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Portugal

LEXOLOGY
Getting The Deal Through

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Quick reference guide enabling side-by-side comparison of local insights, including structure and process, legal regulation, consents and filings; advisers, negotiation and documentation; due diligence and disclosure; pricing, consideration and financing; conditions, pre-closing covenants and termination rights; representations, warranties, indemnities and post-closing covenants; tax considerations; employees, pensions and benefits; and recent trends.

Generated 06 October 2022

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STRUCTURE AND PROCESS, LEGAL REGULATION AND CONSENTS

Structure

How are acquisitions and disposals of privately owned companies, businesses or assets structured in your jurisdiction? What might a typical transaction process involve and how long does it usually take?

In Portugal, M&A transactions related to private limited liability companies are structured in a similar way to those in the United Kingdom and the United States. The acquisition process usually follows four main structures: share deals, asset deals, transfer of a business as a going concern or mergers. Determining the acquisition structure depends on certain factors, including the business type acquired, the buyer's funding capacity, the legal and tax considerations affecting the target, and the target's financial condition.

Although asset deals have become more popular during the past few years, especially in insolvency proceedings, share deals against cash consideration are still by far the most used vehicle for the acquisition of business undertakings. Asset deals are often used to acquire target's specific parts or assets. This is because asset deals avoid exposure to the company's past liabilities and contingencies, and can, therefore, be more flexible when funding the transaction. Further, in most cases, this structure does not trigger change of control provisions involved in typical finance, commercial or other agreements material to the target's business.

The transfer of a business as a going concern is mainly tax-driven. It involves the simultaneous transfer of some or all of the company's business to the buyer. Consequently, all assets, debts, rights and obligations related to the transferred business are transferred.

Share deals are typically performed through the execution of a contract referred to as a sale and purchase agreement entered into between the seller and the purchaser. Depending on the terms and conditions agreed on and each party's negotiating power, the seller and the purchaser's parent companies may be also asked to execute the agreement to secure their affiliates' obligations.

The complexity and sophistication of the documentation required to complete a share deal have increased substantially over the past decade. This is because most transactions involving large and mid-cap corporations are now carried out through bid auctions, whereby several bidders are selected to submit offers to acquire the target's shares.

A typical bid auction is structured in two rounds, involving drafting and negotiating the following documents:

- first round:
  - confidentiality agreements between the seller and each bidder to protect sensitive information are disclosed to the bidders to evaluate the transaction during the negotiation phase;
  - prospective bidders submit first-round or non-binding offers;
  - preliminary versions of the transaction documents (eg, a share purchase agreement, a shareholders' agreement and a transitional services agreement) are made, which will be sent to prospective bidders; and
  - a small number of selected bidders submit second-round or binding offers, along with mark-ups of the most important transaction documents; and
- second round:
  - final versions of the transaction documents with one or more selected bidders (simultaneously or not) until final terms and conditions are agreed with the final purchaser (the preferred bidder); and
  - closing documents required to complete the transaction are submitted.

The length of the transaction process depends on several factors, especially the extent of potential liabilities and contingencies identified during the due diligence phase. The target size (large-cap versus small and mid-cap) and the number of conditions precedent (eg, clearance from the competition authorities, waivers from creditor institutions and regulatory approvals) may also influence the complexity and length of the process.

Law stated - 10 August 2022

Legal regulation

Which laws regulate private acquisitions and disposals in your jurisdiction? Must the acquisition of shares in a company, a business or assets be governed by local law?

The general legal framework for M&A transactions is established in the Civil Code , the Commercial Code and the Companies Code , along with ancillary legislation and regulations. The Securities Code contains the key provisions governing transactions involving public limited liability companies.

Other areas of law that play an important role in structuring the transaction or in the due diligence phase are labour law (eg, the protection granted to employees in case of transfer of undertakings), tax and competition (merger control). For transactions in regulated sectors, specific laws and regulations governing these sectors may also need to be taken into account.

Given the increasing importance of transactions made in insolvency or company restructuring proceedings, the Insolvency and Companies Recovery Code may also be crucial when assessing a specific deal.

Although the Portuguese legal system is based on civil law, common law jurisdictions, including the United Kingdom and the United States, have a large influence on cross-border transactions. Despite the fact that the majority of deals affecting Portuguese companies remain subject to Portuguese law, the parties can opt to submit the transaction documents to foreign law, especially when overseas investors are involved.

Regulation (EU) 593/2008 (Rome I), which is effective in Portugal, grants the parties to a civil or commercial contract the right to choose its governing law, provided that the mandatory rules established under local law are complied with (eg, provisions governing the transfer of shares, assignment of credits and obligations).

Law stated - 10 August 2022

Legal title

What legal title to shares in a company, a business or assets does a buyer acquire? Is this legal title prescribed by law or can the level of assurance be negotiated by a buyer? Does legal title to shares in a company, a business or assets transfer automatically by operation of law? Is there a difference between legal and beneficial title?

The definition of property in Portugal follows other continental legal systems based on civil law. This definition encompasses the ownership, full possession, exclusive use and disposition rights.

The Civil Code provides the basic rules that govern the core areas of private law, including the legal framework for sale and purchase agreements.

Under the Civil Code, the sale of shares or assets, unless the agreement's circumstances demonstrate that the parties have a different intention, must entail the seller's implied warranty that it has the right to sell the shares or assets, and that they are transferred to the buyer free of charges, encumbrances or third-party rights. On top of this implied warranty, the buyer would normally seek additional protection from the seller by including in the transaction documents

a complete set of title warranties relating to the shares or assets' ownership, and the absence of charges and encumbrances.

Law stated - 10 August 2022

Multiple sellers

Specifically in relation to the acquisition or disposal of shares in a company, where there are multiple sellers, must everyone agree to sell for the buyer to acquire all shares? If not, how can minority sellers that refuse to sell be squeezed out or dragged along by a buyer?

In most cases involving privately held companies, the buyer typically acquires the target company's entire share capital, conditioning the acquisition to all sellers signing the transaction documents. If this outcome is unfeasible, the acquisition of stakes that the minority shareholders own could take place through exercising the drag-along rights established in the company's by-laws or, more often, in shareholders' agreements, or through the squeeze-out procedure established in the Companies Code.

The right to squeeze out may be exercised after a company acquires, directly or indirectly, shares of 90 per cent or more of another company's share capital. Within six months of the date the acquisition is notified to the target, the buyer may launch a squeeze-out offer for the remaining shares that minority shareholders possess in exchange for consideration in cash, its own shares, quotas or bonds.

The offered consideration must be confirmed and justified in a report that an independent statutory auditor must prepare. This report must be given to the competent commercial registry office and made available to the target's shareholders in the registered office of both companies. The acquisition then becomes effective when registering the squeeze-out offer in the commercial registry office, as long as the buyer deposits the consideration (shares, quotas or bonds) to acquire the target's shares or quotas into a bank account.

Law stated - 10 August 2022

Exclusion of assets or liabilities

Specifically in relation to the acquisition or disposal of a business, are there any assets or liabilities that cannot be excluded from the transaction by agreement between the parties? Are there any consents commonly required to be obtained or notifications to be made in order to effect the transfer of assets or liabilities in a business transfer?

Under Portuguese law, a buyer can generally choose the assets or liabilities it would like to acquire in a transaction structured as an asset deal; however, in certain situations that qualify as a transfer of an undertaking or of a business, from an employment law perspective, the acquirer is automatically assigned the legal position of employer concerning its labour relationship with the employees.

The transfer of assets and liabilities may require third-party consents or authorisations, especially in the event of a transfer of the contractual position in certain agreements to the buyer or the transfer of licences or permits in regulated sectors. This normally requires government, municipal or other public entities' approval before being transferred; therefore, the buyer should try to identify all third-party authorisations required at an early stage of the transaction, which can only be made through an adequate due diligence review. This procedure normally prevents significant delays at closing.

Law stated - 10 August 2022

Consents

Are there any legal, regulatory or governmental restrictions on the transfer of shares in a company, a business or assets in your jurisdiction? Do transactions in particular industries require consent from specific regulators or a governmental body? Are transactions commonly subject to any public or national interest considerations?

Concentrations between undertakings in Portugal are subject to merger control under the terms and conditions established in Law 19/2012 of 8 May 2012 (the Competition Act). The Competition Act applies to concentrations between undertakings that meet the below thresholds.

Turnover threshold

Concentrations must be notified to the Competition Authority if, in the preceding financial year, the aggregate combined turnover of the undertakings involved in the concentration in Portugal exceeded €100 million after deducting the taxes directly related to the turnover; however, this only applies if the individual turnover achieved in Portugal in the same period by at least two of these undertakings exceeded €5 million.

Standard market share threshold

Even if the turnover threshold is not reached, notification is mandatory if implementing the concentration results in the acquisition, creation or reinforcement of a market share exceeding 50 per cent in the 'national market' for a particular good or service, or a substantial part of it.

De minimis market share threshold

Even if the standard threshold is not met, the creation or reinforcement of a share between 30 and 50 per cent of the 'national market' of a particular good or service will still be subject to mandatory filing if at least two of the participating undertakings achieved, individually in Portugal, a turnover of at least €5 million in the previous financial year.

When mergers occur in regulated markets, the Competition Act establishes cooperation mechanisms between the Competition Authority and sector regulators during the merger review procedure. This includes the duty to request an opinion from the appropriate regulator before adopting a final decision.

Transactions in certain sectors that entail the acquisition or reinforcement of a qualified shareholding (ranging from 10 to 50 per cent) may also be subject to the approval or non-opposition of the competent regulatory bodies (insurance, banking and media).

In Portugal, there are no legal or regulatory restrictions on foreign ownership of companies or assets; however, Decree Law 138/2014 of 15 September 2014 , establishes the framework to acquire control of strategic assets, guaranteeing the defence and national safety and the safety of the country's supply of services that are fundamental to national interest. These include energy, transport and communications.

Acquisitions of control over strategic assets in those areas by a person or an entity from a non-EEA country may be subject to an evaluation by the member of the government responsible for the area at stake. If the government concludes that the acquisition may substantially hamper national security or services fundamental to the national interest, the acquisition may be blocked.

Law stated - 10 August 2022

Are any other third-party consents commonly required?

In public limited liability companies, a shareholder has, prima facie, the right to transfer his or her shares to whom he or she pleases. In certain cases, the transfer of shares may be curtailed, although not excluded, provided that any restrictions are established in the by-laws. These restrictions include the company's consent, mandatory pre-emptive rights or compliance with certain requirements relating to the company's commercial interests.

When required for the transfer of shares, the general shareholders' meeting must grant the company's consent, which can be rejected based on any motives described in the by-laws or on the basis of any justified company's interest. If the company refuses to consent to the transfer of the shares, it must find another purchaser to acquire the shares under the same price and payment conditions for which the consent was requested.

In private limited liability companies, the transfer of participations is subject to the company's consent, except for transfers between spouses, ascendants, descendants or partners (unless prescribed otherwise in the by-laws). If the company refuses to provide consent for the transfer, it must make an offer to acquire or redeem the quotas. Provisions of by-laws that exclude the transfer of participations are valid in these types of companies, provided that the partners have the right to withdraw within 10 years from joining the company.

Contractual pre-emptive rights or tag-along rights may also be agreed in shareholders' agreements or in the by-laws both for public and private limited liability companies. In shareholders' agreements, pre-emptive rights can be in the form of rights of first offer, meaning that the selling shareholder must negotiate the transfer with other shareholders before offering the participations to third parties; or rights of first refusal, meaning that the selling shareholder must grant to the other shareholders the right to match the terms of a transfer negotiated with a third party. Tag-along rights are aimed at restricting the ability of any shareholder to transfer his or her shares without including other shareholders' stakes in the same proportion.

Depending on the deal's structure, other consents may be required to complete the transaction. A share deal would normally reduce the number of third-party authorisations needed, as the purchaser acquires the company's shares and, indirectly, the ownership of all its assets and liabilities. Apart from the potential change of control covenants usually included in certain financing and facility agreements, the buyer does not have to seek specific consents from third parties for the assignment of the rights under the agreements entered into by the target.

In asset deals, considering that the buyer will only acquire the assets and liabilities specifically established in the asset purchase agreement, there could be a significant number of assets or rights that cannot be transferred without the consent of the third parties involved (eg, licences, permits and lease agreements).

Law stated - 10 August 2022

Regulatory filings

Must regulatory filings be made or registration (or other official) fees paid to acquire shares in a company, a business or assets in your jurisdiction?

Often in regulated sectors, filings must be made with the competent authorities, depending on the transaction's nature, structure and scope.

Asset deals that involve acquiring real estate or other assets subject to mandatory registration require the corresponding filings to be made with the competent land registry office. Similarly, any transaction involving a change to the company's corporate information that is subject to mandatory registration would also entail the respective filing with the commercial registry office.

Depending on the transaction's scope, filings with the Competition Authority and other regulatory authorities may also be required.

The notification of concentrations to the Competition Authority is subject to paying a notification fee, which is calculated based on the combined Portuguese turnover of the companies involved in the concentration in the previous financial year. The notification fee is €7,500 if the combined turnover is less than €150 million; €15,000 if the combined turnover is greater than €150 million but less than €300 million; or €25,000 if the combined turnover is greater than €300 million.

Law stated - 10 August 2022

ADVISERS, NEGOTIATION AND DOCUMENTATION

Appointed advisers

In addition to external lawyers, which advisers might a buyer or a seller customarily appoint to assist with a transaction? Are there any typical terms of appointment of such advisers?

Typically, the parties appoint a financial adviser to manage the transactions from start to finish and to provide strategic advice (including timing, structure, financing, pricing, valuation and assistance during negotiations and closing). Other advisers include legal counsel, accountants and tax experts.

Regarding appointing professional advisers, most have standard terms of engagement to be agreed upon with the client. Fees are usually negotiated on a stand-alone basis and depend on several factors (eg, the deal's value, complexity and timetable).

Law stated - 10 August 2022

Duty of good faith

Is there a duty to negotiate in good faith? Are the parties subject to any other duties when negotiating a transaction?

Under Portuguese law, there is a general duty of good faith imposed on each party during a contract's negotiation and formation. If this duty is breached, the non-defaulting party is entitled to seek compensation from the defaulting party for any damages suffered as a result of this breach. The duty of good faith includes the duties of loyalty, confidentiality and information. The duty of information, which requires disclosing the contract's most important aspects before it is executed, must be assessed on a case-by-case basis, depending on the circumstances of each situation.

Under the Companies Code, when negotiating a transaction, the directors are subject to the general duties of care and diligence, and a duty of loyalty in the company's interest, bearing in mind the shareholders' long-term interests, as well as the interests of the employees, customers, creditors and other stakeholders. The duty of care includes the obligation to have the availability and technical skills required to perform their functions and to act on an informed basis after due consideration of the important matters at stake. The duty of loyalty requires the decision making to be free from any conflicts of interest.

Directors are liable to the company for damages caused as a result of their actions or omissions that are in breach of their legal or contractual duties, except when they have demonstrated that their actions were taken without breaching any diligence duties. Portuguese law establishes a business judgement rule under which a director's liability is excluded if the director is able to demonstrate that he or she acted in a reasoned manner, free of any personal interest, and used a corporate rationality criteria in the decision-making process.

Law stated - 10 August 2022

Documentation

What documentation do buyers and sellers customarily enter into when acquiring shares or a business or assets? Are there differences between the documents used for acquiring shares as opposed to a business or assets?

When entering into a share or asset deal, the parties will normally enter into:

- a confidentiality agreement governing the disclosure of information of the target company to the buyer;
- non-binding and final offers;
- a sale and purchase agreement governing the transaction's terms and conditions;
- the remaining transaction documents (which could be included as schedules to the sale and purchase agreement), which normally include the disclosure letter in which the seller provides the buyer with a list of information that qualifies the warranties);
- a transitional services agreement governing the seller's provision of services to the target company for a limited period of time after closing;
- a shareholders' agreement when the buyer does not acquire the company's whole allotted share capital and the parties are interested in agreeing on certain rules to govern their future relationship as shareholders of the company; and
- a financing agreement and additional security package if external debt providers partially or fully finance the transaction.

Law stated - 10 August 2022

Are there formalities for executing documents? Are digital signatures enforceable?

The formalities involved in finalising documents are typically defined by the contract or underlying assets, the general rule being that there are no specific required formalities except when the law prescribes them.

A public deed or a notary-certified private document must enforce an agreement for the transfer of ownership over real estate assets, whereas an agreement for a transfer of quotas in private limited companies is subject to mandatory written form and registration with the commercial registry office.

Digital signatures are enforceable in Portugal, subject to legal conditions.

Law stated - 10 August 2022

DUE DILIGENCE AND DISCLOSURE

Scope of due diligence

What is the typical scope of due diligence in your jurisdiction? Do sellers usually provide due diligence reports to prospective buyers? Can buyers usually rely on due diligence reports produced for the seller?

Legal due diligence in any transaction is paramount to assess potential risks in the target company that may have an impact on the transaction's valuation, timing or structure. In the absence of a 'one size fits all' model, the scope should be fine-tuned depending on the business acquired. Clients may opt for full or limited scope reviews and request thorough investigations into matters that are critical to the target's business or that are of particular importance to the

industry involved.

The most complex and sophisticated deals are organised through auction bids. In these auctions, buyers are occasionally entitled to rely on vendor due diligence reports. These reports identify potential irregularities that may impair or delay the transaction's closing. In these cases, the scope of the review that the buyer's advisers conduct is substantially reduced and is focused on predefined key matters (confirmatory reports). Agreeing on specific materiality thresholds to assess the information and report any findings is also common.

Increasing pressure on fees and timing is affecting the scope of both types of due diligence reviews. Consequently, clients are keen to reduce the scope to a minimum, which has an impact on drafting and negotiating sale and purchase agreements.

Law stated - 10 August 2022

Liability for statements

Can a seller be liable for pre-contractual or misleading statements? Can any such liability be excluded by agreement between the parties?

A seller may be liable for pre-contractual misrepresentations; however, except when wilful or gross misrepresentations have been made, the parties may limit the seller's liability to claims for breach of contract, excluding liability for pre-contractual statements. This limiting of the seller's liability can be established in the purchase agreement.

Law stated - 10 August 2022

Publicly available information

What information is publicly available on private companies and their assets? What searches of such information might a buyer customarily carry out before entering into an agreement?

Portuguese companies must make a large number of filings to the competent commercial registry offices, which are publicly available online, including:

- the articles of association;
- amendments to the articles of association, including share capital increases and reductions, mergers, demergers, and the company's transformation and dissolution;
- the annual financial statements and management report;
- the appointment of directors and statutory auditors; and
- the transfer, unification, pledge, attachment, seizure and redemption of quotas of private limited liability companies.

Any person or entity may request a permanent certificate from a Portuguese company at any time. This permanent certificate allows the person or entity to view all registrations in force and the underlying documents entered into as a basis for the registrations.

Law stated - 10 August 2022

Impact of deemed or actual knowledge

What impact might a buyer's actual or deemed knowledge have on claims it may seek to bring against a seller relating to a transaction?

Information on the target company specifically disclosed to the buyer on or before signing of the transaction documents may restrict the buyer's right to terminate the agreement or seek compensation for breach of warranty on grounds of misrepresentation, provided that the facts, events or circumstances that constitute the basis of the buyer's right to terminate the agreement or seek compensation against the seller have been disclosed to it prior to closing of the transaction; hence, the buyer's knowledge of the facts and circumstances on which a claim is based on or before the closing date may, to some extent, exclude or limit the seller's liability for this claim, except where the claim is covered by a specific indemnity undertaking made by the seller, in which case the seller's liability shall not be excluded.

Law stated - 10 August 2022

PRICING, CONSIDERATION AND FINANCING

Determining pricing

How is pricing customarily determined? Is the use of closing accounts or a locked-box structure more common?

In share deals subject to Portuguese law, the purchase price is normally agreed in two ways, meaning that the parties agree on a fixed purchase price based on the last (audited) financial statements (locked box), or they agree on an initial price that would be subject to an adjustment based on closing accounts prepared with reference to the closing date.

Price adjustment mechanisms are usually agreed upon relating to specific target values on the closing date (eg, net debt and working capital), and the final purchase price would be the initial price plus or minus the purchase price adjustment. This protects the buyer from any value erosion in the company between signing and closing (to the extent that it has an impact on the purchase price through the price adjustment). On the contrary, locked-box mechanisms allow for a full or partial transfer of the risks to the buyer from the locked-box date, subject to the extent of the protective covenants agreed (eg, no-leakage, pre-completion undertakings and material adverse change).

Traditionally, price adjustment mechanisms based on closing accounts have often been used in Portugal; however, use of the locked-box mechanism has increased significantly in recent years. This is especially true in larger deals carried out through bid auctions or in regulated sectors. The nature of the buyers and sellers also plays an important role in selecting the final mechanism. Trade buyers and sellers are more reluctant to accept locked-box structures, whereas private equity funds and other institutional investors, especially on the sell side, generally avoid closing accounts, given the higher level of price uncertainty and risk of potential disputes.

Law stated - 10 August 2022

Form of consideration

What form does consideration normally take? Is there any overriding obligation to pay multiple sellers the same consideration?

There is no obligation to pay multiple sellers the same consideration, with the exception of public takeover offers (which are subject to specific regulation) and offers to squeeze out minority shareholders.

Law stated - 10 August 2022

Earn-outs, deposits and escrows

Are earn-outs, deposits and escrows used?

Earn-out covenants are normally agreed on when the seller and buyer's price expectations do not match, or there is potential upside valuation of the target based on events that are unpredictable or that the parties cannot control (eg, the outcome of material litigation proceedings that the target filed). Deposits are rarely used. Escrows are often used as security for claims for breach of warranties and no leakage undertakings.

Law stated - 10 August 2022

Financing

How are acquisitions financed? How is assurance provided that financing will be available?

Lending provided by banks and other credit institutions is still by far the most common way to finance M&A transactions. In the aftermath of the financial crisis that took place between 2009 and 2013, Portuguese banks, because of reduced liquidity and higher capital requirement factors, became less able to finance transactions. Consequently, overseas banks have played an increased role in the market. Alternative sources of funding are also sought, including direct lending from investment funds and other institutional investors. NewCos are generally funded through a combination of debt and equity. The final funding structure will depend on each transaction's specific structure.

Given the uncertainty surrounding whether the buyer is willing to secure finance for the transaction between signing and closing, sellers are usually reluctant to accept any condition precedent that subjects closing to the obtaining of finance. When the buyer makes the acquisition through a special purpose company incorporated to acquire the target shares at closing, the seller often requests the buyer to provide equity (and debt) commitment letters that will be conditional upon satisfaction of the conditions precedent established in the sale and purchase agreement.

Law stated - 10 August 2022

Limitations on financing structure

Are there any limitations that impact the financing structure? Is a seller restricted from giving financial assistance to a buyer in connection with a transaction?

Public limited liability companies in Portugal are prohibited from providing financial assistance to the acquisition of its own shares. This prohibition is drafted to the fullest extent possible and means that the target company cannot make loans, advance funds, grant security or offer funding to a third party to acquire or subscribe its own shares through any other means.

Whether the prohibition of financial assistance also applies to private limited liability companies by analogy has been subject to much debate. This is because there is no provision in the Companies Code establishing that these kinds of companies would also be subject to the same restriction.

Law stated - 10 August 2022

CONDITIONS, PRE-CLOSING COVENANTS AND TERMINATION RIGHTS

Closing conditions

Are transactions normally subject to closing conditions? Describe those closing conditions that are customarily acceptable to a seller and any other conditions a buyer may seek to include in the agreement.

In the vast majority of transactions, conditions precedent, or conditions to closing that must be satisfied before the closing date, are usually agreed on to accommodate any required regulatory approvals or waivers between signing and closing.

The most common conditions precedent that sellers are usually willing to accept include clearance from competition authorities, consents on non-opposition from other regulatory authorities in regulated markets (eg, banking and insurance) and waivers from counterparties in key agreements to existing change of control covenants (eg, financing agreements and lease agreements).

Examples of other conditions precedent that a buyer may push to be included in the agreement, but that a seller is usually reluctant to accept, are the non-occurrence of any material adverse change or the buyer's obtaining of external financial debt to fund the transaction.

Law stated - 10 August 2022

What typical obligations are placed on a buyer or a seller to satisfy closing conditions? Does the strength of these obligations customarily vary depending on the subject matter of the condition?

Typical obligations to satisfy conditions precedent include efforts obligations and cooperative obligations. Efforts obligations govern the level of effort and diligence that the buyer must use to fulfil the conditions precedent. 'Commercially reasonable efforts' is the standard level usually agreed to fulfil conditions precedent related to merger control or regulatory authorisations.

Cooperative obligations impose reciprocal obligations on both parties to cooperate in fulfilling the conditions precedent (eg, exchange of sensitive information and review of submissions to regulatory authorities).

'Hell or high water' covenants forcing buyers to do whatever it takes (as the appropriate regulatory authorities require) to fulfil the conditions precedent are uncommon because of their potentially detrimental effects on the buyer or target.

Law stated - 10 August 2022

Pre-closing covenants

Are pre-closing covenants normally agreed by parties? If so, what is the usual scope of those covenants and the remedy for any breach?

The use of pre-closing covenants is common in share deals and asset deals whenever closing is subject to certain conditions. The seller's undertakings could be in the form of affirmative (actions) or negative covenants (prohibitions). In transactions subject to mandatory competition clearance, those covenants should be carefully assessed to avoid the risk of gun jumping. The most common seller's interim obligations agreed in purchase agreements subject to Portuguese law are:

- to conduct the target's business in the ordinary course of business;
- to provide access to all the target's records, assets and facilities (this is expressly prohibited if the transaction is

subject to competition clearance (gun jumping));
- not to amend the target's corporate documents;
- not to alter the target's share capital;
- not to encumber the target's assets;
- to maintain the current insurance policies in force;
- to conduct the business in accordance with the applicable laws; and
- to ensure the target does not anticipate any account receivables or postpone any account payables.

A seller's breach of a pre-closing undertaking would normally entitle the buyer to make a claim for damages. Unlike a claim for breach of warranty, a claim for damages is not usually subject to limitation (eg, caps and baskets).

Law stated - 10 August 2022

Termination rights

Can the parties typically terminate the transaction after signing? If so, in what circumstances?

Termination rights after signing and before a negotiated long-stop date are uncommon; however, buyers may push to have the right to either terminate the agreement or reduce the purchase price before closing in cases where there was a breach of a warranty after signing or where there was a material adverse change. If the buyer decides to reduce the purchase price, the seller, if it does not agree with this change, typically has the right to terminate the contract.

Law stated - 10 August 2022

Are break-up fees and reverse break-up fees common in your jurisdiction? If so, what are the typical terms? Are there any applicable restrictions on paying break-up fees?

In the acquisition of privately held companies in Portugal, neither pre-agreed break-up fees (for the seller to compensate the buyer for transaction costs) nor reverse break-up fees (for the buyer to compensate the seller for abandoning the deal) are common. Most widely used provisions establish that each party must bear its own costs and expenses for the transaction's negotiation and consummation; however, if the target pays the break-up fees (and not the seller), the payment may fall under the prohibition of financial assistance rules.

Law stated - 10 August 2022

REPRESENTATIONS, WARRANTIES, INDEMNITIES AND POST-CLOSING COVENANTS

Scope of representations, warranties and indemnities

Does a seller typically give representations, warranties and indemnities to a buyer? If so, what is the usual scope of those representations, warranties and indemnities? Are there legal distinctions between representations, warranties and indemnities?

Sellers usually agree to provide buyers with a certain degree of protection, the extent of which is based on the selected number of representations, warranties and indemnities established in the transaction documents.

Typical representations and warranties that are given include:

- the seller's capacity and authority to enter into the agreement;

- title to shares (ie, legal and beneficial ownership of the shares);
- the target's incorporation and valid existence;
- the basis of preparation of the target's financial statements;
- the absence of any substantial or material changes to the assets' condition, liabilities and the business since the warranted financial statements' date;
- business-related issues concerning employees, properties, financial commitments, key agreements, litigation and intellectual property; and
- the accuracy, sufficiency and completeness of the information that the seller supplies to the buyer so that it can evaluate the transaction.

In Portugal, the terms 'representations' and 'warranties' are used interchangeably. They mean statements or promises that the underlying fact, event or circumstance given as a warranty is or will be true at a specific date. A warranty is a legal mechanism to share or allocate a contractual risk between the parties to a contract to reduce the disproportionate level of information between the buyer and the seller in a sale and purchase agreement.

Based on recent case law, the Portuguese Supreme Court, under the freedom of contract principle established in the Civil Code, acknowledged the parties' right to use this risk allocation mechanism. It further stressed that the breach of a warranty would not trigger a typical duty of indemnification; instead, the breach of a warranty would obligate the seller to compensate the buyer for the difference between the qualities or specific features warranted and the target's actual qualities or features.

An indemnity is an undertaking that a seller assumes under a sale and purchase agreement to compensate the buyer for losses or damages suffered. An indemnity would typically be negotiated if the buyer identifies certain risks during the due diligence review that may impair the target's valuation if they materialise (a buyer is typically prohibited from raising a warranty claim because of a matter it is aware of on the signing date). Rather than requesting a warranty from the seller or requesting the purchase price to be reduced, which could cause the seller to walk away from the deal, the buyer would typically request the seller to pay an indemnity in cases where the risks detected become effective damages.

Law stated - 10 August 2022

Limitations on liability

What are the customary limitations on a seller's liability under a sale and purchase agreement?

Customary limitations include:

- a maximum cap of liability (which can typically range from 10 to 30 per cent of the purchase price, depending on each party's negotiation bargaining power). Such caps would not typically apply to title warranties, which are normally subject to a cap equal to the purchase price;
- de minimis, where each individual claim must exceed a certain threshold or percentage of the purchase price to be accounted for;
- baskets, where the buyer can only claim the amount of the losses above a certain global threshold (insurance or franchise) or, once the threshold is reached, the buyer can claim for the full amount of the losses ('tipping basket'); and
- statute of limitation periods, usually agreed between 12 to 24 months, except for title warranties, warranties subject to higher legal statute of limitation periods (tax, employment, social security or environment) or indemnities, for which the parties often negotiate extended terms.

Law stated - 10 August 2022

Transaction insurance

Is transaction insurance in respect of representation, warranty and indemnity claims common in your jurisdiction? If so, does a buyer or a seller customarily put the insurance in place and what are the customary terms?

The use of transaction risk solutions that insurance companies provide to grant adequate protection in M&A transactions has become more common in recent years. This is especially true in more complex transactions or deals that are conducted through auction bids, where sellers look for clean exit strategies.

In negotiations on warranty and indemnity (W&I) insurance policies, the scope and the type of due diligence carried out by the buyer are vital, as well as the completion of a proper vendor due diligence. The latter must also be complemented by a detailed Q&A to be conducted by the buyer, and the scope of the audit must extend to matters or areas that are not encompassed in the vendor due diligence report following a gap analysis.

Typically, the insurance would cover losses that the buyer or target suffers because of a breach of certain pre-agreed warranties the seller makes in excess of the caps agreed for the seller's liability (generally at a lower amount).

The time to establish an insurance policy should be about three to four weeks.

The policy excludes recovery if the seller commits fraud or the buyer has actual knowledge of the breach, and in the event of lost profits. Costs are in the range of 2 per cent to 5 per cent of the liability cap agreed.

Negotiations with the insurance company and its advisers will have a decisive effect on the scope and constraints of the policy. The buyer's advisers play an important role and must seek to extend the scope of the W&I insurance policy and find alternatives in indemnity insurance policies for known contingencies.

Law stated - 10 August 2022

Post-closing covenants

Do parties typically agree to post-closing covenants? If so, what is the usual scope of such covenants?

Parties often agree to post-closing covenants to address transition matters, including confidentiality, non-compete and non-soliciting undertakings.

Law stated - 10 August 2022

TAX

Transfer taxes

Are transfer taxes payable on the transfers of shares in a company, a business or assets? If so, what is the rate of such transfer tax and which party customarily bears the cost?

Although the transfer of shares triggers no transfer taxes, real estate transfer tax may be levied upon the acquisition of shares of companies owning real estate at a rate of 6.5 per cent over the higher between the fiscal value and the book value of the property. If levied, taxation is borne by purchaser.

The transfer of a business as a going concern is not subject to value added tax (VAT), but may trigger stamp duty of 5

per cent. If levied, the stamp duty is borne by purchaser.

In other cases, where assets are transferred separately and not as a going concern, the transfer of assets is subject to VAT. The current standard VAT rate is 23 per cent.

As a rule, the acquisition of real estate is VAT-exempt, but triggers real estate transfer tax over the transfer value or the fiscal value of the property, whichever is higher. For residential property, progressive rates of up to 7.5 per cent apply. For other urban property, a 6.5 per cent flat rate applies, and for rural property, a 5 per cent flat rate applies. Except for individuals, a 10 per cent flat rate applies in all cases if the purchaser has a domicile in a 'blacklisted' jurisdiction or is, directly or indirectly, controlled by an entity with a domicile in a blacklisted jurisdiction.

The purchaser is also liable to stamp duty upon the acquisition of real estate, at a flat rate of 0.8 per cent, over the transfer value or the fiscal value of the property, whichever is higher.

Notwithstanding the above, Portuguese tax law sets forth several exemption regimes, which may apply, for example, regarding real estate transfer tax and stamp duty levied on transfers undertaken within business reorganisations, or regarding real estate transfer tax upon the acquisition of property for resale or for rehabilitation.

Law stated - 10 August 2022

Corporate and other taxes

Are corporate taxes or other taxes payable on transactions involving the transfers of shares in a company, a business or assets? If so, what is the rate of such transfer tax and which party customarily bears the cost?

The annual corporate income tax taxable income of resident entities engaged in business results from the accounting profit or loss of the year and certain positive and negative changes in equity not reflected in the profit or loss account, which is subject to certain adjustments in accordance with the corporate income tax law. This includes gains obtained upon disposals of shares, a business or assets.

The standard corporate income tax rate is 21 per cent.

A state surtax is also applicable over the annual taxable profit exceeding €1.5 million at progressive rates varying between 3 per cent and 9 per cent. Most municipalities also apply a municipal surtax at a rate of up to 1.5 per cent over the annual taxable profit.

Pursuant to the participation exemption regime, capital gains derived from the disposal of shares may under certain conditions benefit from a full corporate income tax exemption.

Under certain conditions, 50 per cent of the positive balance between capital gains and capital losses obtained upon disposal of certain other qualifying assets may be excluded from taxation in cases where the sales proceeds are reinvested in the acquisition of qualifying assets.

Non-resident companies are liable to corporate income tax under different rules, and may, in general, be liable to taxation upon disposal of shares in Portuguese companies, upon disposal of a local business or upon disposal of Portuguese real estate. In some cases, Portuguese-sourced income may, however, benefit from corporate income tax exemptions, which, under certain conditions, may be the case for capital gains derived from the transfer of shares of Portuguese companies.

Law stated - 10 August 2022

EMPLOYEES, PENSIONS AND BENEFITS

Transfer of employees

Are the employees of a target company automatically transferred when a buyer acquires the shares in the target company? Is the same true when a buyer acquires a business or assets from the target company?

A share deal does not trigger the transfer of employees or any specific employment issues, because the employing company remains the same.

Regarding the acquisition of a business or assets, the employment legal framework of the transfer of an undertaking is established by article 285 et seq of the Labour Code , which transposes Directive 2001/23/EC, which governs the approximation of the laws of member states relating to the perception of employees' rights in situations of transfers of businesses or undertakings, or of parts of a business or undertaking.

According to this regime, the transferee takes over the employment contracts on the transfer of a business and assumes the position of the transferor in such employment contracts.

For the purposes of protection by the transfer of undertaking regime, there must necessarily be a transfer of business or undertaking (ie, an economic unit or part of an economic unit (whether intangible or tangible) that constitutes an autonomous set of means), regardless of the cause or form of such transfer.

However, transferring employees have the right to oppose the transfer of their employment contracts by claiming that it can cause them 'serious harm' owing to the patent lack of solvency or the difficult financial situation of the buyer; or that they do not trust the work organisation policy of the acquirer of the business.

Transferred employees also have the right to terminate employment for cause after the transfer if one of the grounds established for the employees' right to opposition is verified. Employees who terminate the employment contract under those grounds are entitled to compensation.

Law stated - 10 August 2022

Notification and consultation of employees

Are there obligations to notify or consult with employees or employee representatives in connection with an acquisition of shares in a company, a business or assets?

Yes, in connection with an acquisition of a business or assets.

Both the transferor and the transferee must comply with the following information and consultation obligations to their respective employees before the transfer:

- written information to the employees or their representatives regarding the date and reasons for the transfer, as well as the legal, economic and social consequences of the transfer, any foreseen measures planned concerning the employees and the content of the agreement between transferor and transferee; and
- consultation with the employees or their representatives to obtain their agreement on any specific measures to be taken as a result of the transfer that may affect employment conditions.

Transferors with more than 50 employees must also notify the Authority for Work Conditions. This written notification must include information on the content of the agreement between the transferor and the transferee and all the

elements of an economic unit, if it is transferred.

Law stated - 10 August 2022

Transfer of pensions and benefits

Do pensions and other benefits automatically transfer with the employees of a target company? Must filings be made or consent obtained relating to employee benefits where there is the acquisition of a company or business?

The transferee is under an obligation to continue the employment relation under the same terms and conditions as the transferor including benefits to employees; however, the Labour Code does not establish express rules concerning the transfer of pension entitlements of employees under complementary social schemes.

Based on the terms and conditions of the employment relationship and in the absence of an express ruling on the protection of the employees' acquired rights under complementary social schemes, it is advisable to consider that the rights of the employees under a pension scheme will transfer together with the remaining employment conditions.

Under the transfer of the undertaking's regime, the transferor will be jointly liable with the acquirer for all credits related to the employment contract, its breach and its termination and for all social costs due until the date of transfer. This joint liability will be effective for a two-year period. Information and consultation obligations towards the regulatory authorities supervising pension funds may also apply.

Law stated - 10 August 2022

UPDATE AND TRENDS

Key developments

What are the most significant legal, regulatory and market practice developments and trends in private M&A transactions during the past 12 months in your jurisdiction?

In terms of market trends, and despite the covid-19 pandemic, there has yet to be a shift of the M&A market from being pro-seller to pro-buyer. In larger deals, there is a clear preference for locked-box price structures, particularly in competitive processes involving institutional players, such as pension, infrastructure and private equity funds. There has been a significant number of auctions with a large number of bidders, especially in trendy sectors involving regulated assets, where private equities, infrastructure funds, sovereign funds and limited partnerships compete for the best price.

In the mid-cap market and deals with a lower value, it is more difficult to attract institutional buyers and, therefore, to maintain competitive pressure. This has resulted in processes that started as auctions but later converted into bilateral deals, with or without exclusivity.

The competition is intense when it comes to certain assets and sectors (eg, energy, infrastructure and technology), mostly because in those sectors the earnings before interest, taxes, depreciation and amortisation and margins have not been compressed by the covid-19 pandemic, which provides more security to institutional players in respect of the expected returns.

The author would like to acknowledge, with thanks, the contributions of colleagues Pedro Marques Bom, from the competition and EU law department, Gonçalo Bastos Lopes, from the tax department, and Sandra Lima da Silveira, from the employment and social security department, in the preparation of this chapter.

Law stated - 10 August 2022

Jurisdictions

Australia	MinterEllison
Austria	Schoenherr
Belgium	Stibbe
Brazil	Campos Mello Advogados
Canada	Bennett Jones LLP
China	Haiwen & Partners
Denmark	Gorrissen Federspiel
Dominican Republic	Guzmán Ariza
Egypt	Soliman, Hashish & Partners
Finland	Waselius & Wist
France	Davis Polk & Wardwell LLP
Georgia	MG Law Office
Germany	Gleiss Lutz
Greece	Karatzas & Partners Law Firm
Hong Kong	Davis Polk & Wardwell LLP
Indonesia	Makes & Partners
Israel	Naschitz Brandes Amir
Italy	Legance - Avvocati Associati
Japan	TMI Associates
Latvia	VILGERTS
Luxembourg	Stibbe
Malaysia	Foong and Partners
Myanmar	Myanmar Legal MHM Limited
Netherlands	Stibbe
New Zealand	Hesketh Henry

Philippines	Zambrano Gruba Caganda & Advincula
Portugal	Cuatrecasas
Romania	MPR Partners
Serbia	Stankovic & Partners NSTLaw
Singapore	WongPartnership LLP
South Korea	Bae, Kim & Lee LLC
Spain	Uría Menéndez
Sweden	Vinge
Switzerland	Homburger
Turkey	Turunç
United Kingdom	Davis Polk & Wardwell LLP
USA	Davis Polk & Wardwell LLP
Zambia	Dentons Eric Silwamba Jalasi & Linyama