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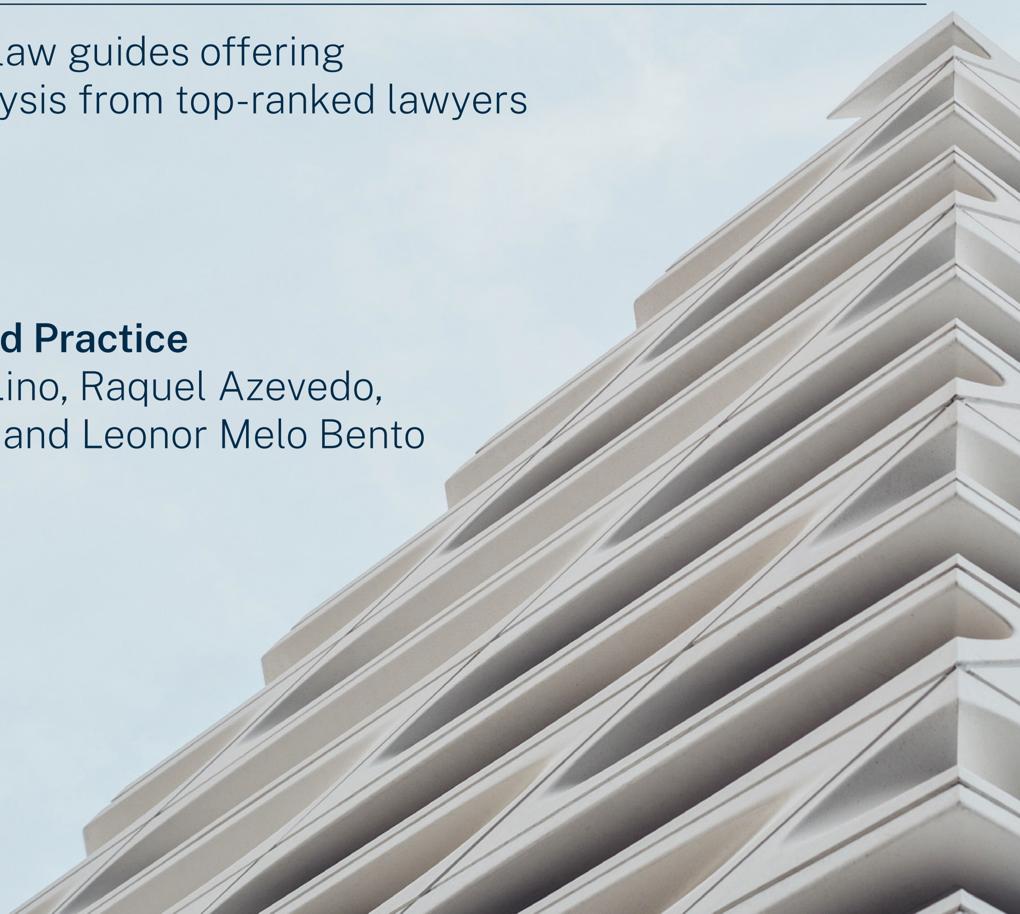

Portugal: Law and Practice

Duarte Schmidt Lino, Raquel Azevedo, Alexander Ehlert and Leonor Melo Bento
PLMJ

PORTUGAL

Law and Practice

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PLMJ is a law firm based in Portugal that offers a full range of legal services coupled with bespoke legal expertise. The firm has been providing tailor-made legal solutions to its clients for more than 50 years, in all areas of the law, and always as a business partner in the most strategic decision-making processes. To ensure a close relationship with its clients, it has created PLMJ Colab, a co-operative network of law firms in Portugal and throughout the world. It is PLMJ Colab's objective 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 Tome 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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1. Market Trends

1.1 Technology M&A Market

Like the global M&A market, the Portuguese M&A market was also affected by the rise of inflation and interest rates and the consequent higher cost of capital, and this may last through 2024 due to the current geopolitical situation and risks (eg, in Ukraine and the Middle East).

This economic backdrop led to lower deal volumes and lower company valuations in most sectors in the first half of 2023. In the second half of 2023, M&A activity seems to have increased due to buyers having incorporated the above factors in their investment decisions. In any case, transaction opportunities are being more thoroughly pondered and analysed by potential buyers.

The technology sector continues to be one of the most attractive sectors in Portugal for investments and M&A opportunities. This is due in part to the increased global market demand for digital transition, which is a pillar of the Portuguese Recovery and Resilience Plan (PRR), and in part to the innovative companies and highly qualified talent in the Portuguese ecosystem.

1.2 Key Trends

Even though there has been a shift from a sellers' market to a more balanced market, a valuation gap between potential sellers and buyers persists. This has led to an increased use of price adjustment mechanisms, such as earn-outs, as well as dual-phased acquisition processes – where buyers first acquire an initial stake in the target company and the remainder at a later stage, usually with an updated valuation.

In the venture capital sector, and considering the existing economic backdrop, one is also witnessing an increase in bridge/extension rounds with existing investors, so as to attend to the funding requirements of start-ups.

Finally, one continues to see growing importance being given to responsible business (ESG) practices, social entrepreneurship, the blue/green economy and compliance.

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 the first 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, including:

- 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, StartUp Braga, Startup Leiria, Startup Lisboa, Maze X (an impact accelerator) and Fábrica de Unicórnios (directed at scale-ups) – as well as through 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 and government-sponsored funds are available in Portugal. More recently, these have included the Venture Capital part of the "Consolidar" programme launched by Banco Português de Fomento in 2022, further to which 16 management companies were chosen to manage funds partially funded under the Portuguese Recovery and Resilience Plan (PRR) totalling up to EUR400 million.

In addition, foreign venture capital firms are also increasingly and actively investing in Portugal. 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, a recent statute is designed to support and promote R&D companies (especially start-ups and scale ups) and, among others, provides for tax benefits applicable to the stock options granted by start-ups. The Portuguese State Budget Law for 2024 further broadens the scope of these tax benefits for stock plans granted by start-ups, by including stock attributed by entities in a group, control or affiliate relationship with the start-up, regardless of geographical location. The State Budget Law also introduces a reduced 12.5% corporate income tax rate applicable to the first EUR50,000 of taxable base (subject to EU de minimis rules).

2.5 Venture Capital Documentation

In contrast with 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 generally transforms into an LLC, which will:

- be able to issue different types of securities (including warrants convertible into shares);
- have a more sophisticated governance structure; and

- 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 (such as the USA or UK) for fundraising purposes 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 for dual-track processes, and although this 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. 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 and is a very active issuer, targeting the Portuguese retail market both for equity and for debt issues (eg, capital increase and green bonds).

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 bring more complexity to future transactions, as two legal frameworks will apply to the same company. As an example, this may complicate 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. As a result, sometimes neither regime applies. In a past transaction, which involved a takeover of a Portuguese company listed in Spain, neither of the squeeze-out mechanisms was expressly applicable, and an ad-hoc mechanism had to be 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 the auction and the bilateral negotiation are usual sale processes, the auction/competitive process is typically launched when the transaction has a significant/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 process can be used by the sellers to increase competitive pressure for the potential buyers and to 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 performed 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, 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/holdback or representations and warranties insurance is not customary for VC transactions, but it is sometimes required by investors.

5. Spin-Offs

5.1 Trends: Spin-Offs

In general terms, spin-offs are a common mechanism in Portugal for separating and ring-fencing a specific business unit. The key drivers for a spin-off are normally the separation and isolation of a specific business unit, with its subsequent development and specialisation through its own focused 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, not for tax reasons. 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. Tax neutrality in demergers or asset transfers usually requires 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 is one of the types of spin-offs 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 the 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 decision to acquire a minority stake in a Portuguese public company prior to making an offer depends on the target's shareholder structure, as well as on the transaction structure. This is usually considered as one of the transaction structure options, as it may allow the acquisition of an 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 Portugal is 5% of voting rights legally attributed to the holder (which may include other shares/voting rights controlled but not directly held by the holder). 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 one third and 50% of voting rights corresponding to the share capital, directly held or legally attributable to the potential offeror. The launch of the bid is not required if the potential bidder proves to the CMVM (the Portuguese Securities Market Commission) that it does not have control (*influência dominante*) over the target.

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 and Minimum Price

Please see **6.3 Transaction Structures**. The use of cash in merger transactions is subject to strict restrictions. The minimum price requirements are 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 prior to the publication of the preliminary offer announcement; or
- the weighted average price of these securities verified in a regulated market during the same period.

The minimum consideration should be determined by an independent expert, at the expense of the offeror, whenever one of the following occurs:

- when the consideration cannot be calculated based on the above criteria; or
- when the consideration proposed by the bidder is neither justified nor equitable because it is insufficient or excessive.

Following from the last point, the consideration shall be deemed to be inadequate if:

- the higher price has been determined by agreement between the buyer and the seller in private negotiations;
- the securities in question have experienced reduced liquidity; or
- the market on which the securities are admitted to trading has been affected by an exceptional event.

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 typically 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 minimum acceptance condition 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 (or higher if the offeror acquired shares at a higher price). In contrast with a takeover bid, a squeeze-out does not depend on the acceptance of an offer by the shareholders. The controlling shareholder who decides to squeeze out the minority shareholders must immediately publish a preliminary announcement and submit it to the CMVM for registration. A squeeze-out involves the immediate exclusion of shares from trading on a regulated market.

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 register and 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 M&A 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, rather than to protecting it.

6.11 Additional Governance Rights

If 100% ownership of the target is not acquired, and assuming that the articles of association of the target do not establish higher thresholds, the acquisition of a stake representing more than 50% of the voting rights in a Portuguese company will allow the acquirer to individually decide on the composition of the company’s governing bodies (namely the board of directors). In contrast, the acquisition of a stake representing more than two thirds of the voting rights will also enable the acquirer to approve the most important matters concerning the company – eg, the amendment of articles of association, merger, etc. The relevant votes for these matters are the votes cast, so in practice a lower holding (depending on the usual general meeting attendance) may also enable such approvals.

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

The 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 on 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 in 2022.

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 legal conditions to launch. Hence, they do not usually affect 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 setting up and starting 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. The National Communications Authority (ANACOM) and the Portuguese Regulatory Authority for the Media (Entidade Reguladora para a Comunicação Social – ERC) 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, it may take up to eight months to obtain the licence.

The provision of television services is subject to authorisation, at the request of interested parties, if it consists of 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.

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 M&A transactions.

7.3 Restrictions on Foreign Investments

The Portuguese government may exceptionally oppose investments made by residents outside the EU or the European Economic Area (EEA), or made by legal entities directly or indirectly controlled by residents outside the EU or EEA, that directly or indirectly allow direct or indirect control over strategic assets, which 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 does not have suspensory effect. 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 this jurisdiction.

7.5 Antitrust Regulations

Takeover offers are reportable to the Portuguese Competition Authority when 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; and/or
- 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, 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 an M&A transaction, except when it comes to regulated entities.

8. Recent Legal Developments

8.1 Significant Court Decisions or Legal Developments

Litigation in M&A and technology mainly takes place before arbitral tribunals, and as arbitral decisions are not made public, there are no significant public court decisions relating to technology M&A.

9. Due Diligence/Data Privacy

9.1 Technology Company Due Diligence

When providing information regarding technology companies, it is important to determine whether 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;
- relates, directly or indirectly, to the target or a financial instrument; and
- would be 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 advisers.

9.2 Data Privacy

If the due diligence requires the 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). Regarding transfers of personal data between the EU and the USA, based on the adequacy decision for the EU-US Data Privacy Framework, personal data can flow freely from the EU to companies in the USA that participate in the Data Privacy Framework.

Furthermore, disclosure of personal data must be done in accordance with the GDPR regarding the purpose and basis for the processing of personal data, and with the principle of minimisation and information for providing 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 final decision is taken to bid. A final decision is considered as having been taken when all essential elements, including price, have been determined (price and structure test). Although there are no express "put up or shut up" rules in Portugal, the CMVM has previously made potential bidders (and potential competing bidders) disclose their intentions to the market. 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. The prospectus of a takeover bid must contain complete, truthful, up-to-date, clear, objective and lawful information, including:

- the identification and registered office of the offeror and the issuer;
- the identification and specific characteristics of the securities being offered;
- the type of offer;
- the consideration offered, its justification and payment conditions;
- the minimum and maximum quantities of securities that the offeror proposes to acquire;
- the term of the offer; and
- the conditions of effectiveness to which the bid is subject, among other requirements defined in the Portuguese Securities Code.

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, which are also applicable to business combinations. 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 (and which is, inter alia, typically in charge of negotiating and implementing business combinations), 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, applicable in most cases. 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 on 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.

Nevertheless, the board of directors plays a very important role in the takeover process over a listed company, as it is required to issue a report on the terms and conditions of the takeover bid that must be shared with the bidder and with the CMVM within eight days of receipt of the draft prospectus. This report must contain an autonomous and reasoned opinion on, at least:

- the type and amount of the consideration offered;
- the offeror's strategic plans for the target company;
- the repercussions of the bid on the interests of the target company, in general, and in particular on the interests of its employees and their terms of employment, as well as the locations where the company carries out its activity; and

- the intentions of the members of the management body, who are simultaneously shareholders in the target company, as to the acceptance of the bid.

Shareholder activism is not significant in Portugal, especially due to the fact that most M&A 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 advisers, 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;
- the due diligence; and
- input in the drafting and negotiation of the transaction documents.

Financial advisers can also be asked by the board to issue a fairness opinion.

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