THE FOREIGN INVESTMENT REGULATION REVIEW

Tenth Edition

Editors
Calvin Goldman, KC and Alex Potter

THE LAWREVIEWS

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TENTH EDITION

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PREFACE

This tenth edition of *The Foreign Investment Regulation Review* provides a comprehensive guide to laws, regulations, policies and practices governing foreign investment in key international jurisdictions. This year, the publication begins with summaries of the more detailed country chapters that follow. These chapter summaries should make the text even more user-friendly.

This book is being published at a time of unprecedented geopolitical tensions. The combined effects of the invasion of Ukraine by Russia over the last number of months, together with the continuing escalation of issues between China and the United States in relation to Taiwan and other international matters, have created an environment in which foreign investment reviews across many jurisdictions will be heightened in both substantive terms and related timelines, particularly in relation to possible issues of national security and national interests. In our view, the tenth edition is exceptionally timely in this respect.

Foreign investment has been attracting increased attention for a number of years and this trend has accelerated throughout the past two years. Prior to the covid-19 pandemic, the global economy was continuing its trend towards further integration, even with indications of emerging protectionism, and the number of cross-border and international transactions was increasing, while national governments continued to intervene in foreign investment based on a broadening set of criteria. Foreign investment reviews of cross-border mergers could not help but be affected by shifts in economic relations between countries, which in turn were driven by evolving geopolitical considerations. These included structural developments such as Brexit, now in its post-implementation stages, as well as increased tensions over trade and related policies, as we have seen between the United States and China and now between much of the western world and Russia.

In addition, unprecedented challenges have arisen during the past year or so in relation to supply chains of many essential products, from food supplies to computer chips to building materials, among many other products. These exceptional developments have served only to increase the focus of regulatory authorities on their respective national interests, which may enhance product supplies across many markets and economic sectors. In this regard, Russia's invasion of Ukraine has sent shock waves through the global economy and led to major changes in trade and investment. The significance of Russia's recent actions were exemplified by the exceptional decision of the Steering Group of the International Competition Network (ICN) to disinvite the Competition Authority of Russia from participating in the ICN's Annual Conference in Berlin in May 2022, in which more than 80 national delegations participated, as part of the broader exceptional decision of the Steering Group to suspend Russia's continuing participation in the ICN. This was an unprecedented step, especially for an international organisation that is generally considered to be apolitical and focused on promoting international cooperation and convergence in relation to competition law

principles, which include the regulatory review of proposed mergers that may overlap with concurrent foreign investment reviews, particularly in high-profile trans-border cases. That exceptional ICN decision is also particularly significant having regard to the fact that Russia hosted the ICN Annual Conference in Moscow in 2007.

These increased tensions overall have continued to heighten concerns about national interest considerations (such as the export of jobs, essential supply chains and industrial policies) and about cybersecurity, new technologies, communications and other strategic areas.

These and other developments discussed below have led, in the case of certain merger reviews, to increased tensions between normative competition and antitrust considerations on the one hand, and national- and public-interest considerations on the other hand, the latter sometimes weighing heavily against the former. An example of the kind of differing regulatory decisions between the competition authorities and the ministerial decision-making in relation to concurrent foreign investment reviews occurred when BHP Billiton, the global leader in mining based in Australia, which had already engaged in previous significant mining investments in Canada, proposed to acquire the Potash Corporation of Saskatchewan for approximately US$40 billion. Both Australia and Canada are members of the Five Eyes with respect to national security matters. That regulatory review process became a highly publicised matter of public interest through much of 2010. In the end, although the Canadian Competition Bureau cleared the proposed merger, the federal Minister of Industry, following his review under the Investment Canada Act and consultation with his Cabinet colleagues, issued an interim negative decision, in November 2010, on national interest grounds that were never really articulated. Rather than trying to then make further submissions, BHP Billiton decided to withdraw the proposed acquisition. Some commentators at that time suggested that the reasons for the ministerial position had more to do with the pending elections at the provincial level in Saskatchewan and at the federal level than any significant national interest issue (Potash Corporation had a long-standing perception among people in Saskatchewan as a historical corporate leader in that province).

A similar split in regulatory decision-making occurred in November 2013 in relation to the proposed acquisition of Grain Corporation of Australia by Archer Daniels Midland Company of the United States. That also was cleared by the competition authority (the Australian Competition and Consumer Commission) following its competition review. However, following subsequent concerns raised by the Foreign Investment Review Board, the Treasurer of Australia, one of the most senior Cabinet members, decided to block the proposed acquisition. Concerns voiced by farmers and distribution networks were apparently factors in that decision. Again, some commentators suggested that real-world political considerations had some bearing on that negative decision.

In May 2022, the UK government decided to subject the acquisition by Nexperia, a Dutch subsidiary of Chinese tech company Wingtech, of Newport Wafer Fab, a UK semiconductor manufacturer, to a detailed retrospective review under the UK National Security and Investment Act 2021, some 10 months after the deal closed. Press reports have suggested that politicians in the United States put pressure on the UK government to act.

As a result of cases such as these and other evolving considerations discussed below, more cross-border mergers have been scrutinised more intensely, with the process delayed or in some cases thwarted by foreign investment reviews that are increasingly broader in scope.

When the pandemic took hold, the underlying considerations that had been driving trends in the review of foreign investment moved to the front of national agendas, with the result that these trends have both been accelerating and increasing in scope. Concerns

about the benefits of globalisation have been on the rise in an environment where nations have found themselves competing for supplies of critical medicines, equipment and personal protective equipment necessary to meet the public health emergency. This has led to a broadening of the types of businesses the takeover of which might be viewed as raising strategic, public interest or national security considerations. The increased focus on the stream of capital flowing from state-owned enterprises (SOEs) that had already driven greater scrutiny of proposed investments took on heightened importance, particularly in economic sectors viewed as being critical of the pandemic response, such as public health and supply chains. As the effects of the worldwide economic shutdown on the valuation of domestic businesses began to be felt, concerns around opportunistic hollowing-out of domestic sectors rose to the forefront of considerations of such matters as lowering financial thresholds that trigger foreign investment reviews.

This has all taken place in the context of efforts to overhaul the regulatory landscape that were already under way in the United States and Europe. In the United States, which saw the introduction of a mandatory notification regime and expansion of the review authority of the Committee on Foreign Investment in the United States (CFIUS) following the enactment of the Foreign Investment Risk Review Modernization Act (known as FIRRMA) in August 2018, greater resources are now being allocated to monitoring and enforcement activities. This is making the voluntary filing calculus even more complex as there is no statute of limitations on CFIUS's jurisdiction if it has not cleared a transaction. As the policy focus has shifted to supply chain security across the globe, CFIUS is being used in conjunction with other US government authorities to wean critical US supply chains off their reliance on Chinese inputs; for example, by either blocking or subjecting to review even ordinary course transactions with blacklisted Chinese companies. Heightened CFIUS interest and commentary pertaining to certain China-related transactions, such as occurred in relation to TikTok, is a reflection of some of these evolving developments.

The scope of national security and national interests is clearly continuing to grow. For example, in the United States in February 2022, a revisited and broadened list of technologies was announced as critical or potentially critical to the United States in national security and economic terms. Concurrently in Canada, the minister responsible for the Investment Canada Act was called before a parliamentary committee early in 2022 to explain the reasoning that led to a China-based company being permitted to acquire a Canada-based company that is developing its only mine for lithium, which is located in Argentina, having regard to lithium generally being considered a critical mineral under classifications that apply both in Canada and the United States.

In turn, the greater focus on foreign investment has continued in Europe, where the European Union's foreign investment screening regulation, which became fully operational in October 2020, gives the European Commission a new central advisory role in coordinating increased scrutiny by Member States and obliges Member States to notify other Member States and the Commission of foreign investments that they are screening under their national regimes. After nearly two years of implementation, the regular exchanges of information between the European Commission and the EU Member State authorities driven by the regulation appear to be increasing levels of scrutiny, with several examples of national authorities approaching parties to a transaction to initiate enquiries where notifications have not been made proactively. The momentum to introduce foreign investment review has been given added impetus by the Russian invasion of Ukraine, with the European Commission urging all EU Member States to implement foreign investment screening mechanisms as

a matter of urgency in light of the risks flowing from investment from Russia and Belarus. At the time of writing, 18 Member States have foreign investment screening regimes on their books, and a further seven countries are in the process of introducing them.

In the United Kingdom, the National Security and Investment Act 2021 is now in force and marks a step change in the UK government's power to screen, impose conditions on and block deals that pose unacceptable risks. The new Act requires mandatory notification of investments in 17 strategically sensitive sectors that cross certain share or voting rights thresholds – a significant change in light of the United Kingdom's (continuing) voluntary merger filing regime. Transactions in all other sectors will be susceptible to 'call in' by the government should there be concerns. Early experience testifies to the effects of the new Act: 222 notifications in the first three months of operation, one transaction prohibited (the first formal prohibition in the United Kingdom on national security grounds) and several cases subject to detailed reviews; this coupled with several national security interventions – including far-reaching remedies – under the outgoing UK public interest regime in its last months.

The United States and Europe are not alone in elevating concerns regarding foreign investment during the pandemic and in response to increasing concerns about China's global influence. In Canada, during 2020–2021, timelines for national security reviews were temporarily extended and investments by SOEs, as well as in Canadian businesses related to public health or the supply of critical goods and services, were subjected to heightened scrutiny in response to the pandemic. The Canadian government has issued more detailed guidelines for the review of foreign investments, among other things, to include national security concerns relating to the potential of the investment to enable access to sensitive personal data that could be leveraged to harm Canadian national security through its exploitation, including personal data concerning government officials, such as members of the military or intelligence community. The most recent annual report on the application of the Investment Canada Act (released by the Canadian government in early February 2022) reflects the Canadian government's increased application of national security screening for more proposed foreign investments on a proportionate basis than in past years. In this respect, while as a result of the pandemic there were fewer proposed foreign investments, the 2022 report indicates that there were considerably more national security screenings in the immediately prior year than in the previous year; moreover, there were almost as many investments that were subjected to increased national security screenings in the immediately prior year as compared with the number of proposed investments that were reviewed during the combined total of the previous four years. The highest percentage of these increased screenings pertained to China-based acquirers relative to other nations. This reflects an example of the increased scrutiny that Canada, one of the members of the Five Eyes alliance, is applying to foreign investment reviews in the context of the current geopolitical environment.

In Australia, the Foreign Investment Reform Act came into effect on 1 January 2021, ushering in sweeping changes to the country's foreign investment review law. The temporary A$0 monetary screening thresholds for all investments that had been introduced in response to covid-19 were removed; however, this threshold was continued through provisions for the mandatory review of investments in sensitive national security businesses. New Australian regulations list businesses in critical infrastructure, telecommunications, military goods or defence or intelligence technology, the provision of services to defence or intelligence forces, the storage of or access to classified security information and the storage, collection or maintenance of personal information about defence and intelligence personnel. The symmetry

between the Canadian guidelines and the Australian regulations should not be considered coincidental. Both countries are members of the Five Eyes alliance (with the United States, the United Kingdom and New Zealand). The Australian Treasurer has also been given new, stronger enforcement and review powers under the legislation, including a 'last resort' power, under which the Treasurer may review previously approved transactions where national security risks have emerged after approval by the Foreign Investment Review Board.

In addition to these significant developments, differences in foreign investment regimes (including in the timing, procedure and thresholds for and substance of reviews) and the mandates of multiple agencies (often overlapping and sometimes conflicting) continue to contribute to the relatively uncertain and at times unpredictable foreign investment environment. This gives rise to a greater risk of inconsistent decisions in multi-jurisdictional cases, with the potential for a significant 'chilling' effect on investment decisions and economic activity. Foreign investment regimes are increasingly challenged by the need to strike the right balance between maintaining the flexibility required to reach an appropriate decision in any given case and creating rules that are sufficiently clear and predictable to ensure that the home jurisdiction offers the benefits of an attractive investment climate notwithstanding extraordinary circumstances.

The recently increasing breadth, scope and timelines for proposed acquisitions by SOEs and other proposed acquisitions giving rise to national security considerations have raised a potentially challenging issue in the context of proposed acquisitions of failing firms. There is a widely held view that, as a result of the disruptive economic effects of the covid-19 pandemic, there may be a sizeable number of distressed industries and failing firms in sectors that have been most significantly affected by the pandemic. The number of cases of failing firms is likely to increase the longer the pandemic continues to substantially affect the timeline for economic recovery from the effects of the pandemic.

In this exceptional environment, there may be cases of failing firms in which the proposed acquirer is an SOE, which in some foreign direct investment reviews includes a corporation that may be influenced directly or indirectly by a foreign government. There may also be proposed acquisitions of failing entities in the public health or supply chain markets, which may be regarded as more sensitive transactions in the context of the pandemic. If these types of proposed acquisitions are subjected to increased scrutiny and longer timelines in foreign investment reviews where the acquiree is a failing firm, and to the extent that there may be a parallel competition review conducted on a considerably more expeditious basis, the proposed acquisition risks not being completed if the target cannot be sustained during that period. That may lead to an anticompetitive acquirer with existing operations in the same jurisdiction becoming the only purchaser in a position to complete the proposed acquisition, thereby avoiding liquidation of the assets and loss of jobs. The same result may follow even where the proposed acquirer is not an SOE or the failing firm is not in an apparently sensitive business because the increasing scope and timelines for foreign investment reviews, coupled with continuing geopolitical tensions, may raise sufficient uncertainty to dissuade a foreign entity from making a proposed acquisition. These developments could have a significant effect on domestic market concentrations going forward.

With respect to the interface of national interest and public interest considerations and the evolving breadth of national security reviews (including, in some cases, as they may relate to or interface with normative competition reviews), the American Bar Association Antitrust Law Section (ABA ALS) Task Force on National Interest and Competition Law prepared a report that was considered and approved by the Council of the ABA ALS in August 2019.

In that report, the Task Force examined a number of cases in selected jurisdictions where these issues have been brought to the forefront. In addition, the ABA ALS Task Force on the Future of Competition Law Standards delivered a further report in early August 2021 to the Council of the ABA ALS that, among other subjects, considered recent developments pertaining to national interests and national champions in competition reviews. These evolving considerations in competition reviews cannot be viewed in isolation from the increasing scope of national interest factors in foreign investment reviews.

In the context of these significant evolving developments, including the heightened geopolitical tensions and the unprecedented challenges that have arisen in relation to supply chains following the pandemic, we hope this publication will prove to be a valuable guide for parties considering a transaction that may trigger a foreign investment review, which often occurs in parallel with competition reviews. The book provides relevant information about, and insights into, the framework of laws and regulations governing foreign investment in each of the featured jurisdictions, including the timing and mechanics of any required foreign investment approvals, and other jurisdiction-specific practices. The focus is on practical and strategic considerations, including the key steps for foreign investors planning a major acquisition or otherwise seeking to do business in a particular jurisdiction.

This publication examines the emerging issues described above and the recent trends that have continued to evolve, together with their implications. Parties would be well advised to ensure that they thoroughly understand these issues and to engage with regulatory counsel early in the planning process so that deal risk can be properly assessed and managed. Having regard to the changing regulatory environment pertaining to foreign investment reviews and the evolving protectionism, as well as serious geopolitical considerations across a number of jurisdictions, regulatory counsel may recommend approaching the relevant government authorities at a comparatively early stage to engage in constructive discussions and to obtain an initial view from government officials of the proposed transaction.

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Please note that the views expressed in this book are those of the authors and not those of their firms, any specific clients, or the editors or publisher.

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Chapter 17

PORTUGAL

Tânia Luísa Faria, Miguel Stokes, Margot Lopes Martins and Tomás Pereira Carneiro[1]

I OVERVIEW

Foreign investment has been one of the most prominent cornerstones in Portuguese policymaking for more than a decade. Multiple legislative and political initiatives have been promoted to enhance the country's global competitiveness. According to data compiled by the World Bank, Portugal is the 39th easiest country in the world in which to do business, and the 12th of countries within the European Union (outranking the Netherlands, Belgium and Italy).

Despite having endured two back-to-back economic crises – the sub-prime crisis (2012) and the covid-19 recession – the Portuguese economy has been steadily growing thanks to economic recovery and pro-business policies.

II YEAR IN REVIEW

The year 2022 has been one of legal and regulatory reform. In particular, securities law has been restructured to promote the development of the Portuguese securities market and to incentivise companies to use said market to fund their business enterprises.

Notwithstanding the economic effects of the covid-19 pandemic, the war in Ukraine and associated economic sanctions on the Russian Federation, the Belarus government and Russian and Belarus economic players have sent the world into a cycle of economic retraction. The consequences of sanctions, despite being severe, have had little effect in Portugal, owing to the country's growing commitment in transitioning to a low-carbon economy.

III FOREIGN INVESTMENT REGIME

i Policy

One of the current ideas for ways to attract foreign investment is to transform Portugal into a sandbox for technological solutions of issues arising in relation to cities, networks, energy, resource management, mobility and waste management and treatment, undertaken in liaison with Portuguese companies.

1 Tânia Luísa Faria is a counsel, Miguel Stokes is a partner, Margot Lopes Martins is an associate and Tomás Pereira Carneiro is a trainee lawyer at Uría Menéndez – Proença de Carvalho.

Another way of attracting foreign investment is through the external promotion of some of Portugal's key assets, alongside the creation of international consortiums to develop these resources:

a mineral resources, such as lithium, cobalt, nickel, niobium, tantalum and rare earths;
b the sea and in particular the Portuguese exclusive economic zone, which extends to the outer limit of the continental shelf; and
c hydrothermal fields.

Moreover, in line with the European Union's European Green Deal goals, another key national strategy for obtaining foreign investment has been a focus on the renewable energy industry sector, where Portugal has shown itself to be one of the best countries in which to invest.

ii Laws and regulations

Portugal's legal environment encourages foreign investment. The country has no foreign capital entry restrictions and Portuguese law prohibits any discrimination between investments based on nationality.

With regard to foreign direct investment (FDI) measures, no changes to the Portuguese FDI legal framework[2] (which has been in force since 2014) have been made during the past year.

iii Scope

Most foreign investment in Portugal continues to be unregulated. As a general rule, Portuguese law does not impose any specific restrictions on foreigners or foreign investment in corporate matters, as regulations on the incorporation of companies, mergers and acquisitions, day-to-day business activities, duties and liabilities of shareholders and directors, merger control and antitrust all apply irrespective of nationality. The Portuguese framework on corporate groups is based on the central concept of an affiliated company, deemed to exist upon the occurrence 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). One should 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.[3]

Authorisation is required only when investing in sensitive areas, in particular defence and other regulated areas (e.g., banking, media and financial services). Foreign investors in Portugal must also take into consideration EU and national competition rules and other EU policies.

2 Decree-Law No. 138/2014 of 15 September.

3 Nevertheless, the Constitutional Court has already held, with general effect, that a 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.

iv Procedures

Banking and other financial institutions

Summary of supervisory system

The provision of banking services is a regulated activity that must be carried out professionally by authorised credit institutions or financial companies, and is subject to the supervisory powers of the regulatory authority of the Member State of origin.

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, 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.

With the introduction of the General Framework for Investment Companies, approved by Decree-Law 109-H/2021, of 10 December, a new type of financial institution has emerged – the investment firm – having as its sole supervisor the Portuguese Securities Market Commission (CMVM). With a simpler incorporation procedure, these entities may provide investment services (and related ancillary services) in Portugal, but do not have the necessary authorisation to grant credit and perform similar financial operations.

Insurance

Summary of supervisory system

The provision of insurance services is a regulated activity and must be carried out professionally by authorised insurance companies, and is subject to the supervisory powers of the regulatory authority of the Member State of origin.

Supervision of the Portuguese insurance system is governed by (1) Law 147/2015 of 9 September, as amended, which establishes the legal framework and requirements for taking up and pursuing insurance and reinsurance activities, (2) Law 7/2019 of 16 January, which establishes the legal framework for the distribution of insurances and reinsurances, and (3) the regulations and circulars issued by the Portuguese Insurance and Pension Funds Supervisory Authority (the ASF).

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 thereof establishes the Energy Services Regulatory Authority as the domestic regulatory authority for the gas and electricity sectors.

Production, transport, distribution and trading of electricity

The legal framework for the production, transport, distribution and trading of electricity is regulated under Decree-Law 15/2022 of 15 January, which establishes the general grounds for the organisation and functioning of the national electricity system and regulates the production, transport, distribution and trading of electricity in Portugal.

Production

Decree-Law 15/2022 of 15 January 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.

Transportation and distribution

Both the transportation and distribution of electricity must 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 based on its classification as a public utility.

Trading

Decree-Law 15/2022 of 15 January states that trading in electricity is free, subject to a licence granted by the licensing entity. The licence must be requested by a company that is registered in an EU Member State.

Telecommunications

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 electronic communications networks and services 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 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.

Television broadcasting

The legal framework for television broadcasting is based on the Television Act,[4] which governs access to and the exercise of television activity. The main regulatory authority for this 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 and trade unions, among other things).

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 (EC) No. 1008/2008 of the European Parliament and of the Council of 28 September 2008, as amended, on common rules for the operation of air services in

4 Law 27/2007 of 30 July, implementing Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities – 'Television without Frontiers', as amended.

the Community. For an undertaking to be granted an operating licence by the competent licensing authority (in Portugal, the ANAC, pursuant 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 European Union is a party.

IV SECTOR-SPECIFIC REQUIREMENTS

Restricted sectors

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 a bid for a concession contract.

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

a the 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 services;
c the operation of seaports; and
d the exploitation of natural resources of the subsoil or that may be considered part of the public domain.

Similarly, foreign investment projects must be compatible with specific legal requirements if they could in any way potentially affect public policy, 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. These activities must comply with legally mandatory conditions and requirements, and thus require specific licences. Access conditions and the pursuit of commerce and industry involving goods and military technology are regulated by Law 49/2009 of 5 August, namely 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 (research, planning, testing, manufacturing, assembly, repair, modification, maintenance and demilitarisation of military goods or technology) of military goods and 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 in connection with the main infrastructures and assets relating to defence and national security, or to the basic energy, transportation and communication services – may have to comply with the Strategic Assets Special Framework.[5] This Framework sets out some restrictions that specifically apply to entities from outside the European Union and the European Economic Area (Foreign

5 Decree-Law 138/2014 of 15 September.

Investors) that intend to acquire direct or indirect control (Control) over assets in specific sectors of the economy: main infrastructures and assets relating to defence, national security, energy, transportation and communication services (Strategic Assets).

According to the framework set out in the Strategic Assets Special Framework, the Portuguese Council of Ministers, following a proposal by the minister overseeing the sector to which the relevant Strategic Asset pertains (the Sector Minister), may oppose the conclusion of a transaction in relation to a Strategic Asset in the event that it results in the direct or indirect acquisition of control of that Strategic Asset by a Foreign Investor and that circumstance poses a real and severe threat to national security or the provision of basic services considered fundamental to the country. The procedure *ex officio* for clearing the acquisition of Control by a Foreign Investor over a Strategic Asset is outlined below.

a Within 30 calendar days of the execution date of the relevant agreement (or other legal instrument, as applicable) pursuant to which the Foreign Investor will directly or indirectly acquire Control over a Strategic Asset, or of the date the transaction became public knowledge, if later, the Sector Minister may initiate an assessment procedure to determine the risk that the acquisition may pose to national security or the provision of basic services considered fundamental to the country.

b When the procedure referred to in point (a) is opened, the Foreign Investor is legally obliged to provide all information and documentation requested by the Sector Minister. The minister in charge of foreign affairs and the minister in charge of national and homeland security are immediately notified of the opening of the procedure.

c Within 60 calendar days of delivery by the Foreign Investor of the information or documentation requested by the Sector Minister, the Council of Ministers may oppose completion of the transaction envisaged by the Foreign Investor.

d If the Council of Ministers opposes completion of the transaction envisaged by the Foreign Investor, the legal instruments underlying the transaction, and any subsequent acts relating thereto, including transfer of ownership of the Strategic Asset, are null and void.

e The decision by the Council of Ministers to oppose completion of the transaction is subject to appeal by the Foreign Investor.

In addition to the procedure *ex officio* described above, which is triggered by the Sector Minister, the Foreign Investor may, on its own initiative, request confirmation from the Sector Minister that the envisaged transaction will not be opposed by the Council of Ministers. If the request for confirmation is not answered within 30 days, the Strategic Assets Special Framework sets out that tacit confirmation is given. The request for confirmation must be accompanied by a description, provided by the Foreign Investor, of the terms and conditions of the intended transaction involving the acquisition of Control over the Strategic Asset.

The real and severe threat to national security, or the provision of basic services considered fundamental to the country, is asserted exclusively by the following criteria:

a the physical security and the integrity of the relevant Strategic Asset;

b the permanent availability and operability of the relevant Strategic Asset, as well as its ability to fully comply with its obligations, in particular the functions of public service that are the responsibility of the entities that control them, in the terms prescribed by law;

c the continuity, regularity and quality of the services of public interest to be provided by the person or company who controls the relevant Strategic Asset; and

d conservation of the confidentiality, imposed by law or public contract, of the data obtained during the course of activity by those who control the relevant Strategic Asset and of the technological resources required for management of the relevant Strategic Asset.

Moreover, the acquisition by a Foreign Investor of Control of a Strategic Asset is considered to be potentially capable of representing a threat to national and homeland security or to the provision of basic services considered to be fundamental for the country, whenever:

a there is serious evidence, based on objective factors, of the existence of a connection between the purchaser and third countries that:
- does not observe the principles of the rule of law;
- represents a risk to the international community as a result of the nature of its alliances;
- maintains relations with criminal or terrorist organisations or with persons associated with such organisations, taking into account the official positions of the European Union in these matters, if any;
- where the purchaser has used, in the past, a controlling shareholding held over other assets with the purpose of creating serious difficulties in the regular provision of essential public services in the country where it was located or in neighbouring countries; or
- does not ensure that neither the allocation of the assets to its main function, nor their reversion at termination of the corresponding concession agreements, if applicable, in particular considering the absence of appropriate contractual provisions for said purpose; or

b the relevant transaction alters the function of the relevant Strategic Asset, threatening the permanent availability and operability of the Strategic Asset to comply with its applicable obligations, in particular the functions of public service, in the terms prescribed by law.

V TYPICAL TRANSACTIONAL STRUCTURES

i General environment

In view of the prohibition against discrimination based on 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 Functioning of the European Union establishes the free movement of capital within the European Union 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 or recognised terrorist organisations). As mentioned previously, temporary restrictions and sanctions

have been imposed on the Russian Federation, the Belarus government, and entities and natural persons that support these regimes. Furthermore, the exclusion of Russian economic entities, such as payment institutions and banks, from the SWIFT system has disrupted cash streams and provided for an additional barrier when dealing with entities established in this economic area.

ii Setting up a business in Portugal

Foreign investors typically choose a transaction structure that allows them to invest directly 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 involved, 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 it. 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 case 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, as amended. A tax identification number is obtained by filing specific documentation with the tax authorities regarding residency in the country of origin and, in certain cases, by appointing a representative.

No tax issue should arise from an application by an individual who is not resident in Portugal 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 individual will be subject to Portuguese income tax as a non-resident on income obtained abroad; the individual will be taxed in Portugal only on income considered to have been obtained within Portuguese territory, if and when applicable.

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 a Portuguese company is subject to specific rules regarding disclosure of the stake held or, to some extent, to the duty to launch a mandatory takeover.[6]

A major reform took place at the beginning of 2022 with the entry into force of the new Portuguese Securities Code, the aim of which, among other things, is to simplify the issuance of securities in the regulated market, thus fostering its growth.

Securities code

Disclosure duties

Any legal or natural person who acquires a direct or indirect holding that, in aggregate or with the shares already held, reaches, exceeds or falls below 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 an issuer admitted to trading on regulated markets located or operating in Portugal (i.e., having its shares or other equity securities listed in those markets) is required to notify the CMVM and said issuer of that fact.

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 include 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 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 threshold of one-third or half of the voting rights, 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;
c a merger; or
d an inheritance or legacy.

ii Antitrust: merger control rules

Companies operating in Portugal or planning to enter the Portuguese market should take into consideration that a concentration between companies active in Portugal may be subject to mandatory merger control review by the corresponding competition authorities. This may

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

entail an obligation to notify the Portuguese Competition Authority (AdC),[7] and therefore may also be subject to a suspension obligation (the standstill obligation)[8] until the operation is authorised. For that reason, merger control has a very significant role in establishing the expected timetable for a 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 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 (including the AdC) have considered a wide range of transactions as concentrations for merger control purposes. Most of these transactions involve acquisitions of majority stakes in certain companies. However, the concept of 'concentration' also applies to other operations, such as the acquisition of assets (e.g., factories, commercial premises and even intellectual property), provided that these assets constitute an activity resulting in a market presence to which a turnover can be attributed, and even to agreements that do not involve a change of ownership. Furthermore, a change in the nature of control, from sole control to joint control or vice versa, is also relevant for merger control purposes and may constitute a concentration for competition purposes.

As elsewhere in the European Union, the Portuguese 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 on 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 the appointment of managers and directors;
d the appointment of the majority of the members of the board; or
e decisions about strategic investments.

Once the existence of a concentration is established, the Portuguese Competition Act (unlike the EU Merger Regulation and the laws of most Member States – except for Spain) establishes alternative turnover and market share notification thresholds.

7 Autoridade da Concorrência.

8 Significant fines could be imposed – up to 10 per cent of the worldwide turnover of the company – and even the validity of the agreement challenged, if the suspension obligation is not met.

Therefore, in short, undertakings must notify a concentration if any of the following conditions are met:

a the combined aggregate turnover in Portugal of all the undertakings exceeds €100 million, provided that the individual turnover in Portugal of each of at least two of the undertakings concerned exceeds €5 million;

b the concentration results in the acquisition, creation or increase of a market share in Portugal equal to or greater than 50 per cent; or

c the concentration results in the acquisition, creation or increase of a market share in Portugal equal to or greater than 30 per cent but less than 50 per cent, provided that the individual turnover in Portugal of at least two of the undertakings concerned exceeds €5 million.

If a transaction has an EU dimension, the European Commission will have exclusive jurisdiction over the merger and, in principle, the Portuguese merger control procedure will not apply. In this regard, the EU Merger Regulation[9] establishes the thresholds[10] that trigger the obligation to notify the Commission. Nevertheless, the issue must be analysed in each case depending on the market affected by the transaction.

In this context, when a transaction qualifies as a concentration, from a competition standpoint, and meets one of the notification thresholds, it will be subject to both the prior notification obligation and the standstill obligation. The parties are then obliged to notify the AdC or the European Commission and are obliged to suspend the implementation of the concentration until the AdC has issued a clearance decision and until the real closing of the operation. In exceptional circumstances, the AdC, like the Commission, can grant a waiver from the standstill obligation if the acquirer can demonstrate that serious harm will arise from the suspension and that no competition law concerns are expected.[11] Derogation of this kind is relatively rare and is normally only considered if the target is facing serious financial and structural difficulties that threaten its viability.

Otherwise, a breach of these obligations (notification and standstill), which qualifies as 'gun-jumping', entails a fine of up to 10 per cent of the turnover of the undertaking in breach. Under the Portuguese Competition Act, members of the board of directors of the infringing undertakings, as well as any individuals responsible for managing or supervising those individuals, could also be sanctioned for gun-jumping, especially when directly involved in an unlawful decision not to file a notification or to breach a standstill obligation. The fine imposed on individuals cannot exceed 10 per cent of the individual's annual income deriving from the exercise of their functions in the undertaking concerned.

Additionally, during the past few years, there have been wide-ranging discussions about the adequacy of the existing merger control tools in the European Union, and worldwide, to capture and sufficiently assess the concentrations that could significantly impede effective competition. These discussions are starting to materialise at the EU level and are having a direct impact in Portugal. For instance, the guidance issued by the European Commission on

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

10 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.

11 Portuguese Competition Act, Article 40(3).

the application of the referral mechanism set out in Article 22 of the EU Merger Regulation,[12] aims at ensuring the review by the Commission, through referrals by Member States, of certain transactions that otherwise would escape merger control by falling below the relevant and existing thresholds. Even though the AdC has not yet used this mechanism, this new position necessarily has a relevant effect at national level, requiring the careful assessment of any transaction that, although not meeting the national or EU notification thresholds, could justify being subject to merger control. This could end up introducing more uncertainty for businesses, increased costs, potential delays to closing and increased burdens in the drafting of the transaction documents.

In parallel, and further to the health and financial crises caused by covid-19, the AdC has spent time evaluating options to strengthen competition regimes, with a special focus on innovation. The AdC drew attention to the importance of promoting innovation towards a better and more sustainable economic recovery. Making the protection and incentives for innovation one of its priorities for 2021 and again in 2022, the AdC considers that the removal of structural and legislative barriers that impede innovation, efficiency and growth contribute to a greater level of competitiveness between companies.[13] This increasing attention to innovation concerns is leading to more sophisticated substantive assessment in merger control proceedings, namely for more importance to be given to the effects of the merger in terms of reducing choice and harming innovation. Thus, we can undoubtedly expect further developments in the near future and undertakings must remain vigilant for new rules and, especially, new enforcement approaches.

iii Anti-commercial bribery law

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

The concepts of corruption and bribery can have different connotations in different countries 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 Criminal Code distinguishes between acts of 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.

12 Available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021XC0331%2801%29 (last accessed 5 September 2022).

13 Portuguese Competition Authority (Autoridade da Concorrência): Competition policy priorities for 2021, available at https://www.concorrencia.pt/sites/default/files/Competition%20Policy%20priorities%20for%202021_0.pdf and priorities for 2022, available at https://www.concorrencia.pt/sites/default/files/Priorities%202022_0.pdf (last accessed 5 September 2022).

VII OUTLOOK

The aim of the government's economic recovery plan for the next 10 years, entitled Strategic Vision for Portugal's Economic Recovery Plan 2020–2030,[14] is to reactivate the Portuguese economy; a set of guidelines and recommendations is being established to achieve this. Further economic development is expected, with a projected growth (to 2030) of 2.68 per cent.[15]

In terms of relevant legislative innovations, a Banking Activity Code is currently undergoing the legislative process, having already ended its public consultation phase. The main goal of this regulation is to concentrate and clarify the regime applicable to banking activity and to reinforce the supervisory powers of the Bank of Portugal over banks carrying out business in Portugal.

14 Visão Estratégica para o Plano de Recuperação Económica de Portugal 2020–2030 (21 July 2020), https://www.portugal.gov.pt/pt/gc22/comunicacao/documento?i=visao-estrategica-para-o-plano-de-recuperacao-economica-de-portugal-2020-2030 (last accessed 5 September 2022).

15 Atlas of Economic Complexity, https://atlas.cid.harvard.edu/growth-projections.

Appendix 1

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