



MACE
DO ■ ■
VITO
RINO

#WHYPORTUGAL 2021

PORTUGUESE DUE DILIGENCES

M A C E
D O ■ ■
V I T O
R I N O

CONTENTS

- 03 INTRODUCTION
- 04 CORPORATE MATTERS
- 05 MATERIAL CONTRACTS
- 10 GOVERNMENTAL AND REGULATORY MATTERS
- 18 LABOUR MATTERS
- 22 REAL ESTATE
- 03 INTELLECTUAL PROPERTY
- 04 LITIGATION AND OTHER RELEVANT MATTERS
- 05 FINAL REMARKS

INTRODUCTION

In general, Portuguese due diligences are similar to due diligences in other European countries. There are, however, some legal features with an impact on the risk assessment of the potential buyer that should be considered in due diligences of Portuguese targets.

In broad terms, due diligences include four main stages:

Preparing a checklist with the information regarding the target that will be requested to the seller;

Reviewing the information and preparing a plan describing the most relevant topics for each exposure area;

Preparing a preliminary report with the assessment of the relevant information and documentation; and

Preparing the final report.

These stages are indicative and may vary on a case-by-case basis. In some cases, the due diligence process may continue in the post-closing phase

A due diligence process occurs throughout the proposed transaction, which may take from few weeks to several months. An effective selection of the relevant information, limiting the scope of the review to matters related to the business, may be crucial for the due diligence to be carried out in a timely fashion and avoid undesirable surprises.

The length of the due diligence process may depend from several issues: (i) how much time and monetary resources the potential buyer may spend, (ii) the areas to be covered, (iii) the documentation/information to be reviewed and (iv) the need to hire specialized consultants to review the relevant business aspects.

Although there is no preferred outcome, it is crucial that the collected information confirms the real situation of the target company. The target company may be subject to different regulatory obligations due to its nature or the nature of its business. The legal framework governing Portuguese companies and Portuguese law contracts, should be properly assessed. This paper reviews the most relevant aspects in a due diligence of a Portuguese target and certain legal and regulatory aspects affecting Portuguese due diligences that should be considered by foreign buyers and their legal advisors.

CORPORATE MATTERS

A review of corporate matters might include viewing copies of the articles of association, minutes of meetings, and incorporation documents of the target company.

The basic corporate data of the target company is publicly available and could be obtained by requesting an online certificate at www.portaldaempresa.pt.

This certificate contains the main information regarding the company: purpose, head office, tax identification number, share capital, corporate bodies, powers of attorney, deposit of the annual accounts, etc.

The articles of association also include relevant information: capital structure, share transfer provisions, shareholders rights, and the main rules regarding management and corporate governance.

The two types of Portuguese limited liability companies – private liability companies (sociedade por quotas, Lda.) and public limited liability companies (sociedades anónimas, S.A.) – are broadly managed in similar ways, but private limited liability companies are often less formally managed. This means that many management decisions of Lda. companies are taken by their shareholders and not the board of directors.

In reviewing the minutes of the shareholders' general meetings and the minutes of the board of directors' meetings, it is relevant to have in mind that:

In private limited liability companies, shareholders retain the power to intervene and decide on management issues;

In public limited liability companies, it is up to the board of directors to decide on matters concerning the management of the company.

Portuguese limited liability companies have to approve annual accounts. It is important to review the target company's annual accounts approval by the shareholders' meeting and confirm that they have been deposited with the Commercial Registry Office.

The transfer of shares in private limited liability companies requires the consent of the remaining shareholders and must be registered with the Commercial Registry Office. No public registration is required for the transfer of shares in public limited liability companies.

The articles of association may also establish pre-emption rights or other requirements in case of transfer of shares.

MATERIAL CONTRACTS

One of the most time-consuming and also crucial part of due diligences is the review of the material contracts and commitments of the target company.

Typically the due diligence will cover all contracts or only those above a specified amount including:

- Guaranties, loans, and credit agreements;
- Customer and supplier contracts;
- Distribution, dealer, sales agency, or advertising agreements;
- Equipment leases;
- Contracts involving payments over a material monetary threshold;
- Indemnification agreements;
- Exclusivity agreements and/or non-competition agreements; and
- Contracts whose termination may result in a material adverse effect on the company.

A foreign buyer should be aware that, unlike in common law countries, many aspects of the contract are determined by law, which means that many times the parties rely on implied statutory terms instead of specifying all agreed terms in the contract.

In order to evaluate the impact of material contracts on the transaction, the lawyers carrying out the due diligence should review the main contract provisions, particularly those that may interfere with the transaction, such as the change of ownership and change of control provisions and the termination provisions, as well as those that might trigger liabilities for the target company.

If the buyer is not familiar with Portuguese law, it may be advisable to obtain a detailed description of the rights and obligations that will arise from some of the contracts to which the target company is a party to, so as to gain a more accurate understanding of the legal implications arising from those contracts.

Care must also be taken to include in the review of unwritten contracts that may be in force as well as contracts resulting of informal exchange of written correspondence, as Portuguese law in general does not require to be put in writing.

GOVERNMENTAL AND REGULATORY MATTERS

A due diligence process may also include the review of other relevant governmental and regulatory matters, including administrative licenses, authorisations and permits for the target company to pursue its business activity in Portugal.

Particular care should be given to specific permits, such as telecommunications, energy, manufacturing industries and healthcare.

Compliance with environmental license, wastewater discharge license, license to use subterranean waters and waste management license must be also reviewed.

LABOUR MATTERS

In Portugal, employment contracts are subject to mandatory rules and statutory limits on several matters, such as remuneration, working hours, holiday rights or duration of contracts.

As in other European countries, labour matters are quite sensitive issues in a due diligence, particularly if the buyer intends to restructure the business and lay off employees.

The review of labour matters may include the preparation of a list of all employees or at least of the personnel, along with an organization chart, and copies of employment contracts grouped by type.

In general, employment contracts do not need to be in writing. Only for some types of contracts the law requires a written document, including, but not limited to, fixed-term contracts, part-time contracts, contracts with foreign employees, and secondment.

In several cases, particularly in small businesses, companies do not execute written contracts with employees. All unwritten employment contracts are deemed open-ended contracts.

Attention should be given to services contracts to confirm that they are not materially employment contracts. If this is the case, the employer may

be obliged to keep the service provider under employment and comply with all relevant tax and social security obligations.

In general, services contracts may be automatically terminated by either party and for whatsoever reasons, unlike employment contracts, whereby the dismissal is merely allowed in certain cases and after a lengthy disciplinary procedure.

Once confirming the different types of contracts, the due diligence team should look into the terms of individual written contracts and verify if all requirements for the contracts to be legally construed as term employment or part-time contracts are met.

Otherwise, these contracts could be converted into open-ended contracts, which may impact on the restructuring or termination envisaged by the buyer.

The due diligence should also include a review of the target company's collective agreements, employees' payroll, benefit plans, Social Security's contributions, employment insurance policies and employment litigation (pending, threatened, or settled) involving the target company.

REAL ESTATE

In order to confirm the title of the properties of the target company, property registry certificates should be obtained at www.predialonline.pt with the Property Registry Office, as well tax office property certificates on immovable assets with the Tax Authorities.

Considering that the transfer of real estate is only effective towards third parties after registration with the Property Registry Office, the due diligence must verify the title and ownership of the target's assets.

It should be also looked for registrations that may have an impact on the proposed transaction, such as any rights, restrictions or charges including liens, mortgages and encumbrances on the property, which should be registered with the Property Registry Office.

For unregistered and undisclosed restrictions on the target's rights over real estate assets, including promises, options and leases, the purchaser will have to rely on the representations of the seller.

In Portugal, lease contracts are normally executed in writing. The survival of these contracts could be particularly relevant for certain business.

If a transfer of business is contemplated, the buyer should make sure that

the lease will be transferred and that the lessor will not have the option to purchase the seller's business, as this may in many instances have a material impact on the proposed transaction.

In transactions with a real estate component, a review of the administrative permits regarding the properties of the target is crucial, as no urban property may be sold or leased in Portugal without license of use other than in special cases set out in the law.

INTELLECTUAL PROPERTY

Industrial property and copyrights are relevant matters in a due diligence when the target owns IP rights or uses third parties' IP rights to be able to conduct its business.

The due diligence team should review the nature of the industrial property and copyrights owned by the target company, relevant territorial scope (Portugal, European Union and/or third countries) and how these rights are protected and enforced in Portugal.

Industrial property rights such as trademarks, designs, patents, etc. are registered with the Industrial Property Institute (*Instituto Nacional da Propriedade Industrial*, INPI).

Industrial property rights registration gives priority over third parties seeking to register the same industrial property rights and to prevent third parties from making unauthorised use of the target company's property rights for a limited period. In Portugal, this period is of 10 years for trademarks and 20 years for patents.

INPI's records are public and it is easy to conduct a search of all registrations in name of the target company. This information is available at www.inpi.pt.

Other IP rights are not subject to registration and the buyer will have to

rely on its own investigation as to the priority rights in respect of copyrights of the target and on the information and representations made by the seller.

The Portuguese domain names “.pt” are registered with the national domain names registrar (*Associação DNS.PT*), which is available at www.dns.pt.

A due diligence may also include data protection matters. Currently, personal data processing activities are subject, depending on the data and processing activities, to notification or prior authorization from the Data Protection Authority (*Comissão Nacional de Proteção de Dados*, CNPD), the Portuguese supervisory authority.

Although the General Data Protection Regulation (GDPR) is expected to be applied throughout the EU from 25 May 2018, Portuguese law will continue to apply in cases it may impose more detailed conditions, such as in case of sensitive data (e.g. genetic data, biometric data or data concerning health) and employees' personal data.

A combined due diligence review of the GDPR and the Portuguese law will be particularly relevant where the target carries out data processing activities from Portuguese individuals and/or these activities are subject to control of the CNPD

LITIGATION AND OTHER RELEVANT MATTERS

A detailed review of the relevant lawsuits, such as debts recovery, insolvency proceedings and liability claims, will expose company's contingencies and liabilities.

In Portugal, most court files may be made available by the court. Of course, if copies of the files are available, the due diligence review will be speedier, making it easier to create a schedule of all pending, threatened, or settled lawsuits involving the target.

The litigation risk review must first imply an identification of the litigation matters that could be relevant for the potential buyer, such as debts recovery, insolvency proceedings and liability claims, as well as the settlements to which the company is party. This review should include the details of the parties, nature of the proceedings, date of commencement, status, relief sought and settlements offered, if any, contingencies and liabilities, court fees, insurance coverage, etc..

In particular, it should be confirmed if any debts recovery and insolvency proceedings are pending against the target company, as they may be indicative that the company will be in a difficult economic situation, including if it is not able to comply with most of its obligations or it does not own sufficient assets.

Among other issues, it should be checked whether an insolvency order was

issued by a court and, if so, whether the company has an insolvency plan specifying how creditors' claims may be satisfied, for instance, through the liquidation of the company's assets, the company's restructuring, the sale of the company to a third party.

An assessment of the expected outcome and the resolution time may be crucial for the buyer, even though not always easy to predict.

A due diligence process may also include other matters, such as insurance contracts and policies, tax matters, etc. depending on the nature of the target's business.

In respect of insurance matters, it may be important to review the company's general liability, such as personal and real property, product liability, directors and officers' liability, employees' compensation, as well as the company's insurance claims history.

Typically, a legal due diligence report will not include tax matters. Issues such as thin capitalization, tax contingencies should be reviewed by tax auditing team appointed by the buyer. When a legal due diligence on tax matters is requested, the legal team should review the compliance with ongoing reporting and payment obligations and on the administrative and legal proceedings filed by or against the target company.

FINAL REMARKS

A due diligence of Portuguese targets is broadly like those of most western European countries. There are, however, certain aspects of Portuguese law that have to be considered by potential purchasers that may impact the transaction.

Due diligences are often commissioned by purchasers. Over the years, this trend has been changing with increasing in vendor-driven due diligence on the business owners are trying to dispose of.

Due diligence is generally performed to protect both parties, but primarily the buyer in finding potential liabilities and, if possible, mitigate the risks that may affect the transaction.

A due diligence final report should mostly contain a summary assessment of the potential risks, along with the matters that the transaction needs to be adjusted based on the findings, as well a summary of matters where the target company was found to have a clean bill of health.

Typical outputs of a due diligence may include (i) information upon which transaction terms may be based or to be considered on the final investment decision, (ii) information to be used to negotiate the price, (iii) caveats by

means of warranties or indemnities to be included in the transaction documents.

In addition, the outcome of a due diligence over a Portuguese target is to provide legal advice on the practical implications of Portuguese law features. These features might affect the transaction, when they differ from what may be seen by clients as an international standard.

In many cases, small differences may have a significant impact on the perception of risk, while issues that are considered difficult obstacles will be more easily understood if the due diligence provides an accurate explanation of the legal consequences of specific legal issues that may arise in Portugal, and that may be adjusted by the parties under the transaction documents.

Ensuring the buyers have the full picture of the target company and of Portuguese legal features involving the target company prior to completion of the transaction will allow buyers to take a meaningful decision and help to avoid nasty surprises in a post acquisition scenario.

MACEDO • VITORINO

ABOUT US

WHO WE ARE & WHAT WE DO

ABOUT US

MACEDO VITORINO is a leading Portuguese law firm. We advise domestic and foreign clients in a wide range of business sectors, including banking, distribution, industry, energy, TMT and projects. We are known for our professional and client oriented approach to complex and difficult matters.

Since the foundation of our firm in 1996 we have been involved in several high profile transactions in all of the firm's fields of practice, including banking and finance, capital markets, corporate and M&A, etc.. We have also acted on many complex disputes and restructurings.

We have strong relationships with many of the leading international firms in Europe, Asia and the Americas, which enable us to handle cross-border transactions effectively.

The firm recognised by The European Legal 500, IFLR 1000 and Chambers and Partners for its work in its main practice areas.

Our team is committed, hard working, accessible and friendly. We believe in collegiality, teamwork, trust and loyalty. Clients value our team approach, the good management of time and our focus on their business goals.

We advise:

- NATIONAL AND MULTINATIONAL COMPANIES
- BANKS AND OTHER FINANCIAL INSTITUTIONS
- FUNDS
- BUSINESS AND SCIENTIFIC ASSOCIATIONS
- FOREIGN EMBASSIES
- INDIVIDUAL ENTREPRENEURS
- PRIVATE EQUITIES
- START-UPS
- PRIVATE CLIENTS

MACEDOVITORINO.COM

MA
CE
DO
▪ ▪
VI
TO
RI
NO