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CHAMBERS GLOBAL PRACTICE GUIDES

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# Technology M&A 2023

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**Portugal: Law & Practice**

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and Leonor Melo Bento  
PLMJ

## Law and Practice

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## 1. Market Trends

### 1.1 Technology M&A Market

The mergers and acquisitions market has not experienced any significant downturn in the last 12 months. However, given the current economic backdrop and prospects, there appears to be a shift from a sellers' market with very high liquidity to a more balanced market. Recent market conditions have prompted investors to make quick investments and, in general, sellers have had an advantage in negotiations. Considering the rise in interest rates and the high cost of capital, investors are becoming cautious and selective, and are taking more time to analyse opportunities and to do their due diligence. This may impact the pace of mergers and acquisitions deals in the near future.

## 2. Establishing a New Company, Early-Stage Financing and Venture Capital Financing of a New Technology Company

### 2.1 Establishing a New Company

Typically, if the new start-up's base of operations is in Portugal, that is where entrepreneurs (Portuguese or foreign) will seek to incorporate the company. Compared to other EU jurisdictions, the incorporation of a new company in Portugal is a quick and simple process. The process can be completed within two to three weeks. The initial capital requirement for the incorporation of a limited liability company by quotas (*sociedade por quotas*) (LLCQ) is EUR1 (for companies with a single quotaholder) and EUR2 (for companies with two quotaholders). The initial capital requirement for incorporating a limited liability company by shares (*sociedade anónima*) is EUR50,000.

### 2.2 Type of Entity

As a rule, entrepreneurs are advised to establish an LLCQ at an early stage, since the initial capital requirements are lower and the corporate structure and governance are less complex.

### 2.3 Early-Stage Financing

The early-stage financing available in Portugal takes many forms and involves a variety of investors. These include business angels, Portuguese venture capital funds (some of which are sponsored by government-sponsored funds and the European Investment Fund) and foreign venture capital funds. Funding is also available through seeding and acceleration programmes (such as Fábrica de StartUps or StartUp Lisboa, as well as international accelerators such as Techstars). Typically, investments are made in exchange for equity or convertible instruments, so the underlying documentation is a standard term sheet that contains the general terms and conditions of the long form investment documents. Examples include SAFEs and CLAs in the case of convertibles, and investment and shareholder agreements in the case of equity.

### 2.4 Venture Capital

Please see **2.3 Early-Stage Financing**. Portuguese venture capital as well as government-sponsored funds are available in Portugal, and foreign venture capital firms are investing here increasingly and actively as well. The fact that Portugal is one of the largest tech and start-up hubs in Europe – the Web Summit is held in Lisbon and there are now six unicorns with Portuguese DNA – has attracted the attention of foreign tech investors. Additionally, there was a recent bill to support and promote R&D companies, especially start-ups and scale ups, which, among others, provides for tax benefits applicable to the stock options granted by start-ups.



## 2.5 Venture Capital Documentation

Contrary to the UK and USA, which have standard model legal documents, for venture capital funding established by the BVCA and NVCA, Portugal does not have such guidelines. Even so, Portuguese market practices closely follow international market standards and developments, from seed to late stage.

## 2.6 Change of Corporate Form or Migration

A new start-up company is usually incorporated in Portugal as an LLCQ, as described in **2.1 Establishing a New Company** and **2.2 Type of Entity**. As the start-up grows and attracts more investors, the LLCQ will generally transform into an LLC, which will be able to issue certain types of securities, including warrants convertible into shares, have a more sophisticated governance structure, have the possibility of an initial public offering (IPO), which is not possible with LLCQs. There have been instances where a holding company may be incorporated in a foreign country for fundraising purposes (eg, the US or UK), while keeping the operational/subsidiary company in Portugal.

## 3. Initial Public Offering (IPO) as a Liquidity Event

### 3.1 IPO v Sale

Portuguese capital markets have not been very active in terms of IPOs of Portuguese start-ups, so investors should expect a sale process instead of an IPO. As to dual-track processes, and although it is something that the Portuguese market and its players are aware of as a possible option, the choice between a sale and an IPO is usually made at the outset.

## 3.2 Choice of Listing

A company's decision to list in a particular country will depend on its characteristics: a company with a global profile and market may choose a country with an internationally recognised market (eg, Farfetch is currently based in London and listed in New York) while other companies may still prefer to list in Portugal. For example, Greenvolt, a company in the renewable energy industry, had its IPO on Euronext Lisbon in 2021.

## 3.3 Impact of the Choice of Listing on Future M&A Transactions

If a company chooses to list on a foreign exchange this could affect feasibility of a future sale since some jurisdictions apply a squeeze-out mechanism based on the country in which the company is listed and others based on where its registered office is located, which means that sometimes neither regime applies. In a previous situation, which involved a takeover of a Portuguese company listed in Spain where none of the squeeze-out mechanisms were expressly applicable, an ad-hoc mechanism was agreed between the two regulators to allow minorities to exit the company, should the takeover be successful (it did not occur).

## 4. Sale as a Liquidity Event (Sale of a Privately Held Venture Capital-Financed Company)

### 4.1 Liquidity Event: Sale Process

Even though both sale processes are usual, the auction/competitive process is typically launched when the transaction has a relevant/higher magnitude that justifies the underlying costs and when the seller has specific timings in mind for the execution of the sale. Additionally, the auction/competitive process can be used by

the sellers to pressure the potential buyers and obtain better terms for the sale.

## 4.2 Liquidity Event: Transaction Structure

A sale chosen as a liquidity event is normally a sale of the majority of the share capital of the start-up company or a sale of all founder stock. In this scenario, venture capital (VC) investors have all sorts of typical exit options, including right of first refusal, drag-along, and tag-along, and the sale of the entire company or the maintenance of the VC investors as shareholders will depend on the VC's and buyer's will.

## 4.3 Liquidity Event: Form of Consideration

Most transactions in Portugal are done as sale of the entire company for cash. Stock-for-stock transactions are not very common in this jurisdiction.

## 4.4 Liquidity Event: Certain Transaction Terms

Founders together with the start-up company are usually expected to stand behind representations and warranties and certain liabilities after closing. As a general rule, VC investors are only required to provide fundamental warranties, such as title and capacity. In Portugal, escrow/hold-back or representations and warranties insurance is not customary for VC transactions, but it is sometimes required by early-stage investors.

# 5. Spin-Offs

## 5.1 Trends: Spin-Offs

In general terms, spin-offs are a common mechanism in this jurisdiction to separate and ring-fence a specific business unit. The key drivers for a spin-off are normally the separation and isolation of a specific business unit with its sub-

sequent development and specialisation through its own focussed management and specialist employees.

## 5.2 Tax Consequences

Portuguese tax law provides for a special tax neutrality scheme for certain operations performed as part of group reorganisations, including all types of demerger, merger and demerger-merger (and asset transfers). Consequently, spin-offs can generally be structured as a tax-free transaction both at the corporate and shareholder levels, provided that the applicable conditions, requirements and formalities are met.

Among other conditions, this scheme applies only to operations performed for sound economic reasons, ie, for reasons other than tax avoidance. In broad terms, more practical tax requirements require that the assets and liabilities transferred must maintain their tax value, while shareholders must also maintain, for tax purposes, the original acquisition value of the shareholdings, as well as the original acquisition dates. Demergers or asset transfers usually involve the transfer of autonomous business units.

## 5.3 Spin-Off Followed by a Business Combination

A spin-off immediately followed by a business combination is possible and it is one of the types of spin-offs that are permitted under Portuguese law (*cisão-fusão*). The key requirements are the preparation of a demerger-merger plan (*projeto cisão-fusão*), its registration and publication, and its subsequent approval by each of participating companies' shareholders followed by the definitive registry.

## 5.4 Timing and Tax Authority Ruling

Typically, a spin-off takes between two and three months to complete, taking into account

the preparation and submission of the necessary corporate documents and the observance of legal interim periods, such as the deadline for creditors to oppose the transaction. The spin-off of a company does not require a ruling from the tax authority.

## 6. Acquisitions of Public (Exchange-Listed) Technology Companies

### 6.1 Stakebuilding

The acquisition of stake in a public company in your jurisdiction prior to making an offer depends on the target's shareholder structure as well as the transaction structure. This is usually considered as one of the transaction structure options, as it may allow the acquisition of initial stake at a cheaper price and limit the size of the offer. However, it also has disadvantages to consider, such as setting a minimum price for the offer.

The minimum reporting threshold in accordance with the takeover directive as implemented in Portugal is 5% of voting rights. Disclosure of the purpose of the acquisition and other similar information is required only when a takeover bid is launched, and not when minority stakes are disclosed.

### 6.2 Mandatory Offer

There is a mandatory offer threshold of  $\frac{1}{3}$  and 50% of voting rights.

### 6.3 Transaction Structures

The most common types of acquisitions and mergers are takeovers and mergers. There are not many merger precedents, but the two most significant precedents are related to the technology sector.

### 6.4 Consideration; Minimum Price

Please see 6.3 Transaction Structures. The use of cash in merger transactions is subject to strict restrictions. The minimum price requirements is applicable to mandatory takeovers, generally in line with the takeover directive. The consideration for a mandatory takeover may not be less than the highest of the following amounts:

- The highest price paid by the offeror, or by any individuals involved in some of the situations of acting in concert or attribution of voting rights, for the acquisition of securities of the same class, in the six months before the publication of the preliminary offer announcement.
- The weighted average price of these securities verified in a regulated market during the same period.

Even if the offer is compliant with the minimum consideration rules for a mandatory bid referred to above, the regulator (CMVM) is entitled to appoint an independent auditor to set the minimum price if it considers the consideration unequitable or unjustified. Contingent value rights are not common in this type of transaction.

### 6.5 Common Conditions for a Takeover Offer/Tender Offer

The most common conditions are regulatory and competition clearances (conditions to launch) and success conditions (conditions to complete). The acceptance condition is usually to acquire at least more than 50% of the shares of the company. Regulators usually look carefully at unusual conditions and restrict conditions that depend on the offeror. In addition to conditions, the offer is usually also subject to assumptions relating to the absence of material adverse changes in the target or market, etc.

## 6.6 Deal Documentation

Transaction agreements in connection with the takeover offer or business combination are not very common considering the legal restrictions and implications, including the Market Abuse Regulation, which may require disclosure to the market, and acting in concert provisions that may trigger aggregation of voting rights between the parties.

## 6.7 Minimum Acceptance Conditions

The most common is more than 50% of the voting rights, as explored in **6.5 Common Conditions for a Takeover Offer/Tender Offer**.

## 6.8 Squeeze-Out Mechanisms

The threshold is 90% of voting rights, further to a tender offer. The offeror may acquire the remaining shares within three months at the price offered in the bid.

## 6.9 Requirement to Have Certain Funds/ Financing to Launch a Takeover Offer

Funds must be provided by deposit, bank guarantee, or other similar means accepted by the regulator in order to launch the offer.

## 6.10 Types of Deal Protection Measures

The general rule is that directors need to act in the interest of the company and that the offerors (if there are competing offers) need to be treated equally. Break-up fees are increasingly used in private mergers and acquisition transactions but not in takeovers. In the case of mergers, the board necessarily needs to take the transaction to the general meeting for approval. In general, Portuguese law is more restrictive in measures that would negatively affect the deal, for example, the board is generally subject to the stand still rule during an offer, than to protect it.

## 6.11 Additional Governance Rights

From a capital markets perspective there is no specific information on this topic.

## 6.12 Irrevocable Commitments

It is common to have statements from major shareholders confirming whether they will sell in the offer and whether they support the transaction. These commitments may have certain caveats/conditions including in relation to competing bids.

## 6.13 Securities Regulator's or Stock Exchange Process

CMVM needs to approve the prospectus and register the offer. The offeror needs to submit a draft prospectus within 20 days of the preliminary announcement of the offer. The CMVM then has eight days to review the offer documentation, but in practice this is an interactive process that will take several weeks. If the offer is subject to conditions to launch, these may delay the process for several months. A competing offer may only be launched up to the fifth day before of the end of the first offer period and both offer periods must finish in the same date, so adjustments to the calendar may be required. These competing offers rules and, in particular, the required calendar as described above only came into force this year and has not been applied in practice to date.

## 6.14 Timing of the Takeover Offer

It is typical for parties to obtain regulatory and competition clearances between announcement and launch. In fact, these are usually conditions to launch. Hence, they do not usually impact the offer period length. The revised takeover rules include a six-month general deadline for the entire takeover process, which can be extended if authorised by the regulator.



## 7. Overview of Regulatory Requirements

### 7.1 Regulations Applicable to a Technology Company

The regulation will depend on the type of technology industry at stake. For example, the set-up and start of operations of Information and Communications Technology (ICT) companies in Portugal in sectors such as the media and electronic communications is subject to specific regulations. ANACOM (the National Communications Authority) and the Portuguese Regulatory Authority for the Media (ERC – Entidade Reguladora para a Comunicação Social) are the regulatory bodies involved in the approval of provision of media (radio and television broadcasting) or electronic communications networks and services.

Companies present in the market with offers that fall under the category of electronic communications networks and/or services must undergo certain procedures to provide their networks/services. If the provision of the latter does not require spectrum or numbering resources, companies may start operating immediately after notifying ANACOM of their intention to provide those networks or services, in accordance with the procedure set out in the relevant Regulations. If the provision of the network or service requires radio frequencies or numbering resources subject to licensing/rights of use, licensing may take up to eight months (in the case of spectrum) or 30 business days (for numbering resources) to obtain.

Television activity is subject to licensing, by means of a public tender, launched by the government, when the use of radio spectrum is required, and the service consists of:

- the organisation of unconditional access television programme services; and
- the selection and aggregation of television programme services of conditional access or non-conditional access with subscription.

In such circumstances, the licence may take up to eight months to obtain.

If the provision of television services consists in the organisation of television programme services that:

- do not require the use of radio spectrum intended for broadcasting; and
- are intended to be included in the offer of a distribution operator previously licensed for television activity, it is subject to authorisation, at the request of interested parties.

There is no specific deadline established for the issuance of the ERC's approval.

### 7.2 Primary Securities Market Regulators

The CMVM is Portugal's primary securities market regulator for public mergers and acquisitions transactions.

### 7.3 Restrictions on Foreign Investments

The Portuguese Government may exceptionally oppose investments made by residents outside the European Union (EU) or the European Economic Area (EEA) or by legal entities directly or indirectly controlled by residents outside the EU or EEA, or those that directly or indirectly allow direct or indirect control over strategic assets that are defined as key infrastructures or assets related to defence and national security or to the provision of essential services in the energy, transportation or communications sectors.

There is no mandatory notification procedure. Nonetheless, the prospective buyer may, on a voluntary basis, request an ex-ante confirmation that an opposition decision will not be adopted. If the government does not begin an assessment procedure within 30 business days of the date of the request, a non-opposition decision is deemed to have been tacitly adopted.

Unless an ex ante confirmation is requested, a review of the transaction can be conducted by the government ex officio within 30 business days of the conclusion of the transaction or the date it becomes public. This ex officio procedure is not suspensory, however if an opposition decision is adopted, all legal acts and transactions relating to the transaction in question will be considered null and void.

## 7.4 National Security Review/Export Control

There are no foreign capital entry restrictions and Portuguese law does not allow any discrimination between investments based on nationality. In fact, the Portuguese legal framework is in line with the EU guidelines (except for Russian investment restrictions as sanctions following the war in Ukraine), which point to non-discrimination of investment on the grounds of nationality. Therefore, the Portuguese legal framework encourages foreign investments.

There are also no export control regulations in the jurisdiction.

## 7.5 Antitrust Regulations

Takeover offers are reportable to the Portuguese Competition Authority where they determine a change of control in the target company and meet one of the following criteria: the transaction creates or reinforces a market share in excess of 50%; the transaction creates or reinforces

a market share in excess of 30% and each of the parties achieves a turnover of at least EUR5 million in Portugal; the parties to the transaction achieve a combined turnover of at least EUR100 million in Portugal and each of the parties achieves a turnover of at least EUR5 million in the country.

## 7.6 Labour Law Regulations

In the case of a transfer of undertaking, the employment contracts are automatically transferred to the new employer by operation of law. The transferor and the acquirer must inform the employees' representative body, in writing, of the date, the reasons and consequences of the transfer for the employees, and the measures to be taken (if any) concerning the employees. They must also begin a consultation period with the employees' representative body to reach an agreement on the measures to be applied to the employees as a result of the transfer. The acquirer will be responsible for all employment obligations that arose prior to the transfer date. Employees have the right to oppose the transfer of their employment contracts where they have reasonable grounds to believe that the transfer could cause them serious harm.

## 7.7 Currency Control/Central Bank Approval

There is no currency control regulation or central bank approval for a mergers and acquisitions transaction, except when it comes to regulated entities.

## 8. Recent Legal Developments

### 8.1 Significant Court Decisions or Legal Developments

Litigation in mergers and acquisitions and technology is mostly subject to arbitral courts reso-

lution and since arbitral decisions are not public, there is no significant public court decision related to technology mergers and acquisitions.

## 9. Due Diligence/Data Privacy

### 9.1 Technology Company Due Diligence

When providing information regarding technology companies, it is important to determine if the company has certain statutory or compliance rules in place (eg, ISO 27001 certification), which may prevent disclosure of specific information to external parties.

From a capital markets perspective, the same level of information must be provided to all bidders. Moreover, the Market Abuse Regulation applies and therefore no inside information should, in principle, be shared with bidders (some exceptions may apply). Inside information consists of information that has not been made public and relates, directly or indirectly, to the target or a financial instrument, and would likely to have a significant impact on the prices of those financial instruments or on the prices of related derivative financial instruments if it were made public.

If any inside information is shared, the receivers of that information cannot trade the shares or other financial instruments of the target until such information is made public or is no longer relevant.

Sharing commercially sensitive information may create competition law concerns where the public company is competing with a bidder or with more than one bidder. In such cases, commercially sensitive information regarding current or future prices, volumes, rebates, or any other commercially sensitive information should only be shared between advisors.

### 9.2 Data Privacy

If the due diligence requires transfer of data to countries outside the EU/EEA, the disclosing and receiving parties must adopt the Standard Contractual Clauses to provide appropriate safeguards for such transfers pursuant to the EU's General Data Protection Regulation (GDPR). Furthermore, disclosure of personal data must be done in accordance with the GDPR regarding the purpose and basis for the processing of personal data, principle of minimisation and information to provide to data subjects.

In addition, if the technology company operates a critical digital infrastructure, access to personal data during the due diligence cannot compromise the security of network and information systems of the company.

## 10. Disclosure

### 10.1 Making a Bid Public

The takeover bid is announced through a preliminary announcement, which must be disclosed as soon as a decision is taken to bid. Up to that moment, all persons involved in the process have a legal obligation of non-disclosure.

### 10.2 Prospectus Requirements

In general, a prospectus is required for the issuance of shares in a stock-for-stock takeover offer or business combination, but there may be exemptions in accordance with the Prospectus Regulation or if another document containing the relevant information is available.

### 10.3 Producing Financial Statements

There is a requirement that the IFRS-EU statement be prepared within the jurisdiction.

## 10.4 Disclosure of Transaction Documents

In a takeover bid, the offer documents (preliminary announcement, prospectus, and possibly other ancillary documents) are submitted to the CMVM for publication, as are the results of the offer.

## 11. Duties of Directors

### 11.1 Principal Directors' Duties

Directors are generally bound by two fundamental duties — the duty of care and the duty of loyalty. They must fulfil these duties diligently, in good faith and for the company's benefit, taking into account the interests of the shareholders, employees, creditors and other stakeholders.

### 11.2 Special or Ad Hoc Committees

In a limited liability company (LLC), the board may establish an executive committee to which certain management powers will be delegated as well as specialised committees. In the case of listed companies, the most typical specialised committees are on corporate governance, remuneration/evaluation and appointment matters, as recommended by the Portuguese Corporate Governance Code. In certain regulated sectors, specialised committees (such as remuneration, risk and selection committees) are also required.

The shareholders may, in turn, create and appoint a remuneration committee, which will be responsible for establishing and managing the remuneration policy for the company's corporate bodies, including the directors.

### 11.3 Board's Role

The board is generally not limited to a recommending role and can be actively involved in the negotiations. However, in the case of a takeover, which is launched over a listed company, the Portuguese Securities Code provides for a board neutrality rule. This rule stipulates that as soon as the board of directors becomes aware that a bid will be launched to acquire more than one-third of a specific category of the company's shares, and until the conclusion of or before the conclusion of the takeover process, the board of directors cannot make any decisions that could significantly impact the bidder's objectives outside the normal management of the company. This rule can be bypassed, however, by a decision of the shareholders' general meeting expressly convened for the purpose of deciding on such actions and approved by two-thirds of votes issued.

Shareholder activism is not significant in Portugal, especially due to the fact that most mergers and acquisitions transactions are made in alignment with the majority shareholders' interests.

### 11.4 Independent Outside Advice

Directors usually seek independent outside advice in mid to high-profile business combinations to allow them to analyse the potential implications of a transaction.

Normally, independent outside advice is obtained from legal and tax advisors, auditors, accountants, investment banks, strategic consultants, or consultants specialising in certain fields of expertise (such as intellectual property (IP)). Financial advice is usually sought for the structuring of the deal, for the due diligence and for input in the drafting and negotiation of the transaction documents. Financial advisors can also be asked by the board to issue a fairness opinion.

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jective to maximise its resources and respond effectively to the international challenges of its clients, wherever they may be located. International collaborations are ensured by firms specialising in the legal systems and local cultures of Angola, Cape Verde, China/Macao, Mozambique, São Tomé and Príncipe and Timor-Leste. The firm would like to extend its gratitude to the following colleagues: Ricardo Oliveira, André Barbieri, Pedro Lomba, Nádia da Costa Ribeiro, Joana Campelo, João Rodrigues Duarte, Ana Nunes Teixeira and Álvaro Santos Pinto.

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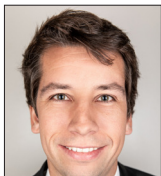
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