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# The Legal 500 Country Comparative Guides

# Portugal

# MERGERS & ACQUISITIONS


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

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# PORTUGAL
# MERGERS & ACQUISITIONS

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

The essential rules relevant for M&A operations can be found in the Companies Code (*Código das Sociedades Comerciais*) and in the Securities Code (*Código dos Valores Mobiliários*).

Apart from the rules foreseen in these two Codes other rules may be found in the laws concerning to regulated activities such as, for example, the banking, insurance or media laws.

It must not be forgotten that M&A operations are also subject to the competition rules and that the legal provisions of the Competition Code may also be applicable.

## 2. What is the current state of the market?

According to the most recent reports, namely the TTR report, the Portuguese market registered, between January and October 2020, some 306 M&A operation which means a decrease of 23% when comparing with 2019.

According to the same source and regarding the amounts involved those that have been publicly disclosed refer to 145 deals and have a global amount of EUR 15,5B. This means that when comparing with 2019 there was an increase of 32% in value.

The activity sector with more deals concluded is still the real estate sector but the technology sector must also be highlighted.

Spanish and French companies are, according to these reports, the ones that have concluded the biggest number of deals and American companies and foreign private equity funds and foreign venture capital have reduced their presence in the market over the year.

The M&A market has been obviously affected by the COVID-19 pandemic. Notwithstanding some deals that were already started in 2019 in sectors such as media or energy (fuel distribution) have been concluded in 2020.

It is foreseeable that the progressive return to normality will lead to an increase in M&A activity both in the number of operation and amounts involved considering the increasing number of opportunities that may arise as a consequence of the pandemic.

## 3. Which market sectors have been particularly active recently?

We have already mentioned that the real estate and the technologies sectors have been especially active.

However there are also other sectors that is important to highlight such as the media sector, the transportation sector, in which the Portuguese Government acquired a private participation in TAP airline company, the energy sector, banking and finance and the insurance sector in which the acquisition of Tranquilidade by Generali deserves to be mentioned. The infrastructures sector must also be highlighted – BRISA the highways concessionary has been acquired by a consortium that included the National Pension Service, the APG Group and the Swiss Life Asset Management.

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

We believe that the main factor influencing the M&A activity over the next two years will be undoubtedly the economy recovery and its pace.

The fact that many companies experienced an important activity decrease over the last few months that led to cash-flow problems, may also influence the M&A activity over the next times. This because the sale of assets or of share capital combined with mechanisms of reinforcing the companies' equity may be an alternative to banking debt.

 

The capacity of banking institutions for financing the economy during the next few years may also be a factor influencing the M&A activity.

The funds that the European Union will make available in order to support the economy and the way it will be used may also affect the development of the M&A activity over the next few years.

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

The main means of effecting the acquisition of a publicly traded company is by launching a public takeover bid.

As in most jurisdictions the public takeover bids may be voluntary or a consequence of an imposition of the Securities and Exchange Commission (*Comissão do Mercado de Valores Mobiliários*).

The process to which the bid is subject is regulated under the Securities Code (*Código dos Valores Mobiliários*) and follows the lines of identical processes in the other European Union countries.

One must bear in mind that in certain operations the intervention of other regulatory agencies may be required, namely the intervention of the Competition Authority, and that this may add some complexity to the bid's process.

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

Depending on the type of company and depending on its particulars, for example being a listed company or not, the information relating to a target company publicly available may be more or less extensive.

Having this in mind it will be generally possible to know the holders of the share capital, the effective beneficiaries and the yearly financial statements of a company.

In companies with special disclosure obligations, such as the listed companies, it will be possible to know quarterly and yearly financial statements which are an important and thorough source of economic and financial information.

The information included in certain public registries such as the property or automobile registries will also be available.

In what concerns the obligation to disclose information to potential acquirers it is not mandatory by law for strictly private operations (it may exist as a result of a MoU or any document previous to the negotiations, but not as a legal obligation).

In M&A operations involving listed companies there are disclosure obligations as a consequence of the applicable laws and regulations. Notwithstanding it must be highlighted that there are mechanisms in order to prevent the disclosure of sensitive and confidential information of the target company.

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

The detail of due diligence depends of the profile of the targeted company, of the type of assets involved in the transaction and also of the values at stake.

It is only natural that operations with higher values will imply more detailed and broader due diligences.

It is usual that due diligences include financial and accounting aspects as well as legal aspects.

In what concerns the legal aspects the most common issues to be addressed in a due diligence are corporate issues (the incorporation of the company, its registry and corporate governance aspects); the labour law issues (labour contracts, collective bargaining agreements, social security payments, litigation); regulatory and activity licensing issues; the property and registration of certain types of assets such as, for example, real estate assets; litigation (appraisal of existing disputes, claims and complaints, etc.); tax issues namely the timely payment of due taxes.

Apart from these aspects, that are common to every due diligence report, it is always possible to find other aspects that depend of the specificities of the parties involved or of the scope of the transaction.

What is certain is the existence of a practice of previous assessment of the transactions' risks. It is very rare, even in less important transactions, not to find a minimum diligence in order to assess the transaction's risks.

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

 

The intervention of the corporate bodies in an M&A transaction depends on the type of operation which will also conditions the participation of the shareholders in the process.

In public takeover bids the role of the management is essential, because it has the power to decide if the bid is hostile or not, and the shareholders don't have any specific role during the entire process. There is no right of approval or of refusal of the operation by the Shareholders Meeting.

In other types of M&A transactions, not concluded by means of public takeover bids, the role of the shareholders is much more relevant, not to say it is essential, because the shareholders usually take part in the negotiation, depending on the type of company involved, and the operation may be subject to the shareholders' approval.

Safeguarding exceptional situations the ultimate decision to sale it equity interest relies on the shareholder, but this must not be understood as a right of approval or rejection of the operation.

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

Within the specific scope of M&A deals the controlling shareholders have no specific obligations.

The duties of the controlling shareholders may be the ones resulting from the company's articles of association, of possible shareholders agreements and those resulting from the law for all the shareholders, namely the obligation to pay up the share capital and the obligation to share the losses of the company.

The main duties of the directors come from the general duties of care and loyalty that determine that the companies' directors must act with the care of a good manager and in the interests of the company and of its shareholders.

From these general duties arise a group of specific duties that are foreseen in the Companies Code and in other laws.

Specifically within the scope of public takeover bids the director of the target company must refrain from any action that may hinder the operation, with exception of those already taken before the bid was known. The directors must also express their opinion on the bid (whether it is hostile or not) or they can seek alternative bids even if this may frustrate the results of the initial bid.

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

The Portuguese legal regime is, as a general rule, very protective of employees and of their rights. However there are no rules regarding the need of consultation of the employees in case of companies' sale.

In the specific case of public takeover bids there are certain cases in which may take part a consultation of the employees' representative bodies, namely when the management board is preparing the report on the bid.

There are some rules regarding the protection of specific rights of the employees such as seniority rights in typical M&A operations.

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

Conditional offers are common in the Portuguese market.

There are several situations that may determine the conditionality of an offer such as, for example, the need of approval of the transaction by a regulatory agency, the acquisition of a minimum number of shares (this is quite common in almost every public takeover bids) or the completion of a certain amendment to the articles of association which is favorable to the purchaser.

Some conditions are mandatory by law hence there are no means of avoiding it.

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

In private M&A transactions it is common to assure the exclusivity of the negotiation since its early stages.

That exclusivity may take different forms.

However there are some competitive processes in which the exclusivity may only be assured in the last phases of the process.

In the specific situation of public takeover bids one must bear in mind that certain agreements between the offeror and the target company and/or its shareholders may have consequences in the process.

 

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

It is common that the parties to a transaction execute preliminary documents that assure how will the process take place (MoU), that foresee confidentiality undertakings, that guarantee the exclusivity of the negotiations, when allowed, or that impose penalties in case of abandon of the negotiations, etc.

Usually the public takeover bids don't have this type of guarantees.

### 14. Which forms of consideration are most commonly used?

The most common payment consideration is currency.

However it is not unusual to find other forms of payment such as the delivery of assets, the issuance of convertible bonds, etc.

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

The public disclosure of the shareholders of a company depends on the type of company and on the circumstance of being a listed company, or not.

In private limited companies any change to the shareholders is subject to registration and will consequently be made public.

In non-listed public limited companies the change to the shareholders must be communicated to the company but it is not subject to registration.

In listed public limited companies the market (thru the Securities and Exchange Commission) and the company must be informed regarding any transaction on shares allowing to acquire voting rights corresponding to 2%, 5%, 10%, 15%, 20%, 25%, 1/3, 50%, 2/3 or 90% of the share capital.

The laws on beneficial owners also require the registration, in a special registry, of the effective owners of the share capital in any type of company.

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

Once again, the moment in which it is common or it is mandatory to publicly disclose an M&A operation depends on the type of operation and on the type of target company.

In public takeover bids the disclosure is mandatory when the offer is launched.

In operations that do not involve listed companies the disclosure is usually made when the operation is closed or previously to closing when the intervention of a regulation body is required, this also because the opinion of any such bodies can be a condition precedent.

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

There are no legal limits for the maximum time period for negotiations or due diligence.

However the public takeover bids are subject to several deadlines and terms, for example the term for which the offer must be kept.

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

With few exceptions in which the purchase price may be based on an independent appraisal (under the applicable law or under agreements entered into between the shareholders) the rule is that the acquisition price may be freely agreed.

In operations in the securities market, for example in mandatory public takeover bids, there may be rules determining the intervention of an independent expert.

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

The general rule, namely in what concerns to public limited companies (article 322 of the Companies Code) is that the target companies cannot supply funds or issue guarantees on behalf of a third party so that he may purchase shares representing its share capital.

Under this rule it has been considered that the target companies cannot provide financial assistance to the purchasers of its shares except in very limited situations (for example the purchase of shares by the company's employees provided certain equity rations have been

 

met).

## 20. Which governing law is customarily used on acquisitions?

Usually the Portuguese law is applicable to transactions involving Portuguese companies. In fact this law is mandatory in the case of public takeover bids.

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

When launching a public takeover bid the buyer must produce the following documents:

1. Preliminary announcement of the bid;
2. Bid announcement; and
3. Prospectus – the document that includes the information regarding the buyer, the offer, the securities that are object of the bid and the price.

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

The formalities required in order to document a transfer of shares depend on the type of the target company.

In the case of private limited companies the document must be a written agreement and the transfer is subject to registration with the Companies Registry. As a general rule the transaction is subject to prior approval by the Company, except in specific cases such as transfers between shareholders.

The transfer is not subject to any task except when the company's assets are mainly real estate assets in which case the tax on real estate transfer may be due.

Considering the share titles of public limited companies must always be registered titles, the transfer of shares in public limited companies is achieved by title endorsement and the communication to company in order to update the shares registry book or, when the shares are non-titled shares, the transfer is achieved by the movement of the respective accounts.

The transfer of shares in public limited shares is not also subject to any tax.

Capital gains taxes may however apply in case the sale generates gains to the seller.

When the transaction involves the change to the company's beneficial owners the relevant registry must be updated.

## 23. Are hostile acquisitions a common feature?

Hostile acquisitions are not a common feature although some already occurred.

We must not forget that the existence of hostile bids and the qualification of a public takeover bid as hostile is expressly foreseen in the securities market legal regime.

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

The measures foreseen in the Portuguese legislation are essentially designed to protect the company and mainly its shareholders from hostile approaches. The measures are not designed for the directors' protection.

It must be remembered that the management board as an obligation of abstaining from any behavior that may create obstacles to the public takeover bid. However they can express their opinion on the bid and consider it as a hostile bid.

Therefore any protective measure against a hostile bid must be an initiative of the shareholders of the target company and not of its directors.

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

Yes, when a company is listed those to which are attributed 1/3 or more than 1/2 of the voting rights must have to make a compulsory offer.

The big difference between these two threshold is that, in the case of the 1/3 threshold if the offeror proves that despite the attributed voting rights he doesn't exercise the control of the company, the Securities and Exchange Commission may exempt him of launching the compulsory offer.

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

There are rights that are granted to every shareholder

 

with independence of its stake in the share capital and there are rights granted to shareholders that own certain percentages of the share capital.

Among the rights granted with independence of the share capital owned one can find, for example, the right to the approved dividends or the right the consult the shareholders meetings preparatory information.

In what regards the rights associated with owning a certain percentage of the share capital we can give as an example the right to take part in the shareholders meetings (it can be limited to shareholders owning a minimum number of shares, the association of shareholders that don't meet that threshold is allowed), the right to consult certain documents of the company's activity or the right to included certain matters in the agenda of the shareholders meetings.

These are some examples of the rights granted by the law to minority shareholders.

We must not also forget the possibility of existence of shareholders agreements that grant certain rights to minority shareholders such as, for example, the tag along right – the right to sell their shares under the same terms of the majority shareholders in case of a prospective sale.

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

Yes, if a company holds 90% or more of another company it can launch an offer to acquire the share capital it doesn't owns and the minority shareholders are forced to sell their part in the company.

However some conditions and certain deadlines must be respected by the dominant company.

If those deadlines have elapsed without the dominant company presenting its offer, than the minority shareholders may impose the sale of their shares. If the proposal of the dominant company is not voluntary or satisfactory for the minority shareholders these can submit the decision to a court of law that will determine the purchase by the dominant company and the conditions thereto.

In case of listed companies this acquisition process follows the rules foreseen in the Securities Code (*Código dos Valores Mobiliários*).

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