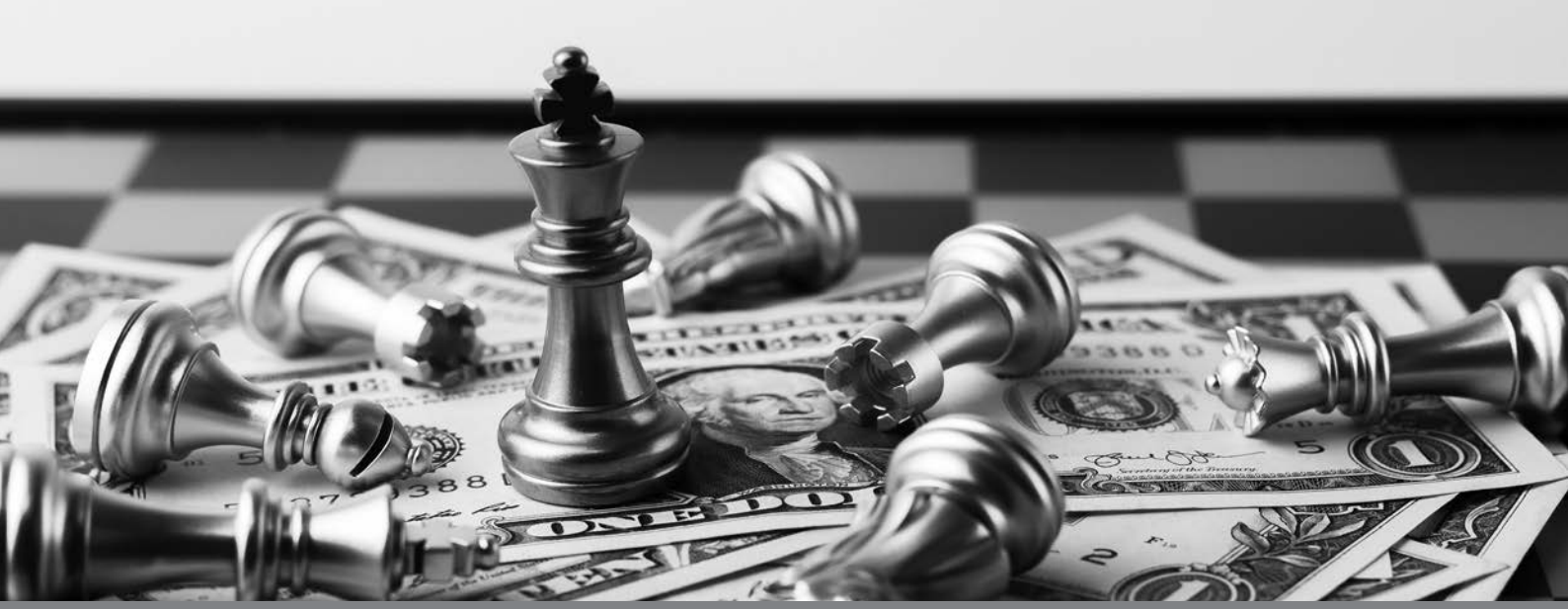

ICLG

The International Comparative Legal Guide to:

Mergers & Acquisitions 2019

13th Edition

A practical cross-border insight into mergers and acquisitions

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Country Question and Answer Chapters:

EDITORIAL

Welcome to the thirteenth edition of *The International Comparative Legal Guide to: Mergers & Acquisitions*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of mergers and acquisitions.

It is divided into two main sections:

Three general chapters. These chapters are designed to provide readers with an overview of key issues affecting mergers and acquisitions, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in mergers and acquisitions in 54 jurisdictions.

All chapters are written by leading mergers and acquisitions lawyers and industry specialists, and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors Scott Hopkins and Lorenzo Corte of Skadden, Arps, Slate, Meagher & Flom (UK) LLP for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The International Comparative Legal Guide series is also available online at www.iclg.com.

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1 Relevant Authorities and Legislation

1.1 What regulates M&A?

M&A transactions in Portugal follow the general principle of Portuguese civil law, which allows the contracting parties to establish all clauses, covenants and conditions they agree on, provided that they are not contrary to any law and/or public order (i.e. the principle of free will of the parties).

The most relevant legislation governing M&A in Portugal is:

- The Portuguese Civil Code, enacted by Decree-Law no. 47,344 of 25 November 1966, as amended from time to time ("**Civil Code**"), which contains the general Portuguese civil law rules, widely applicable to M&A transactions and to the relationship between the parties involved.
- The Portuguese Commercial Companies Code, enacted by Decree-Law no. 262/86 of 2 September, as amended from time to time ("**PCC**"), which sets out a thorough regime applying to companies in Portugal, ranging from the general principles applicable to companies' law to the specific rules concerning the different types of companies.
- The Portuguese Securities Code ("*Código dos Valores Mobiliários*"), enacted by Decree-Law no. 486/99 of 13 November, as amended from time to time ("**PSC**"), which governs, amongst others, the main aspects concerning public takeover bids, as well as the requirements concerning the transfer of a company's shares.

1.2 Are there different rules for different types of company?

Yes. There are four main types of company in Portugal: (i) limited liability companies by *quotas* ("***sociedades por quotas***"); (ii) limited liability companies by *shares* ("***sociedades anónimas***"); (iii) *sociedades em nome colectivo*; and (iv) *sociedades em comandita*. The most important and common types of company are by far the first two types of companies mentioned: *sociedades por quotas* and *sociedades anónimas*.

Each type of company follows a different set of rules, notably concerning the rules applicable to the shareholder's relationship with the company and with other shareholders (including in terms of the relevant liability regime) and the type of organisation and duties regarding the corporate bodies of the company.

In terms of M&A transactions, the types of requirements, formalities and authorisations needed to complete a transaction depend on the type of company concerned.

1.3 Are there special rules for foreign buyers?

In general, there are no special rules, nor constraints, regarding foreign buyers. However, in some regulated sectors (such as the banking and insurance sectors) the acquisition of a qualified holding in a company operating in such sector may be subject to an approval of the relevant regulators.

1.4 Are there any special sector-related rules?

Yes. In this respect we note the following regulated sector rules:

- In the banking sector, the regulator, *Bank of Portugal*, must be notified in advance (to give approval) of an entity's intention to reach or exceed, directly or indirectly, the following thresholds of the share capital or voting rights of the regulated company: 10%, 20%, ⅓ or 50%. Also, the intention to acquire a stake enabling a significant management influence to be exercised must be previously notified to the Bank of Portugal. The intention to decrease shareholding participations below a threshold must be previously notified to the Bank of Portugal and the completion of the relevant acquiring and disposing transactions are subsequently subject to notification to the Bank of Portugal. Below the 10% threshold, the Bank of Portugal must be subsequently notified (within 15 days as from completion of the transaction) by the entity that directly or indirectly reaches or exceeds the threshold of 5% of the share capital or voting rights of the relevant company.
- In the insurance sector, the regulator, *Autoridade de Supervisão de Seguros e Fundos de Pensões* ("**ASF**"), must also be notified in advance (to give its approval) of an entity's intention to reach or exceed, directly or indirectly, the following thresholds of the share capital or voting rights of the issuer: 10%; 20%; ⅓; or 50%. Also, the intention to acquire a stake enabling a significant management influence to be exercised in the target company must be previously notified to the ASF. The intention to decrease below a threshold must also be notified to the ASF and the completion of the relevant acquiring and disposing transactions are subsequently subject to notification to the ASF.

1.5 What are the principal sources of liability?

Although liability can emerge from multiple sources in M&A transactions, pre-contractual liability, contractual liability (such as the breach of the relevant agreements, including the breach of representations and warranties), as well as tax liabilities are the most common sources.

In addition, in regulated sectors the failure to comply with the relevant procedures/duties applicable to M&A transactions may lead a party to incur in liabilities/penalties.

2 Mechanics of Acquisition

2.1 What alternative means of acquisition are there?

There are various means to structure an acquisition in Portugal, depending on the object of the transaction, its purposes, risks and potential liabilities. The most common means of acquisition are: (i) share deals (which may take different forms and be subject to different requirements and procedures, mostly depending on the target concerned); and (ii) asset deals (including transfers of businesses as an ongoing concern whereby the assets and elements that form a relevant business are globally transferred to a buyer).

2.2 What advisers do the parties need?

The type and extent of advisory needed in an M&A transaction will largely depend on the variables of the transaction (such as specific issues concerning the target, the price, regulatory or tax implications, etc.). However, it is typical for the parties to have at least a legal and a financial advisor in this type of transaction.

2.3 How long does it take?

In theory, most M&A transactions can be completed in a relatively short period of time, provided that the parties are aligned regarding the terms and conditions of the deal, including the value of the target. In practice, this usually does not happen.

The duration of an M&A transaction is therefore difficult to predict, and is typically subject to multiple variables, such as the specific features of the target, the scope the due diligence process and the number and type of conditions precedent needed for completion.

It is important to note that the duration of an M&A transaction may also be affected by specific laws and procedures applicable to certain types of transactions (for instance, (i) the acquisition procedures applicable to public takeovers, (ii) the acquisition of shareholdings in companies operating in a regulated sectors, and (iii) the procedures applicable to merger processes).

2.4 What are the main hurdles?

The main hurdles in common M&A transactions depend largely on the type of transaction concerned. As an example, the information gap between sellers and buyers may lead to relatively long/thorough due diligence processes, which findings may be interpreted in different ways by the seller and the buyer. Such due diligence findings commonly lead to lengthier negotiations, typically in relation to the representation and warranties to be provided by the seller.

2.5 How much flexibility is there over deal terms and price?

In general, there is much flexibility over deal terms and price. As previously mentioned, M&A deals are governed by the free will of the parties, limited only by relevant applicable rules.

Exceptions to this general principle may exist on occasion, notably in public takeovers, in which, for instance, the consideration may only consist of cash or securities that have been or are yet to be issued.

Also, in mandatory public takeovers, the price offered must follow specific requirements regarding the minimum amount of the cash consideration.

2.6 What differences are there between offering cash and other consideration?

In most M&A transactions, the parties are free to choose between offering a cash consideration or other type of consideration. Specific tax aspects must be taken into consideration in this respect.

In public takeovers, however, there are certain restrictions and procedures that apply depending on the type of consideration chosen. As mentioned, in such type of transactions the consideration may consist of cash, securities (issued or yet to be issued), or both. In case cash is offered, the offeror must deposit the relevant amount with a credit institution or provide a bank guarantee. In case securities are offered, such securities must have the appropriate liquidity and be readily assessable.

2.7 Do the same terms have to be offered to all shareholders?

In general, parties are free to negotiate and offer different terms to different shareholders of a target company.

However, there may be exceptions to this general rule, notably resulting from the target company's articles of association and/or from certain provisions contained in a shareholders' agreement regarding the target company. Also, in public takeovers, the terms and conditions should be the same for all potential buyers and the offeror's proposal must contain all the mandatory information established in the PSC.

2.8 Are there obligations to purchase other classes of target securities?

In general, there is no legal obligation to do so, unless such obligation arises from the target's articles of association or from a shareholders' agreement.

2.9 Are there any limits on agreeing terms with employees?

Yes, those terms must comply with Portuguese Labour Law general principles and specific provisions applicable to each case.

2.10 What role do employees, pension trustees and other stakeholders play?

Such role depends on the type of M&A transaction concerned. For example, it may vary if the transaction is a share deal, a merger or an asset deal (including transfers of businesses as an ongoing concern). In some cases, the worker may be entitled to use the right of opposition to the transfer of his/her position of employee in case of transfer of undertakings, businesses or parts of businesses of an economic unit. Such opposition may prevent the transfer of the employer's position in his employment contract, maintaining the link to the transferring entity.

2.11 What documentation is needed?

The type of documentation needed depends largely on the type of M&A transaction concerned. We briefly consider the following types of transaction:

- Typical share deals imply the execution of a written SPA, regulating the terms and conditions of the transaction. Although the sale and purchase of shares is a simple act that may be executed with relatively simple documentation in Portugal, the typical structure of a share purchase agreement in Portugal usually follows a more complex structure (inspired by common law example, including for instance the use of representations and warranties and provisions regarding indemnities and liability).

Share deals within a public takeover procedure imply the elaboration of a different/additional set of documentation, that must be prepared in accordance with the specific rules provided for in the PSC.

- Merger processes are subject to a specific procedure and imply the preparation of mandatory documentation (such as (i) the merger project, (ii) the statutory auditor's reports, (iii) the registration of the merger project with the Commercial Registry Office, (iv) the approval of the merger project by the shareholders of each company, (v) the merger's public deed, and (vi) the final registration of the merger).
- Documentation regarding asset deals varies greatly depending on the asset concerned and the relevant legal regime applicable to such asset. In general, a transfer of assets agreement will have to identify all the assets to be transferred and comply with all requirements, formalities and authorisations regarding each of such assets.

2.12 Are there any special disclosure requirements?

In general, there are no specific disclosure requirements. Moreover, it is quite common for the parties to agree on non-disclosure obligations prior to entering a transaction (notably through non-disclosure agreements).

Notwithstanding, there are certain exceptions, such as mandatory disclosure duties, relating to the acquisition of qualified holdings in public companies, as well as in companies operating on certain regulated sectors.

2.13 What are the key costs?

Key costs in M&A transactions typically derive from the expenses associated with the parties' teams and advisors involved in the transaction, as well as possible fiscal costs that may arise from it.

2.14 What consents are needed?

The consents needed for an M&A transaction depend mostly on the type of transaction concerned and the types of company involved.

We consider the following common types of M&A transactions:

- In share deals regarding a target which is a limited liability company by *quotas* ("*sociedades por quotas*"), the assignment of quotas is subject to the consent of the company (to be granted by its shareholders). In addition, it is quite common for this type of company to include in their articles of association a pre-emption right of the other shareholders, in relation to transfer of *quotas* to third parties.
- In share deals regarding a target which is a limited liability company by *shares* ("*sociedade anónima*"), the general principle is that shares shall be freely transferable. However, although the articles of association (and shareholders agreements) may not exclude the transferability of shares, they may establish some limits (such as preemptive rights, the consent of the company, etc.). Such limits shall be assessed on a case-by-case basis.
- In merger processes, the consent of certain shareholders might be needed if the merger: (i) increases the obligations and liabilities of some or all the shareholders; (ii) affects the special rights of some shareholders; or (iii) changes the proportion of the shareholdings in the company (to the extent that such change results from compensatory payments to shareholders and a fair value is attributed to the shares concerned).

In addition, other consents may be needed in certain transactions; for instance, from regulators, financing entities or suppliers (derived, in particular from change of control provisions).

2.15 What levels of approval or acceptance are needed?

The levels of approval or acceptance needed also depend mostly on the type of transaction concerned and the types of companies involved.

We consider the following common types of approvals and acceptance in M&A transactions:

- The entering into a typical share deal by a limited liability company by *quotas* ("*sociedades por quotas*") is generally subject to the approval of such companies' shareholders.
- The entering into a typical share deal by a limited liability company by *shares* ("*sociedades anónimas*") is generally subject to the approval of such companies' board of directors.
- Mergers are subject to the approval of the shareholders of the relevant companies concerned, regardless of their type.

2.16 When does cash consideration need to be committed and available?

In general, parties are free to establish the terms regarding the timings referring to the cash consideration.

There may be specific rules in certain types of M&A transactions, such as in public takeovers, in which, prior to the registration of the offer, the offeror must deposit the cash consideration (assuming cash is offered in such public takeover) with a credit institution or provide a bank guarantee.

3 Friendly or Hostile

3.1 Is there a choice?

Portuguese law does not distinguish between a friendly or hostile acquisition or takeover.

Notwithstanding, it is quite common for such distinction to be made based on non-legal principles: a takeover will be deemed as friendly or hostile based on the response of target company's board of directors and/or of the relevant shareholders to the relevant takeover bid.

3.2 Are there rules about an approach to the target?

In general M&A transactions, there are no specific rules regarding the approach to the target.

However, in public takeovers, there are certain rules that need to be addressed in this respect. For instance, when the decision to launch

a takeover bid is made, the offeror must send a preliminary announcement to the Portuguese Securities Market Commission ("CMVM"), to the target and to the relevant stock exchange managing entities (in which the target is listed). *See* question 4.3 below regarding the contents of such announcement.

3.3 How relevant is the target board?

In general, the relevance of the target board will depend on the type of company or transaction concerned, as well as the relationship between the target's shareholders and the target's board.

In relation to public takeovers, the launch of a takeover bid results in an obligation to the board of the target company to elaborate a target's report (to be published) concerning specific information regarding the terms, conditions and potential impacts of the proposed bid.

3.4 Does the choice affect process?

This is not applicable (see question 3.1).

4 Information

4.1 What information is available to a buyer?

In general, there is no obligation for the target to provide information to a potential buyer. Buyers may rely on publicly available information, the extent of which may vary depending on the type of company concerned (for instance, there is considerably more public information available regarding listed companies).

4.2 Is negotiation confidential and is access restricted?

M&A transactions are generally confidential, although there is no general legal provision establishing such principle. In addition, it is quite common for the parties to enter into a non-disclosure agreement prior to a transaction.

In public takeovers, however, there are specific provisions regarding confidentiality duties, notably concerning the initial phases of the transaction: in such cases, the offeror, its shareholders, its members of the corporate bodies, as well as those entities or persons who provide services to them, on a permanent or occasional basis, are obliged to a duty of secrecy regarding the potential takeover until the relevant preliminary notice is published.

4.3 When is an announcement required and what will become public?

In general, no announcement is required regarding M&A transactions.

In public takeovers, however, the offeror must submit a preliminary announcement to the CMVM, to the target company and to the relevant stock exchange managing entities (in which the target company is listed). Such preliminary announcement must include, amongst others, the following information: (i) the identification of the offeror and of the target company; (ii) the identification of the securities subject to the offer; (iii) the consideration of the offer; (iv) the financial intermediary (if already appointed); (v) the percentage of voting rights of the target company held by the offeror (and offeror's related entities); (vi) a summary of the offeror's intents regarding the business activity of the target; (vii) the offeror's position regarding the limitation of the target powers; and (viii) the maximum or minimum limit of securities to be acquired and the conditions applicable to the takeover (when applicable).

Also, further to the preliminary report, the offeror must also submit a launching announcement containing the basic elements of the offer.

4.4 What if the information is wrong or changes?

Depending on the assumptions set out by the bidder on the announcement of the takeover, in case the information of the target changes or is wrong, the bidder may modify or request the withdrawal of the offer.

5 Stakebuilding

5.1 Can shares be bought outside the offer process?

In typical M&A transactions, there is no legal general restriction in this respect.

With respect to public takeovers, regarding which the PSC states that as from the publication of the preliminary announcement and up to the calculation of the offer's result, the offeror (as well as related individuals or entities) (i) must not negotiate, outside the stock exchange, any securities of the same category as those that comprise the offer or the consideration, except if authorised by the CMVM (further to an opinion by the target company), and (ii) must inform the CMVM on a daily basis regarding transactions carried out relating to the securities issued by the target company or the category of the securities comprised in the consideration.

Stakebuilding before the preliminary announcement, in the preparatory phase of the offer, may raise market abuse concerns and should be seen with caution.

5.2 Can derivatives be bought outside the offer process?

Please see question 5.1, which also applies to derivatives.

5.3 What are the disclosure triggers for shares and derivatives stakebuilding before the offer and during the offer period?

Please see question 5.1 regarding the duty to inform the CMVM.

5.4 What are the limitations and consequences?

As mentioned, acquisition of derivatives in the preparatory phase of the offer may raise market abuse concerns. Moreover, acquisition of OTC derivatives may be subject to the authorisation of the CMVM during the offer period.

6 Deal Protection

6.1 Are break fees available?

There are no general restrictions in normal M&A transactions.

Considering public takeovers, there is no common practice and the agreement of break fees with a bidder may be considered an unlawful favour to the bidder. This point is subject to debate between scholars.

6.2 Can the target agree not to shop the company or its assets?

Considering public takeovers, in principle, the target can agree not to take actions that frustrate the bid, so in theory it can agree not to shop the company or its assets.

6.3 Can the target agree to issue shares or sell assets?

Considering public takeovers, provided that there is a shareholders' approval, the issue of shares can be agreed. The sale of assets pending the offer raises very complex matters in relation to the determination of the fair consideration in control-taking transactions.

6.4 What commitments are available to tie up a deal?

See questions 6.1 and 6.2. The target's board may not, in principle, take actions that prevent competing bidders from presenting competing offers. Such actions may be considered a breach of the target board's fiduciary duties and neutrality, so provisions like break-up fees and non-solicitation clauses may be considered unlawful. However, the board may approve and recommend the deal to shareholders and agree not to take frustrating actions (negative commitment).

7 Bidder Protection

7.1 What deal conditions are permitted and is their invocation restricted?

In general M&A transactions, there is much flexibility regarding the conditions that might be agreed by the parties for closing a deal. As previously mentioned, M&A deals are governed by the free will of the parties, limited only by relevant applicable rules.

Considering public takeovers, voluntary public offers may be subject to conditions, provided that such conditions correspond to the bidder's legitimate interests and do not affect the normal functioning of the market. Also, the verification of the conditions must not be subject or controlled by the bidder. Mandatory takeovers must not in general be subject to conditions (unless, for example, if regulatory approvals are required).

7.2 What control does the bidder have over the target during the process?

Considering public takeovers, the bidder can only expect no frustrating actions by the board, in case there is reciprocity, i.e. if the bidder is subject to the same rules in respect of board neutrality.

7.3 When does control pass to the bidder?

In general M&A transactions, the closing of the transaction usually entails the change of control to the buyer.

Considering public takeovers, the control passes to the bidder upon the settlement of the offer, unless the bidder decided to move with the offer without the important clearance of the Competition Authority.

7.4 How can the bidder get 100% control?

Portuguese legislation contains squeeze-out mechanisms that apply both to limited liability companies by quotas and to limited liability companies by shares. The PCC establishes that the acquisition of a stake in excess of 90% of the share capital of another company enables the squeezing out of the remaining shareholders.

In relation to listed companies, the PSC states that any person that, following the launch of a general takeover bid over a listed company, achieves or exceeds 90% of the voting rights corresponding to the share capital up to the determination of the outcome of the bid and 90% of the voting rights covered by the bid may, in the subsequent three months, acquire the remaining shares for a fair consideration in cash.

8 Target Defences

8.1 Does the board of the target have to publicise discussions?

No, the board of the target does not have to publicise discussions.

8.2 What can the target do to resist change of control?

Considering public takeovers, the board may not frustrate the offer by taking defensive measures without the approval of ⅔ of the shareholders, unless the bidder does not abide by the same rules (reciprocity). However, in general, the board may be in breach of their fiduciary duties if it frustrates an offer, preventing shareholders of an opportunity to tender their shares. The board may search without any limitation for a white knight.

8.3 Is it a fair fight?

The Portuguese legal framework is in general shareholder-centric, so a bidder presenting an attractive offer may succeed and the board has no robust tool to prevent it.

9 Other Useful Facts

9.1 What are the major influences on the success of an acquisition?

In general M&A transactions, the most crucial factors influencing the success of an acquisition are (i) the ability to plan and structure in advance the different stages of the transaction, (ii) the information regarding the market, the potential competitors and the target (including the ability to establish a positive relation with the shareholders and the directors of the target), (iii) the commercial terms and conditions of the offer, and (iv) the choice of teams and advisors to implement the transaction.

9.2 What happens if it fails?

In relation to general M&A transactions, there are no general legally prescribed rules regarding a failure to complete a transaction. However, the parties are free to establish any consequences for non-compliance with any-contractual or pre-contractual obligations, as well as to resort to the general terms of the applicable civil law.

10 Updates

10.1 Please provide a summary of any relevant new law or practices in M&A in your jurisdiction.

With potential impact on M&A transactions, we note that Law 8/2018, of 2 March 2018 was published, establishing the *Regime Extrajudicial de Recuperação de Empresas* (Extrajudicial Framework for Business Recovery) ("**RERE**"). The RERE, which must be read together with the other instruments making up *Programa Capitalizar*, enacts a material change of the national business recovery framework. It affords debtors, in a difficult economic situation or imminent insolvency, a possibility to negotiate an agreement capable of recovering its situation, with all or some of their creditors. Agreements executed under the RERE, which differs from the Special Revitalization Procedure ("**PER**") in that it is an extrajudicial, voluntary, free content and generally confidential process, will have the same effects as agreements executed under the PER.

In addition, we highlight Ministerial Order 233/2018, of 21 August 2018 ("**Ministerial Order 233/2018**"), which regulates the legal regime of the Beneficial Owner Central Register ("**BOCR**"), enacted by Law 89/2017, of 21 August 2017 ("**Law 89/2017**").

The new statute sets a deadline for the entities subject to the BOCR to submit the initial declaration regarding the beneficial owner(s).

It must be highlighted that associations, cooperatives, foundations, companies without commercial purpose and subject to the Civil Code (*sociedades civis*), companies and other legal persons, even if subject to foreign law, operating in Portugal or engaging in a legal transaction or a business in Portugal for which a Portuguese taxpayer ID number is required, are subject to the BOCR.

Among other things, Ministerial Order 233/2018 regulates the model declaration, access to the BOCR, publication of information, authentication methods and the procedures for the issue of certificates and the provision of information

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