



# ICLG

The International Comparative Legal Guide to:

## **Mergers & Acquisitions 2013**

**7th Edition**

A practical cross-border insight into mergers and acquisitions

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## EDITORIAL

Welcome to the seventh edition of *The International Comparative Legal Guide to: Mergers & Acquisitions*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of mergers and acquisitions.

It is divided into two main sections:

Five general chapters. These are designed to provide readers with a comprehensive overview of key issues affecting mergers and acquisitions, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in mergers and acquisitions in 41 jurisdictions.

All chapters are written by leading mergers and acquisitions lawyers and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor Michael Hatchard of Skadden, Arps, Slate, Meagher & Flom (UK) LLP for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

*The International Comparative Legal Guide* series is also available online at [www.iclg.co.uk](http://www.iclg.co.uk)

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# Portugal

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## Albuquerque & Associados

### 1 Relevant Authorities and Legislation

#### 1.1 What regulates M&A?

The most relevant laws applicable to M&A of companies in Portugal are the *Securities Code and the Companies Code*, which set forth the basic rules to which such operations shall obey. If an M&A is made by way of an offer over securities, the regulations of the Portuguese Securities Market Commission (*Comissão do Mercado dos Valores Mobiliários – CMVM*) on public offers, prospectus, and disclosure and transparency also apply. The supervising and regulatory authority on listed companies in Portugal is the CMVM. Depending on the industry or activity of the target company, other laws may also be applicable, such as the *Legal Framework of Credit Institutions and Financial Companies and the Insurance Legal Framework*.

Depending on the position of the bidder and of the target on the relevant market, the rules on competition and anti-trust control governed by the *Competition Law* may also be noteworthy; the Portuguese authority on this matter is the Competition Authority (*Autoridade da Concorrência – AdC*).

#### 1.2 Are there different rules for different types of company?

In Portugal, there are 3 main types of companies: (i) partnerships (*sociedades em nome colectivo*); (ii) limited liability companies by quotas (*sociedades por quotas*); and (iii) limited liability companies by shares (*sociedades anónimas*). The Companies Code has a set of general rules that apply to all these types of companies and each type is also governed by a set of specific rules impacting on M&A transactions, notably in what concerns the transfer of shares or quotas. Moreover, listed companies are subject to a vast range of additional rules of the Securities Code, therefore M&A transactions involving this type of company are subject to a more complex and demanding regime.

The Securities Code applies to M&A transactions where the target is a company incorporated in Portugal with securities admitted to trading on a regulated market situated or operating in Portugal or with securities that are not admitted to trading on regulated markets. The Securities Code also applies to takeover bids over securities issued by a target subject to a foreign law, provided that the securities targeted: (i) are admitted exclusively to trading on a regulated market situated or operating in Portugal; or (ii) if not admitted to trading in the EU Member State where the registered office of the issuer is located, have been first admitted to trading on a regulated market situated or operating in Portugal.

#### 1.3 Are there special rules for foreign buyers?

In general, Portuguese law does not differentiate foreign buyers from Portuguese buyers. Therefore, as a rule, all buyers (whether nationals or foreigners) are subject to the same procedures and duties. Notably, there are no minimum local ownership requirements.

#### 1.4 Are there any special sector-related rules?

Companies may be subject to additional regulatory control depending on their sector of activity. For instance, when the target is a credit institution, an energy company or an insurance company, the consent of the respective regulatory authorities is required, which in these cases are the Bank of Portugal (*Banco de Portugal*), the Authority of Energy Services (*Entidade Reguladora dos Serviços Energéticos*) and the Portuguese Insurance Institute (*Instituto de Seguros de Portugal*).

#### 1.5 Does protectionism operate in favour of local owners?

As referred in question 1.3 above, Portuguese rules do not differentiate foreign and national owners.

#### 1.6 What are the principal sources of liability?

The main sources of liability in an M&A are related to the quality of information that is conveyed during the process, the prospectus, and to the obligation of launching a bid after it is announced publicly. Those persons involved in drafting the prospectus (including the members of the board of the bidder) are liable for misrepresentations in the offer documentation and may be judicially forced to indemnify any losses caused, but usually it is quite difficult to prove the fault (*culpa*) in rendering misleading information, and there are also exculpatory situations. The infringement of disclosure obligations may lead to the imposition of fines. Insider trading and market manipulation are also examples of relevant unlawful practices that may result in criminal liability.

## 2 Mechanics of Acquisition

#### 2.1 What alternative means of acquisition are there?

An M&A of a company in Portugal may be carried out by way of: (i) a takeover offer to purchase all or some of the target's shares; (ii)



the execution of a financial recovery plan within the scope of one of the types of recovery prescribed by law; and (iii) merger of companies.

The execution of a financial recovery plan within the scope of one of the types of recovery prescribed by law and the merger of companies benefits from an exemption from launching a mandatory takeover offer that has to be recognised by the CMVM. In the case of a merger, it is necessary that the resolution of the general meeting of the issuer of securities, in relation to which the offer would be launched, expressly specifies that the operation would result in the duty to launch a takeover.

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## 2.2 What advisers do the parties need?

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The parties will usually contract the assistance of legal counsellors, accountants and financial intermediaries. If the M&A is to be carried out by way of a takeover offer requiring the issuance of a prospectus, the assistance of a financial intermediary is mandatory. The bidder may also use the expert opinion of an investment adviser (these investment advisers must meet high-level requirements in order to be registered in the Portuguese Securities Market Commission and, thereafter, provide the advising services).

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## 2.3 How long does it take?

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For M&As carried out by way of a takeover offer, the Securities Code sets out that the offer period may vary between two and ten weeks, but the regulatory procedure expands the overall delay. The Securities Code provides for the rules regarding timeframes applicable to a bid, as follows:

- (i) As soon as a bidder reaches a decision to launch a takeover bid, it should send the preliminary announcement to the CMVM, the target and the managing entities of the regulated markets on which the securities that are the object of the offer are listed.
- (ii) The bidder then has 20 days to apply for registration of the offer before the CMVM.
- (iii) The CMVM has 8 days to accept or refuse the registry. This delay is suspended if the CMVM requests additional information to the bidder or to third parties. The registry may depend of the non-opposition to the transaction by sector regulatory authorities and the Competition Authority.
- (iv) Publication of the launching announcement and of the prospectus.

All things considered, and assuming that there is no substantial competition or regulatory issues, it should be possible to reach a conclusion for the takeover in about four months. A takeover bid raising severe regulatory and competition concerns may take over one year to be concluded. In the case of two recent large bids in Portugal in the banking and in the telecom sectors, it took more than one year for the transactions to clear.

When the M&A is carried out by way of execution of a financial recovery plan, the time frame of the transaction depends on the court procedures. If the recovery plan is an extrajudicial conciliatory procedure put in place under the supervision of IAPMEI, the delay until conclusion of the procedure is six months – but it may be extended.

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## 2.4 What are the main hurdles?

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The main hurdles of an M&A transaction are of a regulatory nature and concern the need to obtain clearance from the administrative authorities to carry out the transaction.

Also noteworthy is that if the M&A is carried out by way of a takeover offer, the bidder has to arrange for the financing of the transaction before filing for registry of the bid with the CMVM (the bidder has to attach evidence of the deposit of the consideration in money or the issuance of a bank guarantee that guarantees payment). In terms of financing, it should be noted that Portuguese law does not permit the use of the target's assets as collateral for the financing of the bid.

If the M&A is carried out by way of execution of a financial recovery plan, dealing with the creditors of the target and providing a satisfaction to their specific interests may also be an important constraint.

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## 2.5 How much flexibility is there over deal terms and price?

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In an M&A transaction, the consideration may consist of: (i) cash; (ii) securities already issued or to be issued; or (iii) a mixture. In a takeover offer, as a consequence of the principle of equal treatment of the addresses of the bid, the price for securities of the same class should be the same. The offer may be reviewed, but the reviewed offer must improve the initial offer by at least 2% of its value.

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## 2.6 What differences are there between offering cash and other consideration?

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If the consideration consists of cash, the bidder should deposit the total amount in a credit institution or submit a bank guarantee before filing for the registry of the takeover offer. If the consideration consists of securities, these should have appropriate liquidity and be easy to evaluate, and the bidder should provide for the blockage of such securities.

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## 2.7 Do the same terms have to be offered to all shareholders?

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Portuguese law sets forth the general principle of equal treatment for all target's shareholders and addressees of a takeover offer. This principle imposes, for instance, that there is only a single price for the offer, except for the possibility of different prices according to different classes of securities or addressees. That same principle imposes the obligation to launch a bid if the bidder has acquired (directly or indirectly) a relevant number of voting rights (more than 1/3 and 1/2) by other way than through a takeover offer, in which case the criteria to determine the price of the offer is set in the law enabling the minority shareholders to benefit from control premium.

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## 2.8 Are there obligations to purchase other classes of target securities?

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The Securities Code sets forth that in case of a mandatory takeover, the offer must comprise not only the totality of the target shares, but also other securities issued by the target that grant the right of subscription or acquisition of shares. This includes notably autonomous warrants with rights of acquisition of shares, bonds convertible into shares and bonds with warrants.

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## 2.9 Are there any limits on agreeing terms with employees?

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In general, there are no limits on agreeing any terms with the employees of the target. However, according to the principle of equal treatment, if the employees are also shareholders, they may

not benefit from special treatment, unless they hold a specific class of securities.

## 2.10 What role do employees play?

According to the Portuguese law, both the target company and the bidder are required to inform their workers' representatives or, if such representatives do not exist, workers themselves, about (i) the date and reasons for the transfer, (ii) the legal, economic and social consequences for workers, and (iii) the planned measures for workers. Afterwards, before transfer of the target company is completed, the target company and bidder are also required to consult workers' representatives of each party, in order to agree on the measures to be applied to workers as a result of such transfer.

## 2.11 What documentation is needed?

The M&A carried out by a takeover offer is subject to previous registration before the CMVM. The application for registration shall be submitted together with the following documents: (i) a copy of the resolution to issue the offer taken by the bidder's competent bodies and the necessary management decisions; (ii) a copy of the bylaws of the target; (iii) a copy of the bidder's bylaws; (iv) an up-to-date certificate of company registration of the bidder; (v) an up-to-date certificate of company registration of the target; (vi) a copy of the management reports and accounts, the opinions of the supervisory bodies and the legal certification of the target's accounts in respect of the periods required in the terms of the Commission's Regulation no. 809/2004/EC; (vii) a report or statement from an auditor; (viii) an identification code of the securities that are object of the offer; (ix) a copy of the contract entered into with the financial intermediary assisting in the operation; (x) a draft prospectus; and (xi) other documents that according to the specific case may be required. Before filing for the registry of the takeover, the bidder has to issue a preliminary announcement, and after the approval by the CMVM, it has to issue an offer announcement describing the essential components for the formation of the agreements it refers and, if applicable, a prospectus. On the side of the target the board has to issue a report on the opportunity and terms of the offer.

If the M&A is carried by merger, the boards of the bidder and of the target should draft together a project of merger with all relevant information regarding the operation.

## 2.12 Are there any special disclosure requirements?

As mentioned in the answer to question 2.11, in a takeover offer, the Securities Code requires the submission of some accounting documentation, including a report or statement from an auditor which entails a special procedure since such auditor must be registered before the CMVM. Also, in a merger, in addition to the accounts of both companies, the merger project is subject to the opinion of the auditor of both companies, as well as of an independent auditor. For disclosure requirements related to labour issues, please refer to question 2.9 above.

## 2.13 What are the key costs?

The main costs of an M&A transaction relate to fees of financial intermediaries, accountants and auditors, legal counsellors, taxes, and, if applicable, financing costs. Whenever the bidder requests the opinion of an investment adviser, the former will also have to bear the respective fees.

## 2.14 What consents are needed?

As mentioned above (see question 2.11), takeover offers are subject to prior registry before the CMVM. Such registration may only be denied by the CMVM if the offer is illegal or if any of the submitted documents do not comply with the legal requirements. Depending on the industry or activity of the target, consents may be required from sector regulatory authorities (such as the Competition Authority, Bank of Portugal, Portuguese Insurance Institute, etc.).

## 2.15 What levels of approval or acceptance are needed?

The bidder must disclose the level of acceptance that it deems essential for the success of the bid. If the bidder wants to acquire sufficient shares to enable it to exercise compulsory acquisition rights to squeeze out any minority who do not accept the offer, it must specify as condition to the offer that it acquires shares corresponding to at least 90% of the share capital. In any case, the bidder may reserve the right to accept a lower level of acceptance.

In an M&A carried out under a recovery plan, it is necessary to have the approval of the creditors of the target. In an M&A carried out by merger it is necessary to get the approval of 2/3 of the shareholders by votes cast in a general meeting.

## 2.16 When does cash consideration need to be committed and available?

As referred to in question 2.6 above, the bidder shall deposit the total amount of the cash consideration in a credit institution or present an appropriate bank guarantee, before registration of the bid.

## 3 Friendly or Hostile

### 3.1 Is there a choice?

Portuguese law does not provide for a distinction between hostile and friendly bids, and does not provide for any specific constraints to hostile bids. The distinction results from the practice and derives from the assertion that if the bid is the consequence of an invitation or there has been previous negotiation, there is a friendly environment to it.

### 3.2 Are there rules about an approach to the target?

Although there are no specific rules concerning the approach itself, the preparation of an offer is subject to strict secrecy requirements. In fact, the Securities Code sets forth that the bidder and all those who render services on a permanent or occasional basis should maintain secrecy on the preparation of the offer until publication of the preliminary announcement. Therefore, among other duties, the bidder is required to inform the market in case of leakage of information that might disturb the normal price setting.

### 3.3 How relevant is the target board?

The target board's views are quite relevant for the bid success. In a takeover offer, under Portuguese law, the target board is required to issue and publicise a report on the offer that must include an opinion concerning: (i) the type and amount of the consideration offered; (ii) the bidder's strategic plans for the target; (iii) the repercussions

of the bid on the interests of the target, in general, and, in particular, on the interests of its employees; and (iv) the intentions of members of the board who are simultaneously shareholders in the target, in respect of acceptance of the bid.

In an M&A carried out under a recovery plan or a merger, the board of the target is at the centre of the process and usually is responsible for the preparation or assistance in the preparation of all relevant documentation and submission of the transaction to the shareholders approval.

### 3.4 Does the choice affect process?

See question 3.1.

## 4 Information

### 4.1 What information is available to a buyer?

Usually, the only information about the target available to the bidder is the information that is available to the public. Yet, the target's board may provide additional information to the bidder. In a takeover offer, should the board disclose additional information, it should provide the same level of information to third parties.

### 4.2 Is negotiation confidential and is access restricted?

All negotiations prior to the disclosure of the preliminary announcement of a takeover offer may be kept confidential, provided there is no leak of information to the market. However, according to the Portuguese Securities Code, companies which have securities admitted to trading on a regulated market or have requested their admission to such a market are required to disclose any non-public information that, if it were made public, would be likely to have a significant effect on the prices of such securities, their underlying instruments or related derivatives. As such, for these companies, disclosure is required whenever negotiations have reached a stage in which that significant effect may occur. The public disclosure of this information may be delayed if, cumulatively: (i) immediate disclosure would be likely to prejudice their legitimate interests; (ii) such delay is not likely to mislead the public; and (iii) evidence is provided that the confidentiality of such information is ensured.

### 4.3 What will become public?

The preliminary announcement of a takeover offer should notably contain the following information: (i) the identification of the bidder; (ii) the identification of the securities that are the object of the offer; (iii) the consideration offered; (iv) the financial intermediary in charge of assisting with the offer; (v) the percentage of voting rights in the target company held by the bidder and entities concerted with it; and (vi) a summary statement of the bidder's intentions, notably with regard to continuity or alteration of the business of the target.

The registration of a takeover bid shall imply approval of the corresponding prospectus. The approval of the prospectus is the act by which the prospectus' conformity with the requirements of completeness, accuracy, updating, clearness, objectivity and lawfulness of the information is verified by the CMVM. The prospectus must notably contain the following information which will become publicly available after disclosure: (i) identification

and the registered office of the bidder, the target and financial intermediaries in charge of assisting in or submitting the offer; (ii) characteristics and amount of the securities concerned by the offer; (iii) type of offer; (iv) capacity in which the financial intermediaries act regarding the offer; (v) price and overall amount of the offer, nature and terms of payment; (vi) offer period; (vii) allotment criteria; (viii) conditions for effectiveness of the offer; (ix) percentage of voting rights in the company held by the bidder and any persons related to the bidder; (x) places of dissemination of the prospectus; (xi) entity responsible for determining and disclosing the outcome of the offer; (xii) the consideration offered and its justification; (xiii) the minimum and maximum amounts of securities that the bidder intends to acquire; (xiv) the percentage of voting rights that may be exercised by the bidder in the target company; (xv) the percentage of voting rights that may be exercised by the target company in the bidder company; (xvi) possible implications of a successful bid for the financial condition of the bidder and any funding of the bid; and (xvii) possible charges to be borne by the addressees of the bid.

### 4.4 What if the information is wrong or changes?

If the circumstances that grounded the bidder's decision to submit an offer are changed in an unpredictable and substantial manner, and such changes increase the risks of the offer, then, within a reasonable period and subject to the CMVM's authorisation, the bidder may modify or revoke the offer. If the information provided by the bidder is wrong, all parties responsible for such incorrectness will be jointly liable for the damages caused, unless they prove to have acted without fault.

## 5 Stakebuilding

### 5.1 Can shares be bought outside the offer process?

Yes, it is possible to buy shares outside the offer process, but such purchases have an impact on a possible mandatory bid and its terms, and may trigger disclosure obligations (see question 5.2).

Also, during a takeover process, as from the publication of the preliminary announcement and until the assessment of the offer's result, the bidder may not buy securities of the class of those which are the object of the offer outside regulated markets, except if authorised by the CMVM with a previous opinion from the target company.

### 5.2 What are the disclosure triggers?

As a general rule, when buying shares outside an offer process, any entity reaching or exceeding a holding (directly or indirectly) of 10%, 20%, 1/3 (one third), 50%, 2/3 (two thirds) and 90% of the voting rights in the capital of a public company subject to Portuguese law, or reducing its holding to a value lower than any of the above thresholds, should, within 4 business days from such fact or the knowledge thereof, inform the CMVM and the company holding the participating interest of said fact. Thresholds of 2%, 5%, 15% and 25% are also applicable in some specific situations.

### 5.3 What are the limitations and implications?

When someone (legal entity or an individual), directly or indirectly, acquires 1/3 (one third) or 2/3 (two thirds) of the voting rights corresponding to the share capital of a public company, he must launch a public offer for the totality of the shares and other

securities issued by the target company that granted the right to their subscription or acquisition.

The mandatory takeover is not applicable when the threshold of the voting rights has been exceeded due to: (i) the acquisition of securities by a takeover launched over the whole of securities issued by the target company, without any restriction relating to the quantity or maximum percentage of securities to be acquired; (ii) the execution of a financial recovery plan within the scope of one of the types of recovery prescribed by law; and (iii) the merger of companies, if the resolution of the general meeting of the issuing company of securities in relation to which the offer would be launched, expressly specifies that the operation would result in the duty to launch a takeover. The exemption of the duty to launch an offer is subject to declaration by the CMVM.

## 6 Deal Protection

### 6.1 Are break fees available?

Portuguese law does not provide a break fee rule. However, if there has been a previous negotiation, the target and bidder may agree a penalty clause for such purpose under the principle of contractual freedom.

### 6.2 Can the target agree not to shop the company or its assets?

From the moment the target acknowledges the decision to launch a takeover of more than one third of the securities of the respective class, and until the assessment of the result or until the prior termination of the respective process, the target's board may not perform acts that materially affect the net equity of the target company and which may significantly affect the objectives announced by the bidder, apart from the normal day-to-day management of the company. Within such acts are the issuance of shares and other securities conferring the right to their subscription or acquisition and the entering into contracts representing the sale of important portions of the company's assets. However, the board may carry out acts intended to seek a competing bidder, and so it will be free to limit its action in this regard, except if otherwise approved by the shareholders.

### 6.3 Can the target agree to issue shares or sell assets?

See question 6.2.

### 6.4 What commitments are available to tie up a deal?

Although a bidder can agree some commitments with the target and its shareholders, it is difficult to tie up the deal in a takeover process, and in any event the final decision results from the level of acceptance by a majority of shareholders.

## 7 Bidder Protection

### 7.1 What deal conditions are permitted?

In non-mandatory offers, the bidders may subject their offers to certain conditions provided that those conditions correspond to a legitimate interest of the bidders, do not affect the normal functioning of the market and the verification of which does not

depend on the bidders. Typical conditions include minimum levels of acceptance and approvals from the relevant authorities. Mandatory offers may not in general be subject to special conditions.

### 7.2 What control does the bidder have over the target during the process?

The bidder does not have instruments of direct control over the target during the bidding process. In any case, from the moment a target company knows the decision to launch a takeover for more than 1/3 of the securities of the respective class, and until the assessment of the result or until the prior termination of the respective process, the target's board may not perform acts that materially affect the net equity of the target company and which may significantly affect the objectives announced by the bidder, apart from the normal day-to-day management of the target.

### 7.3 When does control pass to the bidder?

Usually the bidder takes control over the target as a result of a successful unconditional offer, or when it holds over 50% of the voting rights of the target and can appoint a new board.

### 7.4 How can the bidder get 100% control?

Getting 100% control depends firstly of the level of acceptance of the bid by the shareholders. A bidder that, following the launch of a general takeover bid over a publicly traded company subject to Portuguese law, reaches or exceeds 90% of the voting rights up to the determination of the outcome of the bid and 90% of the voting rights covered by the bid is entitled, in the subsequent three months, to acquire the remaining shares for a fair consideration, in cash.

## 8 Target Defences

### 8.1 Does the board of the target have to publicise discussions?

See question 3.3.

### 8.2 What can the target do to resist change of control?

The decision on the bid's fate is of the shareholders. As such, the target's board may not perform acts that materially affect the net equity of the target company and which may significantly affect the objectives announced by the bid, apart from the normal day-to-day management of the company.

Nevertheless the target's board may provide for the fulfilment of obligations assumed before the knowledge of the offer launch, and execute acts authorised by a shareholders' meeting called exclusively to such end, if approved by the majority required to amend the bylaws.

### 8.3 Is it a fair fight?

Both the bidder and the target's board have instruments to publicise their positions and to influence the shareholders with their opinions and information disclosed. In the end, the success or failure of the bid is decided by the shareholders, and it is not unusual for the shareholders, specially the small investors, to be caught in the



confusion resulting from the complexity of the information provided by both sides.

## 9 Other Useful Facts

### 9.1 What are the major influences on the success of an acquisition?

Depending on the industry and size of the companies, the position of regulatory authorities, especially in competition matters, may have great influence on the success of the transaction. Aside from that, also of great importance is the price offered.

### 9.2 What happens if it fails?

Regarding takeover offers, except for express authorisation granted by the CMVM for the protection of the interests of the target, within twelve months following the publication of the assessment of the offer's result, the bidder may not launch a new bid. This rule is not applicable to mandatory takeover offers.

## 10 Updates

### 10.1 Please provide a summary of any relevant new law or practices in M&A in Portugal.

The recession felt in Portugal continued to provoke a difficult environment for companies and investors to obtain relevant financing in adequate size and conditions, which results in a slow-down in the economy and a decrease in M&A operations in Portugal. There is some expectation though that in the second half of 2013 some improvement of these conditions may occur. The financial assistance agreement entered into between Portugal and the European Commission (EC), the International Monetary Fund (IMF), and the European Central Bank (ECB) has resulted in a programme of sale of State-owned stakes in Portuguese companies. The Government has sold stakes in the energy utility EDP to China Three Gorges Corporation, in REN (electrical infrastructure) to the Chinese company State Grid and to Oman Oil, and in ANA, which holds the concessions of the Portuguese airports, to the French company Vinci. On the other side, the proceeding of the privatisation of TAP Air Portugal has resulted in a Government decision not to adjudicate, but the process may restart in 2013. Other companies are due to be privatised or further privatised, notably in the transports and insurance sectors.

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