The Private Equity Review

Second Edition

Editor
Kirk August Radke

Law Business Research

The Private Equity Review

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Kirk August Radke

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EDITOR'S PREFACE

This second edition of *The Private Equity Review* contains the views and observations of leading private equity practitioners in 24 jurisdictions, spanning every region of the world. This worldwide survey reflects private equity's emerging status as a global industry. Private equity is not limited to the United States and western Europe; rather, it is a significant part of the financial landscape in developed countries and emerging markets alike. Today, there are more than a dozen private equity houses that have offices around the world, with investment mandates matching such global capabilities. In addition to these global players, each region has numerous indigenous private equity sponsors.

As these sponsors seek investment opportunities in every region of the world, they are turning to practitioners in each of these regions and asking two key commercial questions: 'how do I get my private equity deals done here?', and the corollary question, 'how do I raise private equity money here?'. This review provides many of the answers to these questions.

Another recent global development that this review addresses is the different regulatory schemes facing the private equity industry. Policymakers around the world have recognised the importance of private equity in today's financial marketplace. Such recognition, however, has not led to a universal approach to regulating the industry; rather, policymakers have adopted many different schemes for the industry. The following chapters help provide a description of these various regulatory regimes.

It remains to be seen how 2013 will treat private equity sponsors, and whether the world will see uniform opportunities for deals and fundraising in all regions, or rather a series of disjointed stories, with opportunities in some regions and none in others.

I wish to thank all of the contributors for their support of this second volume of *The Private Equity Review*. I appreciate that they have taken time from their practices to prepare these insightful and informative chapters.

Kirk August Radke
Kirkland & Ellis LLP
New York
March 2013

Chapter 14

PORTUGAL

Tomás Pessanha and Manuel Liberal Jerónimo[1]

I OVERVIEW

In Portugal, 2012 was marked by the joint intervention of the International Monetary Fund, the Central European Bank and the European Commission (known collectively as 'the Troika'), and the implementation of the subsequent economic and financial aid programme. This programme has guaranteed the financing of the Portuguese economy (in particular, the domestic banking system) and it has also led to the implementation of structural reforms necessary to remove the main structural blockages in the country's economy. In this overall context, the Portuguese economy continues to witness a severe contraction in activity, despite the relatively good performance of Portuguese exports.

Although there are some signs of stabilisation (for example, in medium and long-term public debt interest), financing conditions in Portugal continue to be conditioned by tensions in the international financial markets and by the process of economic adjustment. This is particularly evident in the restrictions on the granting of credit to the private sector (which have had an effect on most of the country's businesses and investors).

This recession has naturally translated into an overall reduction in investment (public and private) and, consequently, into an increase in the rate of unemployment to historic levels.

Following this trend, and although there is not yet definitive or trustworthy data for the final quarter of 2012, the Portuguese private equity and venture capital market saw a decline in 2012.[2]

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1 Tomás Pessanha is a partner and Manuel Liberal Jerónimo is a senior associate at PLMJ – Law Firm.

2 It should be stressed that in Portugal generally no distinction is drawn between the use of the concepts of private equity and venture capital (actually, there is, indeed, a real blurring of these concepts, with no proper distinguishing criterion). In most cases, they are used to describe

Looking individually at each of the first three quarters of the year we see the following:[3]

a During the first quarter of 2012, around €7 million was invested, compared with €188.7 million in the same period in 2011. The operations that stood out were buyouts (63.5 per cent) and growth capital (20 per cent). The same period witnessed a divestment of around €2.7 million. Sales to management ('MBOs') were principally responsible, with a total of around €2.4 million. In the same period in 2011, there was a total divestment of around €10.5 million, mainly through the repayment of preference shares or loans and sales to management.

b The second quarter of 2012 saw an amount invested of around €49.116 million, which represents a fall of 25 per cent against the value registered in the same period of 2011. Most investment was in follow-on (involving amounts of around €34.197 million), followed by small-scale buyouts.

Divestment was limited to a symbolic €978,000 compared with the €10.552 million in the year before. Sales to management (buy-back) and divestment by write-off were the most common form of exit in the third quarter of the year.

c The investment registered in the third quarter of 2012 was as much as €81.284 million, which represents growth of 19 per cent compared with the same quarter in 2011. By type of transaction, buyouts stand out with a value of around €64 million. Divestment rose to €43.457 million, contrasting with €549,000 in the same period in 2011. Trade sale was the principal form of divestment, representing more than 84 per cent of the total divested.

The numbers set out above confirm a trend towards deceleration in private equity and venture capital market in Portugal.[4] As an example,[5] during the 2010 there was total investment in that market in the order of €164 million, representing a fall of around 46 per cent in relation to 2009, with 50 per cent of this investment due to buyout operations.

It is also curious to note that the level of investment in 2010 was close to the levels registered in 2007 (around €169 million), although in the latter year, the level of divestment had been greater (€86 million, as against the €18.1 million registered in 2010).

---

the same situation: the acquisition, for a limited time, of shareholdings in companies with a (high) potential for growth, in order to increase their value and sell them in the future (with the resulting gains). In addition, in Portugal there is no standard legal definition for 'private equity', as opposed to 'venture capital', the latter having also its own – and all-encompassing – legislative framework (see Section IV, *infra*). Also, the private equity market in Portugal is essentially run by venture capital vehicles (many times referred to as 'private equity vehicles') (in this respect, see also Section IV, *infra*).

3 Source: APCRI (Portuguese Venture Capital Association). These figures should be seen as merely indicative as there are several transactions (or the value thereof), some of them of relevant dimension, that annually escape the radar of APCRI, notably because they are not reported.

4 As we can see, 2011 was a true (and transitory) exception.

5 Referring to the data provided by the APCRI.

Finally, and despite the fluctuations described above, it is important to point out a certain stability when it comes to private equity and venture capital investors acting in the Portuguese market over recent years. Some of the leading players in this area are:[6]

a Finpro, SCR SA (market share: 19.5 per cent);
b ECS – SCR SA (market share: 18.6 per cent);
c Caixa Capital – SCR SA (market share: 16.7 per cent);
d Explorer Investments – SCR SA (market share: 9.1 per cent); and
e Espírito Santo Ventures – SCR SA (market share: 6.5 per cent).

ii Operation of the market

The activity of company acquisition (core business in the private equity market) is difficult to classify: it may involve the company itself (asset deal) or the transfer of voting rights inherent to the underlying corporate shareholdings (share deal). In the context of the latter, a distinction can also be drawn between transactions that take place through direct or 'private' deals and those that take place on the open market (for example, through a public offering).

The transfer of control over the company can also be achieved on the basis of agreements that provide a degree of influence over the company (for example, group contracts, voting agreements and shareholders' agreements).

Company acquisition transactions are, as a rule, processes made up of a chain of a multitude of legal documents and transactions. There is no fixed process that can be construed as a template and the duration of the said process can also vary greatly. It is, however, common for there to be a pre-contractual phase in which preliminary agreements (memoranda of understanding, heads of terms, letters of intent, etc.) are concluded, in which the parties set out the key terms of the basic agreement as and when they reach them during the course of the negotiations, as well as confidentiality agreements (non-disclosure agreements) and exclusivity agreements.

In this phase, the due diligence process also plays an important role, enabling the investor to gather detailed information on the target company in terms of its assets, finances and legal and tax situations. The due diligence process assists a prospective buyer in taking the decision whether to buy the target company and on what terms and conditions, such as the purchase price and even what financing will be required (see Section III, *infra*, for more information regarding financing).

The acquisition phase itself then follows, with a special focus on the share purchase agreement ('SPA'), which governs – usually in minute detail – the rights and obligations of the parties.

In this respect it should be noted that it is also current practice in Portugal – mainly in more complex transactions – to structure the operation in two distinct stages. In the first stage, the terms and conditions of the deal are set out in the SPA itself and the agreement is signed (signing). In the SPA, the parties agree to enter into the final documentation that transfers the shares (closing) once certain conditions have been

6 Source: Portuguese Securities Commission ('the CMVM'). Information on market share refers to 2011.

met (the conditions precedent). Sometimes, this interim period is covered by the parties entering into escrow agreements to deposit the purchase price (or part of it) or the shares themselves, or both.

After closing, and to the extent all or some of the old shareholders remain as such (naturally with their own stakes reduced by means of the sale), the parties often opt (essentially under pressure from the investors) to enter into a shareholders' agreement and, following on from this, to alter – at least partially – the target company's constitutional documents, notably the articles of association. These changes are made to adapt them to what has been agreed in the transaction documents identified above (for example, in respect of any share transfer restrictions, qualified majorities required to pass certain resolutions, or rights to appoint the members of the different management bodies).

Outside the scope of the acquisition process itself, but related to it, management incentive schemes for directors merit special attention, as they are very common in private equity transactions. These schemes are often put in place at investor level or, in some cases, at the level of the target company itself. Their aim is to provide management with an incentive to increase value and growth in the target, as they themselves will benefit, along with the investors (particularly in the event of an exit) from the potential gains.

It should be noted that remuneration, subject to terms approved by the general meeting of the shareholders, can be of a fixed amount or consist of a percentage of the profits for the relevant financial year. In the latter case, the maximum percentage to be paid to directors must be authorised in the articles of association.

We have, however, witnessed – particularly over the past few years – the redrawing of remuneration schemes on the basis of shares and particularly, stock options.

Share distribution plans and share option plans are common. In the former, the company sets up a programme that provides the option, within a specific period, for the company to sell its own shares (treasury stock) to its directors for a price lower than fair market value or on favourable terms ('sweet' equity). In the latter, the company grants the directors options to purchase shares in the future (within a certain period of time and often subject to certain targets being met) at a fixed (or pre-calculated) price (a stock 'option' in the strict sense) or the right to subscribe for new shares (subscription rights).

It is a fact that these variable remuneration packages are, in the abstract, a strong incentive to directors to perform their duties well and to allow the interests of those directors to be brought into line with the interests of the shareholders. However, the truth is that they are also an incentive to short-term corporate policies that promote rapid growth, sometimes at the cost of the company's own sustainability.

The importance of this issue has led to a number of recommendations by regulatory bodies such as the CMVM.

Indeed, and as relates specifically to the private equity and venture capital sector, the Portuguese legislator has recently engaged in what is clearly a legislative U-turn that abandoned the path to simplification. Law 28/2009 of 19 June allows the same rules that apply to credit institutions and financial companies regarding the approval and publication of remuneration policy for the members of their managing bodies, to now also be applied to venture capital companies and venture capital fund management companies and, apparently, also to venture capital funds.

This means that from this year the annual general meetings of venture capital companies and venture capital fund management companies must approve the

remuneration policies for the members of the management and supervisory boards. Furthermore, this policy and the annual amount of the remuneration earned by the members of those boards must be published in the annual report.

II LEGAL FRAMEWORK

i Acquisition of control and minority interests

The process for acquiring a minority or majority shareholding (or even one representing the entire share capital) is, as a general rule, identical. It follows the process described in Section I, *supra*, without great variation and is, in fact, governed by the same legislative framework (essentially the Commercial Companies Code and the Civil Code).[7]

In any case, it is important to look closely at some specific points associated with taking a controlling interest (or one of influence only) in a listed company (regulated by the Portuguese Securities Code). These are as follows:

a Any party who reaches or exceeds a shareholding of 10 per cent, 20 per cent, one-third, one-half, two-thirds and 90 per cent of the voting rights corresponding to the share capital of a listed company subject to Portuguese law and any party that reduces its shareholding to a value lower than those limits is, within certain parameters, required to inform the CMVM, and the company in which the shares are held, of this fact.

b With a few exceptions, anyone whose shareholding in a limited company exceeds one-third or half of the voting rights corresponding to the share capital must make a compulsory offer for acquisition of all of the shares and other securities issued by the company that confer the right to subscription or acquisition. Making such an offer is not required when, having exceeded the limit of one-third, the party that would be required to make the offer proves to the CMVM that it does not have control over the target company (and is not in a group relationship with it).

c Any party who holds 90 per cent (or more) of the share capital, or the respective voting rights thereto, both in the case of listed companies and private companies (the latter meaning those that do not have capital open to public investment), may acquire the remaining shares through a squeeze-out process. If successful, such investor will then hold the entire share capital.

ii Fiduciary duties and liabilities

Both the shareholders and directors of any commercial company (whether they are individuals or legal entities such as private equity vehicles) have – somewhat extensive – fiduciary duties, not only towards the company itself, but also towards their fellow shareholders (or directors), creditors of the company and any other stakeholders. They will, of course, be held accountable for any breach of these duties.

7 It is natural that the acquisition of shareholdings in listed companies or other regulated vehicles must comply with some specific and particular requirements resulting from the strict supervision or regulation to which they are subject. These acquisitions are sometimes dependent on prior authorisation (for example, in the case of financial institutions).

Beginning with the shareholders, in the context of the company, the shareholders relate to one another and to the company itself. This relationship is subject to the principle of good faith. Shareholders should act with loyalty in their internal relationships.

One of the main aspects of the duty of loyalty is the corporate interest, as defined by the company itself through its shareholders.

Therefore, the duty of loyalty imposes an obligation on each shareholder not to act against the interests of the company. In practice, whenever there is a conflict of interest between the company and the shareholder, the latter may not act against or betray the interest of the company. An attempt should however be made to reconcile both interests at stake whenever possible.

Although the concept of the duty of loyalty of the shareholders is not expressly laid down in Portuguese corporate law, the law does provide for some specific parameters of conduct that may be construed as such. This occurs, for example, and only for some legal types of companies, with the duty of non-competition.

In addition to these parameters of conduct, which are known as 'atypical' duties of loyalty, there are those that, in a corporate context, one might define as standard practice, but which are equally important. Standing out from these more standard duties, are the duty of cooperation in (and with) the company bodies, the duty of economic cooperation (more correctly of financing) with the company, and also the duty of functional cooperation.

Portuguese law is far more explicit with regard to the fiduciary duties of directors, and provides that directors must observe the following duties in the course of their work:

a a duty of care, which requires that directors have the availability, technical skills and information in respect of the activity of the company, required to perform as a careful and diligent manager; and

b a duty of loyalty, which demands that directors act in the best interest of the company, taking into account the long-term interests of the shareholders and also considering those of the other relevant stakeholders (such as employees, clients and creditors).

As previously pointed out, any breach of the aforementioned duties may lead to the person committing the breach being held liable, one way or the other.

As regards shareholders – and, in particular, shareholders of limited liability companies[8] – the general rule is that only the assets of the company (and not those of the shareholders) are liable for the debts thereof.

The Commercial Companies Code, however, sets out certain legal mechanisms through which the allocation of (additional) liabilities to shareholders is (residually and secondarily) expressly permitted under the law:[9]

8 Such as share companies ('SAs') and quota companies ('SQs').

9 The possibility of lifting the corporate veil and directly attacking the (personal) assets of the shareholders beyond the exceptions expressly set out in the law, has been the subject of heated discussion, particularly in legal literature, and even admitted in exceptional cases (such as fraud or serious material asset-stripping of the company).

a any shareholder who, acting alone or jointly with others to whom it is bound under the terms of a shareholders' agreement, has the right to appoint (or remove) a director or directors, may be held jointly liable with the person appointed by it, whenever that person is liable, under the law, to the company or the shareholders and there is fault in the choice of the person appointed; and

b if a company that has been reduced to a single shareholder is declared bankrupt, this shareholder is liable, without limitation, for any obligations of the company that were undertaken in the period following the concentration of all the shares in the said shareholder, provided it is proven that, in this period, the provisions of the law that establish the allocation of the assets of the company to meet the respective obligations (and segregate them from the shareholder's own assets) were not observed.[10]

As regards directors, Portuguese corporate law makes provision for the possibility of directors being held liable by the company, the shareholders and even the creditors of the company for any losses caused to them by acts or omissions performed in breach of their legal (as listed above) and contractual duties. In this respect, it is important to underline the following:

a The rules on the liability of directors towards the company include a number of exceptions. For example, they apply the 'business judgement rule' (imported from the United States). Under this rule, liability is excluded if the director can prove that he or she acted on an informed basis, free from any personal interest and according to criteria of rational business logic.

b The rules on liability of directors to creditors of the company only apply when, through a culpable failure to comply with legal or contractual obligations aimed at protecting those creditors, the assets of the company become insufficient to satisfy their credits.

III YEAR IN REVIEW

i Recent deal activity

As previously mentioned, 2012 was (also) heavily influenced by the effects of the Troika's economic and financial aid programme.

Continuing to face significant difficulties in access to international financing, Portuguese banking activity was inevitably characterised by the restrictions imposed on financing of small and medium companies or enterprises ('SMEs'), with the inevitable (and damaging) consequences in terms of investment and job creation. Unable to sustain

10 Under the Commercial Companies Code, a Portuguese company that is given authority pursuant a written subordination agreement to fully direct another Portuguese company shall be fully liable for the debts of the latter (the subordinated company), regardless of its origin, and without limitation, as long as the said subordination agreement is in force. This rule is also applicable to Portuguese companies that hold, directly or indirectly, the entire share capital of another Portuguese company. These exceptions do not apply to foreign companies.

the (apparent) growth registered in 2011, the Portuguese private equity and venture capital market suffered a slow-down in 2012.

Having presented the figures for 2012 (as well as those for previous years), it is now important to analyse, also with reference to the first three quarters of the year, the sectors in which private equity and venture capital investment made itself most felt:[11]

a The life sciences sector was the one that saw the highest level of investment in the first quarter of 2012 (around €5 million). Industrial businesses and products was the sector with the second-highest level of investment (around €791,000), followed by computers and consumer electronics, involving approximately €724,000.

b In the second quarter of 2012 the sector that immediately stood out was consumer goods and retail, with the sponsors investing around €17.173 million. Computers and electronics, and real estate were the next most successful sectors, with values invested in the order of €6.216 million and €8.585 million, respectively.

c As to the third quarter of 2012, the sector in first place was real estate, capturing 38 per cent of the investment (€23.9 million), followed closely by consumer goods and retail, with 37 per cent (€22.9 million) and industrial businesses and products, with 25 per cent (almost €16 million).

Among the private equity and venture capital operation registered in Portugal over the past three years, the following are highlights:[12]

Target	*Buyer*	*Seller*	*Sector*	*Value (approx)*	*Type*
Omni Helicopters	Stirling Square Capital Partners/Private Investors	Private shareholders	Services (transport)	€40 million	Takeover
Grupo Oliveira Sá	WireCo Group / Paine & Partners	Private shareholders	Industry	Not disclosed	Takeover
MoveOn	Tata Group	ECS Capital	Industry (fashion and textiles)	Not disclosed	Takeover/exit
Artland PTA	ECS Capital/ Caixa Capital/ Inovcapital	–	Industry	€96.90 million	MBI
Probos Plásticos	Explorer II	Private shareholders	Industry	€50 million	LBO
Altitude Software	Bilbao Viscaya Holding/IBI	Sonaecom/ AICEP Capital Global/Grupo Salvador Caetano/Olmea	Technology and telecoms	€24 million	Takeover/exit
Edifer	Vallis Capital Partners	Private shareholders	Real estate	Not disclosed	Takeover

11 Source: APCRI.

12 Source: TTR – Transactional Track Record (www.ttrecord.com).

Target	*Buyer*	*Seller*	*Sector*	*Value (approx)*	*Type*
Sumol+Compal	Refrigor	CGD Caixa Capital	Industry	€28.32 million	Exit/strategic
Hagen Construções	Vallis Capital Partners	Private shareholders	Real estate	Not disclosed	Takeover
Grupo MonteAdriano	Vallis Capital Partners	Private shareholders	Real estate	Not disclosed	Takeover

ii Financing

Corporate acquisition financing is – in general and with regard to private equity in particular – heterogeneous, varying from transaction to transaction. This means it is not easy to establish a pattern (all the more so because this type of information is, as a rule, not disclosed, making it very difficult to build any kind of model in this respect).

In the context of a financial crisis, it could be expected that the various market players would go ahead with the structuring of new financial products and alternatives to pure bank debt; in fact, there have been some interesting developments in the area of acquisition financing. The introduction to the market of hybrid securities is a good example of some of the alternative means of financing, combining debt and equity elements, making it possible to achieve greater returns.

In any event, however, bank debt continued to be the most popular means of finance in Portugal, and it is important to highlight bridge financing and limited recourse financing as being commonly used in acquisitions.

Also worth noting, particularly in a financial crisis such as the one Portugal currently faces, was the progressively greater use of market flex clauses. These clauses provide, at the sole discretion of the financing party, for later revisions of the contractual conditions for financing in the event of a change in the surrounding market conditions. Among the different forms of these clauses, which are especially justifiable in turbulent times, the market has seen the following:

a flex clauses subject to conditions, which allow limited variations in the agreed interest rates or maturity periods;

b unrestricted flex clauses; and

c market disruption clauses (making it possible to use indexation other than the current one).

Financing has often been conditioned on the issuance of comfort letters (investor or credit letters). The degree to which such letters were binding and enforceable on the signatory varied.

iii Key terms of recent control transactions

Corporate acquisition transactions, whether intending to take a minority or majority holding (or more correctly, a 'controlling interest'), do not follow a predetermined script and vary from case to case.

From recent legal transactions, however, one can see some consistency in the use of certain contractual terms and conditions; this results from the fact that, as a rule, the

concerns of investors are generally the same. This means that one frequently comes across the following:

a warranty clauses, with the objective of setting out the buyer's (and the seller's) understanding (and guarantee) of what is being bought (sold); breach of such a clause may lead to a price adjustment, payment of damages, penalty payment or even to termination of relevant agreements;

b exclusion or limitation of liability clauses, such as no-reliance clauses (with the objective of reducing the relevance of the information exchanged between the parties during the negotiating process) and limitation of liability clauses (aimed at restricting the liability of the seller for specific aspects of the company or the business);

c conditions precedent, which make the completion of the transaction conditional upon the occurrence of certain events. Examples include the resolution of problems detected during the negotiation or due diligence phase, or in obtaining financing, or in securing regulatory clearance (such as from the competent competition authority), etc.;

d conditional clauses, such as MAC (material adverse change) and MAE (material adverse event) clauses, which establish as a condition of the deal going through that, between the moment of signature of the SPA and the closing date, the target company must not suffer any material loss in value; and

e conduct clauses (with special focus on covenants).

It should also be noted that transactions in Portugal are generally accompanied by shareholders' agreements with clauses providing for call and put options, drag-along and tag-alongs or even those clauses that ensure the investor has the right to appoint one or more members to the relevant company bodies, in order to gain a degree of control over the target company and, as such, over the investment itself.

iv Exits

Private equity activity in Portugal is relatively new (far more so than in the rest of Europe and, above all, in the United States, its country of origin), which means that most private equity vehicles are still in the investment phase. This means, however, that greater activity can be expected in terms of exits in the coming years. For this reason, it is not possible to outline a definite pattern in this area, but a few examples have been given in Section III, *supra*.

IV REGULATORY DEVELOPMENTS

As referred to above,[13] the private equity market in Portugal is essentially run by venture capital vehicles. These vehicles are:

a venture capital companies ('SCRs'), which are commercial companies set up in the form of share companies;

13 See footnote 2.

b venture capital investors ('ICRs'), which are set up in the form of a single shareholder limited liability quota company;[14] and

c venture capital funds ('FCRs'), which are independent funds with no legal personality belonging to the group of owners of the respective units managed by SCRs or other management entities allowed to manage similar funds.

In any event, it should be noted that private equity activity is not conditioned on or limited to the said vehicles.[15] In fact, activity in the private equity market may to a certain extent be carried out by other types of vehicles and corporate structures, which, in some cases, may even be more tax-efficient. Likewise, subject to certain conditions, foreign private equity and venture capital vehicles may operate in Portugal.

Without prejudice to the foregoing, and as we have said previously, it is through the above typical venture capital vehicles that the private equity market has been developing in Portugal and, for this reason, their legal regime deserves special attention.

Private equity and venture capital activity is currently regulated by Decree-Law 375/2007 of 8 November, which repealed Decree-Law 319/2002 of 28 December.

The main aim of this change in the legislation was to bring greater flexibility and simplicity and, as a consequence, to promote private equity and venture capital as an instrument of support for business start-up, restructuring and expansion.

Some aspects of the said legal framework are as follows:

a The creation of the figure of the ICR as referred to above, with the consequent recognition of the possibility for investors who are private individuals to carry out this activity, although having to adopt the form of a single-shareholder quota company.

b The distinction between the different types of FCR has been brought to an end. In accordance with the new rules, FCRs are no longer divided into two categories (one aimed at qualified or institutional investors and the other aimed at unqualified or non-institutional investors). There is now only one type of FCR and any investors may subscribe to it as long as they meet the minimum admission requirements laid down by law (for the moment the requirement is for a minimum subscription amount of €50,000) as well as any requirements of the management regulations.

c The new system now provides that SCRs may have the sole purpose of managing FCRs. In these cases they must be incorporated with a minimum share capital of €250,000, as opposed to the €750,000 required should SCRs be directly involved in investments. It is also important to note that ICRs cannot engage in any FCR management activity.

d The system for registration or start of activities with the competent regulatory authority (the CMVM) has been simplified. In certain cases it depends only on a simple prior communication.

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14 These are vehicles available for individuals wishing to invest as business angels.

15 The existing legal framework, including tax-wise, should be seen as an incentive rather than a constraint to the industry.

Another more recent change, as previously mentioned, was made in respect of the remuneration of members of management and supervisory bodies of SCRs, by Law 28/2009 of 19 June. Put simply, this change created a requirement for the remuneration policy for the respective management and supervision bodies to be approved by the general meetings of SCRs.

Finally, and despite the trend towards simplification, it is always important to remember that private equity and venture capital vehicles are subject to supervision and regulation by the CMVM in respect of the following issues:

a valuation of their assets and liabilities;
b accounting policies;
c reporting requirements;
d registration procedure;
e requirements as regards the good reputation of the members of the company bodies and holders of qualifying holdings; and
f the exercise of activity by FCRs that invest in other FCRs.

V OUTLOOK

2013 will continue to be marked by the economic and financial crisis that has been ravaging Portugal (and, in general, the whole European market), by the implementation of the economic and financial aid programme, and also by the innumerable legislative measures – of a domestic or internal nature – being passed to implement that programme.

Notwithstanding the foregoing, and with respect to the private equity and venture capital market in particular, 2013 promises to be a year of great opportunities and prospects for investors, in view of the following:

a the relatively low market capitalisation of some of the leading listed companies;
b the ambitious privatisation programme launched in 2012 by the Portuguese government and imposed, to a great extent, by the Troika, which involves a set of minority and majority holdings in a number of companies that are semi-public and public in nature, in sectors as distinct as energy, infrastructure, transport, logistics, insurance and distribution;[16]
c the current increase in value of several SMEs with a strong and attractive foothold in a number of international markets including the emerging economies of Angola and Mozambique, which are at true 'sale prices'; and

16 2013 will inherit a number of ongoing privatisation processes. After the failed sale of the Portuguese airline company TAP Portugal, which will be resumed during the course of this year, a number of important privatisations are on the table, including the railway-based logistics operator CP Carga – Logística e Transportes Ferroviários de Mercadorias, SA; the sub-holding company of the Águas de Portugal Group (water supply), which is responsible for guaranteeing the treatment and recovery of waste (EGF – Empresa Geral de Fomento, SA); the Portuguese postal services company CTT – Correios de Portugal, SA; and the shipyard of Viana do Castelo (Estaleiros Navais de Viana do Castelo, SA).

d the current constraints on access to the banking market for a significant part of the Portuguese business community (with the possibility for private equity and venture capital to take on the role of an alternative to the traditional model of bank financing).

Also of great relevance are the (ambitious) measures and stimuli launched by the Portuguese government in 2012 (in particular, for the private equity and venture capital market), with a view to aiding the recovery of the country's economy. It is hoped that their effects will be felt in 2013.

The 'Revitalise Programme' stands out among these measures because of its importance and scope. It arose as a strategic response to the need to create an environment favourable to the revitalisation of Portugal's business infrastructure at a point that is particularly crucial to its development.

This new intervention model favours more flexible legal mechanisms that make it possible to rehabilitate companies (with an emphasis on the proactive and concerted involvement of all the agents of public administration). It is essentially based on the following:

a revision of the Insolvency and Company Recovery Code, focusing on a theme of revitalisation as opposed to the previous philosophy that focused on the liquidation and dismantling of companies, notably by means of the Special Revitalisation Process, inspired by the US Chapter 11 bankruptcy proceedings, offering an alternative to insolvency for companies that, still being viable, are in an economically difficult situation or in a situation of imminent insolvency;[17] and

b creation of the Out-of-Court Company Recovery System, which is also intended to promote the financial recovery of companies in an economically difficult situation.

Also in the context of the Revitalise Programme, the following financial support measures aimed at capitalising and recapitalising companies (alternatives to increasingly scarce bank finance) are also worthy of mention:

a Restructuring of the public venture capital sector through the creation of a new single player, Portugal Capital Ventures – Sociedade de Capital de Risco SA,[18] which results from a merger between three of the leading Portuguese public venture capital operators: AICEP Capital, INOV Capital and Turismo Capital. On the date of its launch, this entity had a volume of around €600 million in assets under its management (corresponding to a total of 26 funds) and around €140 million available for investment. Its operations, which are aimed exclusively at Portuguese SMEs, give preference to innovative science and technology-based projects, and also to support the revitalisation of the traditional economic fabric of the country.

17 As well as an interesting instrument to prepare a distressed target for the entry of a new investor (notably by restructuring its debt to sustainable levels – with the involvement of all creditors – before takeover).

18 www.portugalventures.pt.

b Creation of funds known as 'revitalisation and expansion funds' (also known as 'turnaround funds'). These are set up in the form of venture capital funds whose primary objective is to work as an alternative to banking financing, promoting the capitalisation of SMEs with expansion and growth projects, which despite their need to strengthen capital or working capital (or both), are still in a relatively sustainable financial situation. This instrument was organised through three regionally based funds, one for the northern region (with a budget of €80 million), another for the central part of Portugal (with the same budget) and one last for Lisbon and the south of the country (with a budget of €60 million exclusively allocated to the support of start-ups). Turnaround funds will focus predominantly on the industrial, energy, commerce and services, transportation and logistics, tourism and construction sectors. The management of the three funds was allocated to three private venture capital companies (through public tender) and the funds are expected to be fully operational some time in 2013.

Appendix 1

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Tomás Pessanha is a partner of the firm and currently heads its Oporto office. He predominantly handles commercial and corporate law, mergers and acquisitions, and corporate litigation, having been involved in some of the most significant M&A transactions closed in the northern part of the country in the recent years, assisting both national and foreign clients. Mr Pessanha has a postgraduate degree in communications law from Coimbra University Law School and attended postgraduate studies in management at the Portuguese Catholic University, Economics and Management School (Oporto) and a programme on negotiation at Harvard Law School. He is also a lecturer on several courses, seminars and conferences on themes related to commercial and corporate law. He acts as chairman and co-chairman of the general meeting of shareholders of several Portuguese companies. He is a member of IBA (Corporate and M&A Committee), and is regularly referred as one of the leading lawyers in Portugal and the Oporto market by researchers such as *Chambers & Partners*, *Legal 500* and *Best Lawyers*.

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