



TELLES
TELLES DE ABREU | ADVOGADOS

MERGERS & ACQUISITIONS CASES

Carlos Lucena, Managing Partner of TELLES


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INTRODUCTION

Mergers & Acquisitions.



MERGERS & ACQUISITIONS.

- When we speak about Merger & Acquisition we are mentioning much more than these words directly mean, ie, we are speaking about:
 - a) sale and purchase of a company share capital;
 - b) sale and purchase of assets;
 - c) sale and purchase of a business;
 - d) merger of two or more companies;
 - e) putting together the assets of one or more companies;
 - f) creating a company holding shares of other companies;
 - g) spin off of certain assets and subsequent sale of a part of them
- The relevant characteristics of the M&A activity is that some assets/shares are put in common in others and that a transaction of a part of the capital or its totality is sold;



CASE A

Merger of the European industrial units of two international groups.



CASE A

MERGER OF THE EUROPEAN INDUSTRIAL UNITS OF TWO INTERNATIONAL GROUPS.



- Two groups of companies holding companies in the same area of business in several different countries.
- Both groups felt that there were not enough space to multiple actors in the market and decided to merge their activities in the sector.
- Decided to put under a common company all the companies that each of one controlled by means of a share transaction, distributing the capital of the holding according to some basic principles:
 - one of the shareholders would have a majority percentage in the capital, previously defined;
 - the participation of each shareholder would be achieved by the contribution of its shares in the industrial companies;
 - in the case that the agreed percentages would not be achieved with shares by one of the parties, there would be a payment made by the latter to the other party as a price of the complementary shares that would have to be bought to reach the percentage established.



1) Signing of the Confidentiality Agreement

November year 1

2) Several meetings between the two parties' teams



3) Signing of the Heads of Agreement

(Main basis of the JV to be implemented)

October year 2

**Signing of the
Heads of
Agreement**

Where the following aspects were regulated:

1. Due diligence and pro-forma accounts to be elaborated;
2. Determination of the enterprise value of each of the companies to be brought to the JV (as of 31 December year 2) and of the share percentage of each party in the JV according to the pro-forma accounts;
3. Definition and determination of EBITDA, working capital and financial indebtedness;
4. Mechanisms of correction of the enterprise value of each of the companies to bring to the JV – the value according the pro-forma accounts versus the audited accounts – prevision of correction made in shares or in cash;



**Signing of the
Heads of
Agreement**

5. Definition of the JV to be implemented and of the agreements to be prepared thereto:
- i. Normal representations and warranties in this kind of transactions, with the associated indemnifications rights related to assets, financial information, intellectual property rights, conduct of business, legal, tax, labor and environmental duties, true and complete information, time and cash limits for indemnification;
 - ii. Obligations to be assumed by both parties related to anti-trust authorities; management of the companies during the transition period;
 - iii. Indemnification rights due to the violation of reps & warrs.



**Signing of the
Heads of
Agreement**

6. Negotiation of the Shareholders Agreement

Previewing among others:

- i. JV objectives;
- ii. Strategy to be implemented;
- iii. Management;
- iv. Social bodies;
- v. *Quorum* for deliberations both at Board of Directors and at General Meetings of Shareholders;
- vi. Dividends policy;
- vii. Relevant issues to be approved by both parties;
- viii. Minimum Period for Standing Still regarding the shareholding (moratorium period);
- ix. Put and call rights after the moratorium period;
- x. Rights of first refusal in the sale of shares after the moratorium period.



- xi. Exclusivity;
- xii. Duration of the Negotiation period;
- xiii. Responsibility for costs (legal, audit, consultancy);

**Signing of the
Heads of
Agreement**



- 4) Due Diligence list**
November year 2
- 5) Detailed Confidentiality Agreement regarding
relevant information in due diligence**
November year 2
- 6) Due Diligence Procedures**
December year 2 to March year 3



7) Drafting of JV's Agreement

February and March year 3

Drafting of JV's Agreement

1. Reps & War
2. Disclosure letter regarding facts and situations not giving right to indemnification
3. Final Structure of the Transaction:
 - i. Acquisition by JV of both parties' companies;
 - ii. Sale and purchase of a part of the shareholding of one the Parties at JV;
 - iii. Capital Increase of the JV subscribed by one of the parties (in kind or money);
 - iv. Escrow Agreement regarding the deposit of the JV shares.



Drafting of JV's Agreement

4. Adjustments to the price to be made one year after Transaction (credits accounts not received and differences between the estimated value of certain non-core assets to be sold and the effective price received);
5. Formulae for the calculation of the short time credits to be taken into account for the evaluation of the several companies;
6. Conditions Precedent regarding the several anti-trust authorities involved.



8) Drafting of JV's Shareholders Agreement

February and March year 3.

Drafting of JV's Agreement

Main issues:

1. GSM – subjects to be approved by 2/3 majority;
2. Existence of a Strategic Board;
3. 7 members BoD
4. BoD – subjects to be approved by 75% of its members, others being approved by a simple majority;
5. In the case of lack of agreement between parties, the CEO to be nominated by one party and the CFO by the other;
6. Budget and financial reporting to the Strategic Board;
7. 50% of the net profit to be mandatory distributed as dividends;
8. Moratorium Period of 4 years regarding non selling of shareholding;



Drafting of JV's Agreement

9. After Moratorium Period, the minority shareholder has a put to be exercised at a price of
 $[5,65 \times (\text{JV EBITDA} - \text{Financial Indebtedness}) \times 40\%$;
10. After Moratorium Period, the majority shareholder has a call to be exercised at a price of
 $[6,75 \times (\text{JV EBITDA} - \text{Financial Indebtedness}) \times 40\%$;
11. Non competition;
12. Arbitration;



9) Drafting of JV's Articles of Association

February and March year 3.

Main issues:

1. Nominative shares;
2. Rights of first refusal in the sale of shares;
3. *Quorum* for deliberations to be taken;
4. BoD – subjects to be approved by 75% of its members, others being approved by a simple majority;



10) Notification of Transaction to the several Anti-trust authorities involved

April year 3

11) Closing of Transaction

July year 3



CASE B

Acquisition of an industrial Portuguese unit by a private equity company.



CASE B

ACQUISITION OF AN INDUSTRIAL PORTUGUESE UNIT BY A PRIVATE EQUITY COMPANY.



- The negotiations took place in total secrecy, the seller not wishing that the management team was informed of the sale negotiations;
- Some of the assets of the target company should be removed before the closing of the transaction;
- The buildings where the factory is installed should be kept by the seller;
- The capital grants received by the target would be accrued to the price in the case that they become partially or totally not reimbursable;
- The due diligence procedures would take place after closing or prior to closing but after being reached a final agreement regarding the terms of the SPA.



1) Signing of the Confidentiality Agreement

May year 1

2) Delivery of Target's relevant information by the Seller

May year 1

3) Non-binding offer

June year 1

4) Revised non-binding offer by the Buyer

July year 1

5) Negotiation about the perimeter of the Transaction

September year 1



6) Drafting of the SPA

October year 1 to March year 2

Drafting of the SPA

Main issues:

1. Definition of the object of the transaction;
2. Conditions Precedent: concerning the Anti-trust Portuguese Authority and the Seller;
3. Fixed sale price, non-revisable due to change of circumstances between SPA signature and Closing;
4. Any risks concerning the activity and business of the target between SPA signing and closing are assumed by the Buyer;
5. Rules of behavior by the members of the BoD of the target between SPA signing and closing;



Drafting of the SPA

6. Non verification of conditions precedent: right of the Seller to be indemnified in a certain amount;
7. Payment of the price: down payment and escrow deposit;
8. Seller's Reps and Warrs;
9. Time and value limits to the Seller's responsibility to indemnify Buyer;
10. Lack of exactitude of the Reps and Warrs;
11. Seller's Non competition duty;
12. Escrow deposit of the shares and of the price;
13. Arbitration.



7) Binding Offer – subject to due diligence procedures and anti-trust approval

November year 1

8) Ending of the drafting of the SPA

March year 2

9) Interaction between the Buyer and the Target's team of management

March year 2



**10) Tax, Legal, Industrial, Financial and Commercial
Due Diligence**

April to May year 2

**11) Revised Business Plan between Buyer and
Management Team**

May year 2

12) Decision of the Buyer about the Purchase

May year 2



13) SPA signing

June year 2

14) Anti-Trust filing

June year 2

15) Closing of the Transaction

July year 2

TELLES
TELLES DE ABREU | ADVOGADOS

OBRIGADO.

PORTO

R. da Restauração, 348
4050-501 Porto · Portugal
t. +351 22 030 88 00
f. +351 22 030 88 98/9

LISBOA

Av. António Augusto de Aguiar, 15/5º
1050-012 Lisboa · Portugal
t. +351 210 308 830
f. +351 210 308 839

telles@telles.pt
www.telles.pt

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MARCALLIANCE 
FOR GLOBAL LAW
& TAX PRACTICES