The Private Equity Review

Editor

Kirk August Radke

Law Business Research

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This article was first published in The Private Equity Review, 1st edition
(published in April 2012 – editor Kirk August Radke).

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Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

ISBN 978-1-907606-31-1

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:

AFRIDI & ANGELL

A&L GOODBODY

CAREY Y CÍA, LTDA

DARROIS VILLEY MAILLOT BROCHIER

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EDITOR'S PREFACE

This inaugural 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 both 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.

I wish to thank all of the contributors for their support of this inaugural 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
April 2012

Chapter 15

PORTUGAL

Tomás Pessanha and Manuel Liberal Jerónimo[1]

I OVERVIEW

i Deal activity

The sovereign debt crisis in 2012 deeply affected Europe and in Portugal it is a threat that will remain over the coming years. It was in the shadow of this more global problem that the Portuguese economy gave in – after Greece and Ireland – to the need for external aid. The International Monetary Fund came back to Portugal for the first time in 30 years, this time together with the European Central Bank and the European Union – collectively known as the 'troika' – creating the background and incentive for several legislative changes that will lead to structural reforms of the state and the national economy in the near future.

The crisis that befell Portugal (on many occasions inflamed by cuts in the country's credit rating) also meant a tightening of the restrictions on the Portuguese banks' access to international financing, with the consequent harmful limitations on internal access to bank credit for most of the Portuguese players active in business.

Paradoxically, it was very interesting to see positive developments in the Portuguese private equity and venture capital market in 2011.[2]

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1 Tomás Pessanha is a partner and Manuel Liberal Jerónimo is an 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 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

Although there is no definitive or reliable data yet for the second half of 2011, the first half of the year saw a total investment of €62.6 million in private equity and venture capital, which, compared with the same period of 2010, represents an increase of around 84 per cent.[3]

Of the different types of private equity/venture capital investment, the following stand out:

a growth capital, with values in the order of €51.3 million;
b start-up, with values of around €5.2 million;
c rescue or turnaround, with a single operation of around €5 million; and
d buyout, with a volume of around €1 million.

By reference to the same time period, Portugal registered a divestment of €10.1 million, which, compared with the same period in 2010, represents growth of around 82 per cent.

The types of exit seen were:

a trade sale, with a total of €7.3 million;
b repayment of principal loans, with a total value of €2.1 million; and
c management buyouts, accounting for around €700,000.

It should be noted that, contrary to the growth registered in 2011, Portugal had, in previous years, seen a slowdown in its private equity/venture capital market. By way of example, during 2010[4] the country saw a total investment in that sector of around €164 million, representing a drop of approximately 46 per cent in relation to 2009 (€303 million), 50 per cent of this investment being due to buyout transactions. Likewise, it is also curious to observe that the level of investment for 2010 was close to the levels registered in 2007 (around €169 million), although in 2007 the total volume of divestment had been greater (€86 million, compared with the €18.1 million registered in 2010).

Leaving aside the classification of the businesses themselves (private equity/venture capital or other) and also the amounts involved, the past year saw a significant increase in the number of M&A transactions concluded,[5] with an average growth of around 40 per cent when compared with 2010.[6]

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.

4 Referring to the data provided by the APCRI.

5 Source: TIR – Transactional Track Record (www.ttrecord.com). Once more, figures should be seen are merely indicative.

6 Although the deals that exceeded a value of €25 million can be 'counted on one hand' according to the data provided by Mergermarket (one of the exceptions is the deal to buy 21.35 per cent of Energias de Portugal, SA by the China Three Gorges Corporation, which involved a price of €2.4 billion).

Finally, and despite the fluctuations referred to above, it is important to mention a certain stability in terms of the private equity/venture capital investors acting in the Portuguese market over the past few years. Some of the most important (all of them Portuguese) are listed below:[7]

a Finpro SCR, SA (market share: 22.4 per cent);
b Caixa Capital – SCR, SA (market share: 17.7 per cent);
c Explorer Investments – SCR, SA (market share: 12.6 per cent);
d ECS – SCR, SA (market share: 8.4 per cent); and
e InovCapital – SCR, SA (market share: 7.4 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

7 Source: Portuguese Securities Commission ('the CMVM').

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/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).[8]

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

8 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).

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. Each shareholder should act with loyalty in their internal relationship.

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[9] – 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:[10]

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

10 The possibility of lifting the corporate veil and directly attacking the (personal) assets of the shareholders beyond the exceptions expressly set forth in the law, has been the subject of heated

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;

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.[11]

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 pointed out, 2011 was very challenging for investors (to say the least). The persistent recession that has started to ravage the eurozone and Portugal in particular, as well as weak macroeconomic fundamentals and the growing volatility of the market,

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discussion, particularly in legal literature, and even admitted in exceptional cases (such as fraud or serious material asset-stripping of the company).

11 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.

have all made it difficult to get any sort of real return on capital. Share markets have fallen globally and yields have gone up in many credit and public debt bond markets.

Many of the micro and macroeconomic problems are also due to the weakness of the European banking sector (with particular effects on the Portuguese banking sector). This sector, while still dealing with the sluggish effects of the 2008 collapse of Lehman Brothers and all that preceded it, is trying to balance its books (the 2011 financial year accounts being the first to really recognise the losses and impairments of the past).

The reluctance of the European banks to lend money has made a significant contribution to the disappointing growth that followed the initial recovery of 2009–2010. There has been a severe restriction on loans granted to small and medium-sized companies, which are in fact responsible for the greater part of the growth in employment in the OECD.

Portugal felt the impact of the crisis – especially in terms of financing – with particular intensity, with the inevitable consequences for public and private investment. Nevertheless, the evolution of the private equity/venture capital market in Portugal has been positive, perhaps because opportunities sometimes come in times of crisis (with some investors taking advantage of the fact that the vast majority of assets – and companies – are at very attractive prices). This goes against the downward trend we had seen up to 2010.

In 2011, the communications sector saw the greatest volume of private equity/venture capital investment, followed by life sciences, chemical materials and energy and the environment. The following stand out among the private equity/venture capital transactions that have taken place in Portugal over the past two years.[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/IPO
MoveOn	Tata Group	ECS Capital	Industry (fashion and textiles)	Not disclosed	Takeover/exit
Palexpo Tecnologias Laser	Espirito Santo Capital/Private Investors	Private shareholders	Services and distribution	Not disclosed	MBI
Artland PTA	ECS Capital/ Caixa Capital/ Inovcapital	–	Industry	€96.90 million	MBI
Probos Plásticos	Explorer II	Private shareholders	Industry	€50 million	LBO

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

Target	*Buyer*	*Seller*	*Sector*	*Value (approx)*	*Type*
Altitude Software	Bilbao Viscaya Holding/IBI	Sonaecom/ AICEP Capital Global/Grupo Salvador Caetano/Olmea	Technology and telecoms	€24 million	Takeover/exit
Drink In	Font Salem (Damm)	Iberpartners	Services and distribution	€15.5 million	Takeover/exit

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 (1) no-reliance clauses (with the objective of reducing the relevance of the information exchanged between the parties during the negotiating process) and (2) 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 Please see footnote 2 above.

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/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/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/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 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.

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 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/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

2012 will continue to be marked by the economic and financial crisis, by the implementation of the troika's bailout programme and by the innumerable legislative changes – many structural in nature – imposed thereby, the results of which remain to be seen.

2012, however, promises to be positive for private equity investors (particularly international investors). First, some of Portugal's leading companies, as well as a great number of SMEs with a very significant presence in the external market are on offer at bargain prices. Second, the Portuguese state has committed to a very ambitious privatisation programme for 2012 involving majority or minority holdings in a considerable number of Portuguese public or semi-public companies operating in sectors such as energy retail and production, electricity distribution, air infrastructure and air transport, railway logistics, insurance, mail distribution, water distribution and TV broadcasting. Third, in the context of severe scarcity of liquidity, with the European banks (and Portuguese banks in particular) still trying to work out their own problems, private equity may come to be, for many companies, the only available source of financing.

As regards the public venture capital sector, one may also expect extensive reforms to take effect in 2012. The government announced, at the end of 2011, an in-depth structural revision of this sector, promoting, for example, the concentration of the powers currently spread among the various public venture capital operators into a single entity, channelling the available funds to sectors deemed strategic to the national economy such as tourism, technology, internationalisation of companies and exports.

The creation of a public fund to support the restructuring of distressed companies is also planned for 2012 and this is accompanied by the announcement of the radical reform of Portuguese insolvency law, which will focus on the recovery of companies rather than the liquidation of their assets.

Finally, it is worth mentioning the setting up by the Portuguese government in February 2012 of the foundations for a new support programme for Portuguese companies that are economically viable but financially in distress, defining as priorities, *inter alia*, (1) the reinforcement of state financial aid instruments focused on the funding and restructuring of companies, with a particular focus on private equity or venture capital, and (2) the facilitation of sale and purchase transactions of companies and of their tangible and intangible assets.

Appendix 1

ABOUT THE AUTHORS

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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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