

Mergers and Acquisitions Report **2016**

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Section 1: GENERAL OUTLOOK

1.1 What have been the key recent M&A trends or developments in your jurisdiction?

In the midst of a frail recovery, political uncertainty and the shock-waves of two bank resolutions, Portuguese public M&A deals have faced significant challenges. As an overall trend, Portuguese ownership of public companies continues to erode.

1.2 What is your outlook for public M&A in your jurisdiction over the next 12 months?

2016 will remain a time of opportunities and will be as dynamic as preceding years. High-profile M&A is expected to continue. We would draw attention in particular to the consolidation in the banking sector. Following the purchase of Banif by Santander, Spanish banks are said to be looking to expand into Portugal, in the context of a resumed Novo Banco sale process, or through acquisitions of other privately-owned Portuguese banks. The deleveraging of Portuguese banks is expected to give rise to a number of important restructuring and distressed assets deals.

Section 2: REGULATORY FRAMEWORK

2.1 What legislation and regulatory bodies govern public M&A activity in your jurisdiction?

In addition to general corporate law, public M&A is governed by the Portuguese Securities Code (PSC) and ancillary legislation. The Portuguese Securities Market Commission (*Comissão do Mercado de Valores Mobiliários*, or the CMVM) regulates public M&A. Depending on the companies involved, other laws may apply.

2.2 How, by whom, and by what measures, are takeover regulations (or equivalent) enforced?

The CMVM has a broad range of supervisory powers to enforce public M&A rules, notably takeovers.

Section 3: STRUCTURAL CONSIDERATIONS

3.1 What are the basic structures for friendly and hostile acquisitions?

There is no legally prescribed difference. The PSC generally provides the regime applicable to public takeovers, but does not take into account whether the takeover is friendly or hostile. A takeover will be friendly or hostile based not on legal criteria, but on the position assumed by the target and/or its shareholders. The legal structure for the acquisition will not be impacted.

3.2 What determines the choice of structure, including in the case of a cross-border deal?

The main drivers for structuring public M&As are typically linked to the purposes of the transaction and to whether the target acts in a regulated sector. Tax-related considerations are also always in play.

3.3 How quickly can a bidder complete an acquisition? How long is the deal open to competing bids?

Given all the potential variables, it is difficult to provide a clear indication on how quickly a bidder can complete an acquisition. The law establishes certain deadlines that are important guidelines. The offeror should publicly disclose a preliminary announcement immediately after it decides to make

the offer. After publication of the announcement, the bidder has 20 days to request the CMVM to register the offer. Afterwards, the CMVM must decide within eight days (this is suspended if more information is required). However, if the offer is subject to conditions, such as antitrust clearance or the removal of a voting cap, the deadlines above are suspended until the relevant conditions are met. Finally, the offer period may last between two to eight weeks. The CMVM may extend this under certain conditions, notably before a competing bid.

Upon publication of a preliminary announcement, any other public offer over the same category of shares is subject to the rules on competing bids. Competing bids have to be launched by the fifth day before the term of the first offer. Following that, the terms of both offers shall in principle be adjusted so as to run in parallel.

3.4 Are there restrictions on the price offered or its form (cash or shares)?

The price of public takeovers may consist of cash, securities (issued or to be issued), or a combination of both. If cash is offered, the offeror must deposit it with a credit institution or provide a bank guarantee. If the price consists of securities, these must have the appropriate liquidity and be easily valued.

Specific requirements apply to competing bids and to mandatory bids.

3.5 What level of acceptance/ownership and other conditions determine whether the acquisition proceeds and can satisfactorily squeeze out or otherwise eliminate minority shareholders?

The level of acceptance/ownership is only relevant if the offeror has expressly made the offer conditional upon a minimum amount.

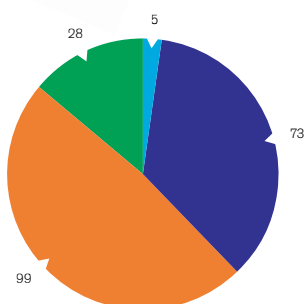
A squeeze out mechanism is provided for under the PSC if, following a general takeover bid, the bidder acquires 90% or more of the total voting rights in the target and 90% of the voting rights which are the object of the takeover bid. During the three months following calculation of the offer results, minority shareholders have a sell-out right. In these cases, special provisions on price apply, similar to those applicable to mandatory bids.

3.6 Do minority shareholders enjoy protections against the payment of control premiums, other preferential pricing for selected shareholders, and partial acquisitions, for example by mandatory offer requirements, ownership disclosure obligations and a best price/all holders rule?

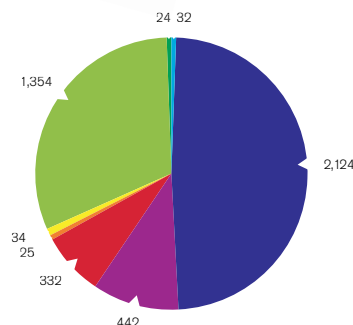
The PSC provides for a mandatory takeover mechanism, which allows minority shareholders to exit if there is a change in control. In particular, there is an obligation to launch a public offer over all the shares of the target once the relevant entity acquires (directly or indirectly) one third or half of the voting rights. Where the former threshold is crossed, the obligation may be set aside to the extent that the shareholder evidences it is unable to exercise control over the company. The only exemptions if the 50% threshold is crossed are where (i) the threshold is surpassed as result of a prior public offer over all shares of the target; (ii) in the context of financial restructuring measures; or (iii) in the context of mergers, subject to certain conditions. The PSC requires the disclosure of qualified holdings (starting at two percent). These are calculated on the basis of rules for aggregation of voting rights.

dealogic

OUTBOUND



INBOUND



NB only deals with publicly disclosed values are represented in the charts and infographics

- Consumer products
- Energy and natural resources
- Financial services and investment management
- Healthcare
- Leisure and hospitality
- Industrial goods
- Professional services
- Infrastructure and public services
- Telecoms, media and technology

3.7 To what extent can buyers make conditional offers, for example subject to financing, absence of material adverse changes or truth of representations? Are bank guarantees or certain funding of the purchase price required?

Voluntary public offers may be subject to conditions that correspond to the bidder's legitimate interests and do not affect the regular functioning of the market and the verification of which is not dependent upon or within the control of the bidder. In general, mandatory public offers may not be subject to conditions.

Section 4: TAX CONSIDERATIONS

4.1 What are the basic tax considerations and trade-offs?

The main taxation issues around public M&A relate to capital gains derived from the transfer of assets, such as shares in listed companies. From the bidder's perspective, the main concerns are associated with the tax efficiency of the ownership structure. When financing is involved, the structure will also look at efficient ways to avoid tax leakage. This may include, particularly in cross-border deals, the issuance of notes to benefit from a special tax regime which allows, subject to certain conditions, a withholding tax exemption.

4.2 Are there special considerations in cross-border deals?

See 4.1.

Section 5: ANTI-TAKEOVER DEFENCES

5.1 What are the most important forms of anti-takeover defences and are there any restrictions on their use?

In this respect, practice is in line with other European jurisdictions. Usually preventive measures are applied as well as reactive measures. However, regarding reactive measures it should be noted that the target board's scope of action is limited to day-to-day management after it becomes aware of the takeover, to ensure there are no significant changes to the target's financial position (the so-called neutrality rule). Also, the target's board must issue a

report on the merits of the offer, which may be used to influence the outcome of the takeover.

5.2 How do targets use anti-takeover defences?

Without prejudice to the neutrality rule, the board of directors may still use anti-takeover defences, even going beyond day-to-day management actions, to the extent such measures are approved by a supermajority at a general shareholders meeting. Even without shareholder approvals, the target board may always seek a competing bidder.

5.3 Is a target required to provide due diligence information to a potential bidder?

No, bidders can only rely on publicly available information. However, the CMVM has issued guidelines requiring that, in the context of competing bids, all bidders be treated equally, particularly in relation to levels of information.

5.4 How do bidders overcome anti-takeover defences?

Bidders may request a general meeting to try to eliminate anti-takeover defences, if they have shares amounting to two percent of the share capital. This is typically the case for removing voting caps.

5.5 Are there many examples of successful hostile acquisitions?

Although there have been no successful hostile acquisitions, there have been the following attempts: BCP over BPI, in 2006; Sonae over Portugal Telecom, in 2006; CSN Cement over CIMPOR, in 2009/2010; Terra Peregriin over Portugal Telecom, in 2014; CaixaBank over BPI in 2015.

Section 6: DEAL PROTECTIONS

6.1 What are the main ways for a friendly bidder and target to protect a friendly deal from a hostile interloper?

The law does not establish specific protection mechanisms. In practice, these arrangements may include: voting caps; lock-ups; strategic partnerships; or irrevocable sell commitments by aligned shareholders. Subject to the considerations in 6.2, to the extent there has been a previous negotiation, the target and bidder may also agree a break-up penalty clause.

6.2 To what extent are deal protections prevented, for example by restrictions on impediments to competing bidders, break fees or lock-up agreements?

Deal protections are subject to scrutiny under general Portuguese corporate law and, particularly, under the fiduciary duties owed by the target's board members. Moreover, to the extent agreed after the offer launching the neutrality rule also applies.

Section 7: ANTITRUST/REGULATORY REVIEW

7.1 What are the antitrust notification thresholds in your jurisdiction?

Under the Portuguese Competition Act, a concentration is subject to prior notification to the Portuguese Competition Authority (PCA) if one of the following conditions is met:

- a market share equal to or greater than 50% of the market in a product or service, or in a substantial part of it, is acquired, created or reinforced;
- a market share equal or greater than 30% but smaller than 50% of the market in a product or service, or in a substantial part of it, is acquired, created or reinforced and the individual turnover in Portugal in the previous year of both the purchaser and the target exceeds €5 million (\$5.6 million) net of taxes directly related to the turnover;
- the purchaser and target have reached an aggregate turnover in Portugal in the previous year greater than €100 million, net of taxes directly related to the turnover, as long as the turnover in Portugal of both the purchaser and target exceeds €5 million.

7.2 When will transactions falling below those thresholds be investigated?

Such transactions will not be investigated under the merger control rules.

7.3 Is an antitrust notification filing mandatory or voluntary?

If one of the thresholds in 7.1 is met.

7.4 What are the deadlines for filing, and what are the penalties for not filing?

There is no mandatory deadline, but it shall take place:

- after the parties conclude an agreement and prior to its implementation;
- following the preliminary announcement of a public offer;
- following the announcement of the acquisition of a controlling shareholding in a listed company;
- If a concentration results from a public procurement procedure, after a definitive tender selection and before the public contract is executed.

Failure to comply with notification duties is an administrative offence punishable with a fine of up to 10% of the turnover of each of the undertakings concerned in the year preceding the final decision by the PCA. Also, the PCA may impose a periodic penalty payment up to five percent of the average daily turnover in the year preceding the decision for every late payment day, from when the notification was to be filed.

7.5 How long are the antitrust review periods?

The PCA must conclude proceedings within 30 working days after the notification becomes effective. If the PCA opts for an in-depth investigation, it must be concluded within 90 working days after the notification becomes effective. The PCA can extend this up to 20 working days at the request, or with the agreement, of the notifying party. The deadline for a decision may be extended for 20 working days if remedies are offered.

7.6 At what level does your antitrust authority have jurisdiction to review and impose penalties for failure to notify deals that do not have local competition effect?

If one of the thresholds mentioned in 7.1 is met, the PCA has jurisdiction to review deals and impose penalties.

7.7 What other regulatory or related obstacles do bidders face, including national security or protected industry review, foreign ownership restrictions, employment regulation and other governmental regulation?

There are no constraints on foreign investment. If the target acts in a regulated sector, acquisition of qualified holdings may be subject to approval by the sector regulator.

Section 8: ANTI-CORRUPTION REGIMES

8.1 What is the applicable anti-corruption legislation in your jurisdiction?

The legal framework is included in the Criminal Code and in special legislation.

8.2 What are the potential sanctions and how stringently have they been enforced?

The guilty party will be subject to criminal penalties, varying from a fine to imprisonment. The application of sanctions in the context of public M&A due to corruption is uncommon.

Section 9: OTHER MATTERS

9.1 Are there any other material issues in your jurisdiction that might affect a public M&A transaction?

The current legal framework should not constitute an obstacle to successful public M&A. The PSC is substantially in line with EU directives, so international investors will not face material local specificities.



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André Figueiredo is a partner and the head of capital markets at PLMJ. He has significant and diverse experience in large-scale, complex capital markets and corporate finance transactions, both in the equity segment (IPOs, rights issues, block sales) and in the debt segment (including sovereign debt, structured debt and securitisation). He has been involved in numerous cross-border financing operations, including high-yield bonds and preference share issues, as well as advising on restructuring and insolvency matters. This includes his recent work advising investors in shares, bonds and commercial paper issued by the Espírito Santo Group companies. He regularly advises on both transactional and regulatory aspects of equity derivatives transactions involving Portuguese listed securities. In addition, he pursues an academic career, having earned a PhD in securities law from Universidade Nova de Lisboa, where he teaches securities and finance law. He has authored several articles and legal books in the fields of securities and finance law, and is a regular speaker at industry and academic conferences.



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