

THE FOREIGN
INVESTMENT
REGULATION
REVIEW

FIFTH EDITION

Editor
Calvin S Goldman QC

THE LAWREVIEWS

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INVESTMENT
REGULATION
REVIEW

The Foreign Investment Regulation Review
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This article was first published in The Foreign Investment Regulation Review, -
Edition 5

(published in September 2017 – editor Calvin S Goldman QC)

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Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK
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www.TheLawReviews.co.uk

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Enquiries concerning editorial content should be directed
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ISBN 978-1-910813-79-9

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

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ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ALRUD

ASBZ ADVOGADOS

ATSUMI & SAKAI

CLAYTON UTZ

CLEARY GOTTlieb STEEN & HAMILTON LLP

DARROIS VILLEY MAILLOT BROCHIER

DLA PIPER DENMARK LAW FIRM P/S

ESTUDIO BECCAR VARELA

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HOGAN LOVELLS

KING & WOOD MALLESONS

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URÍA MENÉNDEZ

VIETNAM INTERNATIONAL LAW FIRM (VILAF)

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PORTUGAL

*Joaquim Caimoto Duarte, Verónica Martins Mendes, Miguel Stokes
and Hélder Santos Correia¹*

I INTRODUCTION

Portugal's legal environment encourages foreign investment. The country has no foreign capital entry restrictions, and Portuguese law prohibits any discrimination between investments on the basis of nationality. Portugal is currently still ranked first for cross-border trading, an indicator that encompasses the time and cost for document preparation, and compliance with border procedures for the export and import of goods.²

Portugal has a liberal economy, which has led to significant development and diversification of the Portuguese market, with non-EU trade partners continuing to maintain their increasing importance (30.2 per cent of total exports in 2016),³ despite the key role assumed by the EU countries (69.8 per cent).

According to the World Bank's findings on ease of doing business, Portugal is ranked 25th in the world, and 12th within the EU (a higher rating than the Netherlands, France, Spain or Italy).

Foreign direct investment in Portugal has evolved positively, and the most recent forecasts from the European Commission, the Bank of Portugal and the Portuguese Ministry of Finance for 2017 refer to a continued gradual recovery of the Portuguese economy, indicating an increase of GDP of 1.8 per cent. For 2018, the European Commission indicates an increase of GDP of 1.6 per cent, the Bank of Portugal 1.7 per cent and the Portuguese Ministry of Finance 1.8 per cent.

According to the World Economic Forum,⁴ in 2017, Portugal ranks 14th in the travel and tourism competitiveness index, and fourth in terms of tourism service infrastructure.

According to data from the Bank of Portugal, the net inflow of foreign direct investment into Portugal registered an amount close to €5.5 billion in 2016 (-12.3 per cent in relation to 2015) and Portuguese foreign direct investment, in net terms, was close to €1.4 billion in 2016 (-72.1 per cent compared with the previous year). The highest value during the period 2012–2016 was in 2015 (nearly €5.1 billion).

In 2016, the majority of the foreign capital invested in Portugal originated from the EU, particularly from the Netherlands and Spain (25.6 per cent and 22.9 per cent of the

1 Joaquim Caimoto Duarte is a counsel, Verónica Martins Mendes and Miguel Stokes are senior associates, and Hélder Santos Correia is a trainee lawyer at Uría Menéndez – Proença de Carvalho.

2 World Bank, 'Doing Business 2017: Equal Opportunity for All' (Washington, DC: World Bank, DOI: 10.1596/978-1-4648-0948-4, 2017).

3 AICEP Portugal Global – Trade & Investment Agency, a Portuguese global trade and investment government agency, on 22 June 2015.

4 World Economic Forum, 'The Travel & Tourism Competitiveness Report 2017'.

total respectively), Luxembourg and the United Kingdom (18 per cent and 7.6 per cent of the total respectively). Outside the 28 Member States of the EU (which had a quota of 12.5 per cent of the total in 2016), Brazil (2.5 per cent), Angola, the United States and Switzerland (with quotas of 1.7, 1.6 and 1.6 per cent respectively) were among the 10 largest foreign investors in Portugal in 2016.

In April 2016, the Portuguese government submitted its National Reform Programme for the period 2016–2020. This programme introduces essential structural reforms to the Portuguese market, notably by promoting foreign investment and contributing to the public finances. The programme is built on measures addressing qualifications, promotion of economic innovation, territorial enhancement, modernisation of the Portuguese state, capitalisation of companies and social cohesion and equality. Moreover, an extensive privatisation programme has been successfully implemented and has provided revenues of around €9 billion (exceeding initial expectations of €5 billion). The programme focused particularly on the aviation, electricity, healthcare and financial sectors. For additional information regarding the programme, see Section VII.

II FOREIGN INVESTMENT REGIME

Most foreign investment in Portugal is unregulated. Nevertheless, authorisation is required for investment in sensitive areas, in particular defence and other regulated areas such as banking, media and financial services; however, the majority of requirements apply both to national and foreign investors. Foreign investors in Portugal must also take into consideration EU and national competition rules and other EU policies.

i Corporate

Legal environment

As a general rule, Portuguese law does not impose any specific restrictions on foreigners or foreign investment in corporate matters.

Notably, regulations on the incorporation of companies, mergers and acquisitions, day-to-day business activities, duties and liability of shareholders and directors, merger control and antitrust apply irrespective of nationality.

Notwithstanding the above, some differences in the treatment of Portuguese and foreign entities do exist under Portuguese law (although exceptional), such as the approach taken in connection with groups of companies.

Regulation of affiliated companies and groups

The Portuguese framework on corporate groups is based on the central concept of an ‘affiliated company’, which is deemed to exist in instances of legally defined types of relationships between companies.

Holding companies are legally authorised to direct the management of their subsidiaries if a company is wholly controlled by another company, or a company agrees to subject its management to the direction of another company (which may or may not be its parent company). Holding companies may also issue binding orders to the board of directors of subsidiaries. The orders may be disadvantageous to the controlled company if they serve the corporate group’s interests or those of the holding company (despite the existence of specific limitations).

This potential power is nevertheless counterbalanced by the requirement that the holding company comply with several duties in relation to the subsidiary's financial undertakings. The holding company is subsidiarily liable for all obligations of the subsidiary arising before or after the occurrence of the change in control, and the subsidiary may request that the holding company assume responsibility for its annual losses.

It is important to take into consideration that some of the aspects of the legal framework on groups and, in particular, the possibility of issuing binding orders and the liability of the holding company, are only applicable if the registered offices of both companies are located in Portugal.⁵

ii Regulated sectors

Banking and other financial institutions

Summary of supervisory system

Under Portuguese law, the provision of banking services is a regulated activity that may only be carried out on a professional basis by authorised credit institutions or financial companies, and remains subject to the supervisory powers of the regulatory authority of the Member State of origin.

The supervision of the Portuguese banking system is governed by the Portuguese Credit Institutions and Financial Companies Legal Framework, approved by Decree-Law 298/92 of 31 December, as amended (Decree-Law 298/92), and the notices, instructions and circulars issued by the Bank of Portugal. The supervision of credit institutions, and in particular their prudent supervision, including monitoring activities carried out abroad, is entrusted to the Bank of Portugal under its basic law enacted by Law 5/98 of 31 January, as amended, and Decree-Law 298/92.

Insurance

Summary of supervisory system

Under Portuguese law, insurance services are a regulated activity and may only be carried out on a professional basis by authorised insurance companies and are subject to the supervisory powers of the regulatory authority of the Member State of origin.

The supervision of the Portuguese insurance system is governed pursuant to Decree-Law 94-B/98 of 17 April, as amended, which establishes the legal framework and requirements for taking up and pursuing insurance and reinsurance activities and regulations and circulars issued by the Portuguese Insurance and Pension Funds Supervisory Authority (ASF).

5 Nevertheless, the Constitutional Court has already held that the holding company's liability, at least in connection with labour matters, cannot be excluded solely on the basis that its registered office is located abroad. Although these decisions have no general effect (as of this time, since Portuguese law requires that the Constitutional Court issue at least three decisions to have such an effect), they may trigger a change in the framework.

Energy

Summary of the supervisory system

The supervision of energy production, transport, distribution and trade is regulated by Decree-Law 97/2002 of 12 April, as amended. Article 1 establishes the Energy Sector Regulatory Authority as the domestic regulatory authority in the national gas and electricity sectors.

Production, transport, distribution and trading of electricity⁶

The legal framework for the production, transport, distribution and trade of electricity is regulated under Decree-Law 29/2006 of 15 February, as amended, which establishes the general grounds for the organisation and functioning of the national electricity system, and under Decree-Law 172/2006 of 23 August, as amended (Decree-Law 172/2006), which specifically regulates the production, transport, distribution and trade of electricity in Portugal.

Production

Decree-Law 172/2006 establishes that energy production activities under the ordinary regime are free, subject to the granting of a production licence following a request by the licensing entity.

Transport and distribution

Both the transport and distribution of electricity will be carried out under a public service concession agreement awarded through a public tender, unless the concession is granted directly to a state-controlled entity. The concession is performed under a public service framework on the basis of its classification as a public utility.

Trading

Decree-Law 172/2006 states that trade in electricity is free, subject to a licence granted by the licensing entity. The licence must be requested by a company registered in an EU Member State.

Telecoms

The legal framework governing the telecommunications sector is regulated under Law 5/2004 of 10 February, as amended (the Electronic Communications Law).

Pursuant to the Electronic Communications Law, the provision of electronic communications networks or services requires a general authorisation. Companies that intend to offer networks and services of electronic communications must submit a short description to the regulator, ANACOM, of the network or service they wish to initiate, and give notice of the date on which the activity is expected to commence, further submitting any

6 The gas sector is also subject to the supervision of the Energy Sector Regulatory Authority, and the legal framework on the production, transport, distribution and trade of gas is regulated under Decree-Law 30/2006 of 15 February, as amended, which establishes the general grounds for the organisation and functioning of the gas system; and under Decree-Law 140/2006 of 23 August, as amended, which specifically regulates the production, transport, distribution and trade of gas in Portugal.

details necessary for their full identification under terms to be defined by ANACOM. Once that notification is made, undertakings may immediately commence the activity, subject to the limitations resulting from the allocation of rights to use frequencies and numbers.

Decree-Law 31/2003 of 17 February initially granted a concession for the operation of the public service of telecommunications to PT Comunicações, SA, a subsidiary of Portugal Telecom, SGPS, SA, for a term that would end on 20 March 2025. However, in 2010, the European Court of Justice held the concession to be illegal and, following a public tender launched in 2013, the concession with PT was terminated and granted to Optimus Comunicações, SA (currently Nos Comunicações, SA), ZON TV Cabo Portugal, SA (subsequently merged into Nos Comunicações, SA) and PT Comunicações, SA (currently MEO – Serviços de Comunicações e Multimédia, SA). Decree-Law 31/2003 of 17 February was subsequently revoked by Decree-Law 35/2014 of 7 March.

Television broadcasting

The legal framework on television broadcasting is based on the Television Act, which governs access to and exercise of television activity (Law 27/2007 of 30 July, implementing Directive 89/552/EEC – ‘Television without frontiers’, as amended). The main regulatory authority for such activity is the Portuguese Regulatory Authority for the Media.

The Television Act establishes that channel licences are granted through a public tender, and lays down restrictions regarding minimum capital requirements and the ownership of capital (in particular regarding political associations, trade unions, etc.).

Air transport

Portuguese law does not impose any specific restrictions on foreigners or foreign investments in air transport matters. Most mandatory requirements and procedures are established in Regulation 1008/2008 of the European Parliament and the Council of 28 September 2008 on common rules for operating air services in the EU. For an undertaking to be granted an operating licence by the competent licensing authority (in Portugal, the ANAC, according to Decree-Law 40/2015 of 16 March), EU Member States or nationals of EU Member States must own more than 50 per cent of the undertaking and effectively control it, directly or indirectly, through one or more intermediate undertakings, except as otherwise established in an agreement with a third country to which the EU is a party.

Restricted activities

In general, foreign and domestic companies are free to invest in any industry. However, there may be specific requirements when performing activities for the public administration sector, such as winning the bid for a concession contract.

Therefore, private firms, except when licensed by a public entity through an administrative contract, are prohibited from carrying out directly the following economic activities:

- a* collection, treatment and distribution of drinking water and disposal of urban wastewater, both through fixed networks; and solid waste collection and treatment in the case of municipal and multi-municipal systems;
- b* rail transportation operated for public service;
- c* operation of seaports; and
- d* exploitation of natural resources of the subsoil or that may be considered part of the public domain.

Likewise, foreign investment projects must be compatible with specific legal requirements if they could in any way potentially affect the public order, or safety or health matters.

Projects of this nature require an assessment of compliance with statutory requirements and preconditions established under Portuguese law.

Included in this category are activities concerning the production of weapons, munitions and war materials, or those that involve the exercise of public authority. Such activities must comply with legally mandatory conditions and requirements, and thus require specific licences. Access conditions and the pursuit of commerce and industry of goods and military technology are regulated by Law 49/2009 of 5 August. Law 49/2009 regulates the conditions of access to trading activities (in addition to the purchase, sale and lease activities of any of its contractual forms, import, export, re-export activities or flows of military goods and technologies, as well as broker-related business) and industry of military goods and technologies (research, planning, testing, manufacturing, assembly, repair, modification, maintenance and demilitarisation of military goods or technologies), as well as military activities themselves, either by enterprises and individuals based in Portugal, or qualified entities in other EU Member States.

Non-European investment in national strategic assets (those related to critical infrastructure; defence and national security; and basic energy, transportation and communication services) may have to comply with the Strategic Assets Special Framework (Decree-Law No. 138/2014 of 15 September).

Under this framework, the government may object to a transaction in relation to those strategic assets, if (1) it entails control of the assets by a person or company from outside the European Economic Area, and (2) it poses a real and severe threat to national security or to the provision of basic services considered to be of a fundamental nature for the country.

III TYPICAL TRANSACTIONAL STRUCTURES

i General environment

Because of the prohibition against discrimination on the basis of nationality, when setting up a transactional structure in Portugal, there is no need to involve a domestic partner and there are no specific obligations for foreign investors; the treatment of foreign and domestic investment in Portugal is identical.

In addition to enjoying the same conditions and rights as domestic companies, foreign companies are liable for the same taxes and must also satisfy social security payment deadlines.

Regarding exchange control and currency regulations, the Treaty on the Function of the European Union establishes the free movement of capital within the EU and therefore, as a rule, all restrictions on capital movements and payments between EU Member States are prohibited. There are no exchange controls or currency regulations affecting inbound or outbound investment, the repatriation of income, capital or dividends, the holding of currency accounts or the settlement of currency trading transactions. However, there are separate restrictions relating to the provision of funds or dealing with the assets of certain individuals and entities (e.g., entities linked to terrorism and recognised terrorist organisations).

ii Setting up a business in Portugal

Foreign investors typically choose a transaction structure that allows them to directly invest in Portugal. The two most important structures involve the incorporation or acquisition of

a subsidiary or the establishment of a branch. The choice between the two options is determined primarily on the basis of commercial reasons given that the opening and registration costs under the alternatives, as well as the tax and accounting duties, are generally similar.

A subsidiary is an independent legal entity that may be incorporated under any of the structures established under Portuguese law.

The most frequently used structures are limited liability companies and public limited companies. Both limit the shareholders' liability for the company's obligations to the amount invested as share capital. A foreign investor's choice between a limited liability company and a public limited company primarily depends on the simplicity of the corporate and management structure, the investment to be made as share capital and any confidentiality issues surrounding shareholdings in the company.

The process of incorporating a company in Portugal was recently amended to simplify the process. A company may be set up by means of a private document signed by the shareholders whose signatures are certified by a notary or a lawyer, unless a more formal instrument is required to transfer the assets brought into the company (in which event a notarial deed must be executed). Registration with the Commercial Registry takes only a few days.

Establishing a branch

Any foreign corporation seeking to carry out activities in Portugal for a period longer than one year must arrange permanent representation in Portugal. If the activity has minimum material substance, that representation may be carried out through a branch. The branch is not deemed an autonomous legal entity and, consequently, the foreign company will be liable for all actions carried out by its local branch. The branch must have a representative with general managerial powers and be registered with the Commercial Registry.

iii Corporate law residency requirements

Under Portuguese law, a tax identification number is mandatory for both natural and legal persons, whether domestic or foreign, who hold obligations or intend to exercise their rights in relation to the tax authorities pursuant to Decree-Law 14/2013 of 28 January. A tax identification number is obtained by filing specific documentation regarding residency in the country of origin with the tax authorities and, in certain cases, by appointing a representative.

No tax issue should arise from a non-Portuguese resident's application for a Portuguese taxpayer number. In particular, obtaining a Portuguese taxpayer number does not imply that the non-resident individual will be taxed in Portugal as a Portuguese resident taxpayer, or that the individuals will be subject to Portuguese income tax as a non-resident on income obtained abroad; they will only be taxed in Portugal on income considered to have been obtained in Portuguese territory, if and when applicable.

IV REVIEW PROCEDURE

According to Portuguese law, there are certain notification and review thresholds, and special situations, regarding the regimes governing (1) banking and other financial institutions, (2) insurance, and (3) television broadcasting, as discussed in Section II above; these are detailed below.

i Banking and other financial institutions

Change of control and takeover bids

The acquisition of a qualified holding in a Portuguese credit institution triggers disclosure duties whenever legally established thresholds are reached.⁷

Under Portuguese law, any natural or legal person (whether domestic or foreign) who intends to directly or indirectly hold or increase a qualified holding in a Portuguese credit institution must give prior notice to the Bank of Portugal of that intention.

A qualified holding in a Portuguese credit institution is any direct or indirect holding (as defined by law) of at least 10 per cent of the share capital or voting rights of the entity in which the stake is held, or a stake that allows the holder to exercise significant influence over the management of that entity.

Prior notice must also be given to the Bank of Portugal regarding actions that involve an increase in a qualified holding whenever the proportion of the voting rights or share capital held would reach or exceed any of the 10 per cent, 20 per cent, one-third or 50 per cent limits, or when the credit institution becomes a subsidiary of the acquiring company.

Where the action involves the increase of a qualified holding above the 50 per cent limit, the Bank of Portugal shall forward the notification and a proposal for a decision to oppose or not to oppose the acquisition, to the European Central Bank, at least 10 working days before the expiry of the relevant assessment period. The European Central Bank shall then decide whether or not to oppose the acquisition.

Actions or events that result in the acquisition or increase of a holding representing at least 5 per cent of the share capital or the voting rights of a credit institution must also be notified to the Bank of Portugal within 15 days of their occurrence. The Bank of Portugal is obliged to inform the party concerned if the holding is to be deemed a qualified holding.

Notifications and approvals

The incorporation of a Portuguese credit institution is subject to authorisation granted by the Bank of Portugal.

Authorisation will be granted by the Ministry of Finance if the matter involves establishing a branch within Portuguese territory of a credit institution with its registered office located in a non-EU Member State (although that power may be delegated to the Bank of Portugal).

ii Insurance

Change of control and takeover bids

The acquisition of a qualified holding in a Portuguese insurance undertaking triggers disclosure duties whenever the pre-established thresholds are reached.⁸

Any natural or legal person (whether domestic or foreign) who intends to hold or increase, directly or indirectly (as defined by law), a qualified holding in a Portuguese insurance undertaking must give prior notice to the ASF of its intention.

7 Applicable merger control rules must also be observed.

8 Applicable merger control rules must also be observed.

A qualified holding in a Portuguese insurance undertaking is a direct or indirect holding (as defined by law) of at least 10 per cent of the share capital or voting rights of the entity in which a stake is held, or a stake that allows the holder to exercise significant influence over the management of that entity.

Prior notice must also be given to the ASF regarding actions that involve the increase in a qualified holding whenever the proportion of the voting rights or share capital held would reach, exceed or fall below any of the 20 per cent, one-third or 50 per cent thresholds, or when the insurance undertaking becomes a subsidiary of the acquiring company. Whenever the proportion of the voting rights or share capital reaches, exceeds or falls below 10 per cent, notice must be provided to the ASF within 15 days of the triggering event.

Notifications and approvals

The incorporation of a Portuguese insurance undertaking is subject to the ASF's authorisation. The authorisation covers the entire EU territory.

In the event of establishing a branch of an insurance undertaking in Portuguese territory with a registered office located in a non-EU Member State,⁹ the Ministry of Finance will grant the authorisation (or that power will be delegated to the ASF). An authorised agent must be appointed.

iii Television broadcasting

The Television Act sets forth the obligation of transparency¹⁰ of broadcasters' property and management by imposing that shareholders of broadcasters, the composition of broadcasters' administration and management members, as well as the identification of the people in charge of the orientation and supervision of the broadcaster's contents, be published on the broadcaster's website and updated during the seven days following the occurrence of the corresponding relevant fact, that is, whenever:¹¹

- a* a shareholder reaches or exceeds 5, 10, 20, 30, 40 or 50 per cent of its share capital or voting rights;
- b* a shareholder reduces its shareholding to a value that is less than each of the above percentages;
- c* a change of control of the broadcaster occurs; or
- d* a modification occurs in the composition of the administration and management members, or in the structure in charge of the orientation and supervision of its contents.

V FOREIGN INVESTOR PROTECTION

Concerning the protection of foreign investors, arrangements for the reciprocal protection and promotion of investments, which are bilateral instruments containing binding measures to create more favourable conditions for investments by investors of one signatory state in the territory of another, ensure more favourable treatment of investors, and guarantee complete security and protection of investments already made, on a reciprocal basis.

9 Special rules apply to the establishment in Portugal of a branch of an insurance undertaking with its registered offices in Switzerland.

10 Similar rules also exist for radio and written press activities.

11 Applicable merger control rules must also be observed.

According to the agency for investment and external commerce, AICEP Portugal Global, the arrangements cover four major areas:

- a* entry of investments;
- b* treatment of investments;
- c* expropriation and losses realised on investments; and
- d* conflict resolution.¹²

Investment in Portugal and the globalisation of the Portuguese economy are supported by a set of tools offered through the National Strategic Reference Framework for the next planning period of EU-level economic and social cohesion funds.

In general, incentive mechanisms usually comprise a set of repayable incentives (fixed-term interest-free loans). A repayable incentive may be replaced by interest-rate benefits, provided that they are stipulated in a call for tenders; and it may be converted into a non-repayable incentive, depending on the performance evaluation of a project, as set out in applicable incentive rules, up to a maximum of a certain percentage of incentives to be granted. In certain cases, or for certain expense categories, incentives may be allocated directly in the form of non-repayable incentives (grants).¹³

Incentives are set out in investment agreements with the government in return for making investments and achieving specific contractually stipulated targets.

Securing incentives is generally subject to a process of submitting offers in competitive bids, in which projects are evaluated and selected in decreasing order of merit up to a budget limit set in the call for tenders, according to a set of selection criteria and based on a calculation method defined in the call for tenders.

Certain projects, in view of their strategic importance (including the size of the investment), may bypass the bidding process. Thus, for example, 'special-regime projects' are exempt from a competitive bid. Special-regime projects may also benefit from a more flexible system for investment-contract negotiations, either in terms of setting goals or, in respect of specific limits, setting the amount and type of incentives to be granted.

VI OTHER STRATEGIC CONSIDERATIONS

i Securities law

Companies operating in Portugal or planning to enter the Portuguese market must take into consideration that the acquisition of a stake in Portuguese companies is subject to specific rules regarding disclosure of the stake held or, to some extent, to the duty to launch a mandatory takeover.¹⁴

12 More information about Portugal's agreements for the reciprocal protection and promotion of investments can be found at: www.portugalglobal.pt/EN/InvestInPortugal/internationalagreements/Paginas/InternationalAgreementsAgreementsfortheReciprocalProtectionandPromotionofInvestments.aspx.

13 Incentive mechanisms promoted by the state should also comply with the applicable EU state-aid rules.

14 As previously mentioned, applicable merger control rules must also be observed.

Securities Code

Disclosure duties

Any legal or natural person who acquires a direct or indirect holding that, in aggregate or together with the shares already held, reaches, exceeds or falls below 2 per cent, 5 per cent, 10 per cent, 15 per cent, 20 per cent, 25 per cent, one-third, 50 per cent, two-thirds or 90 per cent of the voting rights attached to the shares of a public company¹⁵ is required to notify the Portuguese Securities Exchange Commission (CMVM) and the issuer of that fact.

The 2 per cent, 5 per cent, 15 per cent and 25 per cent thresholds apply only to qualified holdings in public companies that have their shares or other equity securities listed in regulated markets located or operating in Portugal.

The Securities Code requires the aggregation of voting rights attached to shares held directly by a shareholder and those held by certain related parties. The shareholder's notification to the CMVM and the issuer must give details of the voting rights held by third parties that have been attributed to that shareholder.

Mandatory takeovers

A legal or natural person who acquires more than one-third or half of the share capital with voting rights of a Portuguese public company must make an offer to acquire all the remaining shares and other securities issued by that company that grant rights to subscribe for or acquire shares (e.g., subscription rights issued in the context of a share capital increase). The launch of an offer is not required when, despite exceeding the one-third threshold, the holder proves to the CMVM that it neither has control of the target company nor is involved with it in a group relationship. In addition, the obligation to make an offer may be waived by the CMVM if the thresholds are reached in the context of:

- a* a takeover bid for all the shares of the relevant company, as long as the rules relating to the consideration to be exchanged for the shares are satisfied;
- b* a financial restructuring plan within the scope of statutory reorganisation measures; or
- c* a merger.

ii Antitrust: merger control rules

Companies operating in Portugal or planning to enter the Portuguese market should take into consideration that the acquisition or merger of companies active in Portugal may be subject to mandatory merger control review by the corresponding competition authorities, and therefore may also be subject to a suspension obligation.¹⁶ For that reason, merger control

15 Under Portuguese law, the following companies qualify as public companies:

- a* companies incorporated through an initial public offer specifically made to individuals or entities resident or established in Portugal;
- b* companies that have publicly offered issued shares or other equity securities to individuals or entities resident or established in Portugal;
- c* companies that have issued shares or other equity securities that are or have been listed in a regulated market located or operating in Portugal;
- d* companies that have issued shares sold or exchanged, in excess of 10 per cent of their share capital, via a public offer to individuals or entities resident or established in Portugal; and
- e* companies incorporated as the result of a split or merger of a public company.

16 Significant fines could be imposed, and even the validity of the agreement challenged, if the suspension obligation is not met.

has a very significant role in defining the timetable for an expected transaction and, from a contractual perspective, requires the inclusion of specific provisions regarding the possibility that the transaction may be subject to prior authorisation from the competition authorities.

For merger control purposes, both EU and domestic rules define a concentration as a transaction that implies the modification of the control structure of the company on a long-term basis through:

- a* the merger of two independent companies;
- b* the acquisition of partial or sole control over a company or various companies, by any legal means or legal contract; or
- c* the creation of a joint venture and, in general, the acquisition of joint control over a company if the latter performs all the functions of an autonomous economic entity.

From a practical perspective, the competition authorities have considered a wide range of transactions as mergers. Most of these transactions involve acquisitions of stakes or traditional mergers. However, the concept of concentration also applies to other operations, such as the acquisition of assets (e.g., factories, commercial divisions and even intellectual property), including agreements that do not involve a change of ownership.

The authorities confirm that the merger control system relies on the concept of 'control'. Only transactions that entail a change in the structure of control of an undertaking will constitute a concentration subject to merger control rules.

In this regard, it is important to take into account that the veto rights conferred to minority shareholders may grant them control under the applicable merger control regulations. For instance, this will occur if they refer to:

- a* approval of the company's budget;
- b* approval of the business plan;
- c* appointment of managers and directors;
- d* appointment of the majority of the members of the board; or
- e* decisions on strategic investments.

Nevertheless, the issue must be analysed on a case-by-case basis depending on the market affected by the transaction.

If a transaction has an EU dimension, the European Commission will have exclusive jurisdiction over the merger and the Portuguese merger control procedure will in principle not apply. In this regard, the EU Merger Regulation¹⁷ establishes the thresholds¹⁸ that trigger the obligation to notify before the European Commission.

17 Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings.

18 A concentration has an EU dimension if the combined aggregate worldwide turnover of all the undertakings concerned is more than €5 billion; and the aggregate EU-wide turnover of each of at least two of the undertakings concerned is more than €250 million, unless each of the undertakings concerned achieves more than two-thirds of their aggregate EU-wide turnover within one and the same Member State.

A concentration that does not meet the previous thresholds nevertheless has an EU dimension if:

- a* the combined aggregate worldwide turnover of all the undertakings concerned is more than €2.5 billion;
- b* in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than €100 million;

If the transaction does not reach the EU thresholds, Portuguese merger control legislation may apply.¹⁹

iii Anti-commercial bribery law

Various acts are criminalised by the Portuguese Criminal Code to prevent corruption in both the public and private sectors.

It is important to note that the concepts of ‘corruption’ and ‘bribery’ can have different connotations in each country and are often used interchangeably. For the purposes of this summary, the concept of ‘corruption’ is used to describe the broader phenomenon of dishonest conduct. As such, it includes the narrower concept of ‘bribery’, understood as the act of providing (or receiving) an advantage to obtain (or perform) a favoured treatment.

The Penal Code distinguishes between passive bribery (generally, the act of receiving an advantage in exchange for a certain action) and active bribery (providing an advantage to someone to receive favourable treatment) committed in both the public and private sectors.

VI CURRENT DEVELOPMENTS

The Legal Framework of Credit Institutions and Financial Companies has been amended by Decree-Law 20/2016 of 20 April, which determined that it was the duty of credit institutions whose by-laws include voting caps to vote on their maintenance or removal every five years, otherwise the relevant voting cap would be removed *ope legis*. Where the removal of the voting cap is proposed by the board of directors, the relevant resolution of the shareholders’ meeting is subject neither to the voting cap nor to special quorum requirements set forth in the by-laws for the removal of the voting cap.

In addition, an extensive privatisation programme has been put in place. So far, and according to publicly available information, the state has sold:

- a a 21.35 per cent stake in EDP to China Three Gorges for €2.7 billion and a 4.14 per cent remaining stake in EDP through an accelerated book-building procedure directed to institutional investors for a total of €356 million;
- b a 25 per cent stake in REN to China’s State Grid and a 15 per cent stake to Oman Oil for a total of €592 million;
- c the health-care arm of the state-owned bank Caixa Geral de Depósitos to Brazil’s Amil for €86 million;

c in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than €25 million; and

d the aggregate EU-wide turnover of each of at least two of the undertakings concerned is more than €100 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate EU-wide turnover within one and the same Member State.

19 Concentrations must be notified to the Portuguese Competition Authority before their implementation if either of the following thresholds is satisfied: turnover threshold – the total combined turnover in Portugal of all the ‘undertakings concerned’ during the most recently concluded fiscal year exceeds €100 million, to the extent that at least two of the undertakings have turnover above €5 million in Portugal during said fiscal year; market share threshold – the concentration results in the acquisition, creation or increase of a market share in Portugal equal or greater than 50 per cent; or the concentration results in the acquisition, creation or increase of a market share in Portugal equal or greater than 30 per cent and less than 50 per cent, provided that the aggregate turnover in Portugal of at least two of the undertakings concerned exceeds €5 million.

- d* local airports operator ANA to France's Vinci for €3 billion;
- e* 80 per cent of the insurance arm of the state-owned bank Caixa Geral de Depósitos (Caixa Seguros) to Fosun for €1 billion;
- f* 100 per cent of postal services CTT through a stock market launch, earning €910 million;
- g* 100 per cent of EGF, the entity responsible for solid waste management, for €149.9 million to SUMA; and
- h* 45 per cent of Portugal's flagship airline carrier, TAP, to Gateway (a company held by David Neeleman and Humberto Pedrosa (the owner of Barraqueiro)); and
- i* 100 per cent of CP Carga, the company responsible for the freight and logistics business of national train operator Comboios de Portugal, to MSC Rail for €53 million.

The Portuguese government has launched the procedure for the privatisation of the 11 per cent shareholding still held in REN – through Parública (9.9 per cent) and CGD (1.1 per cent); the privatisation was launched through a direct offer to institutional investors and around €80 million was raised.

Moreover, on March 2017, the Bank of Portugal selected Lone Star to complete the sale of Novo Banco. Novo Banco is a Portuguese bank established in August 2014 by the Bank of Portugal to rescue the assets and liabilities of Banco Espírito Santo, the shares in which are held by a special public bank resolution fund. Lone Star will inject into Novo Banco a total of €1,000 million, through which it will hold 75 per cent of the bank's share capital. The completion of this sale is conditional on the customary regulatory approvals and, subject to bondholders' acceptance, on a liability management exercise that will see at least €500 million of Novo Banco senior bonds used to reinforce the bank's Tier 1 common capital ratio (or CET1).

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ISBN 978-1-910813-79-9