
THE FOREIGN INVESTMENT REGULATION REVIEW

SECOND EDITION

EDITOR
BRIAN A FACEY

LAW BUSINESS RESEARCH

THE FOREIGN INVESTMENT REGULATION REVIEW

The Foreign Investment Regulation Review

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THE FOREIGN INVESTMENT REGULATION REVIEW

Second Edition

Editor
BRIAN A FACEY

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EDITOR'S PREFACE

I am pleased to present the second edition of *The Foreign Investment Regulation Review*. Building on the inaugural publication of last year, this edition provides insight into the national regulatory framework for foreign investment review in major jurisdictions around the world, as well as an overview of current trends and developments in this field.

Over the past few years, foreign investment has grown to match levels that were attained during the pre-economic crisis era of the mid-2000s. As national economies continue to recover from the global financial crisis, foreign investment often constitutes a source of capital that is key to promoting and sustaining domestic economic growth. From the perspective of investors, it can represent an important opportunity to expand into new markets or to implement efficiency enhancing improvements to a supply chain. Within this environment, legislators and regulators frequently face the challenge of attracting sufficient capital to develop the local economy while at the same time protecting national interests, including national security.

The diversity among foreign investment regimes reflects the fact that each nation has a unique set of goals and priorities to consider. Some countries, such as China, have recently introduced reforms aimed at attracting greater foreign investment. At the same time, the experience of jurisdictions such as Canada highlights that foreign investment review remains a balancing act between attracting foreign capital and protecting domestic interests in certain sectors of the economy. One common theme across jurisdictions is that foreign investment reviews continue to present complex issues for businesses, regulatory authorities and legal counsel alike.

Both legal practitioners and companies seeking to do business internationally will benefit by familiarising themselves with the regulatory frameworks outlined in this treatise. Of particular importance, this edition provides readers with practical guidance to navigate investments in major jurisdictions by anticipating key timing and substantive issues. We hope that it allows investors and businesses being acquired to better evaluate and manage risks associated with investments that may be subject to foreign investment review, ultimately reducing transaction uncertainty and delay.

This edition contains contributions from leading experts practicing in 23 jurisdictions around the world. I would like to express my gratitude to each author and law firm involved in this project for their commitment of both their expertise and time.

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

Brian A Facey

Blake, Cassels & Graydon LLP

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Chapter 16

PORTUGAL

Joaquim Caimoto Duarte, Verónica Martins Mendes and Miguel Stokes¹

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 based on nationality.

The increased liberalisation of the Portuguese economy has led to the significant development and diversification of the Portuguese market, reinforcing the importance of non-EU trade partners (around 30 per cent of total exports in 2013) despite the continued greater importance of EU countries.

Regardless of the global financial and economic crisis, foreign direct investment in Portugal has evolved positively, with annual investments amounting in recent years to between €30 and €40 billion.

Foreign investment has most benefited the wholesale and retail (34 per cent), financial and insurance (22.3 per cent) and manufacturing (19 per cent) sectors, representing almost 80 per cent of total gross foreign investment over the above-cited period. There has also been increasing demand for investments in technology-based industries.

The majority of the foreign capital invested in Portugal originates from the European Union, particularly from Spain, France, the United Kingdom, Luxembourg and the Netherlands. Outside the 27 Member States of the EU, only Switzerland was among the 10 largest foreign investors in Portugal in 2012, although there has been a notable recent significant trend of investment from Angola.

One of the government's key priorities following Portugal's bailout in May 2011 by the International Monetary Fund, the European Central Bank and the European Commission – which was completed in May 2014 – was to capture foreign investment.

¹ Joaquim Caimoto Duarte is a counsel, Verónica Martins Mendes is a senior associate and Miguel Stokes is a junior associate at Uría Menéndez – Proença de Carvalho.

In particular, an extensive privatisation programme was put in place with the ultimate objective of raising €5 billion. The programme focuses particularly on aviation, electricity, health care and television broadcasting. For additional information regarding the programme, see Section VII, *infra*.

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, the 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 these are exceptional), such as the approach taken in connection with groups of companies.

Regulation on 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 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). 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 certain limits being set).

This potential power is, however, 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.

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 pursuant under its basic law enacted by Law 5/98 of 31 January, as amended, and Decree-Law 298/92.

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.²

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.

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).

² Applicable merger control rules must also be observed.

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 (ISP).

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.³

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 ISP of its intention.

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 ISP 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 shall be given to the ISP within 15 days of the trigger event.

Notifications and approvals

The incorporation of a Portuguese insurance undertaking is subject to authorisation granted by the ISP. 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,⁴ the Ministry of Finance will grant the authorisation (or that power will be delegated to the ISP). An authorised agent must be appointed.

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 creates the Energy Sector

3 Applicable merger control rules must also be observed.

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

Regulatory Authority as the domestic regulatory authority in the gas and electricity sectors at the national level.

*Production, transport, distribution and trade of electricity*⁵

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 requested from 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 for 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 details necessary for their full identification under terms to be defined by ANACOM. Once that notification is made, undertakings may immediately

5 With regard to gas, the 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.

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 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, the European Court of Justice found said concession to be illegal and, after a public tender, said concession agreement with PT was terminated and the concession was granted to Optimus Comunicações, SA (currently named Nos Comunicações, SA), ZON TV Cabo Portugal, SA (subsequently merged into Nos Comunicações, SA) and PT Comunicações, SA.

Television broadcasting

The legal framework on television broadcasting is based on the Television Act, which governs the access 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.).

In addition, the Television Act sets forth the obligation of transparency⁶ 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, shall be published on the broadcaster’s website and updated during the seven days following the occurrence of the corresponding relevant fact whenever:⁷

- 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; and
- d* a modification in the composition of the administration and management members, or in the structure in charge of the orientation and supervision of its contents, occurs.

Air transportation

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

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

7 Applicable merger control rules must also be observed.

Portugal, the INAC), 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 provided for 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 potentially affect, in any way, 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. This Law 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 (research, planning, testing, manufacturing, assembly, repair, modification, maintenance and demilitarisation of military goods or technology) of military goods and technologies, as well as the military activity itself, either by enterprises and individuals based in Portugal, or qualified entities in other EU Member States.

III TYPICAL TRANSACTIONAL STRUCTURES

i General environment

Due to 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 Function of the European Union establishes the free movement of capital within the EU; 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 specific 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 establishing of a branch. The choice between the two options is determined primarily by commercial reasons, given that the opening and registration costs and tax and accounting duties under the alternatives 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 depends mostly on the simplicity of the corporate and management structure, the investment to be made as share capital and any confidentiality issue regarding the shareholding of 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 event a notarial deed must be executed). Registration with the Commercial Registry takes only a few days.

Establishing a branch

Any foreign corporation intended for carrying out activities in Portugal for a period of longer than one year must arrange permanent representation in Portugal. If the activity has minimum material substance, the 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 be obtained in Portuguese territory, if and when applicable.

IV REVIEW PROCEDURE

See Section II, *supra*.

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.

According to the agency for investment and external commerce, AICEP Portugal Global, EPE, 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.⁸

Investment in Portugal and the globalisation of the Portuguese economy are supported by a set of tools offered through the National Strategic Reference Framework (QREN) 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

8 More information about Portugal's agreements for the reciprocal protection and promotion of investments can be found at: www.portugalglobal.pt/EN/InvestInPortugal/investorsguide2/internationalagreements/Paginas/InternationalAgreementsAgreementsfortheReciprocalProtectionandPromotionofInvestments.aspx.

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).⁹

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 forego 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.¹⁰

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 company¹¹ is

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

10 Applicable merger control rules must also be observed.

11 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.

required to notify the Portuguese Securities Exchange Commission (CMVM) and the issuer of that fact.

The 2, 5, 15 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 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.

CMVM Regulation 5/2010

Any natural or legal person reaching or exceeding a long position of 2 per cent, 5 per cent, 10 per cent, 15 per cent, 20 per cent, 25 per cent, one-third, 40 per cent, 45 per cent, 50 per cent, 55 per cent, 60 per cent, two-thirds, 70 per cent, 75 per cent, 80 per cent, 85 per cent and 90 per cent of the share capital of an issuer subject to Portuguese law whose shares are admitted to trading on a regulated market located or operating in Portugal, and whoever reduces its position to a value less than any of the thresholds mentioned above, must inform the CMVM and the invested company of this fact within four trading days of its occurrence.

The concept of long position includes:

- a* shares whose voting rights are attributable; and
- b* agreements or financial instruments of similar economic effect to holding shares that alone do not generate the attribution of voting rights, held directly or by third parties:
 - contracts for differences;
 - cash-settled swaps;
 - cash-settled options; and
 - cash-settled futures and forward contracts.

For the purpose of (b), similar economic effect to holding shares means exposure to benefits resulting from the increase, and to risks due to depreciation of share prices via an agreement or the acquisition of a financial instrument.

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.¹² For that reason, merger control 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.

12 Relevant fines could be imposed, and even the validity of the agreement challenged, if such suspension obligation is not adhered to.

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 Regulation¹³ establishes the thresholds¹⁴ that trigger the obligation to notify before the European Commission.

If the transaction does not reach the EU thresholds, Portuguese merger control legislation may apply.¹⁵

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

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

14 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;
- 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.

15 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 of the ‘undertakings concerned’ during the most recently concluded fiscal year exceeds €100 million, to the extent that at least two of such 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 to 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.

purposes of this summary, the concept of ‘corruption’ is used to describe the broader phenomenon of dishonest conducts. As such, it includes the 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.

VII CURRENT DEVELOPMENTS

As previously noted, within the context of Portugal’s bailout in 2011 by the International Monetary Fund, the European Central Bank and the European Commission, a key priority of the government is capturing foreign investment. Notably, new visa rules, whereby individuals investing in Portugal as much as €500,000 in the acquisition of real estate assets, among others, are granted visas within a few days from the submission of the corresponding request, and a special tax regime for non-habitual residents are in place.

In addition, an extensive privatisation programme has been put in place. So far, 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;
- 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; and
- f* 70 per cent of postal services CTT through an IPO, earning €580 million.

The bidding process for the privatisation of EGF, the entity responsible for solid waste management, which has been preliminarily valued at around €200 million, is currently taking place and is expected to be terminated by the end of 2014. In addition, the privatisation of Portugal’s flagship airline carrier TAP is due to recommence following failed negotiations for its sale to the owner of Colombia’s airline carrier, AviancaTaca. The privatisation of the public television broadcasting entity RTP has also been discussed.

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

Appendix 1

ABOUT THE AUTHORS

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Joaquim Caimoto Duarte is a counsel in the Lisbon office of Uría Menéndez – Proença de Carvalho, where he heads the EU and Portuguese competition practice area.

He has advised on matters in various sectors, including pharmaceuticals, air transport, motor vehicles, energy, telecommunications, media and large retailer industries.

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Verónica Martins Mendes joined Uría Menéndez as a trainee in 2008, and is now a senior associate in the commercial law department of the Lisbon office.

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Edurne Navarro is the partner in charge of the Brussels office of Uría Menéndez. She joined the firm in 1992 and became a partner in 2002.

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Miguel Stokes joined the Lisbon office of Uría Menéndez in September 2009 as a trainee and became a junior associate in September 2011. His practice is focused on M&A, corporate finance and securities law.

Mr Stokes assists entities involved in different sectors and activities, including in the incorporation and development of their activities; corporate restructurings; negotiation of national and international structured financings, especially of acquisition finance; mergers; privatisations; debt and equity offerings; admission to trading of shares; and other financial instruments and regulatory advice.

ALFONSO VENTOSO

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Alfonso Ventoso joined Uría Menéndez in September 2002. Prior to this, he amassed experience in real estate law and litigation, and worked in London in the insolvency department of a UK firm.

From January to July 2009, he was seconded to Davis Polk & Wardwell in New York, where he was assigned to the capital markets practice group as part of the firm's foreign temporary associates programme.

Mr Ventoso's practice is focused mainly on equity capital markets (including listings and delistings, public offerings and block-trades), and on providing general advice to investment firms, banks and listed companies on the regulatory aspects relating to securities markets and corporate governance.

In addition, he has ample expertise in M&A deals involving both listed and financial companies, and the issue of debt securities, especially hybrid instruments.

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