Portugal

Negotiated M&A Guide 2022

Corporate and M&A Law Committee

Contacts

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1. INTRODUCTION

In line with the tradition of civil law countries of continental Europe, in Portugal the most relevant aspects of commercial activity are regulated by law, including the acquisition of companies. The regime applicable to the acquisition of companies is not codified under a sole statute, however, but results from different pieces of legislation governing different aspects.

The agreement for the acquisition of a company or a business is not specifically regulated, being in most cases (depending on the particulars of the relevant transaction) subject to the general rules set forth in the Portuguese Civil Code (approved by Decree-Law 47 344 of 25 November 1966) for sale and purchase agreements. Other statutes that govern relevant aspects of the acquisition of companies in Portugal are, among others:

a) the Companies Code (approved by Decree-Law 262/86 of 2 September); the Securities Code (approved by Decree-Law 489/99 of 13 November);
b) the Commercial Registry Code (approved by Decree-Law 403/86 of 3 December); and
c) the Commercial Code (approved by a Law of 28 June 1888).

Additionally, labour, tax and competition laws, as well as any laws or regulations that may be applicable to the relevant activity sector of the target company, are also to be considered in any acquisition of a company in Portugal. A regime for government screening of investments made in strategic assets when the acquirer is a third party based outside of the European Union or the European Economic Area also exists (Decree-Law no. 138/2014, of 15 September), although to date, to the best of the authors' knowledge, no transaction has ever been vetted.

2. TYPE OF TRANSACTION STRUCTURES ADOPTED IN PRIVATE M&A TRANSACTIONS

2.1 Advantages and disadvantages of each structure

Most businesses are acquired through transactions structured as: (1) share deals, whereby the shares representing the relevant company's share capital are transferred to the purchaser, or (2) asset deals, whereby the assets and other elements used by the seller in the relevant business are jointly transferred (in some cases, as an on-going concern) to the purchaser.

Both types of transactions are common, and the choice will depend on the particulars of the case at stake.

An asset deal is more direct and will generally allow the parties to determine more accurately the scope of the business being transferred, namely avoiding the potential transfer of any concealed liabilities or contingencies of the company developing the businesses and allowing the carve-out of parts of the business or certain assets from the scope of the transaction. In some cases, this may not be the most appropriate structure to be adopted for the transfer of a business, to the extent that it may entail a disruption in the relationship maintained with the target company's clientele or the need for third parties' consents for the transfer of licences and agreements, or due to the fact that it may subject the transaction to complex procedures for the transfer of certain assets.

It should also be noted that Portuguese law has transposed Council Directive 2001/23/EC, of 12 March 2001, on the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (commonly known as the TUPE Directive) and, accordingly, any asset deal that is considered to give place to a transfer of a business, an establishment, or a part of a business or an establishment that comprises an 'economic unit' can give place to the transfer of the employment agreements to the acquirer (as well as the transfer to the acquirer of liabilities for employment law infractions).

On the other hand, the acquisition of a business by means of a share deal will, as a general rule (and with exception of the cases where change of control provisions apply), allow the continuity of the business and avoid the need to obtain third parties' consents. It will however require that any liabilities or contingencies resulting from the relevant company's past activity are transferred with the target company. This may consequently add complexity to the process to the extent that the level of due diligence and contractual protection required will be higher.

An additional aspect to be noted in the structuring of share deals is the legal prohibition on financial assistance set forth by the Portuguese Companies Code and the Second Company Law Directive. This prohibition prevents, with some exceptions, target companies from advancing funds, making loans or providing security for the purposes of facilitating the acquisition of their shares by a third party.

The above, together with tax aspects, are usually the key drivers in the choice between a share or an asset deal.

It is also worth mentioning that the direct acquisition of businesses by mergers is not very common in Portugal. In most cases where there is an intention to acquire a business and to combine it with the business developed by the acquiring entity, the transaction is structured in two stages: a first step where the target is acquired by the acquiring entity and a second step where the legal entities (target and acquiring entity) merge, combining their businesses.

Without prejudice to other possible structures (for instance, the transfer of a business as a contribution in kind within the scope of a share capital increase of the acquiring entity), the scope of this note is restricted to the most common forms of asset and share deals.

2.2 Typical documentation used in each structure

Under the Portuguese practice, historically transaction processes were quite simple and consisted of the negotiation of the transaction terms and formalisation by means of a transfer agreement, which tended to be a relatively simple document. This practice has dramatically changed in the past few decades; nowadays, increasingly complex and sophisticated transaction processes with detailed documentation specifying all the aspects of the transaction are common.

The transaction process both for share deals and for asset deals is commonly divided into two stages:

a) a first round where the initial contacts between the parties are made, due diligence is carried out, and the parties execute a confidentiality or exclusivity agreement or a more developed agreement setting the negotiation process to be followed and the basic terms of the prospective transaction; and
b) a second stage where upon the due diligence being concluded, the negotiations are completed and the parties execute the agreements formalising the transaction.

2.3 Tax considerations for each structure

From a tax standpoint, a company resident in Portugal is liable for corporate income tax (CIT) on its worldwide income and is taxed on the basis of its financial statements prepared in accordance with accounting rules. The accruals basis must be used. The reported profit or loss is then adjusted, in accordance with regulations set out in the tax law, to arrive at taxable income subject to a standard tax rate of 21 per cent (small and medium-sized enterprises, as defined by law and subject to the *de minimis* rule of the European Union, avail of a 17 per cent CIT rate for the first €25,000 of taxable income).

Taxable income exceeding €1.5m and up to €7.5m will further be subject to a state surcharge at a 3 per cent rate, increased to 5 per cent for the taxable income in excess of €7.5m, and to 9 per cent for taxable income in excess of €35m. A municipal surcharge may also be applied, at a varying rate up to 1.5 per cent.

The acquisition of a Portuguese investment may be carried out through a non-resident entity or a Portuguese company. The latter alternative is in many cases adopted for tax reasons, as it may, in certain conditions, allow a debt push down by tax consolidation and/or by merger. Both alternatives imply the interposition of a Portuguese vehicle between the investor and the Portuguese company to be acquired so that a complete debt pushdown may be effected – ie, the deduction for tax purposes of the total amount of interest paid regarding the funds used in the acquisition of the Portuguese company against the profits obtained by the latter in its operational activity.

If the Portuguese target company has accumulated tax losses, said tax losses will usually be lost following a change of ownership of more than 50 per cent of the share capital, unless a petition is presented to the Minister of Finance requesting that the tax losses be maintained on the basis of a recognisable economic interest in the transaction being acknowledged.

As a general rule, dividends and interest paid to non-resident and resident corporate entities by a Portuguese company are subject to withholding tax at a final rate of 25 per cent (28 per cent for individuals).

In case of non-residents, provided the conditions are met, a reduced withholding tax may be applicable under a double tax convention entered into with Portugal. There is the possibility of elimination of withholding tax over interest and dividends in cases where the European Directives, as implemented in Portugal, apply; broadly speaking, provided relevant parties are eligible, in order to apply, the EU Interest & Royalties Directive requires a 25 per cent participation to be held for as long as two years, while the EU Parents & Subsidiaries Directive/Participation Exemption Regime requires either a 10 per cent participation or 10 per cent voting right to be held for one year (in both cases, whenever withholding tax applies because the relevant holding period is not complied with, a reimbursement request may be filed once said period has elapsed).

As a general rule, any capital gains derived by resident companies from the sale of shareholdings in a Portuguese company are subject to the above Portuguese CIT general rates. However, in the event that, broadly speaking, at least 10 per cent of the relevant company shareholdings or voting rights have been held for a minimum period of one year, said capital gains will not be taxed pursuant to the Participation Exemption Regime, provided that such company asset's value does not derive, directly or indirectly, in more than 50 per cent from real property which has been purchased after 1 January 2014 (unless said property is allocated to a business activity other than the mere purchase and sale of real estate, in which case the regime will nevertheless be applicable).

According to the Portuguese tax law general regime, any capital gains derived by non-resident companies from the sale of shareholdings in a Portuguese company are considered obtained in Portuguese territory and subject to Portuguese CIT at the rate of 25 per cent.

However, under the Tax Benefit Statute, as a general rule, these capital gains are exempt from CIT in Portugal when obtained by non-residents, except in cases of:

a) non-resident entities without a permanent establishment in Portugal that are owned, directly or indirectly, in more than 25 per cent, by Portuguese entities (this exception is not applicable if certain conditions similar to the requirements of the domestic Participation Exemption Regime are met);
b) non-resident entities without a permanent establishment in Portugal that are resident in a country listed as a tax haven;
c) capital gains obtained on the transfer of a participation in the capital of Portuguese resident companies whose assets are formed, directly or indirectly, in more than 50 per cent, by real estate assets located in Portugal, or on the transfer of shares of resident holding companies that control, as defined in the Legal Framework of Credit Institutions and Financial Companies, Portuguese companies in which 50 per cent of the assets consist of real estate assets located in Portugal;
d) capital gains arising from the sale of shares of a non-resident company, where more than 50 per cent of the value of those shares at any time in the previous 365 days resulted, directly or indirectly, from real estate assets located in Portugal, unless the relevant real estate asset is allocated to an agricultural, industrial or commercial activity that does not consist in the acquisition and resale of real property.

Even if the Tax Benefit Statute regime above described does not apply, under several of the double tax treaties entered into by Portugal, the capital gains obtained on the transfer of the shareholding in Portuguese companies may only be subject to tax in the country of residence of the transferor, unless the transferor has a permanent establishment in Portugal to which the shares may be allocated.

Finally, real estate transfer tax (RETT) may be due as a result of the acquisition of shares in Portuguese companies whenever (1) more than 50 per cent of the value of the company's assets arises, directly or indirectly, from real estate located in Portugal, taking into account the balance sheet value (or, if higher, the tax value of the real estate); (2) such real estate is not directly allocated to an agricultural, industrial or commercial activity, excluding the purchase and sale of real estate; and (3) as a result of that acquisition, amortisation of share capital or any other event, any of the shareholders becomes the holder of at least 75 per cent of the company's share capital.

RETT rates range from 5 per cent to 7.5 per cent (depending on the type of property). If the purchaser is an entity resident in a tax haven or is dominated or controlled, directly or indirectly, by an entity which is tax resident in a tax haven, the applicable rate is always 10 per cent regardless of the type of property.

In the case of an asset deal, the acquisition of real estate is subject to RETT at the above rates, plus stamp tax at the rate of 0.8 per cent. Please note that stamp tax only applies in case the VAT exemption on real estate transactions is not waived.

3. PRE-AGREEMENT DOCUMENTATION

3.1 Main type of pre-agreement documents

The negotiation of an acquisition often includes, at a preliminary stage, the execution of a first round of documents. This is particularly common in cases where the transaction is developed by means of an organised process such as a competitive bid, where the period preceding the execution of a binding agreement will necessarily be long, or when confidential information will be disclosed to the potential purchaser in the course of the negotiations. The need to manage the risk of the negotiation process impels the parties to agree on and execute written documents whereby they agree on: (1) the fundamentals of the prospective transaction; (2) the process to be followed in the negotiations; (3) confidentiality, exclusivity, and sometimes other ancillary provisions such as non-solicitation.

The documents commonly entered at this preliminary stage are confidentiality agreements, exclusivity agreements and/or letters of intent (also referred to as a 'memorandum of understanding', 'heads of agreement' or 'agreement to negotiate'). Term sheets outlining the main aspects of an agreement to be further negotiated may also be agreed (this is particularly common in the case of joint venture agreements and shareholders' agreements).

3.1.1 Confidentiality agreements

During negotiations, the parties exchange information regarding the target company and its business which is not available to the public, in order to allow the evaluation of the transaction. The need to protect such information and to prevent its misuse forces the parties to enter into confidentiality agreements, in which they undertake to hold in confidence all non-public information received from the other party and to use it for no purpose other than evaluating and completing the transaction.

Under such agreements the parties usually guarantee that their employees or advisers, to whom the information may be disclosed, will also keep such information confidential, so that in case of breach of the confidentiality duty by such a person, the party will be deemed liable. Confidentiality agreements are usually signed at a very early stage of negotiations, normally before the beginning of the due diligence review of the target, if it takes place.

It is usually agreed that in case the transaction is not consummated, the parties will return all confidential information or, to the extent that this is not possible, destroy it. Confidentiality obligations undertaken by the parties are usually not limited to the negotiation period and remain in force after the negotiations cease.

It is a common practice to set forth a penalty clause according to which, in case of a breach of the confidentiality undertakings, the defaulting party will pay to the other party a pre-fixed amount defined in the agreement, to compensate for damages incurred by the non-defaulting party because of the breach. The reason for such practice is that it may be difficult to prove in judicial or arbitration proceedings the amount of the damages incurred and consequently the amount of the corresponding indemnification.

Bear in mind that, under Portuguese law, whenever the parties agree on a penalty clause, the non-defaulting party is prevented from claiming for damages in excess of such amount, unless otherwise provided. It is advisable (especially whenever advising the disclosing party) to specifically provide for the possibility of the damages being in excess of the amount specified in the penalty claims. Furthermore, if a court deems the value of the penalty to be manifestly excessive, it may equitably reduce that value (*redução equitativa*).

3.1.2 Exclusivity agreements

Typically, the purchaser requests an exclusivity period to complete its due diligence and to negotiate the agreement, during which the seller will not share information or seek discussions with other potential purchasers. This exclusivity withdraws the target, at least temporarily, from the market. For this reason, in some cases the prospective purchaser agrees to pay an exclusivity fee, which, in case the transaction is concluded, is usually deducted from the purchase price.

3.1.3 Letters of intent and memoranda of understanding

Letters of intent and memoranda of understanding can normally address the same issues that are addressed in confidentiality agreements and exclusivity agreements, as well as any other issues that the parties deemed relevant to agree on to provide a framework regarding the way in which the negotiations and the process will be conducted. This may include aspects such as a tentative timeline for the transaction, non-solicitation obligations, and any other aspects that the parties deem convenient. Generally speaking, when entering into letters of intent and memoranda of understanding (and, as a matter of fact, the other preliminary documents mentioned in this section in general) the parties would normally take great care to reserve themselves the possibility to freely abandon negotiations, or to abandon negotiations if certain circumstances occur, and to make it clear that entering into such preliminary agreements does not create a binding sale and purchase agreement or promissory agreement of any kind.

3.2 Binding nature of clauses in the pre-agreement documentation

As mentioned above, exclusivity commitments and confidentiality obligations are, in most cases, part of a broader pre-agreement, usually referred to as letter of intent, memorandum of understanding, heads of agreement or agreement to negotiate.

These letters of intent usually describe the basic structure of the transaction and are used to record the intention of the parties to proceed with the negotiations and to set forth the process to be followed for such purpose.

They generally include the description of the envisaged transaction, a section relating to due diligence (namely, deadlines, rules and scope), an outline of the structure of the transaction and sometimes an introduction to the main issues to be dealt with in the acquisition agreement should it be executed (in particular, mechanisms of adjustment to the price or representations and warranties to be granted). It is also common to specify a deadline for a binding agreement. As mentioned above, whenever confidentiality or exclusivity agreements are not executed separately, such undertakings are included in the letter of intent.

Portuguese law does not have specific rules regarding these pre-agreements. Therefore, their regime and, in particular, their binding character, will depend on the exact terms and conditions of each particular agreement. Taking into consideration that the binding or non-binding nature of the agreement will result from the interpretation of the document (irrespectively of the name given to it), there is a risk that a letter of intent will be considered (1) an actual agreement, should it contain all elements of an agreement and the parties express their will to agree; or (2) a 'promissory agreement', should any or both of the parties undertake an actual obligation to execute an agreement.

In fact, the difference between the mentioned pre-agreements (letters of intent, memorandum of understanding, heads of agreement, etc.) and promissory agreements is that, under the latter, the parties undertake to, under certain conditions and according to certain terms, execute other agreements. In contrast, letters of intent do not contain any obligations of the parties to conclude the transaction and execute an agreement. Regardless of the theoretical distinction, it should be clear in the letter of intent that the parties do not intend to be bound to the completion of the transaction; otherwise they may be undertaking commitments which they have not foreseen. For such purpose, and in addition to a particular care in the drafting of this type of document, it is usual to include clauses specifying the ‘non-binding’ nature of the agreement and setting forth that, until the purchase agreement is entered into, there is no agreement between the parties as to the transaction nor any commitment to enter into it.

As a result of the above mentioned, letters of intent are mostly relevant in terms of pre-contractual liability, since they do not create contractual obligations regarding the execution of the transaction itself (although they may create separate contractual obligations for the aspects specifically agreed upon – non-solicitation, confidentiality, exclusivity and others; such obligations would normally and in principle be enforceable regardless of whether the transaction is ultimately entered into).

In respect of pre-contractual obligations specifically, the Portuguese Civil Code sets forth that one must act in good faith in the negotiation of an agreement; otherwise, such party shall be liable to indemnify the other party for the damages it incurs because of the breach of this duty (*culpa in contrahendo*). In the context of a negotiation of an agreement, it is generally deemed that the good faith duties of information, loyalty and confidentiality are the most relevant. If these duties are breached, the non-defaulting party must be indemnified for all damages. According to the jurisprudence and doctrine prevailing in Portugal, only damages corresponding to the ‘negative contractual interest’ shall be indemnified, ie, the non-defaulting party shall be put in the same position it would be should the negotiations had not taken place.

4. DILIGENCE STAGE

As in other jurisdictions the due diligence is a relevant stage of the M&A process. The scope of the due diligence will depend on, among other aspects, the concerns of the purchaser, the structure of the transaction, the sector of the business, and other potentially relevant circumstances.

In certain circumstances, the disclosure of information about the target company and business may be subject to limitations such as those deriving from data protection rules, competition rules that restrict the access of competitors to commercially sensitive information, the rules of the Industrial Property code on trade secrets, or rules regarding state sector confidential information. The information relating to contracts may also be protected by confidentiality clauses, which may impose restrictions to their disclosure that would have to be assessed on a case-by-case basis.

The disclosure of information for due diligence purposes is usually subject to a confidentiality undertaking by the purchaser and its advisers (whenever the latter are not already legally bound to professional confidentiality). The access to information may also be limited by different measures such as the disclosure of partially redacted documents or the limitation of the access to certain sensitive information to ‘clean teams’ only.

Particular attention should be paid in the cases when the seller is not the sole shareholder of the target company, where the latter’s management should be especially cautious when making available information for due diligence purposes in order to ensure that the best interest of the company is being pursued, and that they do not breach their legal duties of care and loyalty.

The above is without prejudice to the duty of the seller to act in good faith in the negotiations and its preliminary stages, namely not omitting to disclose information that it may reasonably consider to be relevant for the potential purchaser.

4.1 Brief overview of typical issues and how they are usually addressed

As mentioned above, the scope of the due diligence will depend on, among other aspects, the concerns of the purchaser, the structure of the transaction, the sector of the business, and other potentially relevant circumstances.

The issues that are typically seen will depend on the particularities of the target business or company. Without distinction, some of the main issues typically seen in a legal due diligence exercise include:

a) the existence of litigation or procedures against the target company or business;
b) certain typical or common employment law irregularities (such as, for example, failing to keep appropriate overtime schedules or to fully transfer the liability of the employer to an insurance company under an employee's accidents insurance policy) or other employment law contingencies (eg, the risk that certain service providers may claim that they are actually entitled to treatment as employees of the company);
c) licensing issues (eg, absence of certain licences required to operate the business or failure to pay administrative fees which could void a licence);
d) change of control clauses under financing agreements or other material agreements;
e) especially onerous contractual clauses (eg, non-compete provisions or certain onerous penalties);
f) contingencies related to legacy acquisitions or disposals (eg, if the target company has sold a business, there may be seller's warranties or indemnities that are still surviving and which may give rise to a claim by the purchaser), or related to legacy corporate restructuring transactions (eg, if the target company results from a demerger (*cisão*) it may be deemed liable under certain circumstances for the debts of the demerged entity);
g) legal infractions (eg, on anti-money laundering, environmental laws, or data protection legislation);
h) corporate law irregularities (eg, failure to deposit accounts for consecutive years, which could cause the company to be liquidated ex-officio by administrative authorities); and others.

Depending on the nature of the issue, purchasers can usually try to protect themselves through (1) applying a price reduction (particularly, in the case of contingencies which easily quantifiable and of very likely materialisation) or (2) requesting a specific indemnity from the sellers in the acquisition agreements (where the sellers would promise to pay to the purchaser an amount required to compensate for the losses deriving from these contingencies). When the due diligence points to insufficient information, the purchaser would also normally be advised to protect itself through appropriate warranties in the acquisition agreements.

5. MAIN TRANSACTION AGREEMENT

5.1 Formal requirements

The formalities required to complete an asset or a share deal may differ, in particular depending on the type of assets being transferred in the case of an asset deal.

The transfer of a business under an asset deal must comply with the formalities applicable to the transfer of the elements comprising the scope of the transaction (for instance if real estate property is being transferred together with the remaining elements forming the business, its transfer will have to be formalised by means of a notarial deed or a document with the signatures of the relevant parties duly legalised (*documento autenticado*), in compliance with the legal requirements for the transfer of real estate property). Likewise, where the asset deal is susceptible of being qualified as a transfer of a business for tax purposes (*trespasse*), the parties have to formalise the transfer via a public deed, depositing with the notary a certificate from the tax authorities attesting that the seller does not have any tax debts, or, alternatively, the seller has to communicate the transfer to the local tax authorities at least 30 days, but not more than 60 days, before the date of the sale and purchase, in order to give them an opportunity to enforce any collection rights.

The formalities applicable to a share deal will depend on the nature of the target company. The most common types of companies in Portugal are the *sociedades por quotas* (private limited liability companies) and the *sociedades anónimas* (joint stock companies).

Private limited liability companies have their share capital divided into quotas which are registered with the companies' registry. The quotas are not represented by certificates and their transfer is made by means of an agreement in writing and is subject to registration with the companies' registry. As a general, rule the transfer of quotas is subject to the consent of the company (to be granted by its shareholders general meeting). It is not unusual for the company by-laws to set forth a pre-emption right in favour of the company, or the remaining shareholders, in the event of the transfer of quotas to third parties.

The formalities applicable to the transfer of shares in joint stock companies will depend on the type of shares at stake. Shares represented by certificates are transferred by means of the inscription in writing of the transfer by the seller in the relevant share certificate, and the subsequent registration with the company. Book-entry type shares are transferred by means of their registration in the account of the purchaser.

Except for the cases where a public deed or notarisation is required, electronic signatures and signatures in counterparts are valid (it being convenient however to state in the agreement that the parties agree to use such means of signing, particularly when the electronic signatures are merely simple or advanced electronic signatures, opposed to 'digital signatures' (*assinaturas digitais*), which have increased value as evidence under Portuguese law).

5.2 Overview of the typical key clauses, including typical issues related to representations & warranties, indemnification, etc.

The anatomy and type of clauses in shares purchase agreements and in asset purchase agreements are usually similar to the ones that are normally followed in other jurisdictions, as Portuguese business law practice has been greatly influenced by foreign legal practice.

One aspect that can influence the structure of the agreement is whether there is a gap of time between the date when the parties sign the agreement and the date when the transaction may be consummated (closing date). There may be, depending on the circumstances of the case at hand, a number of conditions precedent to be met before the transaction is closed, such as any third-party consents, competition or regulatory authorities' approvals, the carve-out of assets or parts of the business from the scope of the transaction, the funding required for the transaction being made available to the purchaser, etc, which may take some time to be met. Consequently, in such cases there is also a lapse of time between the date when the parties execute the acquisition agreement and the date when the transaction becomes effective. From a contractual perspective there are usually two options available to formalise the transaction in such circumstances and to address the issues generated by this gap in time.

The first option, somewhat more in line with the Portuguese traditional practice, is to enter into a promissory agreement, whereby the parties agree on all aspects of the transaction, reciprocally promising to execute a definitive agreement formalising the transaction upon the applicable conditions being met. Depending on the sector, it may be common that, at the time of the execution of the promissory agreement, the purchaser will make a down payment, which, unless otherwise agreed, will be kept by the seller in the event of the purchaser breaching its obligation to complete the definitive agreement (or will be returned in double if it is the seller that breaches its obligation to complete such agreement). This is particularly frequent in the case of real estate asset deals.

If the parties agree that the purchaser will provide this down payment (or if the agreement foresees a penalty clause applicable in the event the purchaser fails to comply with its obligation to enter into the definitive acquisition agreement), and if it is not specifically agreed otherwise, the seller will not have the right to specific performance should the purchaser breach its obligation to enter into the definitive acquisition agreement (however, the right to specific performance can still be expressly reserved). As to the execution of the definitive agreement, this is usually done by the parties carrying out the actions required for the transfer of the shares or the assets at stake, in the terms determined in the promissory agreement, together with other agreed closing actions (eg, executing a sale and purchase deed in the case of transfer of property, or executing a closing statement and the formalities for transfer of shares, in the case of a share deal).

The second option is to execute an acquisition agreement subject to conditions precedent. Once the conditions are met, the parties will carry out the actions required for the transfer of the relevant shares or assets. The promissory agreement structure may arguably provide additional protection to the seller if the transaction is ultimately not completed and if the seller then subsequently wants to pursue another deal, as it will make it easier to explain and provide evidence that no formal or definitive acquisition agreement is binding on the seller and on the assets (ie, the agreement is stated to be promissory in nature and this clears doubts as to whether the seller is already committed to a definitive agreement, making it easier to advance to a new transaction).

Other common clauses include the following.

5.2.1 Holdbacks and escrows

Holdbacks, escrows and bank guarantees are commonly used in transactions as a form of guaranteeing any adjustments to be made to the purchase price, as well as any compensation due for a breach of the terms of the agreement.

These mechanisms are particularly important because dispute resolution procedures in Portuguese courts usually take a long time. Through these mechanisms it is more expeditious to obtain the payment, which otherwise could take several years to be made.

Holdbacks and escrows are most commonly used to guarantee any adjustments to be made to the purchase price, namely when it is not possible to determine the final purchase price at the time the transaction is consummated (for instance, because the final purchase price depends on the relevant company's accounts at the closing date, or if the purchase price is subject to an earn-out scheme relating to a certain period after the closing date). Occasionally, it is also agreed to maintain part of the purchase price in escrow for a certain period after closing, in order to cover any potential breach of the seller's warranties. Whenever the price is to be increased subject to the verification of specific milestones or the meeting of certain requirements, it is common practice to have the purchaser place that amount in escrow.

Most commonly the retained amounts are deposited in escrow with a bank, which acts as the escrow agent. Escrow agreements are not specifically regulated by Portuguese law, hence freedom of the parties to contract applies.

As an alternative to holdbacks, it is not uncommon for the parties to obtain bank guarantees. The type of guarantee (ie if payable at first demand or not) depends on the agreement, which the parties reach in this regard. The nature of a bank guarantee is determined by its particular wording, so it is of the utmost importance that it adequately reflects the agreement of the parties in that respect, as there are relevant differences between the regime applicable to first demand bank guarantees and simple bank guarantees. First demand bank guarantees create an autonomous obligation to the bank, so that the bank will be bound to pay the amounts guaranteed upon first demand of the beneficiary without being entitled to oppose it on the grounds of any defence or claim that the other party of the acquisition agreement may have against the beneficiary of the guarantee. In contrast, under a simple guarantee, the bank will be able to use any arguments that such other party may have against the beneficiary.

Other types of guarantees, such as parent company's guarantees, are also common, in particular, when the party at stake is a mere vehicle or a company which does not offer the adequate level of guarantee.

Down payments are also a very common form of guarantee as to the consummation of the transaction.

5.2.2 Representations and warranties

The section of the agreement dedicated to the representations and warranties granted by each party is one of the most discussed and negotiated legal aspects of a transaction, and its final wording tends to reflect the power of each of the parties in the negotiation.

There is an absence of consensus within the Portuguese doctrine in respect of the legal regime applicable to share purchase agreements. The doubts in this respect result from the formal object of the purchase being the shares or quotas, depending on the type of the target company, although the material object of the sale is the company and the business underlying such shares or quotas. The discussion focuses on whether the legal regimes provided for in the Portuguese Civil Code, in respect of the purchase of encumbered or imperfect goods, may be applicable to the purchase of shares/quotas when the issue detected by the purchaser is not related to the shares or quotas themselves but to the company being acquired or its business. Most scholars argue that such regimes will be applicable whenever certain requirements are met, in particular whenever the control of the company is transferred to the purchaser.

Apart from the potential application of these regimes, precontractual liability as well as the doctrine of the error regarding the basis of the agreement (*erro sobre a base negocial*) or the object of the transaction (*erro sobre o objeto do negócio*) may also be relevant as complementary means of protecting the purchaser (specifically these regimes can lead to an indemnification claim, a claim for reduction of the purchase price, or to a claim for annulment of the agreement and a return of the full purchase price).

Under the regime provided in the Portuguese Civil Code for the sale and purchase of imperfect goods, if the agreement is deemed invalid because of a simple error, the seller will not be liable to indemnify the purchaser if it ignored, without fault, the defect or lack of quality of the good (but the seller may still have to repay the purchase price as a consequence of annulment of the agreement (*anulação*)).

Considering that, as a result of the above, purchasers may not be sufficiently protected and parties cannot foresee the risk assumed by entering into such a transaction, it is convenient to expressly regulate the agreement of the parties in that respect, including representations and warranties and detail the scope of the parties' liability in case of their breach. Deriving from the legal practice of common law countries, representations and warranties are already regarded as standard terms in Portuguese contractual practice and Portuguese courts have already confirmed their admissibility under Portuguese law as risk-allocation provisions that can ultimately lead to an obligation to compensate for damages.

Without prejudice to the diversity which characterises this section of the agreements, representations and warranties can be divided into two fundamental types: formal warranties and business warranties. Formal warranties cover, among others: (1) the capacity to enter into and perform the agreement and the fact that the seller is not insolvent; (2) the legal status of the company: incorporation, resolutions and articles of association (and sometimes, the fact that the company is not insolvent); (3) the ownership of the shares and, in situations in which it is essential in the context of the transaction, the ownership by the company of a particular asset, eg, a real estate asset or certain shares in other companies; and (4) the inexistence of encumbrances over or affecting the shares or any agreement or commitment entered into to give or create any such encumbrance.

Business warranties relate to the economical, patrimonial and legal status of the company whose shares or quotas are being acquired. Among the most common warranties are the clauses regarding: (1) assets, liabilities and state of affairs of the company by reference to specific financial statements (which are usually attached to the agreement); (2) compliance with applicable laws (tax, social security, employment, environment, intellectual property rights, etc.); (3) litigation; (4) contracts and commitments; (5) authorisations, permits and licences required for the sound conduct of business of the company; and (6) inexistence of any steps taken for the winding up or liquidation of the company. It is normal for the seller to assume more liability for a breach of the 'formal' or 'fundamental' warranties mentioned in the preceding paragraph than for a breach of the business warranties mentioned in this paragraph, although such aspect is negotiated on a case-by-case basis.

The above-mentioned representations and warranties are granted by the seller. Usually, the purchaser only represents and warrants to the seller that it has the necessary capacity to enter into the agreement and to perform its obligations thereunder, and that the execution and performance do not result in the breach of laws applicable to the purchaser nor the breach of its constitutional documents and do not require the consent, approval, authorisation or notification, nor result in any conflict with contracts, agreements or instruments to which the purchaser is a party, or to which the purchaser is bound.

5.2.3 Limitations to the seller's liability

The seller's liability for the representations and warranties is usually limited, among others:

a) in the amount of the claims, by establishing a *de minimis*, a threshold and a maximum aggregate liability cap;
b) in time, by setting forth a period of time where claims may be brought (it is common practice in Portugal to limit the possibility of the purchaser to claim for the breach of any of the warranties to a period from one to two years, except in tax and social security matters, and, sometimes, 'fundamental warranties', in respect of which the limit is extended to the respective statute of limitation);
c) in cases where the purchaser is otherwise compensated for the loss or the claim is wholly or

partly attributable to the purchaser;
d) to damages suffered as a direct consequence of a breach, excluding indirect or consequential losses or the loss of profits; and
e) in cases where the relevant fact, matter or circumstance which causes the relevant warranty to be breached was previously disclosed by the seller.

These limitations usually do not apply to the breach of seller's warranties concerning the title to the shares or the capacity of the seller and sometimes other 'fundamental' warranties. In any case, the limitations are usually heavily negotiated as part of the general liability regime of the agreement.

It is also increasingly common for purchasers to enter into warranty and indemnity (W&I) insurance policies transferring the risk of breach of warranties to an insurance company. In such cases, the parties may also agree that the acquisition agreement shall be 'without recourse' to the seller, in which case the liability for breach of warranties is usually limited at a symbolic value such as one euro (except for breaches caused by wilful misconduct (*dolo*)).

It is generally understood by Portuguese scholars and courts, and stated in the transactional documents, that any limitations of liability do not apply in case of wilful misconduct of the seller.

5.2.4 Covenants of the purchaser and the seller

In cases where the acquisition agreement is subject to a certain number of conditions precedent (or in the case of a promissory agreement where a certain number of requisites must be met in order for the parties to be obliged to proceed to the final agreement), the parties usually stipulate a number of covenants in order to ensure that the transaction will be consummated as planned.

The seller's covenants in this respect usually include its commitment to carry out all actions required to meet the conditions precedent for which it is responsible (eg, obtain any specific licence or third-party consent; legalise some elements of its activity; terminate any agreements or carve out a part of the relevant companies business, etc) and to maintain a standard in the conduct of the company's business until closing (eg, to inform the purchaser or obtain its consent for any actions out of the ordinary course of business; to inform the purchaser of the progress of the business, etc).

The covenants of the purchaser are usually limited to the commitment to carry out all actions required to meet the conditions precedent for which it is responsible. The most usual covenants agreed between the parties, for the post-closing period, relate to confidentiality duties, transition services and to non-compete periods.

5.2.5 Specific indemnities

Specific indemnities may be agreed whereby the seller assumes an obligation to indemnify the purchaser (usually euro-per-euro) for the losses that may be incurred in case certain pre-identified contingencies materialise. This is usually the case for contingencies detected during due diligence (which normally would not give cause to a claim for breach of warranty due to the operation of disclosure provisions, which would in principle – according to the market standard – eliminate the liability of the seller in respect of issues that were disclosed as part of the due diligence information). Different limitations of liability may be agreed for specific indemnities and breaches of warranties (eg higher caps for specific indemnities or no cap at all).

General 'tax indemnity' deeds as used in other jurisdictions (eg, the UK) are not common in

Portugal.

5.2.6 Pricing structures

In Portugal, both completion accounts-based pricing structures and locked box pricing structures are used. The choice between either of these structures will depend on several factors, including the preferences of the parties and their financial advisers.

The formats are similar to the ones used in other jurisdictions. In a completion accounts structure, the parties agree to a preliminary purchase price (with certain assumed figures for key variables such as net debt and working capital, or using good faith calculations communicated by seller prior to closing), which is then adjusted after the completion accounts are prepared and the true figures at closing are determined for the key variables.

In a locked box structure, the purchase price is fixed by reference to a locked box date and no adjustment is agreed (instead, the value of the company for the purchaser is protected through the inclusion of a 'leakage' concept, which is used to capture instances where an extraction of value from the company to the sellers occurred the seller is obliged to indemnify any leakage euro-per-euro, with 'permitted leakage' carve-outs being agreed between the parties to accommodate matters such as eg the ordinary payment of salaries to the seller (if the seller is a director)).

5.3 Specific considerations when drafting dispute resolution clauses

The parties can choose between the Portuguese courts and arbitration to resolve disputes.

The main advantages of arbitration proceedings over judicial proceedings are speed, the expertise of the arbitrators, confidentiality of the process and, in particular, whenever one of the parties is not Portuguese, the election of the language according to which the proceedings shall be held. Conversely, it may take several years for a final judgment to be provided in a Portuguese judicial court.

If the choice is arbitration, the proceedings may be held in Portugal or abroad. Purchasers (when Portuguese) typically prefer to hold the arbitration in Portugal to the extent that the costs involved are generally lower and high arbitration costs may discourage a dispute over a potential claim for the breach of the seller's representations and warranties.

Specific dispute resolution mechanisms can be used in respect of particular matters such as a disagreement on the completion accounts adjustment or on the calculation of an earn-out: in these cases, the parties often agree that one or more third-party experts (eg, leading auditing firms) are involved to resolve the dispute and that the determination of the expert(s) is final and binding, save for manifest errors.

6. TYPICAL CONDITIONS TO CLOSING/RELEVANT REGULATORY REGIME

6.1 Typical closing conditions

As mentioned above, typical conditions precedent include third-party consents, competition or regulatory authorities' approvals, the carve-out of assets or parts of the business from the scope of the transaction, and the funding required for the transaction being made available to the purchaser.

Closing will take place when all of the conditions are satisfied or waived in writing (it being normally agreed which parties are entitled to waive which conditions, as some of the conditions may benefit one party more than the other). Usually, the party who is in a position to acknowledge the verification of such events will give a closing notice to the other party. The evidence that the conditions precedent have been met is usually exchanged between the parties before or on the closing date.

In Portugal, as in other jurisdictions, it is normal to include conditions precedent related to the prior authorisation that must be given by the regulatory authorities, provided that the transaction is, or may be, subject to such authorisation.

6.2 Regulatory requirements and dealing with competition law, foreign investment control, etc

The transaction must be notified to the Portuguese Competition Authority if the aggregate turnover in Portugal of all the participants exceeded €100m in the last financial year, provided that at least two of the participants have an individual turnover in Portugal of more than €5m. The relevant turnover of the purchaser includes the turnover of its entire group of companies, ie, its subsidiaries and controlling shareholders.

A transaction also must be notified to the Portuguese authorities, regardless of the parties' turnover, if as a consequence of the concentration, a market share equal to or exceeding 50 per cent of the relevant product or service market in Portugal is acquired or increased.

Notification is also required when the transaction entails the acquisition, creation or increase of a market share in Portugal equal to or greater than 30 per cent and lower than 50 per cent, provided that the individual annual turnover in Portugal of at least two of the undertakings concerned exceeds €5m.

The transaction that requires a notification has to be notified prior to its implementation, ie, the parties shall hold on the implementation of the concentration until the Portuguese Competition Authority issues a decision. However, there is no specific deadline to notify after the triggering event. The lack of a decision within the period legally set forth for such purpose (30 business days in normal Phase I investigations, and 90 business days following the notification in cases of in-depth investigations), shall be deemed as a non-opposition to the transaction.

The breach of the obligation to suspend the implementation of the transaction prior to the Portuguese Competition Authority's decision entails a fine of up to 10 per cent of the turnover of the undertaking in breach. Furthermore, any act or transaction implementing the concentration before notification, if required, or before clearance from the Portuguese Competition Authority, is legally unenforceable (*ineficaz*).

Please note, however, that if the relevant transaction meets the thresholds according to which it has to be notified at the EU level, it is not necessary to notify it locally.

Additionally, in certain types of sectors, transactions may be subject to the consent or favourable opinion of the sectoral regulatory bodies, including in the banking, insurance, military industry, telecommunications and social communication sectors. In the case of change of control transactions in favour of a non-EU purchaser of assets considered strategic for the purposes of Decree-Law no. 138/2014, of 15 September, the transaction may be screened by the Portuguese Government and can only be completed when the government confirms its non-opposition or when the relevant review periods expire. In each case, the normal way to deal with the need to obtain antitrust clearance or approval or non-opposition from administrative authorities or the

Portuguese Government is to include conditions precedent in the acquisition agreements.

7. CLOSING ACTIONS

7.1 Typical steps to be undertaken for consummation of the proposed transaction

On the closing date the seller will deliver to the purchaser all elements required to complete the transfer. Should the object of the transaction be a company, the seller will usually deliver the share certificates (if applicable), the company's books and records, the resignation letters of the members of the corporate bodies, the revocation deeds of the attorney's powers, and all relevant documents that may be in its power at that date.

On the other hand, the purchaser will pay the purchase price (or the remaining part of the purchase price) and usually will hold a shareholders' meeting of the target company (and any subsidiaries) to accept the resignations of the resigning directors and to appoint new members for the corporate bodies, as well as to exonerate the outgoing members of the corporate bodies form any liability, save for wilful misconduct.

The parties may also agree to enter into certain agreements on closing date that are part of the transaction (eg, a shareholder's or a joint venture agreement in case the transaction is for sale of less than 100 per cent of the shares).

7.2 Additional inputs in case of cross-border M&A transactions

A cross-border M&A transaction does not normally bring any increased regulatory burden or notification requirements itself, except for the cases of acquisition of strategic assets by non-European Union investors, as mentioned above.

Foreign individuals to be appointed as directors must have a Portuguese taxpayer number. If the directors are not tax-domiciled in the EEA, a local tax representative must be appointed to represent them before the Portuguese tax authorities.

Depending on the type of transaction, the purchaser entity may have to obtain a Portuguese tax and company number as well (particularly to buy shares (quotas) in limited liability companies (*sociedades por quotas*) or to buy real estate). Furthermore, if the foreign entity obtains a Portuguese tax number, it will have subsequently to file a statement with the Portuguese registry of ultimate beneficial owners, identifying its ultimate beneficial owners.

8. POST-CLOSING

8.1 General actions for post-closing

As mentioned above, in transactions that follow a completion accounts pricing structure, post-closing price adjustments will take place. The most usual adjustments are tied to cash, debt and/or working capital. Whenever such type of adjustment is included, it is also normal for the acquisition agreement to establish rules, guidelines and timelines for the preparation of the completion accounts, their review by the parties and the settlement of disputes regarding those accounts (usually involving one or more third-party experts as mentioned above).

As also mentioned above, there is also the possibility of the parties agreeing on contingent price payments (earn-outs) which will be dependent on future revenue or profit metrics of the target company. As with to the completion accounts adjustment, the assessment on whether an earn-out is due or not and on the amount of the payment may trigger disputes between the parties, which can also be solved by the intervention of experts, if such a mechanism was agreed.

Other post-closing actions will depend on the transaction particularities, but it is common, notably, for the parties to agree to the registration of the replacement of directors, so that the directors previously appointed by the seller are no longer presented as directors to the public.

8.2 Regulatory filings

If the transaction concerns a regulated sector, such as a bank or an insurance company, the relevant sectorial legislation and regulation will normally require not only that the transaction is approved by the relevant administrative authority, but also that the actual completion is subsequently notified. Such notifications, when required, are usually also included as a post-closing action.