Portugal

Guidance and Warnings

Chambers & Partners employ a large team of full-time researchers (over 140) working in their London office. They interview thousands of clients each year. This 'Guidance and Warnings' section is based on the views of clients with in-depth international experience. It contains advice on typical local problems and how to overcome them.

Country Profile

Radical austerity measures were implemented following the 2011 bailout granted by the EU and the IMF, but GDP shrunk for the ninth consecutive quarter in the final quarter of 2012, closing 3.2% down year-on-year. This has resulted in lower revenues despite tax hikes and cuts in public spending, with high levels of public debt and a deficit in the vicinity of 5%.

Confidence in the Portuguese market is low and credit in the country is scarce. Furthermore, general ill feeling against measures that are seen as disproportionate and unfair has triggered social unrest. Given the state of the Portuguese domestic market, many key players in the country have tapped into foreign markets, boosting their export operations.

Business Culture

Portuguese people are friendly, open and affable. Personal relationships play a significant role within this society, and lobbying is seen as perfectly acceptable: "*Knowing the right people will not tip the balance, but at least it will open some doors,*" a source observes.

In true Mediterranean fashion, business and pleasure are often combined in Portugal. A local expert notes: "*Good business is always conducted in a good restaurant.*" Therefore, investors seeking to enter the Portuguese market are advised to travel physically to the country, meet people face to face and establish a presence. A foreign entrepreneur asserts: "*In Portugal, you can't build a business from a long distance – you either need a local partner, or you have to move to the country.*"

Local experts stress that it was equally important to find the right partner:"*You need to engage with people, be friendly and be prepared to listen, but you also need to test them before making decisions.*"

Issues of transparency have been significant for some interviewees: "*Through concerns of transparency we have had to shut down deals in the past,*" one reports. However, anti-corruption measures have recently been implemented by the government, and there is a rising awareness among the general public.

Legal Market

The top of the Portuguese legal market is dominated by a number of large and highly reputable local ensembles. These are joined by a handful of regional firms with a strong presence in Spain and Portugal. Global firms tend to operate 'best friend' agreements with domestic partners.

Lawyers in Portugal are praised for their "*vast legal knowledge and sound practical advice.*" Market experts value the "*proactive attitude, reaching out, trying to understand the business model and our needs.*"

Fees in Portugal have reportedly gone down dramatically over the last three years. Partner hourly rates range from EUR200-400, while associates charge EUR150-200 an hour.

M&A Market Profile

The economic crisis has affected the M&A market negatively. Nevertheless, there is still substantial activity taking place in the country, significantly involving players from other Portuguese-speaking countries – primarily Brazil, Angola and Mozambique.

Regulation

The most significant regulatory issues for M&A transactions in Portugal involve competition matters. Regulated industries such as healthcare, banking and finance or media have their own regulators.

Dealings with the authorities are said to "*vary from body to body, but generally they are fairly straightforward.*" However, local experts warn that "*one of the things foreigners are most surprised about when they come to conduct business in Portugal is the notarial nature of our system.*" Notaries are required to validate most paperwork, making processes more time consuming.

Whilst "*the influence of large corporations, in the media industry, for instance, is still palpably felt,*" the current economic situation is said to have "*pressed the government, and also the regulatory bodies, into a more business-friendly attitude.*"

Litigation

The court system in Portugal is described as "*slow and bureaucratic, with numerous provisions to protract processes for years.*" High levels of backlogging in Lisbon courts reportedly lead to cases dragging for longer than necessary. "*We would all be better off with more staff and more efficient digital filing,*" one local source explains.

The judicial system is also described as an "*unpredictable system.*" A local business person emphasises: "*It is one of the points that needs to be highlighted to foreign investors before they commit to anything in the country because it is a major issue.*" Hence, out-of-court settlements are favoured in Portugal. Face-to-face negotiations are the most common alternative, although arbitration is increasingly popular.

Judges in Portugal are praised for their "*professional approach,*" although sources explain "*they are often exposed to excessively complicated issues, so in some cases more training would be advisable.*"

Trends & Developments

Contributed by Morais Leitão, Galvão Teles, Soares da Silva & Associados

With roots in the prestigious law firms founded in the 1930s and 1960s, today **Morais Leitão, Galvão Teles, Soares da Silva & Associados** is one of the leading law firms in Portugal. Independent and internationally recognised, the firm offers specialised services in the main areas of law, having been involved in many of the largest and most important operations in Portugal, as well as in high-value cross-border transactions and disputes. The firm also provides multilingual representation to large companies around the world. With a team comprising more than 160 lawyers at a client's disposal, the firm has its head office in Lisbon and additional offices in Porto and Funchal. Due to its network of associations and alliances with local firms and the creation of the MLGTS Legal Circle, in 2010, the firm also operates through local offices in Angola and and Mozambique, as well as in Macau.

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Carlos Osório de Castro became a partner in 2006. Carlos is one of the most well-known Portuguese lawyers in the areas of capital markets and M&A, a reputation earned due to his participation in major projects involving both national and international clients. A Senior Assistant Professor at the Law Faculty of the Portuguese Catholic University from 1982 to 2002, from 1996 onwards he became responsible for the chair of Capital Markets. Carlos is one of the members of the Review Committee of the Portuguese Securities Code. Previoulsy he was a partner at Osório de Castro, Verde Pinho, Vieira Peres, Lobo Xavier e Associados (1989 -2005).

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General environment

The Portuguese economy has been severely affected by the 2008 financial crisis, which translated into strained access to liquidity and a decrease in the valuation of assets. The financial crisis has also intensified privatisations, and relocated them from the public capital markets to the private sales arena.

Indeed, the financial crisis continues to dictate current trends in the Portuguese M&A market. The undertakings assumed by the Portuguese Republic vis-à-vis the European Union institutions and the IMF in the framework of the financial and economic assistance programme sponsored by those entities (which has created the conditions for a series of bold reforms aiming at creating flexibility in key areas, such as the labour market and privatisations) have also had an impact. An overhaul of corporate tax rules may also be approved in the coming months, as the Government considers the creation of a reduced rate applicable to new foreign investment, aimed at attracting the much-needed inflow of foreign investment.

Portuguese capital market

The Portuguese capital market, when compared to its European peers, has never been known for high transaction volumes or liquidity, and has worsened as a result of the 2008 financial crisis, as the Portuguese leading banks faced liquidity issues. This, combined with a revision of capital requirements, led some banks such as Banco Comercial Português and Banco BPI (and, more recently, BANIF) to request State aid. We also saw substantial public investment in the recapitalisation of Caixa Geral de Depósitos, the State-owned savings bank. Considering that the vast majority of Portuguese M&A deals are financed through debt, the lack of liquidity inevitably led to a shorter number of private transactions taking place over the last few years, at least in their traditional formats.

In some areas such as capital market transactions the crisis has had a less negative effect on the market. In response to the financial and sovereign debt crises, governments and the EU enacted rules providing for higher and stricter core Tier 1 capital ratios for banking institutions, with a view to increasing the availability of funds to finance the real economy. In order to comply with these newly approved rules, some banks resorted to share capital increases, including Banco Espírito Santo (which managed to avoid direct public investment) and Banco Comercial Português.

The search for liquidity

Another trend, exemplified by the acquisition of Cimpor, a leading Portuguese-based multinational cement company, is the search for liquidity. Cimpor had previously been targeted by some hostile takeovers, but its shareholders were never attracted by the conditions offered. The fact that they have now sold their stakes (the tender offer launched by Brazilian cement group Camargo Corrêa valued the company at approximately EUR3 billion) may, among other explanations, be accounted for by shareholders' desire to access liquidity. Brisa (the biggest highway concessionaire in Portugal) was also the subject of a takeover offer, where most shareholders tendered their shares.

Increased foreign investment

It is also important to mention the increase in the flow of foreign investment: apart from restructuring transactions, the most relevant M&A transactions in 2012 involved a significant influx of foreign investment from origins as diverse as China, Spain, Brazil, Angola and France.

In addition, increased international awareness of the development of Portuguese-speaking countries such as Brazil, Angola and Mozambique has led some relevant international players to see Portugal as a channel through which to invest in these jurisdictions. Conversely, investors based in those countries often see Portugal as the ideal entrance to the EU markets.

Surge in mid-market M&A

Furthermore there has been a surge in mid-market M&A within the general restructuring pattern. This involves opportunistic or sectorial rearrangement M&A transactions whereby ailing competitors are absorbed by stronger ones.

Private equity

The most impressive change has been the boom of private equity restructuring funds (either purely privately held or with the participation of governmental entities). These private equity funds have kept the market relatively busy, by taking control of restructuring companies in private transactions either directly or through a combined strategy of acquisition of distressed credits from the banking sector, followed by conversion into equity or other means of control of acquisition.

Recent notable transactions

In the context of the trends listed above, high-profile transactions have been scarce. However, 2012 saw an increase in tender offers, as well as in other relevant M&A transactions involving listed companies.

A number of factors may explain this scenario, one of which is that the decrease in value of assets makes it possible to do deals at lower prices than would otherwise be possible. Other reasons include the search for economies of scale and liquidity, particularly in the context of major restructurings. Indeed, restructuring will be one of the key drivers for M&A in the coming months.

Other relevant transactions include privatisations such as the sale of the Portuguese Republic's 21.35% stake in EDP – Energias de Portugal, the Portuguese electricity company, to China Three Gorges in a transaction worth approximately EUR2.7 billion, and the sale of the State's 40% stake in energy grid company REN – Redes Energéticas Nacionais, acquired by Chinese State Grid (25%) and Oman Oil Company (15%), for a total price of approximately EUR592.21 million. Both deals were also relevant in terms of liquidity, with acquirers committing to make new funding lines available to the concerned companies, some of which already materialised in the course of 2012. In the banking sector, Banco Português de Negócios, an ailing bank that was nationalised in 2008, was re-privatised and sold to Angolan Banco BIC.

In the last days of 2012 it was also announced that the privatisation of ANA, the Portuguese airports management company, was awarded to Vinci, the French group that undertook to pay an approximate amount of EUR3.08 billion for 95% of this company's shares. More complex privatisation transactions are expected to take place in 2013, notably in the transport, environmental and service sectors.

There were a number of transactions that took place in the telecoms sector, as Portugal Telecom, Portugal's largest telecoms operator, sold its stake in VIVO, one of the three biggest players in the Brazilian market, to Spanish company Telefonica (its former partner at VIVO) and used the proceeds of the disposal for the acquisition of a 23% stake in Oi, also one of the leading telecoms operators in Brazil.

It was recently announced that the major shareholders and the boards of two leading telecoms companies, Sonaecom and Zon, agreed on the terms for a merger between Zon and Optimus, Sonaecom's mobile operator company.

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Law & Practice

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Trends

Market developments

The market is currently marred by the financial crisis, which obviously translated into strained access to liquidity and a decrease of stock prices. In this context, high-profile transactions have been scarce. However, while only one public tender offer took place during 2011, three tender offers were announced in 2012, as well as other relevant M&A transactions involving listed companies.

A number of factors may explain this scenario, one of those being that the decrease in assets' valuation allows for deals at lower prices than would otherwise be possible. Other reasons include the search for economies of scale and liquidity, including in the context of major restructurings. Indeed, restructuring will be one of the key drivers for M&A in coming months.

Other relevant transactions include several privatisations, such as the sale of the Portuguese Republic's 21.35% stake in EDP – Energias de Portugal, the Portuguese electricity company, to China Three Gorges in a transaction worth approximately EUR2.7 billion, which was announced in the last days of 2011 and completed in 2012.

There is also the case of the State's 40% stake in energy grid company REN – Redes Energéticas Nacionais, acquired by Chinese State Grid (25%) and Oman Oil Company (15%), for a total price of approximately EUR592.21 million. Both deals were also of relevance in terms of liquidity, with acquirers committing to make new funding lines available to the concerned companies, some of which already materialised in the course of 2012.

In the banking sector, Banco Português de Negócios, an ailing bank that was nationalised in 2008, was reprivatised and sold to Angolan Banco BIC.

In the last days of 2012 it was also announced that the privatisation of ANA, the Portuguese airports management company, was awarded to Vinci, the French group that undertook to pay an approximate amount of EUR3.08 billion for 95% of this company's shares.

More complex privatisation transactions are expected to take place in 2013, notably in the transport, environment and services sectors.

There were also some relevant transactions taking place in the telecoms sector, as Portugal Telecom, Portugal's largest telecoms operator, sold its stake in VIVO, one of the three biggest players in the Brazilian market, to the Spanish company Telefonica (its former partner at VIVO) and moved on to use the proceeds of the disposal for the acquisition of a 23% stake in Oi, also one of the leading telecoms operators in Brazil.

It was also recently announced that the major shareholders and the boards of two leading telecoms companies, Sonaecom and Zon, agreed on the terms for a merger of Zon and Optimus, Sonaecom's mobile operator company.

It should also be noted that some traditional sectors of the Portuguese economy, such as construction, are expected to undergo some dramatic changes, as the effects of the financial recession are more visible, with major restructurings underway.

The Portuguese economy has been severely affected by the 2008 financial crisis, which translated into strained access to liquidity and a decrease of the valuation of assets.

Indeed, the current trends in the Portuguese M&A market originated during the financial crisis, and most of the negative or positive effects in the M&A market are linked to thoseproblems. In the case of Portugal, this must also be considered, taking into account the undertakings assumed by the Portuguese Republic vis-à-vis the European Union institutions and the IMF in the framework of the financial and economic assistance programme sponsored by those entities. This has created the conditions for a series of bold reforms aimed at creating flexibility in key areas, such as the labour market and privatisations. An overhaul of corporate tax rules may also be approved in the coming months, with the government considering the creation of a reduced rate applicable to new foreign investment, aimed at attracting the much-needed inflow of foreign investment.

The most obvious and intense effects of the financial crisis in the M&A market are naturally the negative ones.

The Portuguese capital market, when compared to other European peers, has never been known for high transaction volumes or liquidity, and the 2008 financial crisis worsened the market's conditions, given that Portuguese banks were now facing relevant liquidity issues.

This, combined with a revision of capital requirements, led some banks to resort to State aid, as was the case with Banco Comercial Português or Banco BPI (and, more recently, BANIF). There was also a substantial public investment in the recapitalisation of Caixa Geral de Depósitos, the State-owned savings bank.

Considering that the vast majority of Portuguese M&A deals are financed through debt, the lack of liquidity inevitably led to fewer private transactions taking place during the last few years, at least in their traditional formats.

However, some less negative effects have arisen from the crisis. Certain capital markets transactions are a good example. In response to the financial and sovereign debt crises, the national governments and the EU enacted rules providing for higher and stricter core Tier 1 capital ratios for banking institutions, with a view to increasing soundness and availability of funds to finance the real economy. In order to comply with these newly approved rules, banks resorted to share capital increases. Such was the case, for instance, with Banco Espírito Santo (which managed to avoid direct public investment) or Banco Comercial Português.

Another trend, exemplified by the acquisition of Cimpor, a leading Portuguese-based multinational cement company, is the search for liquidity. Cimpor had previously been targeted by some hostile takeovers, but its shareholders were never attracted by the conditions offered. The fact that they have sold their stakes this time (in the context of the tender offer launched by Brazilian cement group Camargo Corrêa in a deal valuing the company at approximately EUR3 billion) may, among other explanations, account for shareholders' desire to access liquidity. Also Brisa (the biggest highway concessionaire in Portugal) was the subject of a takeover offer, where most shareholders have tendered their shares.

Thirdly, it is important to mention the increase in foreign investment: apart from restructuring transactions, the most relevant M&A transactions in 2012 involved a significant inflow of foreign investment from origins as diverse as China, Spain, Brazil, Angola and France.

In addition, increased international awareness of the development of Portuguese-speaking countries such as Brazil, Angola and Mozambique has led some relevant international players to see Portugal as a relevant channel through which to invest in these jurisdictions. Conversely, investors based in those countries often see Portugal as the ideal entrance to the EU markets.

Fourthly, the financial crisis environment has intensified privatisations, and relocated them from the public capital markets to the private sales side.

Finally, and with roots in the financial crisis, a new surge in mid-market M&A has arisen, within the general restructuring pattern. This comprises, on one side, opportunistic or sectorial rearrangement M&A transactions whereby ailing competitors are absorbed by stronger ones.

However, the most impressive change has been the boom in private equity restructuring funds (either purely privately held or with impulse or participation of governmental entities). These private equity funds have been keeping the market relatively busy, by taking control of restructuring companies in private transactions either directly or through and following a combined strategy of acquisition of distressed credits from the banking sector, followed by conversion into equity or other means of control of acquisition.

Key industries
The industries in which M&A activity was more intense during 2012 were energy, banking, infrastructure, telecommunications and cement.

Overview of the regulatory field

Acquiring a company

The means used to acquire the targeted company depends on whether it is a listed or a non-listed company. While the rules applicable to listed companies are not absolutely identical to those applicable to other companies involving some other kind of public element, our notes below will only refer to listed companies, ie companies whose shares are listed in a regulated market operating in Portugal.

For closely held companies, the traditional way of acquiring a company is to enter into a standard sale and purchase agreement (or other forms of equity participation).

Relevant alternatives provided for in the Código das Sociedades Comerciais (the "Portuguese Companies Code") are mergers and share capital increases (with consideration in kind or in cash), which are also suitable mechanisms for acquiring corporate control.

In the event that the relevant company is a listed company, acquisition of control primarily takes place pursuant to an Oferta Pública de Aquisição (a Public Offers for Acquisition) or a merger.

Regulatory bodies

The identity of the primary regulator very much depends on the activity carried out by the companies in question. Portuguese regulation is sectorial: depending on the economic sector involved, different regulators may be called upon to supervise transactions. A merger or an acquisition involving a bank will be supervised by the Bank of Portugal, the banking regulator. If the company issues listed securities, supervision will most likely fall under the regulatory scope of the Portuguese Securities Commission ("CMVM"). Conversely, where insurance companies are concerned, the Portuguese Insurance Institute will be called upon to intervene. It is also worth mentioning Entidade Reguladora dos Serviços Energéticos, which is the regulator for the energy sector, and Autoridade Nacional de Comunicações, the telecoms regulator, which may need to be involved in transactions in their respective sectors.

It is important to note that some transactions may involve more than one sectorial regulator. It is not uncommon for a transaction to be overseen by multiple entities (for example, a tender offer launched by a bank over the shares of a listed bank will likely involve the banking and securities market regulators). Whenever applicable, the intervention of these entities would in any case be in addition to the powers of the Portuguese Competition Authority, the entity responsible for applying the merger control laws and regulations.

Foreign investment

There are no restrictions on foreign investment in Portugal. Indeed, for transactions involving two or more EU Member States, the EU Fundamental Treaties generally prohibit any sort of national measures that affect free competition within the EU Member States.

Anti-trust regulations

As Portugal is a member of the European Union, it is subject to its fundamental Treaties. Where competition is concerned, articles 101 and 102 of the Treaty for the Functioning of the European Union ("TFEU") fully apply. In addition, there is also the Portuguese Competition Act (Law 19/2012, of May 8th) to bear in mind for transactions carried out in Portugal. Although both sets of rules include relevant provisions on merger control and abuse of dominant position, the criteria used are slightly different in some respects, which may subject the same transaction to different regulators, depending on how it is structured.

Pursuant to article 37 of the Portuguese Competition Act, concentration of companies (i) causing the acquisition, creation or reinforcement of a market share of 50% or more in the national market of a given good or service, or in a substantial part of it, or (ii) causing the acquisition, creation or reinforcement of a market share of 30% or more, but less than 50%, in the national market of a certain good or service, or in a substantial part of it, insofar as at least two of the companies involved individually have a turnover, in Portugal, of more than EUR5 million, net of direct taxes, or (iii) where the relevant companies have together achieved, in Portugal, on their last yearly accounting exercise, a turnover of more than EUR100 million, net of direct taxes, insofar as at least two of the companies involved individually have a turnover, in Portugal, of more than EUR5 million are subject to previous filing with the Portuguese Competition Authority ("AdC").

Labour law

The Portuguese Labour Code applies, and contains the key labour regulations. Furthermore, there are also collective labour agreements to bear in mind, which are entered into by and between employers and unions (or made applicable to certain sectors by a governmental decision).

Nevertheless, it should be stressed that, in the light of the undertakings assumed by the Portuguese Republic in the framework of the financial and economic assistance programme, some relevant provisions of the Labour Law have recently been amended to increase flexibility, with special focus on termination, thus setting the foundations for a more competitive and more attractive regime for foreign investors.

From termination of employment contracts to change of the workplace rules, the acquirer should bear the relevant provisions in mind while structuring a potential transaction. Also, prior to a change of control, the parties must inform the employees or their representatives of the date and motives for the transaction and its legal and economic consequences towards them.

It should be noted that, where the transaction involves the transfer of assets (typically the transfer of an unincorporated economic unit, an estabelecimento comercial), the acquirer automatically assumes the position of employer in the employment contracts previously entered into by the seller and the employees concerned: articles 285 and following of the Portuguese Labour Code provide expressly so for this situation.

Recent legal developments

One of the most significant changes in Portugal regarding M&A has been Law 19/2009, of May 12th, which, implementing Directive 2005/56/EC of the European Parliament and the Council (as amended) into the Portuguese jurisdiction, established the legal framework for transnational mergers (articles 117-A through 117-L of the Portuguese Companies Code).

It should be noted, however, that articles 117-A through 117-L only apply to transnational mergers when the companies merging are all incorporated in EU Member States. In a merger between a Portuguese company and a third State from outside the EU, general provisions of Portuguese law also apply.

In addition, we should also mention no par value shares, which were first introduced in the Portuguese jurisdiction with Decree-Law 49/2012, of May 19th. Since their appearance, which was justified by a need to grant companies (especially listed companies) easier access to capital (given the classic prohibitions of issuing shares at a price lower than their par value), some very relevant Portuguese companies have amended their bylaws with a view to removing the par value of their shares.

Decree-Law 375/2007, of November 8th, introduced a new set of rules in respect of private equity, with the express purpose of seeking to facilitate, simplify and promote the expansion of venture capital as a tool to support companies, especially start-up companies in the scientific and technological fields.

Finally, note that Law 63-A/2008, of November 24th, as amended by Law 4/2012, of January 11th, created a specific regime for the reinforcement of banks' core Tier 1 ratios, which was the basis for the recent recapitalisation exercises undertaken by some major Portuguese banks.

Takeover legislation

As far as statutory law is concerned, no fundamental changes to the existing legal regime were introduced in 2011 and 2012 nor are expected in the coming months at the domestic level. However, Directive 2004/25/EC, regarding the legal framework for tender offers, is currently under review, which will probably bring some changes at the European level, especially to the regime of the mandatory acquisition public offer. Also, the recent Action Plan on corporate governance published by the European Commission may create an environment for additional changes.

Stakebuilding

It is not uncommon for bidders to acquire blocks of shares from certain key minority shareholders up to a certain percentage of the share capital, so as to avoid the minimum threshold under which they are forced to launch an acquisition public offer (1/3 or 50% of voting rights held directly or indirectly). Equity swaps might, in some circumstances, also present a useful stakebuilding strategy.

It should be noted, however, that Portuguese companies generally havea concentrated shareholding structure, which makes stakebuilding more difficult in practice, as controlling shareholders, sometimes bound by shareholders' agreements, will be less inclined, or have less freedom, to sell their shares. Also, in accordance with applicable rules, the price of such acquisitions may be considered for determination of the minimum price for a potential subsequent mandatory tender offer.

Dealings in derivatives are generally allowed under Portuguese law. On this matter, CMVM's Regulation 5/2010 added article 2-A to Regulation 5/2008, providing for the disclosure of certain long positions, given certain circumstances.

Long positions include, in addition to the actual ownership or deemed attribution of voting rights, agreements or financial instruments with similar effects to those resulting from directly or indirectly owning shares, notably: CFDs, cash settled swaps, cash settled options, futures and forwards.

Whoever reaches or exceeds a long position relating to 2%, 5%, 10%, 15%, 25%, 1/3, 40%, 45%, 50%, 55%, 60%, 2/3, 70%, 75%, 80%, 85% and 90% of a listed company's share capital shall inform the CMVM and the target company of such occurrence within four trading days. The same duty applies to those who see their position reduced to a level below any of the aforementioned percentages.

In addition, the same duty will arise whenever said long position refers to shares whose voting rights are attributable to the relevant entity pursuant to article 20 of the Portuguese Securities Code.

Disclosure thresholds

For listed companies, article 16 of the Portuguese Securities Code provides that, in principle, notice shall be given to the CMVM and to the target company whenever the acquirer reaches or exceeds, directly or indirectly, 2%, 5%, 10%, 15%, 20%, 25%, 1/3, 50%, 2/3 and 90% of the voting rights inherent to the relevant listed company's share capital. The same disclosure duty will apply in the event that the relevant entity reduces its stake below one of those thresholds. Disclosure must take place within a period of four trading days after the occurrence of any of the above-mentioned facts, or four trading days following the knowledge of the relevant circumstance. Some specific rules apply to the disclosure of dealings by insiders.

In determining whether these thresholds have been reached, article 20 of the Portuguese Securities Code provides for several situations in which voting rights may be attributed to a relevant entity, even if those voting rights are associated with shares that it does not own. Specific rules apply to disclosure of dealings by insiders.

The Portuguese Companies Code provides some disclosure rules in respect of privately held companies: as of the moment when a company holds 10% of another's share capital, all transactions relating to the latter's shares need be disclosed by the former, for as long as its stake is equal to or higher than this threshold. Furthermore, should a company hold the majority of another's share capital, more than half of the voting rights or the prerogative of designating more than half of the board's members, such facts must be disclosed by both companies. Finally, it should be mentioned that whenever a company, directly or indirectly, controls 90% of another company's share capital, it should make that fact known to the latter within 30 days of acquiring such percentage.

The thresholds mentioned above are imperative. This is to say that, whenever an entity reaches, surpasses or decreases a relevant threshold, it must communicate such occurrence to the CMVM and the target company.

That does not mean that the acquisition of stakes in a company cannot be made subject to other reporting thresholds. Nothing prevents, for instance, a company's bylaws from providing that in the event that 1% is exceeded such occurrence would need to be reported. This, however, is not common practice.

There are, nevertheless, certain means to prevent stakebuilding. To ensure such an outcome, some controlling companies have approved voting rights caps (which may be superseded where the limited breakthrough provisions are implemented into Portuguese law apply).

The most relevant aspect to be considered in stakebuilding strategies, however, results from the law and consists of mandatory acquisition public offers (article 187). The Portuguese Securities Code provides that, should someone acquire 1/3 or 50% of a listed company's share capital, it would have to launch an offer to buy 100% of the share capital (or other securities granting a right to acquire shares). It should be said, nonetheless, that for the 1/3 threshold, the law allows the bidder the option to prove that this percentage of voting rights does not, in that particular case, provide him with control of the target company, in which case no duty would arise.

Obligations of acquiring shareholders

Article 138 (1) (g) of the Portuguese Securities Code states that the prospectus for a tender offer shall include information on the intentions of the offeror relating to the continuity or alteration of the target company's business activity. Further to this requirement, the law also requires that the offeror makes known his purpose concerning maintenance and conditions of the employees' jobs. It must also provide information as to the listed or non-listed future character of the target company, as well as its future policy on securities negotiation.

As for control of the company, the Portuguese Securities Code provides that the offeror must also inform on the percentage of voting rights that, pursuant to the offer, it will be able to exercise in the target company. Additionally, the tender offer prospectus must contain information on any shareholders' agreements entered into by the offeror with other shareholders of the target company.

On the other hand, the offer's preliminary announcement (to be made public as soon as the offeror decides to launch an offer) shall also summarily identify the offeror's objectives in relation to the offer (article 176 (1) (g) of the Portuguese Securities Code).

The negotiation phase

Disclosure requirements

There are different types of disclosure requirements depending on the structure of the deal concerned and the participants involved (eg, if the participants are listed or privately held companies).

Listed companies are subject to the rules on disclosure of privileged information, having regard that information concerning a potential deal may potentially be qualified as such. Even if the deal is a tender offer (in which case specific disclosure rules apply), listed companies are still subject to the duty to disclose privileged information, although there is a specific duty of secrecy (also extended to the target company) concerning preparation of the tender offer until the preliminary announcement is made public. This may be especially relevant when there are meaningful discussions prior to the announcement of an offer.

In the case of a tender offer, the first formal announcement of the deal is in principle disclosed by the offeror, who shall make a preliminary announcement of the tender offer as soon as it takes the decision to launch it. However, it should be noted that, within eight days of the receipt of the draft prospectuses and the preliminary announcement of the offer, and within five days of the disclosure of any supplement to the offering documents, the management of the target company must approve and disclose a report expressing its views on the opportunity and the terms of the offer. This report shall contain information that is complete, true, up to date, accurate, objective and lawful.

In accordance with Articles 248 and 378 (3) of the Portuguese Securities Code, privileged information is defined as any information that directly concerns the issuer or the securities issued by it, has a precise nature (including past and present data, as well as future facts to the extent that such facts are predictable), is not public and, finally, would affect the securities price if it were made public (ie, price sensitive in light of the judgement of a reasonable investor).

As a general rule, privileged information must be promptly disclosed by the issuer. However, in accordance with Article 248-A of the Portuguese Securities Code, issuers may, in some cases, elect to postpone the disclosure of such privileged information to the extent that such disclosure would jeopardise their legitimate interests (as in the case of a material negotiation requiring a certain degree of secrecy), provided that the disclosure postponement is not likely to mislead the public and the issuer ensures the confidentiality of the information until disclosure.

Pursuant to Article 248-A (2) of the Portuguese Securities Code, the disclosure of privileged information is expressly considered as being likely to harm the legitimate interests of the issuers (i) in the case of decisions taken or contracts entered into by the management body whenever the effectiveness of such decisions or contracts is dependent on approval of another corporate body of the issuer, provided that the disclosure of information before such approval, even if made together with the announcement that such approval is still pending, would jeopardise the correct assessment of the information by the public, and (ii) in the case of a negotiation process, or related elements, provided that the public disclosure may affect the results or the due course of such negotiations.

As a consequence of the above-mentioned legal regime on privileged information disclosure (in particular, the rules regarding the postponement of disclosure), it cannot be precisely stated at which stage a target is required to disclose the deal and a case-by-case assessment must be undertaken. However, as a general principle, and considering that privileged information must be of a precise nature and could include future facts to the extent that such facts are predictable, special care should be employed regarding the receipt of non-binding offers.

Due diligence

The scope of due diligence conducted in a business combination will always depend on the specifics of the activity carried out by the target company, its size and the purposes of the due diligence. Other factors such as the initiative to perform the due diligence may have an impact on the scope, ie the scope may differ depending upon the fact that the due diligence is made by the purchaser with the collaboration of the seller (which is the most common approach) or by the seller itself. Lastly, the scope will also be different depending on whether the parties agree to perform different kinds of due diligence: legal due diligence, tax due diligence and/or financial due diligence.

However, it is possible to outline a minimum legal due diligence, which usually comprises the following matters: corporate structure and legal documentation; corporate acquisitions and disposals; compliance programmes; competition law; insurance; personnel; health and safety compliance; pension schemes; land and buildings; equipment and other fixed assets; commercial activities; contracts (including change of control and termination provisions); environmental management; information technology; intellectual property; investments; lending to third parties; banking facilities/borrowing from third parties and financial grants; guarantees/indemnities/letters of credit; product/service liabilities; investigations/litigation/ disputes; compliance with special industry sector legislation; and data protection.

Special care should be taken when the target company is listed, given that disclosure of privileged information to the potential acquirer might either jeopardise its ability to purchase securities issued by it and/or trigger a duty for the company to publicly disclose information generally regarded as confidential. Given the risks involved, due diligence on listed companies is often restricted to previously released public information.

Standstills and exclusivity

These sorts of arrangements are not uncommon in sophisticated M&A transactions taking place in Portugal, especially those arrangements concerning exclusivity. They are most commonly demanded in binding stages of the discussions, especially if pre-transaction investigations and due diligence involve complex issues and higher costs.

Tender offers

It is not common, nor does the law expressly provide, for a tender offer to be documented in a definitive agreement between the bidder and the target company. Once the addressees of the tender offer are the shareholders, bidders tend to find little added value in discussing a formal agreement with the management of the target company, since it will in principle give them no reassurance as to the offer's success. However, it does not necessarily follow that this is outlawed.

Structuring

The duration of the process for acquiring/selling a business in Portugal depends on many factors.

A transaction concerning a privately held company is not subject to any specific time requirements and is usually an efficient process which takes approximately a month or even less. The duration of the process will also vary depending on the scope, depth and overall efficiency of the due diligence performed on the target company and the negotiations held between the parties. The potential need to obtain regulatory approvals may also add some weeks to the process.

The acquisition of a listed company, on the other hand, is subject to several requirements provided for in the Portuguese Securities Code and which are applicable to tender offers (generally in line with the provisions of Directive 2004/25/EC). In accordance with the Portuguese Securities Code, the offer period may vary between two and ten weeks. In addition, a period of 20 business days (that might be extended by CMVM to up to 60 business days in certain cases) is provided in the Portuguese Securities Code for the bidder to proceed with the preparation of the offer documentation and apply for registration of the offer with the CMVM. As a consequence of this legal framework, a tender offer is usually completed within two to six months.

In addition, the duration of the process concerning both privately held and listed companies may also depend on the consents and approvals by the competent public authorities that may be required for the acquisition/sale. As an example, transactions that meet the requirements provided for in the Portuguese Competition Act (or relevant EU legislation) are subject to merger control procedures, which, taking place before the AdC, may in principle last between 30 and 90 business days. As referred to above, other approvals and consents may also be required depending on the business being acquired and other relevant factors.

Mandatory offer thresholds

Pursuant to article 187 (1) of the Portuguese Securities Code, whenever someone reaches or exceeds (directly or indirectly) a stake of 1/3 or 50% of the target company's voting rights, that entity has the duty to launch a public offer for the acquisition of 100% of the shares and other securities that encompass a subscription right of shares of the said company. It should be stated that, in determining whether these thresholds have been reached, the percentage of voting rights attributable to a shareholder shall be determined according to article 20 of the Portuguese Securities Code, so as to include certain cases deemed as attributing voting rights (as established in article 5 (1) of Directive 2004/25/EC).

There are some exceptions to this duty, notably when (i) the bidder proves that, having reached the 1/3 threshold, it did not gain control over the target company; (ii) reaching or crossing the relevant threshold results from a previous offer over 100% of the target's share capital (where the offered price was not lower than that resulting from applying the relevant minimum price applicable to mandatory offers); (iii) the percentage has been attained through the execution of a financial restructuring plan as foreseen in applicable laws; and (iv) the percentage is attained as a result of a legal merger, insofar as the shareholders' resolution of the relevant listed company approving the merger contains an express acknowledgement that a duty to launch such an offer would otherwise emerge.

There is a suspension of the duty to launch an offer whenever the relevant person, having reached or crossed the relevant threshold, expressly undertakes to put an end to such a situation, so as to fall below the relevant threshold within 120 days.

Consideration

In the majority of cases, consideration consists of cash. However, in some cases, Portuguese law allows for shares and, more broadly, securities, to be used as consideration (article 177 (1) of the Portuguese Securities Code), insofar as these have adequate liquidity and are of easy evaluation (article 177 (3)).

Article 188 (5) of the Portuguese Securities Code has higher standards regarding shares as consideration in the case of mandatory tender offers. Under such provision, consideration may consist of shares, but these have to be of the same type as those which are the object of the offer, and have to be listed in a regulated market. Adequate liquidity is not enough: now, the law demands *attested* liquidity. In addition, the bidder or any related entity must not have acquired any shares of the target company for cash in the six-month period before the preliminary announcement of the offer. Should that not be the case, a cash equivalent alternative is mandatory.

Use of offer conditions

The terms under which conditions are accepted are few and well determined in the law. In addition, the CMVM has taken a conservative approach to the admissibility of conditions on an offer. Pursuant to article 124 (3) of the Portuguese Securities Code, an offer may only be subject to conditions that represent a legitimate interest of the offeror and that do not negatively affect the market's functioning. Furthermore, section (4) of the same article provides that the offer may not be subject to conditions whose verification depends upon the behaviour of the offeror itself. Mandatory tender offers may not be subject to any conditions.

Acceptable (and reasonably common) conditions of voluntary tender offers consist of minimum acceptance thresholds, where the offeror may legitimately provide for a minimum number of acceptances in order for the offer to be considered successful and be completed. Others often include the requirement that the target's bylaws are altered (eg, so as to amend or eliminate voting caps).

In addition to those standard conditions, there is a general understanding that the fulfilment of certain regulatory conditions (eg, antitrust or sectorial regulatory consents) can also be seen as conditions for the launch of the offer (ie, they are not "success conditions", but rather circumstances failing which the relevant offer is not formally approved and open for acceptance).

A business combination, understood as a transaction in which one entity gains control or at least a controlling interest in another entity, normally by way of a merger, a voluntary acquisition, etc, may, in some cases, be conditional on the acquirer obtaining financing, although this is uncommon (as sellers generally request that purchasers provide proof of their ability to complete the deal). This is not the case for tender offers, where success cannot be conditional to funding (in effect, one of the legal requirements for an offer to be registered and launched is that the bidder deposits the full amount of the consideration offered or deliver an adequate bank guarantee).

Minimum acceptance conditions

As mentioned above, the Portuguese Securities Code sets out a duty to launch a mandatory takeover of the remaining shares and other securities conferring the right to subscribe shares issued by the target when a shareholder exceeds, directly or indirectly, 1/3 or 50% of the voting rights attributable to the share capital of a public company. In such cases, given the mandatory nature of the tender offer, no minimum acceptance level is allowed.

Bearing in mind that the Portuguese Companies Code and the bylaws of some listed companies foresee a 2/3 voting quorum for the approval of many relevant corporate decisions (eg, changes to the bylaws, including in respect of share capital increases, etc), some bidders use this as a minimum acceptance condition of the offers. However, most recent voluntary bids tend to abide by the 50%+1 threshold, considering that this would generally be enough to approve the election (and the dismissal) of the management of the target company.

The by-laws of some of the most prominent listed Portuguese companies foresee voting caps. When this is the case, bidders usually include the removal of these voting caps as an additional success condition and/or foresee a substantially higher acceptance level condition that allows them to arithmetically have the majority of the votes in the target company's general meeting of shareholders or, should that be the case, to allow for the (limited) break-through provisions implemented into Portuguese law to apply.

Deal security measures

It is not very common for deal security measures to be sought for tender offers. In fact, once these are addressed to the target company's shareholders (and therefore, the company can give no assurance of success of the offer), offerors tend not to negotiate formal agreements with the target companies.

However, in other kind of transactions (ie, mergers and/or private transactions) it is not uncommon for an acquirer to ask for deal security provisions (and for the seller to agree to them). In particular, break-up fees, specific enforcement and, subject to relevant labour and competition laws, non-compete or exclusivity provisions are often found in the drafts of M&A transactional documentation in Portugal.

Additional governance rights

If a bidder does not intend to acquire all shares of the target company, it might enter into a shareholders' agreement with other shareholders, addressing issues such as voting strategies, appointment of members to the company's corporate bodies, etc (it is important to note that, in most cases, shareholders' agreements cause voting rights of all parties to be deemed attributed to the counterparties, which might create disclosure or tender offer duties if the relevant thresholds are reached). Bidders may also propose the adoption of a voting cap in the company's bylaws in order to ensure that no other shareholders will have more voting power than them. Special rights may also be granted to certain classes of shares, subject to general companies law.

Mechanisms employed to buy-out shareholders

Bidders which, following a takeover offer (and up to the date of determination of the outcome of the bid), acquire (directly or indirectly) 90% or more of the voting rights corresponding to the share capital of a listed company and 90% of the voting rights that were the object of the bid (ie, excluding previously owned or attributed voting rights) may acquire the remaining shares of the company for a consideration in cash (calculated in accordance with the criteria established for the consideration of mandatory offers), within three months after the assessment of the offer's result.

This squeeze-out procedure entails the publication of a preliminary announcement, which must be sent to the CMVM for registration and the deposit of the consideration on behalf of the holders of the remaining shares with a credit institution. The compulsory acquisition becomes effective upon announcement that the offer was registered by the CMVM. It implies that the company will cease to be qualified as a "public company" and its shares will be excluded from listing in the relevant regulated market for a minimum period of one year.

In the case described above, holders of the remaining shares are, on their turn, entitled to exercise a right to sell out their shares within three months after the assessment of the result of the offer.

The Portuguese Companies Code also foresees an equivalent mechanism for non-listed companies, whereby acquirers of 90% or more of the share capital of a privately held company may also buy-out the minority shareholders within six months from notice to the company that this threshold was crossed (which notice shall be made within 30 days of the relevant acquisition). Consideration may consist in cash or securities issued by the acquiring entity and shall be verified by an independent auditor. There is also a mirror right of minority shareholders to sell out their shareholdings.

The Portuguese Companies Code also foresees a short form merger procedure, which may apply when a company, directly or indirectly, holds at least a 90% stake in the target. In these cases, a simplified procedure can be adopted and some legal provisions applicable to mergers do not apply.

Short form mergers can be approved without a prior resolution of the shareholders gathered at a general meeting of shareholders, as long as certain conditions are met (in particular, all documents related with the merger shall be accessible to shareholders at the merged company's headquarters for a limited period of time, the merger plan shall expressly indicate that the shareholders did not express their opinion on such matter at a general meeting of shareholders and no shareholders holding 5% or more of the share capital shall have required the convening of a general meeting of shareholders to decide on the merger within 15 days following the announcement that the merger project was registered).

Shareholders holding 10% or less of the merged company share capital and who voted against the merger at a shareholders' meeting convened as described above would be allowed to withdraw from the company.

Irrevocable commitments

Although bidders often try to obtain irrevocable commitments from key shareholders, it is not very common that they succeed in obtaining them. When those are effectively granted, they are usually undertaken immediately before the announcement of the offer and it is not uncommon that they contain provisions ensuring that the relevant shareholder will either have the right to walk away or, at least, be entitled to the economic benefit of an alternative better offer.

Disclosure

Making bids public

As soon as the decision to launch a takeover is approved (or, in the case of a mandatory offer, immediately after the fact that gives rise to such an obligation), the offeror must address a notice to the CMVM, to the issuer, and to the operators of the regulated markets in which the securities object of the offer (or included in the consideration of the bid) are admitted to trading, and publish a preliminary announcement giving notice as to:

(i) the identity and head office of the offeror, the target company, and (if already appointed) the financial intermediary assisting the offeror;
(ii) the securities object of the offer;
(iii) the consideration offered;
(iv) the percentage of voting rights directly or indirectly held in the target company;
(v) a summary statement of the offeror's intentions, notably with regard to continuity or alteration of the business of the target company and, insofar as it may be affected by the bid, the offeror company, and, in the same terms, companies which have group or control relationships with the target or the offeror; and
(vi) the legal status of the offeror with respect to passivity and breakthrough rules.

The communication obliges the offeror to launch the offer in terms no less favourable to the addressees than those contained in the preliminary announcement, to apply for registration of the offer with the CMVM within the term of 20 days (extendable up to 60 days in takeover offers for exchange of securities), and to inform its employees of the contents of the offer documents, as soon as these are made public.

When applying for registration of the offer with the CMVM, the offeror shall also include documents evidencing the:

(i) submission of the preliminary announcement, the draft public offer announcement, and the draft prospectus to the target company and to the competent authorities of the regulated markets in which the securities are admitted to trading;
(ii) deposit of the consideration in money or issue of a bank guarantee which guarantees its payment; and
(iii) blocking of the securities comprised in the offer consideration (in case these are already issued).

Upon registration of the offer, the offeror shall publish a public offer announcement containing the essential elements of the offer, including:

(i) the identification of the offeror and financial intermediaries assisting it;
(ii) the type and number of securities object of the offer;
(iii) the type of offer;
(iv) the price and terms of payment;
(v) the duration of offer period;
(vi) the criteria for settling any over-subscription;
(vii) the conditions for the offer to be fully effective;
(viii) the percentage of voting rights held by the offeror and related parties in the target company;
(ix) the location where the offer prospectus is available; and
(x) the identification of the entity responsible for the calculation and disclosure of the results of the offer.

Types of disclosure

As mentioned above, in the course of a takeover, the offeror is required to draw up and make public an offer prospectus, containing the information necessary to enable the holders of the target company's securities to reach a properly informed decision on the bid.

With regard to mergers, the board of directors of the merged companies must draft a joint merger plan, including information describing the business combination. The merger plan must be approved by the general meeting of shareholders of the merged companies.

When securities are issued in connection with a merger or a tender offer, and the issuance is classified as a public offer, the contents of the merger plan or the offer prospectus shall include information so as to comply with the provisions of Regulation (EC) no. 809/2004 of the Commission, of 29 April, or otherwise contain information considered by the CMVM to be equivalent to that included in a prospectus approved in connection with a distribution offer of shares.

Disclosure of financial statements

In principle, bidders in takeover offers are not specifically required to produce pro forma financial information in the disclosure documents. However, pro forma financial information may be required in the case of prospectuses prepared in accordance with the provisions of Regulation (EC) no. 809/2004 of the Commission, of 29 April, when, a "significant gross change" – ie a variation of more than 25% relative to one or more indicators of the size of the issuer's business – occurs due to a particular transaction. Should pro forma financial information be necessary, it shall be the subject of an independent auditor's opinion stating that the pro forma financial information has been properly compiled on the basis stated and that such basis is consistent with the accounting policies of the issuer.

Disclosure of transaction documents

There is no general obligation to disclose the transaction documents in full, although their key terms are commonly required by the regulator to be summarised in the offer prospectus. However, the law requires that shareholders' agreements are communicated to the CMVM by any of the contracting parties within three days of their execution. Upon receipt, the CMVM may determine that the agreement must be disclosed publicly, in whole or in part, depending on its relevance to the control of the relevant company. Resolutions based on votes exercised pursuant to shareholders' agreements that have not been communicated or disclosed according to the law are voidable, except if it is proved that the resolution would have been approved without those votes.

Duties of directors

Principal directors' duties

In accordance with the Portuguese Companies Code, the company's directors have the duty to be loyal to the interests of the company, serving the long-term interests of the shareholders, but always taking into account the interests of other relevant parties such as employees, clients and creditors in ensuring that the company is sustainable.

The board of directors is responsible for managing the company's activities, subject to the resolutions of shareholders or to the intervention of the supervisory board or the audit committee in cases where the law or the articles of association stipulate it.

In relation to public offers, from the time the board of directors of the target company receives notice of the offeror's intention to launch a takeover and until the result of the bid is made public or the bid lapses, the management of the target company may not perform acts that materially affect the net assets of the target company and which may significantly affect the objectives announced by the offeror, apart from the normal day-to-day management of the company, unless it obtains a specific prior authorisation from the general meeting of shareholders (where a special majority is required). Those acts resulting from the fulfilment of obligations assumed before the knowledge of the offer and acts intended to seek competing offerors are excluded from the restriction. Relevant changes in the net asset situation of the target company comprise, among others, the issue of shares and the entering into contracts for the sale of important portions of the company's assets.

In addition, the management of the target company shall draft and send to the offeror and to the CMVM (and publicly disclose), within eight days of receipt of the draft prospectuses and the preliminary announcement of the bid, and within five days of disclosure of any supplement to the offering documents, a document setting out its opinion of the bid and the reasons on which it is based. The opinion shall include its views on:

(i) the type and amount of the consideration offered;
(ii) the offeror's strategic plans for the target company;
(iii) the effects of the implementation of the bid on all the company's interests and specifically their likely repercussions on employment and on the locations of the company's places of business as set out in the prospectus; and
(iv) the intentions of the members of the boards who are simultaneously shareholders in the target company, in respect of acceptance of the bid.

At the same time, the board of directors of the target company shall communicate its opinion to the representatives of its employees or, in case of non-existence of such representatives, to the employees themselves. If, by the commencement of the bid, the board of directors receives from the employees, directly or through their representatives, an opinion on the repercussions of the bid on employment, it shall be disclosed as an appendix to the report prepared by the management body.

The management of the target company, from the publication of the preliminary announcement until the assessment of the result of the offer, shall:

(i) inform CMVM daily of the transactions performed by its members related with the securities issued by the target company or by individuals in a control relationship with it;
(ii) supply all the information requested by the CMVM in the context of its supervisory functions;
(iii) inform the representatives of its employees or, failing these, the employees of the content of the offer documents and the report prepared by it, as soon as these are made public; and
(iv) act in good faith, particularly concerning the accuracy of information and honest behaviour.

With regard to mergers, and as aforementioned, the board of directors shall draft the legally required merger plan and submit it to a general meeting of shareholders specifically convened for approval purposes.

Special or ad hoc committees

Although there is no legal obligation to do so and, historically, it was not common for boards of directors to establish special or ad hoc formal committees in business combinations occurring in Portugal, an ad hoc committee, composed of independent members of the board of directors, was established by the board of directors of one company involved in a high-profile merger. This is likely to become a more common practice in the near future.

The business judgement rule

Article 64 of the Portuguese Securities Code foresees a mitigated form of the business judgement rule, by establishing that the members of the management body must, on one hand, comply with their duty of care towards the organisation, displaying willingness, technical competence and an understanding of the company's business that is appropriate to their role, and executing their duties with the diligence of a careful and organised manager and, on the other hand, comply with their duty to be loyal to the interests of the company, serving the long-term interests of the partners and taking into account the interests of other relevant stakeholders, such as employees, clients and creditors, to ensure that the company is sustainable. Article 64 of the Portuguese Securities Code also provides that the members of the management body must execute their duties in the interests of the company, executing proper care and employing high standards of professional diligence and loyalty.

Directors, regardless of their nature – executive or non-executive – are jointly and severally liable, there being no formal differences between the liability regimes of executive and non-executive directors, although in the first case, due to the nature of their duties and their responsibilities concerning the day-to-day company's business, there is obviously a higher risk of exposure.

However, there is no clear legal precedent in this area, which may be linked to the relatively restricted powers that the management body has to interfere with an offer when compared with what is accepted in other jurisdictions.

Independent advice

During a business combination process, directors are generally advised by legal (including in respect of tax issues) and financial advisers (accounting and auditing firms, as well as investment banks, who may, on some relevant transactions, be asked by the management body to submit fairness opinions). Depending on the specific area of activity of the companies concerned, some other specialists might intervene (actuaries, in the case of insurance companies, etc).

Shareholder activism

In general, shareholder activism is not an important force. Portuguese companies usually have a concentrated shareholder basis, with a clear control structure, thus limiting the potential success of shareholder activism. In addition, Portuguese law grants minority shareholders certain appointment rights, which also helps to minimise disputes.

It should, however, be noted that some forms of shareholder activism have been tried in the past, especially in large companies and/or in the context of tender offers.

Defensive measures

Hostile tender offers

Portuguese law does not make any distinction between hostile and friendly tender offers and, therefore, there are no legal restrictions to hostile bids, although they are not very common.

In fact, although a limited number of hostile tender offers have been attempted in the past few years, mostly concerning companies in the telecommunications, banking and cement sectors, only a very limited number of hostile tender offers have been successful.

Directors' use of defensive measures

Directors' ability to use defensive measures after the preliminary announcement of an offer is very limited under Portuguese law. As referred to above, from the time the board of directors of the target company receives notice of the offeror's intention to launch a takeover and until the result of the bid is made public or the bid lapses, the management body of the target company may not perform acts that materially affect the net assets of the target company (comprising, among others, issuing shares and entering into contracts for the sale of important portions of the company's assets) and which may significantly affect the objectives announced by the offeror, apart from the normal day-to-day management of the company, unless it obtains a specific prior authorisation from the general meeting of shareholders (where a special majority is required). Acts resulting from the fulfilment of obligations assumed before the knowledge of the offer and acts intended to seek competing offerors are excluded from the restriction.

As mentioned above, once management's ability to resort to defensive measures is very limited under Portuguese law. There is not one set of measures that can be qualified as common defensive measures.

Directors' duties

As referred to above, the board of directors of the target company must act in the interest of the company as a whole and seek specific consent from a shareholders' meeting in order to take any action that may result in the frustration of the bid. In addition, directors are obliged to conduct themselves and act in good faith. Subject to the above, the board of directors would be authorised to look for competitive bids.

In one of its general statements of opinion, the CMVM has made public its understanding that the target company is not permitted to disclose privileged information to potential competing offerors or to *request, either directly or indirectly, representation by proxy at the general meeting*. Additionally, target companies are also forbidden to finance competing bids, even partially.

The company is further rewired to harmonise all information that is to be made public with the contents of documents that it has had to legally present. Finally, it should be noted that, when the target company is required to disclose information to the public, any disclaimer provisions waiving its liability would in principle be deemed invalid.

Preventing a business combination

Once the management body is entrusted by law to draft, approve and submit the merger plan to approval of the company's shareholders, it might in practice be able to prevent a merger from taking place by refusing to prepare such a plan.

In relation to tender offers, directors have to submit to shareholders their views on the offer, but cannot prevent the offer from going ahead without the favourable vote of the shareholders.

Litigation

Although disputes sometimes arise between the parties, these are commonly settled in pre-litigation discussions and it is not very common for the parties to initiate litigation proceedings. When these exist, market practice is to resort to arbitration.

In the case of tender offers, especially hostile bids, a number of administrative issues are often raised by the parties concerned and the CMVM is often called upon to decide certain complaints or provide clarifications, but it is not very common that discussions escalate to courts (or arbitration).

Transactional stage

In the unusual event that the parties eventually resort to litigation, the most common matters relate to misrepresentations and price adjustment. A recent high-profile case related to the interpretation of the relevant contractual documentation concerning which party would be entitled to receive dividends for the period between signing and completion.