

# International Comparative Legal Guides



## Mergers & Acquisitions 2021

A practical cross-border insight into mergers and acquisitions

**15<sup>th</sup> Edition**

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## Expert Chapters

1

### Global M&A Trends in 2020

Scott C. Hopkins, Adam Howard & Craig Kelly, Skadden, Arps, Slate, Meagher & Flom LLP

4

### M&A Lessons from the COVID Crisis

Adam O. Emmerich & Trevor S. Norwitz, Wachtell, Lipton, Rosen & Katz

## Q&A Chapters

9

### Angola

Vieira de Almeida / ASP Advogados: Susana Almeida Brandão & Hugo Sipitali

16

### Australia

Atanaskovic Hartnell: Lawson Jepps & Jia-Lee Lim

24

### Austria

Schoenherr: Christian Herbst & Sascha Hödl

35

### Bermuda

MJM Limited: Jeremy Leese & Brian Holdipp

42

### British Virgin Islands

Walkers: Matthew Cowman & Patrick Ormond

49

### Bulgaria

Schoenherr (in cooperation with Advokatsko druzhestvo Stoyanov & Tsekova): Ilko Stoyanov & Katerina Kaloyanova

58

### Canada

Blake, Cassels & Graydon LLP: Markus Viirland & Richard Turner

67

### Cayman Islands

Maples Group: Nick Evans, Suzanne Correy & Louise Cowley

74

### Cyprus

E&G Economides LLC: Virginia Adamidou & George Economides

81

### Czech Republic

Wolf Theiss: Tereza Naučová & Michal Matouš

89

### Denmark

Bech-Bruun: Steen Jensen & David Moalem

96

### Finland

Dittmar & Indrenius: Anders Carlberg & Jan Ollila

104

### Greece

Rokas: Viktoria Chatzara & Kosmas Karanikolas

112

### Hong Kong

de Bedin & Lee LLP: Claudio de Bedin & Helen Morris

120

### Hungary

Oppenheim Law Firm: József Bulcsú Fenyvesi & Mihály Barcza

127

### Iceland

BBA//Fjeldco: Stefán Reykjalín

134

### India

Shardul Amarchand Mangaldas & Co: Raghubir Menon, Sakshi Mehra & Dipayan Bhattacharjee

143

### Indonesia

Walalangi & Partners (in association with Nishimura & Asahi): Miriam Andreta & Siti Kemala Nuraida

149

### Ireland

Philip Lee: John Given & Andreas McConnell

157

### Israel

APM & Co.: Ian Rostowsky, Stephen Barak Rozen & Elinor Polak

165

### Italy

NUNZIANTE MAGRONE: Fiorella Alvino & Fabio Liguori

172

### Japan

Nishimura & Asahi: Tomohiro Takagi & Keiichiro Yamanaka

181

### Luxembourg

GSK Stockmann: Marcus Peter & Kate Yu Rao

187

### Madagascar

Lexel Juridique & Fiscal: Tafita Ratsimba

192

### Malta

DF Advocates: Dr. Maria Paloma Deguara & Celia Mifsud

200

### Mauritius

LEGIS and Partners Ltd: Bertrand Betsy, Caroline Samy & Zahraa Auchoybur

209

### Montenegro

Moravčević Vojnović and Partners in cooperation with Schoenherr: Slaven Moravčević & Miloš Laković

217

### Mozambique

Vieira de Almeida / GDA Advogados: Guilherme Daniel & Susana Almeida Brandão

224

### Netherlands

Houthoff: Alexander J. Kaarls & Willem J.T. Liedenbaum

233

### Nigeria

DealHQ Partners: Orinari Jeremy Horsfall & Adefere Adeyemo

240

### Norway

Aabø-Evensen & Co Advokatfirma: Ole Kristian Aabø-Evensen

255

### Poland

WBW Weremczuk Bobeł & Partners Attorneys at Law: Łukasz Bobeł

262

### Portugal

Vieira de Almeida: Jorge Bleck & Domingos Freire de Andrade

<b>270</b>	<b>Serbia</b> Moravčević Vojnović and Partners in cooperation with Schoenherr: Matija Vojnović & Vojimir Kurtić	<b>310</b>	<b>Switzerland</b> Bär & Karrer Ltd: Dr. Mariel Hoch
<b>278</b>	<b>Slovakia</b> URBAN STEINECKER GAŠPEREC BOŠANSKÝ: Marián Bošanský & Juraj Steinecker	<b>318</b>	<b>Taiwan</b> Lee and Li, Attorneys-At-Law: James Huang & Eddie Hsiung
<b>284</b>	<b>Slovenia</b> Schoenherr: Vid Kobe & Bojan Brežan	<b>325</b>	<b>Turkey</b> Cektir Law Firm: Berk Çektir & Uğur Karacabey
<b>295</b>	<b>South Africa</b> Bowman Gilfillan Inc.: Ezra Davids & Ryan Kitcat	<b>334</b>	<b>United Kingdom</b> Hogan Lovells: Ben Higson, Sarah Shaw, John Connell & John Holme
<b>303</b>	<b>Spain</b> Roca Junyent SLP: Natalia Martí Picó & Xavier Costa	<b>342</b>	<b>USA</b> Skadden, Arps, Slate, Meagher & Flom LLP: Ann Beth Stebbins & Thad Hartmann

# Portugal

Vieira de Almeida



Jorge Bleck



Domingos Freire de Andrade

## 1 Relevant Authorities and Legislation

### 1.1 What regulates M&A?

M&A transactions in Portugal follow the general principles of Portuguese Civil Law, which allows contracting parties to establish a wide range of clauses, covenants and conditions that the parties deem convenient, provided that they do not conflict with the law.

The general framework for M&A transactions in Portugal is established by the Portuguese Civil Code, enacted by Decree-Law no. 44/344, 25 November 1666, as amended from time to time (“**Civil Code**”), the Portuguese Companies Code, enacted by Decree-Law no. 262/86, 2 September 1986, as amended from time to time (“**PCC**”), and the Portuguese Securities Code, enacted by Decree-Law no. 486/99, 13 November 1999, as amended from time to time (“**PSC**”), along with ancillary legislation and regulations. The Civil Code contains the general principles and rules of civil law, widely applicable to M&A transactions and to the relationship between the parties, the PCC sets out the regime applicable to companies operating in Portugal, ranging from general principles applicable to all companies, to specific rules for each type of company and regulations regarding corporate governance. Lastly, the PSC contains the key provisions regarding public companies’ transactions and governs the main aspects concerning public takeover bids, as well as the requirements concerning the transfer of shares.

For transactions involving corporate restructuring proceedings or companies under insolvency proceedings, the Insolvency and Companies Recovery Code, enacted by Decree-Law no. 53/2004, 18 March 2004, as amended from time to time (“**ICRC**”), is instrumental.

For transactions involving companies with employees, the Portuguese Labour Code enacted by Law no. 9/2007, 12 February 2007, as amended from time to time (“**PLC**”) and other complementary legislation governing the legal relationship with employees (hereinafter jointly referred to with PLC as the “**Portuguese Labour Laws**”) shall also be considered.

Finally, for transactions in regulated sectors, specific laws and regulations also need to be accounted for.

### 1.2 Are there different rules for different types of company?

The PCC foresees four types of companies: (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 last two being less

common on a typical M&A transaction. Each type of company follows a different set of rules when it comes to the relationship among shareholders, including the terms of the liability regime or the type of organisation and duties regarding the several corporate bodies envisaged under Portuguese law. Three main legal differences may be highlighted in relation to the aforementioned two types of companies most commonly used in M&A transactions: (i) governance structure; (ii) capital requirements; and (iii) exit rights.

Regarding the governance structure, limited liability companies by quotas (*sociedades por quotas*) have a simpler governance structure when compared to limited liability companies by shares (*sociedades anónimas*); an example of this is the appointment of an audit body for the limited liability companies by quotas (*sociedades por quotas*) not being mandatory.

Concerning capital requirements, the minimum share capital required for limited liability companies by quotas (*sociedades por quotas*) is €1 and €50,000 for limited liability companies by shares (*sociedades anónimas*), with the exception of regulated sectors where the applicable minimum required share capital may be higher.

In relation to exit rights, the transfer of quotas to third parties in the limited liability companies by quotas (*sociedades por quotas*) requires the previous consent of the Company (to be granted by its shareholders), while the limited liability companies by shares (*sociedades anónimas*) grant enhanced exit rights as the shares are freely transferable to third parties without requiring the consent from the company

### 1.3 Are there special rules for foreign buyers?

As a general principle, there are no special rules or constraints for foreign buyers in an M&A transaction in Portugal besides certain reporting obligations for administrative and statistical purposes. Notwithstanding, in certain regulated sectors – such as banking, insurance, infrastructure and transportation – the acquisition of a qualified holding (which may differ from sector to sector) may be subject to prior approval and/or notification of the relevant regulators or the competent Ministry or State Secretariat.

### 1.4 Are there any special sector-related rules?

Regarding special sector-regulated rules, we would highlight the following: (i) the need for notification in advance of the regulator of the banking sector, the Bank of Portugal, 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%; 1/3; or 50%, or 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; or (ii) the need to also notify in advance the insurance sector regulator, *Autoridade de Supervisão de Seguros e Fundos de Pensões* (“ASF”), 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%; 1/3; 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.

### 1.5 What are the principal sources of liability?

Specific liabilities may emerge in M&A transactions from multiple sources; however, pre-contractual liability, contractual liability (i.e., breach of the relevant agreements, including the breach of Representations & Warranties), as well as tax liabilities, are identified as the most common sources. Failure to comply with the relevant rules and procedures is also a common way for a party to be subject to administrative procedures and incur in liabilities and/or penalties. Concerning transactions involving public companies, failure to comply with the disclosure and procedural requirements may be a source of liability, such as market manipulation in takeover processes or omission of relevant information or even infringement of the procedure stipulated. These types of breaches may lead to the imposition of a sanction.

## 2 Mechanics of Acquisition

### 2.1 What alternative means of acquisition are there?

In Portugal, the acquisition structure of an M&A transaction depends on several aspects such as: (i) the business type that is being acquired; (ii) the buyer’s funding capacity; (iii) the purposes of the transaction, its risks and potential liabilities; (iv) the legal and tax considerations affecting the target company; and (v) the target’s financial condition. The most common means of acquisition are (i) share deals, (ii) asset deals, (iii) transfer of a business as a going concern, (iv) mergers, and (v) demergers.

For public M&A transactions and in order to acquire the control of a listed company, the most common means are the acquisition of shares or other securities directly or indirectly, the grant of voting rights in a company, through entering into shareholder’s agreements with other shareholders, or as a result of a takeover where a merger or another combination of entities, directly or indirectly holding shares in a listed company, results in a change of control in such company.

### 2.2 What advisers do the parties need?

As mentioned above, the different factors surrounding a specific M&A transaction will affect the type and extent of advisory services needed. Typically, the parties would be assisted by an M&A adviser, commonly an investment bank, in charge of managing the transaction and coordinating the various teams involved such as the financial adviser, the legal counsel and/or

the tax experts. Other teams that are often involved in M&A transactions are technical advisers (specialised in the business activity of the target) and insurance advisers. In public takeovers, public relations advisers are also usually involved.

### 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 when it comes to the terms and conditions of a specific deal. However, the reality has shown otherwise. The complexity and sophistication of the transaction documents necessary to complete an M&A deal have increased substantially and the deals are now typically subject to multiple variables, such as specific features of the target, the scope of the due diligence process, the conditions precedent required (e.g. an antitrust clearance being required in the context of a merger control procedure) or even the structure of the transaction, divided in several rounds of negotiation, which has increased the normal duration of an M&A transaction. It is also important to note that the duration of M&A transactions may be affected by specific laws and regulations applicable for certain sectors or the procedures applicable to merger processes. One factor that can be critical for the duration of an M&A transaction is the existence of more than one bidder; commonly, auction processes tend to be more accelerated than exclusive negotiations. In regard to a takeover bid transaction, the duration of the procedure will range from three or four months to a year, depending on the type of bid, the existence of competing bids, and the process of the announcement of the decision to make the bid or the authorisation from the regulatory authorities, among others.

### 2.4 What are the main hurdles?

The main hurdles of an M&A transaction depend largely on the type of transaction concerned. Notwithstanding, the most common obstacle is the information gap between sellers and buyers, which may lead to relatively long and thorough due diligence processes, which automatically lead to lengthier negotiations concerning the set of Representations & Warranties, for example. For public M&A bids, the amount of formalities required, such as approvals and acceptances, are the main hurdles to consider as well as the many deadlines to push for such authorisations.

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

In general, there is much flexibility over deal terms and price, as M&A transactions are mainly governed by the free will of the parties, limited only by the applicable mandatory rules and principles.

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

In most private 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 types 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 private M&A deals, there is no obligation for the same terms to be offered to all shareholders, as the parties are free to negotiate and offer different terms to different shareholders of a target company, with some exceptions. In case of public takeover offers, due to the specific regulation these types of transactions are subject to, the terms and conditions must 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 obligation to do so, unless such obligation arises from the target's articles of association or from a shareholder's agreement. In case of public M&A bids, a bid should be made for all holders of (i) shares with voting rights and pre-emptive subscription rights, and (ii) convertible or exchangeable bonds.

### 2.9 Are there any limits on agreeing terms with employees?

The terms to be agreed with employees must be compliant with the Portuguese Labour Laws' mandatory rules and principles and other specific provisions applicable to each case, such as collective bargaining agreements, if any, namely regarding the transfer of employees of a target company and other specific employment issues, and the need to comply with information and consultation obligations before negotiating directly with the employees.

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

The roles of employees, pension trustees and other stakeholders depend on the type of M&A transaction concerned. Whether it is a share deal, a merger or demerger, an asset deal or the transfer of businesses as an ongoing concern, in some cases it is granted to the employee the right of opposition to the transfer of his/her position in the envisaged transaction. Such opposition may prevent the transfer of the employer's position, maintaining the link to the transferring unit, for example. It is important to note that in transactions involving the transfer of businesses, the transferee is under an obligation to continue the employment relation under the same terms and conditions as the transferor, including the benefits previously granted to employees. However, the Portuguese Labour Laws do not establish express rules concerning the transfer of pension entitlements of employees, although it is advisable to consider that the rights under pension schemes will transfer together with the remaining employment conditions. In terms of public M&A transactions, no specific role is foreseen by the law to be played by these entities. However, the representatives of the employees of the bidder and of the target company have the right to be informed as soon as the takeover bid has been named public.

## 2.11 What documentation is needed?

Generally, share deals imply the execution of a written share purchase agreement regulating the terms and conditions of the transaction, which may follow a more simple or complex structure depending on the type of M&A transaction concerned. It is also common for the parties to execute other documents such as shareholder's agreements, confidentiality agreements, non-binding and binding offers, equity commitment letters, escrow agreements, transitional services agreements governing the seller's provision of services to the target company or the purchaser for a limited period after closing or shareholder's agreements, financing agreements and additional security packages if external debt providers are involved in the transaction. Share deals concerning public takeover procedures also imply the execution of a different and/or additional set of documentation that must be prepared in accordance with the specific rules provided for in the PSC, such as the announcement of the decision to launch the bid, the prospectus, where applicable, and other additional documentation.

Other M&A structures, such as mergers or demergers, involve specific procedures and imply the preparation of mandatory documentation such as the merger or demerger project, the statutory auditor's report or the necessary registration of the merger or demerger project with the Commercial Registry Office or the approval of the merger or demerger project by the shareholders of each relevant company.

Finally, the necessary documentation in an asset deal varies greatly depending on the asset concerned and the applicable legal regime.

## 2.12 Are there any special disclosure requirements?

In general, there are no specific disclosure requirements for private M&A transactions. Notwithstanding, there are certain exceptions such as mandatory disclosure duties concerning the acquisition of qualified holdings in public companies, as well as in companies operating in certain regulated sectors.

## 2.13 What are the key costs?

In M&A transactions, the key costs generally derive from the expenses associated with the parties' teams and advisers, the premium of a warranties and indemnity insurance policy if the parties elect to contract it and possible fiscal and tax costs linked to a specific transaction. The fees charged by notaries or by the commercial registry office to update the corporate information of the company are not significant in the context of most M&A transactions.

## 2.14 What consents are needed?

Often in regulated sectors, certain mandatory filings must be made with the competent authorities, which vary according to the type of transaction concerned and the types of companies involved. In the various types of M&A transactions, we would consider the following:

- (i) in share deals regarding a target that 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 the transfer of *quotas* to third parties;

- (ii) in share deals regarding a target that 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 shareholder's agreements) may not exclude the transferability of shares, they may establish some limits (such as pre-emptive rights, the consent of the company, etc.). Such limits shall be assessed on a case-by-case basis; and
- (iii) in merger processes, the consent of certain shareholders might be needed if the merger:
  - (a) increases the obligations and liabilities of some or all shareholders;
  - (b) affects the special rights of some shareholders; or
  - (c) 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: (i) as aforementioned, 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; and (ii) mergers are subject to the approval of the shareholders of the relevant companies concerned, regardless of their type. For public takeovers, the main consents required are the resolution of the competent board or person launching the bid, authorisation by the Portuguese Securities Market Commission ("CMVM") and, in some cases, other mandatory consents by regulatory authorities. In certain cases, the antitrust clearance from the Portuguese Competition Authority may be required if a merger control process is triggered.

### 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.

Often, in private M&A transactions with separate signing and closing, the purchaser may have to provide an equity commitment letter from its shareholders (this requirement is more common where the purchaser is a special purpose vehicle) or deposit the consideration in an escrow account, on signing date.

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, as there is no legal concept of a

hostile takeover in the PSC. However, it is quite common for such distinction to be made based on the response of the target company's board of directors and/or of the relevant shareholders to the relevant takeover bid. Furthermore, hostile bids are allowed and are common.

### 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.

In public takeovers, and although the legislation tries to protect at all times the principles of fairness and equality of information, there are no specific rules regarding how to approach the target, besides the mandatory information that must be included in the preliminary announcement to the CMVM, to the target and to the relevant stock exchange managing entities.

### 3.3 How relevant is the target board?

In private M&A transactions, 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; however, it is common for the target board not to play an instrumental role.

In public M&A transactions and takeover operations, the board of directors of the target company is subject to a principle of neutrality and/or passivity, which undermines its relevance in terms of their support being essential to a successful bid, as the board has a duty to refrain from taking any action to hinder the success of a bid or any possible competitors.

However, the launch of a takeover bid results in an obligation to the board of the target company to elaborate the target's report (to be published) concerning specific information regarding the terms, conditions and potential impacts of the proposed bid, in which it can give its opinion in favour of, or against, the bid. Normally, the tone of the report will determine whether the submitted bid may be considered hostile or friendly, as mentioned in question 3.1 above. In conclusion, a negative or positive opinion can have a certain influence on the result of the bid.

### 3.4 Does the choice affect process?

This is not applicable. See the answer to question 3.1.

## 4 Information

### 4.1 What information is available to a buyer?

In general, there is no obligation for the target company to provide information to a potential buyer on a typical M&A transaction, which then leads to a purchaser willing to carry a previous due diligence process. However, buyers may rely on certain public available information as Portuguese companies must make numerous filings to the competent commercial registry offices, which are publicly available online, such as: (i) the articles of association and its amendments, namely share capital increases and reductions, mergers and demergers; (ii) annual financial statements and management reports; (iii) appointments of directors and statutory auditors; and (iv) the transfer, unification, pledge, seizure and redemption of quotas of private limited companies. Also, any person or entity may

request a permanent certificate from a Portuguese company at any time, which will allow such person or entity to view all registration in force.

#### 4.2 Is negotiation confidential and is access restricted?

Private M&A transactions are generally confidential, and it is quite common for the parties to enter into non-disclosure agreements prior to the transaction.

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.

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

In public takeovers, as soon as the decision to make a bid is made, the bidder is bound to make public its decision through the publication of the preliminary announcement to the CMVM, the target company and to the relevant stock exchange management 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).

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

Furthermore, it shall be also noted that in mandatory bids, the offeror is required – in accordance with the mandatory bid rule – to pay a price at least equal to the highest price the offeror has paid for shares of the target during the previous 12 months.

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.

#### 5.2 Can derivatives be bought outside the offer process?

The answer to question 5.1 also applies to derivatives.

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

Any entity reaching or exceeding a holding of 10%, 20%, 33.33%, 50%, 66.66% and 90% of the voting rights in the capital of a public company subject to Portuguese law or reducing its holding to a value lower than any of the above thresholds shall inform the CMVM and the target.

#### 5.4 What are the limitations and consequences?

As mentioned, acquisition of shares and 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?

In the acquisition of privately held companies in Portugal, neither pre-agreed break-up fees (for the seller to compensate the buyer for transaction costs) nor reverse break-up fees (for the buyer to compensate the seller for abandoning the deal) are common. Most widely used provisions establish that each party must bear its own costs and expenses for the transaction's negotiation and consummation. When it comes to transactions in the Portuguese public M&A sector, there is no common practice for break-up fees and the agreement of break-up fees with a bidder may be considered an unlawful favour to the bidder. This is a highly contentious point among legal scholars.

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

As a general rule, the board of directors of the target company is allowed to seek other potential competing offers (white knight) and no-shop provisions are not expressly forbidden. In theory, the target can agree not to shop the company or its assets, as the board of directors must maintain neutrality and not take any

actions that are not in the ordinary course of business and may frustrate the bid in any form.

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

As a rule, in public takeovers, the board of directors of the target company is subject to a duty of passivity or neutrality, hence it is not possible, in principle, to assist a preferred bidder to succeed with the transaction. It is, however, possible with the shareholder's approval, to issue shares of the target company. 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?

The board of directors of the target company may not, in principle, take actions that prevent competing bidders from presenting competing offers, or take any steps to assist a preferred bidder and frustrate the intervention by a competitor. Such actions may be considered a breach of the board's fiduciary duties and the principle of neutrality and/or passivity, and provisions in this regard may be deemed unlawful. However, the board may approve and recommend the deal to shareholders and agree not to take frustrating action (negative commitment).

## 7 Bidder Protection

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

In the field of public takeovers, voluntary offers may be subject to certain conditions provided that such conditions match the bidder's interests and do not affect the normal functioning of the market. On the other hand, mandatory takeovers cannot be subject to conditions, other than those related to the regulatory approvals. For general M&A transactions, the same principles apply as for the voluntary bids, as there is much flexibility concerning the conditions that might be agreed by the parties since M&A deals are governed by the principle of free will, limited only by the mandatory applicable rules.

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

In principle, control of the target by the bidder before closing the transaction is prohibited and may raise antitrust concerns (gun jumping); consequently, it should be regarded with caution.

In public takeovers, the bidder has no control over the target company during the entire process. However, the duty of passivity imposed on the board of directors of the target company, which mandates that the board must not adopt any measure to frustrate the success of a bid, may give some comfort to the bidder. Regarding voluntary bids, it is a different scenario as it is possible to gain some control over the target company by making the bid conditional upon certain events.

### 7.3 When does control pass to the bidder?

Generally, in private M&A transactions, the closing of the transaction, with the appointment of the directors nominated by the buyer, usually entails the change of control, although it is

possible to establish monitoring committees. In public takeovers, the control passes to the successful bidder upon the settlement of the offer, unless the bidder decided to move with the offer without the necessary clearance of the competition authority, in cases where the acquisition stays on hold until a final decision.

### 7.4 How can the bidder get 100% control?

Portuguese law contains squeeze-out mechanisms that apply to both limited liability companies by quotas and limited liability companies by shares. The right to squeeze out a minority shareholder may be exercised after a company, directly or indirectly, crosses a holding of 90% or more of the share capital of a company. The PCC states that within six months of the date that the acquisition is notified to the target, the bidder is entitled to launch the squeeze-out offer for the remaining shares in exchange for consideration in cash, its own shares, quotas or bonds, among others. This offer must be confirmed and justified in a report prepared by an independent statutory auditor, given to the competent commercial registry office and made available to the target's shareholders in the registered office of both companies.

Furthermore, and in other cases where the buyer is not able to acquire the entirety of the share capital of a company, the acquisition of the minority shareholders' stakes can also be made through drag-along rights established in the shareholder's agreement.

Concerning listed companies, the PSC states that any person who, 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 What can the target do to resist change of control?

Under Portuguese law, as a general principle, the board of the target company cannot adopt any decision that could prevent the success of the bid. The board may be in breach of their fiduciary duties if it frustrates an offer, preventing shareholders of an opportunity to tender their shares. However, the board is entitled to seek, without any limitation, offers that compete with the takeover bid submitted, in respect of the general principle that the board should pursue opportunities to maximise the value of the company. Regarding public takeovers, Portuguese law also states that the board may not frustrate the offer by taking defensive measures without the approval of  $\frac{2}{3}$  of the shareholders, especially if such decision does not fall within the scope of the ordinary course of business, unless the bidder does not abide by the same rules (reciprocity).

### 8.2 Is it a fair fight?

The Portuguese legal framework tends to guarantee equal treatment at all times between a preferred bidder and an unsolicited competing bidder, although granting certain prerogatives to the first bidder.

It is also important to note that the Portuguese legal framework is generally shareholder-centric, so that the bidder presenting

the attractive offer increases its chances of succeeding, as the board has no robust tool to prevent it as mentioned above.

## 9 Other Useful Facts

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

In M&A transactions, there are several factors that substantially influence the success of an acquisition, namely the (i) strategic motives, (ii) selection criteria (i.e., price and strategic fit), (iii) acquisition experience, (iv) management involved in process, (v) ability to plan and structure, in advance, different stages of the transaction, (vi) knowledge of the market and potential competitors of the target company, and (vii) choice of teams and advisers to execute the transaction, among others. Environmental, social, and governance (“ESG”) concerns are starting to be considered by sellers as a relevant factor when assessing offers.

### 9.2 What happens if it fails?

The parties are free to establish any consequences for non-compliance with any contractual or pre-contractual obligations, along with the ability to resort to the general terms of Portuguese Civil Law as there are no general legal prescribed rules regarding failure to complete a transaction. Regarding public takeovers, in the event that the attempt to acquire is

unsuccessful, it will not be possible to launch a new bid over the target company within a six-month period after the date of the publication of the failure of the offer.

## 10 Updates

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

The implementation in Portugal of the EU directive regarding mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements is expected to have an impact on disclosure requirements and formalities. This legislation aims to hinder tax evasion while fostering tax transparency, by imposing additional reporting duties – with regard to potentially aggressive cross-border tax-planning arrangements – not only to the taxpayer but also to intermediaries, such as tax advisers and lawyers. In the context of the COVID-19 pandemic, Portugal has adhered to the extension, until 28 February 2021, of the deadline to report previous transactions (occurring between 25 June 2018 and 1 July 2020). The applicable legislation also sets out the creation of a committee to monitor the implementation of this directive, named Fórum DAC 6.

The incremental use of warranties and indemnities insurance coverage in private M&A deals may be highlighted as a practice that is becoming incrementally used by the parties as a way of mitigating risks and facilitating complex negotiations.



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