Portugal

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1 Form

What form do business combinations take?

Portuguese law defines several ways for companies to combine their businesses, of which the main ones are briefly analysed in this chapter in the light of current Portuguese M&A practice.

Mergers

Mergers constitute a typical procedure used in Portuguese M&A practice to structure business combinations. Portuguese law governs three different types of merger processes:

- amalgamation – this type of merger is based on the transfer of all the assets from one or more companies to another existing company, the merging company;
- consolidation – a consolidation merger is operated through the winding-up of the companies involved and the transfer of all their assets to a new company, which is incorporated for this purpose;
- demerger–merger – in this type of merger, a company spins off one or more parts of its business units with the purpose of either incorporating new companies or incorporating those assets with an existing company.

Acquisitions

Further to merger procedures, it is also standard Portuguese M&A practice to proceed with business combinations using one of the following types of structure to acquire a Portuguese company:

- shares acquisition;
- assets acquisition;
- transfer of undertaking (*trespasse de estabelecimento*), which consists on the transfer of all or part of the business from one entity to another, involving, as a consequence, the transfer of all assets, obligations, duties and rights related with the transferred business.

The choice of acquisition structure depends on various factors, including:

- specific interests and purposes of the transaction;
- tax treatment;
- risks and liabilities assessment; and
- procedures and formalities.

2 Statutes and regulations

What are the relevant regulations and statutes governing business combinations?

Mergers and acquisitions of non-listed companies are governed by the Companies Code, enacted by Decree-Law No.262/86 of 2 September 1986, which came into force in November 1986.

Public takeover bids and the transfer of Portuguese companies' shares are governed by the Securities Code, enacted by Decree-Law No.486/99 of 13 November 1999, which came into force in March 2000. The supervising authority, the Securities Market Commission (Comissão do Mercado de Valores Mobiliários – hereinafter referred to as CMVM) has enacted complementary regulations applicable to public and listed companies.

Transfer of interests of non-listed companies are regulated by the Securities Code regarding transfer formalities and by the Companies Code, the latter including the regulation of the transfer of quotas (holdings representing the share capital of a limited liability company by quotas).

Assets acquisitions are regulated by special provisions depending upon the assets, rights and obligations to be transferred. However, the general framework applicable to the transfer of assets, rights and obligations is set out in the Civil Code (*Código Civil*), enacted by Decree-Law No.47,344 of 26 November 1966, which came into force in July 1967.

The transfer of an undertaking (*trespasse de estabelecimento*) does not have any special regulation, except in relation to:

- employees' rights that are regulated by Article 318 of the Employment Code (Código do Trabalho) enacted by Law No.9/2003 of 27 August 2003, which came into force on 1 December 2003;
- the form of the transfer agreement, which is governed by Decree-Law No.64-A/2000 of 22 April 2000; and
- the effects on the transfer of leased real estate assets, which are governed by Decree-Law No.321-B/90 of 15 October 1990.

3 Legal documentation

What type of contracts or other legal documentation are entered into by parties to a business combination?

Mergers

Under Portuguese law, a merger is subject to a complex procedure that involves:

- the negotiation and preparation of the merger project;
- the analyses and opinion of the statutory auditor of each company;
- the registration of the merger project with the relevant Commercial Registry Office;
- the approval of the merger project by the general shareholders' meeting of each company;
- the execution of a merger's notarised public deed;
- the lack of opposition by the creditors of each company;
- the definitive registration of the merger with the relevant Commercial Registry Office.

Transfer of shares

The parties to an acquisition of shares of a Portuguese company usually enter into a written purchase and sale agreement to govern the terms and conditions of such acquisition, although the transfer of shares is a simple and single act that involves the transfer of legal title over the shares.

If the parties involved in a share purchase transaction wish to set out, among other issues, their duties as shareholders, as well as to establish the regime for the transfer of shares to third parties, it is customary Portuguese M&A practice for such parties to enter into a shareholders agreement.

Transfer of quotas

The transfer of quotas must be executed by a notarised public deed. The public deed must contain the relevant terms and conditions of the transfer.

Transfer of assets

An asset acquisition is a legally more complex transaction than a share acquisition, because

- the sale agreement has to identify each and every asset to be transferred;
- the legal regime of the assets is not uniform;
- the consent of third parties (eg landlords, creditors with privileges over the assets to be transferred, entities with pre-emptive rights) must be obtained; and
- if the transfer involves real estate assets it must be executed by notarised public deed, subject to registration with the relevant Real Estate Registry Office.

Transfer of undertaking

Under Portuguese law, the transfer of an undertaking must be executed by a written agreement, which must contain the relevant terms and conditions of the transfer.

4 Filings and fees

What governmental or stock exchange filings are required to be made in connection with a business combination? Are there stamp taxes or other governmental fees in connection with completing a business combination?

Filing procedure for takeover bids

Before the announcement of a takeover bid there is often a previous procedure for the offeror to be able to take its decision on launching a bid. During this period, the offeror, the target company, its shareholders and its corporate bodies officers, as well as any consultant or adviser, are bound to maintain the secrecy of the takeover project.

Disclosure of the takeover bid may only occur once a final decision to launch the bid has been taken. In this case, the offeror must file a preliminary notice of the offering with the CMVM, with the target company and with the managing body of the relevant stock exchange, and also immediately publish the notice.

On publication of the preliminary notice, the offeror has to:

- make an offering to shareholders on terms not less favourable than those indicated in the preliminary notice as regards the consideration and minimum amount of the securities to be acquired; and
- request the registration of the takeover bid within 20 days.

After the registration of the takeover bid has been requested, the CMVM may grant the registration within eight days.

Subsequently, the offeror has eight days to publish the definitive notice and prospectus of the takeover bid, which must continue for a period of 2 to 10 weeks.

Competition filing

The Portuguese competition law framework has undergone several important amendments in the past few months. The Competition enforcement authorities have been restructured and Decree-Law No.10/2003 of 18 January 2003 recently created a new Competition Authority, which is now the competent body to assess the admissibility of concentrations in light of the relevant competition law provisions. This is particularly relevant as, from now on, the final decision concerning concentrations will no longer be taken by the minister in charge of trade but by an independent body. The new Competition Act has been enacted by Law No.18/2003 of 11 June 2003, which has introduced several changes concerning substantive and procedural aspects of concentrations.

Thresholds for mandatory prior notification

Concentrations are subject to mandatory prior notification with the new Competition Authority when the participating undertakings meet one of the following thresholds:

- creation, or strengthening as a result of the concentration, of a share greater than 30 per cent in the national market for the relevant goods or services or in a substantial part thereof; or
- the turnover in Portugal of the participating undertakings exceeds €150,000,000.00 in the preceding financial year, after deduction of taxes directly related to the turnover, as long as the individual turnover in Portugal of at least two of the parties to the operation is above €2,000,000.00.

Prior notification shall be given seven business days after the concentration agreement is concluded, the announcement of any public bid is made or a controlling interest is acquired. Until tacit or express authorisation is given, any legal transaction establishing the concentration shall be null and void.

Notification procedure and time period for assessment of the concentration

In Portugal, the Competition Authority is the competent body to assess the admissibility of concentrations in light of the relevant Competition law provisions. Pursuant to Decree-Law 10/2003 and Law No.18/2003, the Competition Authority will have 30 working days, from the date of receipt of notification, to make a decision. If no decision is made within that time, the concentration will benefit from tacit approval. It is important to bear in mind that all delays are counted as working days.

Sanctions for non-compliance with the mandatory notification of a concentration

Non-notification of a concentration is punishable with a fine of up to 1 per cent of the preceding financial year's turnover in Portugal for each company, as it constitutes a misdemeanour. The violation of a decision of the Competition Authority on this subject is punishable with a fine of up to 10 per cent of the preceding financial year's turnover in Portugal for each company. Pursuant to Article 24 of the Portuguese Competition Act, the new Competition Authority has competence to initiate the procedure and impose sanctions in all matters concerning violations of the rules on concentrations.

Fees

Notarial fees are due only if the structure of the business combination requires execution through a public deed or with the intervention of a public notary. Notarial fees vary according to the specific notarial act performed.

Specific acts executed within the context of a business combination may also be subject to registration fees if their completion depends on registration with a Commercial Registry Office or with the relevant Real Estate Registry Office (eg on real estate assets acquisitions). Stamp duties may also apply to business combinations, depending on the adopted legal structure.

5 Information to be disclosed

What information are public companies required to make available to the public in connection with a business combination?

General information about significant stakes

If a public company is the target of a business combination, notably pursuant to a takeover bid or a mere acquisition of its shares, the company is required to make an announcement to the CMVM whenever a shareholder has informed it of the acquisition or sale of a significant stake (see 6 below for the definition of 'significant stake').

Public disclosure of information

A listed company may be required to disclose to the market the main terms and conditions of an acquisition or other type of business combination if such acquisition is material to its activity.

The disclosure of material events by a listed company refers to events occurring in the activity of such a company that have not been publicly disclosed and that, owing to their impact on the patrimonial or financial status or on the company's current business, may have a material influence on the price of its stock.

6 Disclosure requirements for shareholders

What are the disclosure requirements for large shareholders in a company? Are the requirements affected if the company is a party to a business combination?

Disclosure requirements

According to the Securities Code, a shareholder of a public company must make public announcements whenever it comes to hold or ceases to hold, directly or indirectly, a stake equal to or exceeding 10 per cent, 20 per cent, one-third, 50 per cent, two-thirds and 90 per cent of the voting rights corresponding to the public company's share capital.

In the case of listed companies, the disclosure duty regarding direct or indirect significant stakes is also mandatory whenever a shareholder comes to hold or ceases to hold a stake equal to or exceeding 2 per cent or 5 per cent of the target company's share capital.

The disclosure of the significant stake acquisition must be addressed to the CMVM, the target company and, in the case of listed companies, to the managing company of the relevant stock exchange within three days of the direct or indirect acquisition.

Mandatory takeover bids

Under Portuguese law, a shareholder that exceeds, directly or indirectly, the thresholds of one-third or 50 per cent of the voting rights in a public company is required to launch a takeover bid over all shares or other securities issued by the target company that grant the right to the acquisition or subscription of shares.

However, in certain circumstances it is possible not to trigger a mandatory takeover bid, namely in cases of derogation or suspension of the duty to launch such bid.

The preliminary notice of the takeover bid must be sent to the referred entities and published within 30 days of verification of any of the thresholds.

7 Duties of directors and controlling shareholders

What duties do the directors and managers of a company owe to the company's shareholders in connection with a business combination? Do controlling shareholders have similar duties?

The target company, after having knowledge of the offeror's decision to launch a takeover bid, is bound by a 'passivity and neutrality' rule, which inhibits its board of directors (and its supervisory board, where applicable) from performing, during the period of the takeover bid, any acts that:

- may materially change the patrimonial situation of the target company;
- are not included in the normal management of the company; and
- may significantly affect the purports announced by the offeror.

Such acts may, however, be performed if they arise from compliance with obligations undertaken by the target company before the launching of the takeover bid or if authorised by a qualified majority vote at a general shareholders' meeting specifically convened for such purpose.

8 Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

In general, the shareholders rights depend upon the structure of the business combination. We consider the following:

Transfer of shares

In a share acquisition, usually the non-selling shareholders do not have any rights in relation to the transfer, except if pre-emptive rights or rights of first refusal arise from an agreement between shareholders or from the company's articles of association.

Transfer of quotas

The transfer of quotas usually depends on the consent of the general shareholders' meeting of the target company, and therefore the non-selling holders may oppose the transfer. In this last case, the target company has to propose to the selling holder the redemption of the selling quota or the acquisition of the same at the appraised value.

Transfer of assets and transfer of undertaking

Usually the decision to transfer assets or to enter into a transfer of undertaking (*trespasse*) in a stock company is taken by the board of directors. Nevertheless, it is our understanding that if the assets are essential to the activity of the company or the transfer of undertaking involves the sole or main business of the target company, the decision to transfer such assets or to enter into such a transfer must be taken by the general shareholders' meeting of the company and therefore the consent of the majority shareholders must be obtained.

In a company whose capital is represented by quotas (*sociedade por quotas*), unless otherwise provided for in its articles of association, the decision to enter into a transfer of undertaking or to sell real estate assets is taken by the general shareholders' meeting.

Mergers

A merger must be approved by the general shareholders' meeting of the involved companies, by a majority of three-quarters of the votes in a *sociedade por quotas*, and by two-thirds of the votes in a *sociedade anónima*.

The merger requires the consent of the affected shareholders if:

- the merger increases the obligations and liabilities of some or all of the shareholders;
- it affects the special rights of some shareholders; or
- it affects the proportion of the shareholdings in the company except where the change reflects compensatory payments to shareholders and a fair value is attributed to the shares concerned.

Minority shareholders (appraisal right)

In certain circumstances, the law and/or the articles of association of the company grant to a shareholder opposing the merger the right to sell his shares or quotas to the company or allow another person to acquire them at an appraised price.

9 Hostile transactions

What are the special considerations for unsolicited (hostile) transactions?

The Securities Code does not distinguish between solicited and unsolicited takeover bids and consequently there is no specific legal regime applicable to hostile takeover bids. In fact, the hostile nature of a takeover may only be assessed (from a legal perspective) after the board of directors of the target company has presented its evaluation report on the opportunity and conditions for a takeover bid.

10 Break-up fees – frustration of additional bidders

Are break-up fees allowed? Are other types of mechanisms allowed to potentially frustrate additional bidders? Describe any 'financial assistance' restrictions and how they can affect business combinations.

The target company is subject to a 'passive and neutral' position regarding the takeover bid process. The target company is called to present its objective opinion in relation to each takeover offer, but the board of directors cannot adopt measures that may affect in a relevant manner the scope of the pending takeover offers. Therefore, and in the absence of any law, literature or court decisions, it is our understanding that break-up fees are not permitted.

Apart from defensive measures provided for in the company's articles of association, which act as disincentives or avoid takeover bids in general, Portuguese law does not provide for specific mechanisms to frustrate a competitive offer.

Financial assistance

Under Portuguese law, any loans, guarantees, security interests or funds granted by a company for the purpose of, or in connection with the subscription or the purchase of any shares issued by such company may be deemed null and void by a competent court. However, there are certain exceptions in relation to the prohibition of financial assistance.

Financial assistance can affect a share deal, notably an MBO, but, in general, would not affect an asset deal or a *trespasse*.

11 Governmental influence

Other than (i) through relevant competition (antitrust) regulations, or (ii) in specific industries in which business combinations are regulated, can governmental agencies influence or restrict the completion of business combinations?

An intervention by public authorities in a business combination may occur in a merger or acquisition involving companies that are subject to supervision procedures or that develop their activities in restricted areas of activity, namely public service concessionaires.

12 Conditions permitted

What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, can the financing be conditional?

A takeover bid may be subject to certain conditions, as long as those conditions are disclosed in the preliminary announcement of the takeover bid. There are several conditions to which the offeror may subject the takeover bid, namely:

- success conditions based on a minimum or maximum amount of securities to be purchased;
- legal conditions concerning the registration of the offer with the CMVM or the issuance of a regulatory authorisation;
- economic conditions referring to material variations of the target company's assets or financial situation.

However, it is not admissible to make the success of the takeover bid subject to conditions that depend on or are controlled by the offeror (*condições potestativas*).

13 Minority squeeze-out

Can minority stockholders be squeezed out? If so, what steps must be taken to do so and what is the timing of the process?

Any shareholder of a public company that, pursuant to a takeover bid, has acquired a stake in a public company that reaches or exceeds 90 per cent of the voting rights corresponding to such company's share capital may launch, within a six-month period following the closing of the takeover bid, a squeeze-out offer addressed to the remaining shareholders for an appraised consideration.

The squeeze-out causes the immediate exclusion of the company shares and other securities that grant any right to their acquisition, from being listed on a regulated market, excluding the possibility of readmission for a three-year period.

The dominant shareholders of non-public companies may also benefit from a squeeze-out acquisition whenever the dominant company has reached a stake representing a minimum of 90 per cent of the dominated company's share capital. However, the acquisition procedure is more complex since it involves the judicial deposit of the price, the execution of a public deed confirming the acquisition, which afterwards must be registered with the Commercial Registry Office and published in the *Official Gazette* and in a newspaper with widespread circulation.

14 Cross-border transactions

What additional legal and regulatory framework, if any, governs cross-border transactions?

Although all restrictions on foreign investment in Portugal have been revoked, some information requirements remain. Consequently, the Portuguese foreign investment framework must be taken into consideration in cross-border transactions.

Portuguese law considers as foreign investment in Portugal any act or contract entered into by non-resident individuals or companies with the purpose or the result of creating, maintaining or strengthening stable and lasting economic links with a Portuguese company either to be incorporated or already incorporated.

Should a Portuguese non-resident entity perform any operation considered as foreign investment, it is required to notify the Portuguese Institute for Investment, Trade and Tourism (ICEP – Investimentos, Comércio e Turismo de Portugal) within 30 days following the execution or settlement of such operation.

This obligation has is only for administrative and statistical

reasons, but violations may be punished by fines which currently range from €99 to €29,928.

15 Legal form

Can the legal form of the entity involved in a business combination have an impact on the manner in which it is structured? Do such factors have an impact on cross-border transactions involving entities organised in your jurisdiction?

In acquisitions, the legal form of the purchasing company may have material relevance for the structure of the business combination, in particular regarding an impact on taxation.

On the other hand, the legal form of the target company may also influence the business combination structure as regards transferability limitations. For instance, the transfer of quotas may only be executed by a notarised public deed and usually depends on an approval issued by the general shareholders' meeting of the target company, while the transfer of shares does not depend on any notarial requirement (see 3 above) or, often, on any consent by the target company.

From a Portuguese law perspective and except for the tax ramifications, the legal form of a foreign company intending to purchase a Portuguese company does not seem to have, in general, a specific material relevance in the structure of the acquisition, notwithstanding any potential relevance determined on a case-by-case basis.

16 Waiting or notification periods

Other than competition laws, what are the relevant waiting or notification periods for completing business combinations? Are companies in specific industries subject to additional regulations and statutes?

The main relevant notification periods for mergers, takeover bids and acquisitions of companies in general are discussed in 4 and 5 above.

Business combinations involving companies operating in specific industries are subject to additional limitations and constraints. Although there are a variety of industries in which there are specific restrictions on business combinations (eg communications), we highlight banking, insurance and certain limited areas of economic activity.

Credit institutions

Any entity that proposes to acquire, directly or indirectly, a significant holding in a credit institution which increases a significant holding so that the proportion of the voting rights or of the share capital held by such entity would reach or exceed any of the limits of 5 per cent, 10 per cent, 20 per cent, 33 per cent or 50 per cent of such share capital or voting rights is required to give prior notice of its intention to the Bank of Portugal. An identical duty to notify is applicable in the case of the sale or reduction of a significant holding.

Insurance companies

The duty of prior notification to the Portuguese Insurance Institute regarding the acquisition or the sale of a significant stake in a Portuguese insurance company is mandatory if any of the following situations occur:

- an entity has the intention (a) to acquire a stake corresponding to a minimum of 10 per cent of an insurance company's share capital or voting rights or (b) to reduce such a stake (ie a significant stake); or
- an entity has the intention (a) to acquire or to increase its stake in an insurance company in such a way that would lead it to reach or exceed a total stake of 20 per cent, 33 per cent or 50 per cent of an insurance company's share capital or voting rights, or (b) to reduce its stake in the insurance company below any of those thresholds.

Companies undertaking certain economic activities

The following activities may be performed only by public concessionaire companies:

- collection, treatment and supply of water to the public through a fixed network;
- collection, treatment and disposal of urban waste water through a fixed network;
- collection and treatment of urban sewage by municipal and multi-municipal entities;
- public postal services;
- public railway services;
- exploitation of ports.

17 Tax issues

What are the basic tax issues involved in business combinations?

Capital gains derived from the transfer of tangible or intangible assets (including gains arising from indemnities for the loss of tangible assets) become taxable on only 50 per cent of their value, as long as the total amount derived from the transfer is reinvested within the same tax year, the preceding year or during the two years following the transfer.

Capital gains derived by corporate entities from the transfer of securities receive the same legal treatment outlined above, as long as the following requirements are met:

- the total amount arising from the transfer of the securities must be reinvested in the acquisition of securities representing the share capital of Portuguese resident companies or in bonds issued by the Portuguese Republic or in the acquisition or construction of tangible fixed assets;
- the securities transferred represent at least either 10 per cent of the shareholding of the subsidiary or an acquisition value of €20 million, and both the sold holding or bonds and the acquired holding or bonds are retained for at least 12 months; and
- the securities transferred do not involve entities that are related parties (except they are capital formation contributions), or residents of listed tax havens.

From 1 January 2003 Portuguese holding companies (SGPS) became more attractive. Not only do they continue to benefit from a total (100 per cent) dividend participation exemption but also they became entitled to a capital gains exemption on the sale of shares and from a total capital gains exemption on the gains obtained with the sale of shares or quotas of other companies.

These exemptions are not subject to a minimum holding in votes or in capital. The minimum holding period is just one year. This does not, however, apply to capital gains on corporate rights that have been held for less than three years and were acquired from a related party or a resident of a listed tax haven or the free-trade zones of the Azores and Madeira. The drawbacks are that they cannot benefit from a capital loss deduction, which could offset other types of income such as interest and fees for services rendered to subsidiaries. From now on they also cannot deduct financial expenses, such as interest, provided those loans were contracted to acquire equity.

In addition, it should be stressed that for the purpose of capital gains exemptions obtained by non-resident entities with

the transfer of shares, the concept of 'significant stake' has become irrelevant. Until 31 December 2002, to qualify for that exemption the non-resident corporate entity could not transfer shares corresponding to more than 2 per cent or 10 per cent of voting in listed companies and non-listed companies, respectively.

A stamp tax of 4 per cent is payable (except on Euronext Lisbon Stock Exchange transactions) on brokerage fees, bank settlement fees and bank commissions.

Municipal Real Estate Transfer Tax (IMT) is due in relation to the transfer of real estate assets.

18 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits matters in a business combination?

The basic principle governing labour matters is that business combinations do not affect existing employment contracts.

The principle of less material in a share deal (because the employing company remains the same) is particularly relevant in mergers and transfers of undertakings (*trespasse*): the new employer (respectively, the incorporating company and the purchaser of the business) must keep the employees of the incorporated company or of the business and must continue to provide their existing benefits.

Moreover, in most forms of business combination, the new employer is liable for labour credits that accrued prior to the transaction. In mergers, such liability comprises all credits, regardless of their date. The same regime applies in the event of a *trespasse* should the employees claim any existing labour credits.

Depending on the business combination and on existing employees' representative structures, business combinations trigger consultation duties.

19 Restructuring, bankruptcy or receivership

What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

Once the company is declared bankrupt, all the assets of the company are administrated by the Judicial Administrator (*liquidatário judicial*) and the agreements related with the assets are supervised by the Creditors Commission (*comissão de credores*). The company's assets must be sold according to specific legal procedures. The acquisition of a holding in a company declared bankrupt

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Areas of practice:

Administrative and Public Procurement Law; Banking & Finance; Capital Markets; EU and Competition Law; Corporate and Commercial Law; Environment Law, Energy Law; Insurance; Intellectual Property; Labour Law; Litigation and Arbitration; Mergers & Acquisitions; Privatisation; Project Finance; Real Estate, Zoning and Construction Law; Taxation and Madeira Free Trade Zone; TMT

involves a previous agreement with the majority of the creditors of the company, as well as an agreement to terminate the bankruptcy procedures, which has to be confirmed by the court.

A new Insolvency Code has been enacted by Decree-Law No. 53/2004 of 18 March 2004, but will only come into force on 18 September 2004. After such date the regime will be as follows:

- once the company is declared insolvent, all the company's assets and all agreements related with such assets are administered by the insolvency administrator (*administrador de insolvência*);
- the company's assets must be sold according to specific legal procedures;
- the acquisition of a company declared insolvent involves the prior communication, 15 working days before the transaction, to the Creditors Commission and to the debtor, of the identification of the buyer and the conditions of the acquisition, and has to be made in relation to the whole company and approved by the commission of creditors.

20 Current proposals for change

Are there current proposals to change the regulatory or statutory framework governing business combinations?

Last year several legislative changes that concern business combinations were enacted, including the Insolvency Code, the new Employment Code, new taxation of real estate and the Securities Code. Therefore it is natural that there are no publicly announced proposals for major amendments to the legal framework governing business combinations.