The Private Equity Review

Fourth Edition

Editor
Stephen L Ritchie

Law Business Research

The Private Equity Review

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EDITOR'S PREFACE

The fourth edition of *The Private Equity Review* comes on the heels of a solid but at times uneven 2014 for private equity. Deal activity and fundraising were strong in regions such as North America and Asia, but were flat to declining in Western Europe. Nevertheless, private equity continues to play an important role in global financial markets, 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. As large global private equity powerhouses extend their reach into new markets, home-grown private equity firms, many of whose principals learned the business working for those industry leaders, have sprung up in many jurisdictions to compete using their local know-how.

As the industry continues to become 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 this need in mind. It contains contributions from leading private equity practitioners in 26 different countries, with observations and advice on private equity deal-making and fundraising in their respective jurisdictions.

As private equity has grown, it has also faced increasing regulatory scrutiny throughout the world. Adding to this 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 2015, it can confidently be said 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 further expansion into growing emerging markets is also inevitable. It remains to be seen how local markets and policymakers respond.

I want to thank everyone who contributed their time and labour to making this fourth 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 used their valuable and scarce time to share their expertise.

Stephen L Ritchie
Kirkland & Ellis LLP
Chicago, Illinois
March 2015

Chapter 18

PORTUGAL

Tomás Pessanha and Manuel Liberal Jerónimo[1]

I OVERVIEW

2014 saw the end of the joint intervention by the Troika (i.e., the International Monetary Fund, the European Central Bank and the European Commission) in Portugal, and of the corresponding financial assistance programme.

Between the second quarter of 2011 (when the Troika's intervention in Portugal began) and the first quarter of 2014 (immediately prior to its exit), the Portuguese economy was subject to an overall fall of 5 per cent. The austerity measures imposed on families led to an unprecedented reduction in private consumption of 7.1 per cent. More negative expectations regarding sales and restrictions on access to credit led investment to fall by 19.2 per cent. The only exception was exports, which grew 12.2 per cent, with most Portuguese companies looking abroad in an attempt to compensate for the significant fall in internal demand.

From the second quarter of 2013, the Portuguese economy finally exited a period of 10 consecutive quarters of technical recession and began to grow again. In addition to this, and taking final stock of the intervention of the Troika, we saw Portugal's return to the markets and the recovery of its external debt capacity.

The questions we now face are how Portugal will react and evolve after the exit of the Troika, and what the real impact of the structural reforms introduced by its financial assistance programme (many of which are still to be implemented) will have on the economy.

The data available today for 2014[2] are moderately encouraging. In the first half of 2014, we saw a year-on-year growth in economic activity (0.9 per cent). This evolution reflected a gross contribution of 2.6 per cent from internal demand and 1.1 per cent from exports. Gross domestic product saw year-on-year growth of 1 per cent in the third quarter

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

2 Boletim Económico (December 2014) published by Banco de Portugal.

of 2014, which was based on private consumption. In addition, consumer confidence continued to recover in 2014, consistently remaining at values above the average of the past 10 years. There have also been some signs of moderate improvement in employment.

Conversely – and going against the general outlook for the country – the principal Portuguese stock market index (PSI-20) suffered a sharp fall in value in 2014. This affected banks and companies (above all in the energy sector) and, in December 2014 (compared with the end of 2013), this index had fallen 26 per cent in value.

The Portuguese mergers and acquisitions and private equity and venture capital[3] market was particularly active in 2014, with some of the leading Portuguese companies on the radars of large international investors.

In total, and according to data from Bloomberg, proposals to buy Portuguese companies reached a total value of €20.06 billion. This was the highest value since 2006 (€28.5 billion), a year marked by the largest operation ever announced in the Portuguese market (Sonaecom's bid for Portugal Telecom), as well as the bid for BPI by Banco Comercial Português. The main difference between 2006 and 2014 is that, while in 2006 more than 80 per cent of the value announced came from potential Portuguese buyers, in 2014 only 5 per cent of the value came from Portuguese entities.

French investors were the most active players in the Portuguese market during the past year, with bids by Altice for Portugal Telecom and the purchase of Banco Mais by Cofidis. The activity of Chinese investors is also noteworthy: Haitong paid €380 million for Banco Espírito Santo Investimento, while Fosun, in addition to buying Fidelidade, also managed, through this insurance company, to acquire Espírito Santo Saúde.

Regarding the private equity and venture capital market in particular – and without prejudice to the more detailed data included in Section III, *infra* – it is important to highlight the dynamism of Portugal Capital Ventures[4] and the restructuring funds managed by some of the leading private equity and venture capital managers in the Portuguese market, including:

a ECS Capital, created in 2009, is today the largest restructuring manager in the market, with €2.4 billion in assets under its management. The tourism sector saw a lot of investment in 2014, with the acquisition of control of various companies of the Carlos Saraiva group (with around 10 hotels spread between the Algarve, the Alentejo, Lisbon and the Douro, with a total of 3,300 beds);

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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 criteria). 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, there is no standard legal definition in Portugal for 'private equity', as opposed to 'venture capital', the latter also having its own – all-encompassing – legislative framework (see Section IV, *infra*). In addition, 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 Which, as mentioned in the previous edition of this book, results from the merger of the (then) three main venture capital operators in Portugal: AICEP Capital, INOV Capital and Turismo Capital.

b Vallis, created in 2012, has around €540 million in assets under its management. Among the funds it manages, Vallis Construction Sector Consolidation stands out, with stakes in some of Portugal's foremost construction companies, including Edifer, MonteAdriano and Eusébios (today all under the Elevo group name);
c Explorer Investments, created in 2012, manages and advises funds with assets in excess of €900 million, divided into private equity, expansion capital, tourism and real estate. The Discovery Fund (which it manages) was created in September 2012 and has already bought more than 30 hotels valued in excess of €500 million; and
d Oxy Capital: the Oxy Fund, created in August 2012, has capital of €480 million and owns the Cabelte, Mota and Piedade groups. It recently bought Estaleiros Navais de Peniche, in partnership with Amal. In June 2014 it created Aquarius, a venture capital fund.

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 (e.g., 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 (e.g., 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 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 making 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).

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 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 (conditions precedent). This interim period is sometimes covered by the parties entering into escrow agreements to deposit the purchase price (or part of it), 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 (e.g., 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 case, 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 policies 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 2009, 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).[5]

In any case, it is important to look closely at some specific points associated with taking a controlling interest (or one of influence alone) 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); and

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 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

5 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 (e.g., in the case of financial institutions).

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

b a duty of loyalty that demands that directors act in the best interests 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).

Any breach of the above-mentioned duties may lead to the person committing the breach being held liable.

As regards shareholders – and in particular shareholders of limited liability companies[6] – 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:[7]

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

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

7 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 a company).

the said shareholder, provided it is proven that, during 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.[8]

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; and

b the rules on the 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 creditors.

III YEAR IN REVIEW

i Recent deal activity

As previously mentioned, 2014 provided some (moderate) signs of Portugal's economic and financial recovery.

2014 also saw some positive developments in the mergers and acquisitions and private equity and venture capital markets. There were a number of deals that were important in terms of their value or the significance of the assets involved to Portugal's economy. During the past year, we saw the following:[9]

a in the first quarter of 2014, the Portuguese market registered a total number of deals very similar to that of the same period in 2013. The 2014 deals generated an

8 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.

9 Data from TTR – Transaction Track Record (www.ttrecord.com). Some of the data included here should be seen as merely indicative, as various transactions, some of which are relevant, escape TTR's radar each year, generally because they are not reported or published. Furthermore, some of the investment values indicated are merely potential as they have not yet been completed (or it is now known they will not be completed) (e.g., in the case of Terra Peregrin's bid to acquire PT SGPS, referred to in (d) above, which has been withdrawn).

investment amount of €1.78 billion. The technology sector was the most active, with a particular focus on Portugal Capital Ventures, which made investments in a number of start-ups in this sector. The first quarter of 2014 was also marked by the significant presence of foreign (mainly Chinese) investors (the acquisition by Fosun of an 80 per cent stake in Caixa Seguros – Grupo Caixa Geral de Depósitos stands out). Another highlight was the launch of a takeover bid of €166.20 million for Espírito Santo Saúde;

b in the second quarter of 2014, the mergers and acquisitions market was just as active. There were a total of 24 deals and the volume of investment generated was around €647 million, almost double the figure for the same period in 2013. Particularly relevant was the acquisition of AGS Portugal by Japan's Japanese Marubeni and Innovation Network Corporation. The private equity and venture capital market in particular registered a significant level of activity and generated a volume of investment of €227 million, compared with €150 million in the same period of the previous year;

c in the third quarter of 2014, there were 55 deals with a volume of investment of €1.12 billion. The technology market continued to be most attractive for investment. In the private equity and venture capital market, there were 10 deals during this quarter, equivalent to a 150 per cent increase over the same period of the previous year. Total investment in this sector was €562.3 million; and

d there were still no data available for December 2014 at the time of writing, but October and November both saw significant deals. In October, there were 19 deals and a volume of investment of €676.4 million (an increase of around 12 per cent over October 2013). The standout deal of this month was the offer made by Fidelity for Espírito Santo Saúde for a price of around €459 million. In November, there were around 24 deals, with a volume of investment of €1.56 billion, which reflects Terra Peregrin's bid for PT SGPS.

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

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-alongs 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 future. For this reason, it is not possible to outline a definite pattern in this area.

IV REGULATORY DEVELOPMENTS

Law No. 18/2015 was published in the official gazette, Diário da República, on 4 March 2015. This new law introduces a new regime for venture capital into the Portuguese legal system and repeals Decree-Law 375/2007 of 8 November.[10]

The aims of this new regime are to enact into Portuguese law (even if only partially) Directive No. 2011/61/EU, of the European Parliament and of the Council, of 8 June 2011 on alternative investment fund managers and Directive No. 2013/14/EU, of the European Parliament and of the Council, of 21 May 2013, on alternative investment fund managers in respect of over-reliance on credit ratings; and ensure the implementation into the Portuguese legal system of Regulation (EU) No. 345/2013, of the European Parliament and of the Council, of 17 April 2013, on European venture capital funds and Regulation (EU) No. 346/2013, of the European Parliament and of the Council, of 17 April 2013, on European social entrepreneurship funds.

Some of the main points of this new regime are as follows:

a the new rules provide greater coverage and now include, in addition to venture capital activity (in the strict sense), social entrepreneurship and specialised investment;

b in addition to venture capital companies, venture capital funds and venture capital investors,[11] the new legislation also governs investment activity under one of the new legal forms, including:
- venture capital fund management companies;
- venture capital investment companies;
- European venture capital funds (EuVECA);
- social entrepreneurship companies;
- social entrepreneurship funds (including European social entrepreneurship funds (EuSEF));
- specialised alternative investment companies; and
- specialised alternative investment funds;

c the new legislation defines the following:
- 'investment in venture capital': the acquisition, for a limited period of time, of equity instruments and debt capital instruments in companies with great potential for development, as a way to benefit from the respective increase in value;

10 At the time of writing this chapter, Law No. 18/2015 of 4 March had just been published and, because of this, was not yet in force (which will only happen 30 days after its publication date).

11 These vehicles were the only ones provided for under the previous rules (i.e., under Decree-Law No. 375/2007 of 8 November).

- 'investment in social entrepreneurship': the acquisition, for a limited period of time, of equity instruments and debt capital instruments in companies whose activities address social problems, with the objective of achieving quantifiable and positive social impact; and
- 'specialised alternative investment': the acquisition, for a limited period of time, of assets of any nature. No asset may represent more than 30 per cent of the respective total net value;

d regarding, in particular, venture capital companies, venture capital funds and investors in venture capital that do not exceed certain limits (in terms of value of assets under their management)[12] – and which, to this extent, are not covered by Directive No. 2011/61/EU – they continue to be governed by the simplified framework already established in Decree-Law No. 375/2007 of 8 November. They also continue to be subject to prior registration with the CMVM and to compliance with a set of simplified requirements in terms of conditions for access to the activity and rules on organisation and operation; and

e in enacting Directive No. 2011/61/EU, the new legislation also establishes rules on entities that exceed the limits described above. They are subject to stricter rules on organisation and operation, particularly on the valuation of assets, remuneration policy, subcontracting, depositaries and duties of transparency.

Without prejudice to the above, it is important to note that the full extent of the new venture capital rules will only become known during the course of 2015, when Law No. 18/2015 of 4 March is subject to the necessary regulation (notably by the CMVM).

Finally, as we have noted in previous editions, private equity activity is not conditioned on or limited to the (old and new) vehicles referred to above.[13] 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. In the same way, 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 typical venture capital vehicles that the private equity market has been developing in Portugal.

V OUTLOOK

As mentioned in Section I, *supra*, 2014 saw the departure of the Troika and the end of the financial assistance programme, thus leading to Portugal's return to the markets.

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12 Which are €100 million when the portfolios include assets acquired using the leverage effect; and €500 million when the portfolios do not include assets acquired using the leverage effect and in relation to which there are no reimbursement rights that may be exercised during a period of five years from the date of the initial investment.

13 The current (as well as the previous) legal framework, including tax-wise, should be seen as an incentive rather than a constraint on the industry.

Although the signs were subtle, the Portuguese economy began to show some positive signs, and current macroeconomic forecasts point to a gradual recovery in the next few years, slightly above the growth expected for the eurozone. The positive evolution of the Portuguese economy should continue to be ensured in the main by the performance of exports, on par with a recovery in internal demand.

It is hoped that the private equity and venture capital market will follow this positive trend, building on the signs of recovery already demonstrated in 2014. Certain factors will undoubtedly contribute to this:

a the (persistent) low stock market capitalisation of some of the leading listed companies (which, as previously mentioned, suffered a significant fall in value during 2014);

b the continuing increase in value of a significant number of small and medium-sized enterprises (some of which have a strong and attractive foothold in various international markets, including the emerging economies of Angola, Mozambique and Brazil), which are at true 'sale prices';

c the privatisation programme launched in 2012 by the government will begin a new chapter in 2015, particularly in the transport sector;[14] and

d the (still significant) difficulties in accessing the banking market by a substantial part of the Portuguese business world (private equity and venture capital may continue to act as an alternative to the traditional model of bank financing).

It is also hoped that 2015 will see the leading private equity and venture capital market players (particularly Portugal capital ventures and restructuring funds) maintain the level of dynamism that was seen in 2014.

Finally, 2015 will be the year in which the new legislation on venture capital comes into force and, in this context, it will also see the introduction of new investment concepts and vehicles, including investment in social entrepreneurship (specifically through the social entrepreneurship companies fund) and specialised alternative investment (specifically through specialised alternative investment companies and specialised alternative investment funds).

Although we have already outlined some of the principal features of such new legislation, the truth is that only in 2015 – with the implementation of Law No. 18/2015 of 4 March – will it be possible to assess the real merit of the proposed changes.

14 It is hoped that in 2015, the government will relaunch the privatisation programme of Transportadora Aérea Portuguesa and go ahead with the privatisation of CP Carga, Empresa de Manutenção e Equipamento Ferroviário and Carristur. Furthermore, in the context of the process of restructuring the transport sector, it is hoped that 2015 will see concessions granted for the operation of public transport in Oporto, run by the companies Sociedade de Transportes Colectivos do Porto and Metro do Porto; and the operation of Carris and the Lisbon Metro.

Appendix 1

ABOUT THE AUTHORS

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Tomás Pessanha is a partner at 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 recent years, and 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 chair and co-chair 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 named 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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