The Private Equity Review

Third Edition

Editor
Stephen L Ritchie

Law Business Research

The Private Equity Review

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This article was first published in The Private Equity Review, 3rd edition
(published in March 2014 – editor Stephen L Ritchie).

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Stephen L Ritchie

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Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK
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ISBN 978-1-907606-98-4

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

A&L GOODBODY

ADVOKATFIRMAET STEENSTRUP STORDRANGE DA

BA-HR DA

BAHAS, GRAMATIDIS & PARTNERS

CAMPOS MELLO ADVOGADOS

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EDITOR'S PREFACE

This third edition of *The Private Equity Review* comes on the heels of a very good 2013 for private equity. Large, global private equity houses are now finding opportunities to deploy capital not only in North America and western Europe, where the industry was born, but also in developing and emerging markets in Asia, South America, the Middle East and Africa. At the same time, these global powerhouses face competition in local markets from home-grown private equity firms, many of whose principals learned the business working for those industry leaders.

As the industry becomes more geographically diverse, private equity professionals need guidance from local practitioners about how to raise money and close deals in multiple jurisdictions. This review has been prepared with that need in mind. It contains contributions from leading private equity practitioners in 28 different countries, with observations and advice on private equity dealmaking and fundraising in their respective jurisdictions.

As private equity has grown, it has also faced increasing regulatory scrutiny throughout the world. Adding to the complexity, regulation of private equity is not uniform from country to country. As a result, the following chapters also include a brief discussion of these various regulatory regimes.

While no one can predict exactly how private equity will fare in 2014, one can confidently say that it will continue to play an important role in the global economy. Private equity by its very nature continually seeks out new, profitable investment opportunities, so its continued expansion into growing emerging markets appears inevitable. We will see how local markets and policymakers respond.

I want to thank everyone who contributed their time and labour to making this third edition of *The Private Equity Review* possible. Each of them is a leader in his or her respective market, so I appreciate that they have taken their valuable and scarce time to share their expertise.

Stephen L Ritchie
Kirkland & Ellis LLP
Chicago, Illinois
March 2014

Chapter 19

PORTUGAL

Tomás Pessanha and Manuel Liberal Jerónimo[1]

I OVERVIEW

In Portugal, the financial situation in 2013 continued to be marked by the joint intervention of the International Monetary Fund, the European Central Bank and the European Commission (the Troika) and by the implementation of the corresponding financial assistance plan.

In these circumstances, the Portuguese economy – which was still subject to restrictions on the level of external (and internal) financing – continued to witness a significant contraction in its activity.

However, the last quarter of 2013 brought with it some positive signs making it possible, somewhat cautiously, to expect a more favourable 2014 for the majority of economic players.

The indices published in the latest Monthly Bulletin on the Portuguese Economy[2] illustrate the above, especially in respect of (1) economic activity and supply (with a positive change – compared with the previous quarter – in the indices for internal demand, production and confidence); (2) private consumption (particularly the retail trade turnover index, which reached its highest value since May 2010); (3) investment (with an impressive increase, for example, in the level of sales of light commercial vehicles); (4) external accounts (where we continue to witness sustained growth in exports), (5) the jobs market (with a reduction, albeit a small one, in the level of unemployment); (6) capital markets (where, similarly to the indices of international markets, the Portuguese index demonstrated a significant increase in value in 2013); and (7) credit (with the

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

2 Monthly Bulletin on the Portuguese Economy 12 – December 2013, published by the Ministry of Economy and the Ministry of Finance.

annual rate of change for loans to the non-financial private sector witnessing an increase compared with the previous quarter).

As yet, there is no reliable data for the last quarter of 2013, but the Portuguese private equity and venture capital market was characterised by some volatility in the first three quarters.[3]

Looking individually at each of the first three quarters of the year we see the following:[4]

a During the first quarter of 2013, the level of investment was down by around 44 per cent compared with the same quarter of the previous year. The volume of investment rose in this period to around €19.427 million, when in the first quarter of 2012 this was almost €35 million. The main transactions were buyouts (around €11.4 million), replacement capital (around €3.3 million) and later stage venture (around €2.3 million). In the same period of 2013, there was a disinvestment of around €23.122 million, which translates into a fall of 17.57 per cent compared with the first quarter of 2012, in which disinvestment stood at around €28 million.

b In the second quarter of 2013 investment saw a significant increase, rising to €61.466 million (representing an increase of around 261 per cent). The majority of this investment was carried out through buyout transactions (around €55.926 million) and start-ups (€2.469 million). Disinvestment also saw a significant increase with a value of around €46.04 million, which represents an increase of around 103 per cent in relation to the previous quarter.

c Investment in the third quarter of 2013 saw a fall of 49.3 per cent, standing at €31.17 million. The main transactions were growth-capital (€17.365 million), buyout (€7.188 million) and start-up (€2.770 million). Disinvestment fell by 82 per cent in relation to the previous quarter, standing at €22.590 million.

The figures presented above confirm the slowdown that has been witnessed in Portugal over recent years. In fact, we only need to compare the levels of investment registered in

3 It should be stressed that in Portugal generally no distinction is drawn between the use of the concepts of private equity and venture capital (indeed, there is a real blurring of these concepts, with no proper distinguishing criterion). In most cases, they are used to describe 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 also having its own – all-encompassing – legislative framework (see Section IV, *infra*). Also, the private equity market in Portugal is essentially run by venture capital vehicles (frequently referred to as 'private equity vehicles') (in this respect, see also Section IV, *infra*).

4 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 attention of APCRI, notably because they are not reported.

2013 (as indicated above) and even in 2012 (around €228.5 million) with the numbers for 2011 (around €442 million) to reach this conclusion easily.

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:[5]

a ECS – SCR SA (market share: 40.7 per cent);
b Caixa Capital – SCR SA (market share: 12.8 per cent);
c Finpro, SCR SA (market share: 12.3 per cent);
d Portugal Ventures, SCR (market share: 8.2 per cent);
e Espírito Santo Ventures – SCR SA (market share: 5.3 per cent); and
f Explorer Investments – SCR SA (market share: 4.7 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 of 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).

5 Portuguese Securities Commission (CMVM). Information on market share refers to 2012. It should also be noted that this information is not comprehensive and that there are other relevant players in the Portuguese market, although the information on their exact market share is scarcer (and less reliable). We would refer in particular to Vallis Capital Partners, Inter-Risco, Oxy Capital, Capital Criativo and Pathena, SGPS, SA, among others that have remained active in the course of 2013.

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 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 ended up engaging in what was then a legislative U-turn that abandoned the path to simplification. Since Law 28/2009 of 19 June was adopted the rules that apply to credit institutions and financial companies regarding the approval and publication of remuneration policy for the members of their managing bodies, are also applicable 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).[6]

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, 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),

6 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).

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.

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[7] – 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:[8]

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.[9]

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

7 Such as share companies (SAs) and quota companies (SQs).

8 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).

9 Under the Commercial Companies Code, a Portuguese company that is given authority by 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.

at protecting those creditors, the assets of the company become insufficient to satisfy their credits.

III YEAR IN REVIEW

i Recent deal activity

As we have pointed out above and as was the case in 2012, 2013 was strongly influenced by the intervention of the Troika and its financial assistance programme.

Although some positive signs were registered in the last quarter of the year (which foreshadow a more favourable year in 2014), the Portuguese economy continues its trend of contraction, with difficulties remaining in access to bank financing by small and medium-sized companies.

Following the same trend, 2013 witnessed some stagnation in the Portuguese private equity/venture capital market, thus going against a certain degree of growth (although isolated) seen in 2011.

Having presented the numbers for the first three quarters of 2013, it is now important to understand, with reference to the same period, the sectors in which private equity/venture capital investment has been more marked:[10]

a The transport sector saw the greatest investment in the first quarter of the year (around €6 million), followed by the construction sector (with €3.2 million), other consumer services (around €2.5 million) and industrial business and products (with close to €1.7 million invested).

b In the second quarter of 2013, investment was spread over a greater number of sectors and it is not possible to highlight specific areas. In any case, one should note the increase in relevance of the consumer computers and electronics and the real estate sectors.

c In the second quarter of 2013, investment was also spread over different sectors. In any event, the standout sectors were industrial business and products (around €4.3 million) and retail consumer goods (around €3,054 million).

Among the private equity and venture capital operations registered in Portugal over the past four years, the following are highlights:[11]

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

10 APCRI.

11 TTR – Transactional Track Record (www.ttrecord.com).

Target	*Buyer*	*Seller*	*Sector*	*Value (approx.)*	*Type*
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
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
Hospital Veterinário do Porto	OneVet (Inter-Risco)	Private shareholders	Healthcare	€29 million	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,[12] 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;

b venture capital investors (ICRs), which are set up in the form of a single shareholder limited liability quota company;[13] 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.[14] 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

12 See footnote 3.

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

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

€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.

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.

Finally, it should be noted that the 2014 State Budget and the recent reform of the Corporate Income Tax Code have introduced important changes to the Portuguese taxation system. Because of their relevance to the private equity/venture capital market, we would draw attention to the new participation exemption rules, which now provide, *inter alia*, that:

a Profits and reserves distributed are not taken into account in determining the taxable profit of companies that are tax resident in Portugal, as long as they meet certain requirements. These include the need for the taxable company to hold, for at least 24 months, directly or indirectly, a participation of not less than 5 per cent of the share capital or voting rights of the company that distributed the profits or reserves. Capital gains and losses arising from the transfer of shareholdings are also not taken into account if the taxable person, amongst other requirements, (1) holds a participation of not less than 5 per cent of the share capital or voting rights of the relevant company and (2) owns such participation, uninterruptedly, during the 24 months prior to its transfer.

b These rules also apply to merger, demerger, transfer of assets or share swaps to which the tax-neutrality rules do not apply.

c Finally, with a view to eliminating any potential overlap between the different sets of rules, the system of exemption from taxation applicable to capital gains

and losses realised by holding companies, venture capital companies and venture capital investors has been eliminated.[15]

V OUTLOOK

2014 will be the year that sees the end of the Troika's financial assistance programme (which is expected to be successful) with the consequent return of Portugal to the markets. In any event, it is expected that the transition period will be accompanied by a cautionary programme that, nevertheless, creates an environment that is clearly more favourable to investment.

From the economic indicators registered in the last quarter of 2013, 2014 looks like being a year of recovery, with a significant improvement in the economic climate and, in the same way, the confidence of economic players.[16]

It is also hoped that the private equity/venture capital market, in following this positive development, will bring good new opportunities and the following will certainly contribute to this:

a the still-low stock market capitalisation (reduced in 2013) of some of the main quoted companies;

b the ambitious privatisation programme launched in 2012 by the Portuguese government and, to a certain extent, imposed by the Troika, involving a set of minority and majority holdings in a number of public and semi-public companies from sectors as varied as energy, infrastructure, transport, logistics, insurance and distribution;[17]

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

15 In this respect, and due to (1) the fact that all these entities are now subject to the new rules applicable to all companies in general; and (2) the absence of any provision to the contrary, any holding company, venture capital company and venture capital investor that registers a capital gain as a result of the transfer of a given participation that is held for more than 12 months but less than 24 months will be subject to taxation as from January 2014.

16 The most optimistic outlook for 2014 is also backed by the European Commission itself as its president, José Manuel Barroso, recently announced the end of the euro crisis and the consequent recovery of the European economies, pointing, among others, to the Portuguese example.

17 After the (symbolic) privatisation process of the majority of the capital of CTT – Correios de Portugal, SA in 2013, 2014 will see the continuation of other privatisation processes. Some of the more significant privatisations include CP Carga, SA, Empresa Geral de Fomento, SA (Águas de Portugal wastewater management company) and the last phase of the privatisation of REN – Redes Energéticas Nacionais, SA (begun in 2012). Also worthy of note in 2014 will be the possible sale of TAP – Transportes Aéreos Portugueses, SA (after the failed attempt at privatisation at the end of 2012).

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).

2014 will also see the consolidation of measures and stimulus (with a particular focus on the private equity/venture capital sector) launched by the Portuguese government in 2012 under the 'Revitalisitaion Programme'.

In this respect, we would highlight the activity of Portugal Capital Ventures – Sociedade de Capital de Risco, SA and the launch of Revitalisation Funds as likely to have particular impact in 2014.

Portugal Capital Ventures – Sociedade de Capital de Risco, SA resulted from the merger of three of the most relevant private equity/venture capital operators in the country: AICEP Capital, INOV Capital and Turismo Capital. It is expected that these companies, as they did last year, will continue to focus on small and medium-sized Portuguese companies, preferring innovative science and technology-based projects and, in general, the revitalisation of the traditional economic fabric.

Meanwhile, the launch of what are called 'Revitalisation Funds', which are private equity/venture capital instruments created with the objective of bringing capital to viable companies and projects for expansion and growth, thus contributing to the development of new goods and services, internationalisation processes, creating employment and increasing exports is also likely to be significant. Organised on a regional basis, with a total fund of €220 million, the Revitalise Funds are managed by: (1) Explorer Investments – Sociedade de Capital de Risco, SA (responsible for the management of the regional fund for the Northern Zone, with a fund of €80 million); (2) Oxy Capital – Sociedade de Capital de Risco, SA (responsible for the management of the regional fund for the Central Zone, also with a fund of €80 million); and (3) Capital Criativo – Sociedade de Capital de Risco, SA (responsible for the management of the regional fund for the Southern Zone – covering the region of Lisbon, the Alentejo and the Algarve – with a fund of €60 million). The companies that benefit from these funds are essentially small and medium-size companies that carry on their activity in Portugal in one of the following sectors: industry, energy, construction, trade, tourism, transport and logistics and services. Investment by the Revitalise Funds will be made, preferably, by acquisition of or subscription to capital or quasi-capital instruments or by granting credit.

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 the IBA (corporate and M&A committee), and is regularly referred as one of the leading lawyers in Portugal and the Oporto market by directories such as *Chambers & Partners*, *The Legal 500* and *Best Lawyers*.

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