



# INFORMATIVE NOTE



## CAPITAL MARKETS

# NEW LEGAL FRAMEWORK OF VENTURE CAPITAL

The new Legal Framework of Venture Capital (NLFVC) was published on 4 March. The NLFVC was approved by Law no. 18/2015 and partially implements Directive 2011/61/EU of the European Parliament and of the Council, of 8 June 2011, and Directive 2013/14/EU of the European Parliament and of the Council, of 21 May 2013, thus ensuring that, in the Portuguese legal system, Regulations (EU) no. 345/2013 and 346/2013, of the European Parliament and of the Council, of 17 April, are complied with. The NLFVC also amends the legal framework of the activity of investment in venture capital, repealing Decree-Law no. 375/2007, of 8 November.

In this respect, it is important to bear in mind that the new regulation is complemented by the rules provided for in delegated and implementing acts of Directive no. 2011/61/EU, namely in (i) the rules of Delegated Regulation (EU) no. 231/2013, of the Commission, of 19 December 2012, regarding exemptions, general operating conditions, depositaries, leverage effect, transparency and supervision; (ii) the rules of Implementing Regulation (EU) no. 447/2013, of the Commission, of 15 May 2013, which establishes the procedures for managers of alternative investment undertakings that opt to be covered by Directive no. 2011/61/EU; and (iii) the rules of Implementing Regulation (EU) no. 448/2013, of the Commission, of 15 May 2013, which provides for a procedure to determine the reference Member State of the manager of a foreign alternative investment undertaking, according to Directive no. 2011/61/EU.

### Entry in to force and transitional provisions

As a general rule, the new regulation will enter into force 30 days after the date of publication.

However, in order to safeguard some situations to which it would make little sense to apply the NLFVC, at least to its full extent, the law provides for a transitional framework, according to which:

- i) Venture capital companies are granted a period of three months to take the measures necessary to comply with the new legal framework;
- ii) Venture capital companies whose activity is restricted to the management of venture capital funds whose subscription period expired before 22 July 2013 and which have been incorporated for a period that ends up to three years after this date may, after that period has expired, continue to manage those undertakings without having to comply with the NLFVC. However, they are bound by the NLFVC rules on the annual report and, if applicable, by the obligations that result from a position of control in non-listed companies and in companies that issue shares admitted to trading on a regulated market. These companies are also exempt from submitting authorisation requests;
- iii) The management regulations of venture capital funds of an indefinite duration must be amended in order to provide for a specific duration.
- iv) Every registration request that is still pending when the NLFVC enters into force must comply with this new regulation.

**Amendments and innovations of the Legal Framework of Venture Capital**

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**I. THE OLD REGULATION AS A STARTING POINT**

The simplified regulation that was provided for in the old framework remains essentially unchanged. Thus, Venture Capital Funds (“VCF”), Venture Capital Investors (“VCI”) and Venture Capital Companies (“VCC”) will still be subject to prior registration with the CMVM (the Portuguese securities supervisory authority) and will also need to comply with several simplified requirements with respect to the conditions of access to the investment activity and to comply with rules concerning organisation and exercise.

Those same rules will apply, notwithstanding the special framework that will be provided for in a CMVM regulation, to social entrepreneurship companies, to social entrepreneurship funds and to specialised alternative investment funds, except with respect to the investment prohibitions provided for venture capital funds.

Even though a large number of rules provided for in the old framework have remained unchanged, the law chose to reduce the required share capital from the current €750,000 or €250,000 (previously, if the management company was a VCC whose object solely consisted in the management of VCF) to €125,000. However, the law also introduces capital requirements which determine that the share capital must be increased in accordance with the managed amounts.

The NLFVC allows companies that are already in the market to carry on social entrepreneurship activity. It also allows VCCs that do not exceed the amounts provided for in the Simplified Regulation to manage social entrepreneurship funds, specialised alternative investment funds, as well as European regulated funds with the designation of EuVECA and EuSEF.

**II. INNOVATIONS**

**1. Portuguese social entrepreneurship funds**

Social entrepreneurship is the acquisition, for a limited period, of own and borrowed capital instruments by companies which develop suitable solutions to social issues, with the purpose of obtaining quantifiable and positive social results.

The law permits - in a national context, by way of social entrepreneurship funds - the activity of social entrepreneurship management with qualified investors and, provided that certain conditions (to be determined by a CMVM Regulation) are satisfied, with non-qualified investors. It also permits - in a cross-border context - the activity of social entrepreneurship management by way of EuSEFs.

**2. Marketing of venture capital funds and of social entrepreneurship funds in the European Union, with the designation of “EuVECA” and “EuSEF”, respectively, providing for a passport scheme for that purpose.**

**3. A new type of AIU – Specialised alternative investment undertakings**

- i) These undertakings are only aimed at qualified investors and their object is investment for limited periods in assets of any kind; each asset cannot represent more than 30% of their total net value. These undertakings can assume the corporate form of Specialised Alternative Investment Companies (“SAIC”) or the contractual form of Specialised Alternative Investment Funds (“SAIF”).

- ii) The admission of this new instrument will be complemented by a regulatory framework which safeguards its specific characteristics.

#### 4. Four new types of management companies

- i) **Social Entrepreneurship Company:** its activity is limited to the social entrepreneurship activities covered by the Simplified Regulation and it can manage its own portfolio as well as social entrepreneurship funds, including EuSEFs. It constitutes a corporate form comparable to venture capital companies in a social entrepreneurship context;
- ii) **Venture Capital Investment Company:** its object is limited to the management of its own portfolio. When it is not self-managed, it can be managed by a securities investment fund management company or by a MCVCF;
- iii) **Venture Capital Fund Management Company;** and
- iv) **Specialised Alternative Investment Company,** which, when it is not self-managed, can be managed by a securities investment fund management company.

#### 5. Broadening of the corporate object of management companies

- i) The **Credit Institutions** that were authorised to manage alternative investment undertakings in closed-end securities are now able to manage specialised alternative investment funds and social entrepreneurship funds, as a complement to their ability to manage venture capital funds;
- ii) **Securities Investment Fund Management Companies** are now able to manage specialised alternative investment funds, social entrepreneurship funds, EuVECAs and EuSEFs, as a complement to their ability to manage venture capital funds;
- iii) **Venture Capital Companies** are now able to manage specialised alternative investment funds, social entrepreneurship funds, EuVECAs and EuSEFs, as a complement to their ability to manage venture capital funds.

### III. SIMPLIFIED REGULATION AND QUALIFIED REGULATION

The new framework regulates the activity of venture capital investment, creating two different frameworks: (i) a simplified regulation and (ii) a qualified regulation, which are applicable to the activity of investment according to the value of the assets managed by the management companies (see table below).

#### 1. Simplified Regulation

This applies to VCCs, to VCFs managed by VCCs, by Regional Development Companies and by entities legally authorised to manage alternative investment undertakings in closed-end securities, as well as to Venture Capital Investors (“VCI”).

The Simplified Regulations remain essentially as the old regulations and, for that reason, there are no substantial regulation amendments, even though certain issues – such as the good repute of the members of the corporate bodies of entities subject to the respective regulation, and the operations which are forbidden for the same entities – are now more thoroughly regulated and subject to new requirements, in line with those that are already provided for financial entities.

#### 2. Qualified regulation

This applies to the entities whose management exceeds the above mentioned limits, which are subject to stricter requirements of organisation and operation than those applicable to the management of alternative investment undertakings, in particular with respect to asset valuation, remuneration policy, outsourcing, depositary and duties of transparency. Notwithstanding the fact that even the companies covered by the simplified regulation can opt to be covered by the qualified regulation, this regulation applies, as a general rule, to MCVCFs, to VCFs managed by these entities and to VCCs.

The management companies subject to this regulation cannot simultaneously manage their own portfolio (internal management) and manage alternative investment undertakings (external management).

Thus, with the new venture capital regulation, VCCs that carry on both activities (internal and external management) can only keep such a broad corporate object if they remain covered by the Simplified Regulation.

**IV. CHANGES WITH RESPECT TO THE ACTIVITY OF MANAGING VENTURE CAPITAL INVESTMENT**

	<b>OLD REGULATION – DECREE-LAW 375/2007</b>	<b>NEW REGULATION – SIMPLIFIED REGULATION</b>	<b>NEW REGULATION – QUALIFIED REGULATION</b>
<b>APPLICABILITY OF THE REGULATION TO MANAGEMENT COMPANIES</b>	The old framework imposed uniform regulations on venture capital investment management, regardless of the amounts of the investments under management	Management entities whose managed assets do not exceed €100,000,000, with leverage, or €500,000,000, without leverage	Management entities whose managed assets exceed €100,000,000, with leverage, or €500,000,000, without leverage
<b>MANAGEMENT COMPANIES</b>	VCC; RDC <sup>1</sup> ; EMCSIF <sup>2</sup>	VCC; RDC; EMCAIU <sup>3</sup>	MCVCF <sup>4</sup> ; MCMI <sup>5</sup> ; <sup>6</sup>
<b>MINIMUM SHARE CAPITAL</b>	VCC: €750,000 / €250.000 <sup>7</sup>	VCC: €125,000	MCVCF: €125,000 VCIC <sup>8</sup> : €300,000 <sup>9</sup>
<b>OWN CAPITAL</b>	---	002% of the portion of the managed assets' net value which exceeds €250,000,000	002% of the portion of the managed assets' net value which exceeds €250,000,000
<b>PERMITTED ACTIVITIES</b>	Direct investment in venture capital and VCF management	Direct investment in venture capital and VCF management	Solely manage venture capital investment undertakings

The entities subject to the simplified regulation which exceed the limits identified in the table above have 30 days to comply with them, or they will have to request authorisation to act under the terms of the Qualified Regulation and to transform into one of the new limited-object corporate types, such as an MCVCF or VCIC.

**V. EUROPEAN PASSPORT**

In this respect, the NLFVC refers to the Legal Framework of Collective Investment Undertakings<sup>10</sup>, whose rules will now apply to Venture Capital.

**Beneficiary entities:** the new framework only applies to entities covered by the Qualified Regulation; every entity covered by the Simplified Regulation must opt to be covered by the Qualified Regulation in order to be eligible for the European passport.

**Management companies from foreign countries** which are authorised to manage venture capital investment undertakings in Portugal must obtain prior authorisation from the CMVM.

**Practicing in other Member States:** MCVCFs, VCICs and management companies from foreign countries which exclusively manage venture capital investment undertakings, social entrepreneurship investment undertakings or specialised alternative investment undertakings and which are authorised to operate in Portugal may carry on their activities in another Member State, through the establishment of a branch office, provided that the notification requirements are satisfied.

<sup>1</sup> Regional Development Companies.

<sup>2</sup> Entities that are legally authorised to manage closed-end securities investment funds.

<sup>3</sup> Entities that are legally authorised to manage closed-end alternative investment undertakings

<sup>4</sup> MCVCFs determine the maximum level of the leverage effect they can use on behalf of each investment undertaking in VC managed by them.

<sup>5</sup> Management company of securities investment funds.

<sup>6</sup> We are not considering VCCs, for VCFs under a corporate form can always, if they so choose, be self-managed.

<sup>7</sup> When the management company is a VCC whose object consists solely in the management of VCF.

<sup>8</sup> Self-managed.

<sup>9</sup> VCICs which are not self-managed can be managed by a securities investment fund management company or by a venture capital fund management company.

<sup>10</sup> Approved by Law no. 16/2015, of 24 February.

**Management of undertakings from foreign countries:** MCVCs, VCICs and management companies from foreign countries which exclusively manage venture capital investment undertakings, social entrepreneurship investment undertakings or specialised alternative investment undertakings and which are authorised to operate in Portugal may manage venture capital investment undertakings from foreign countries exclusively aimed at qualified investors and which are not marketed in Portugal or in another Member State. To do this, they must comply with the applicable requirements and the appropriate cooperation mechanisms between the CMVM and the supervisory authorities of the foreign country must be established.

**Management of specialised alternative investment undertakings, whose State of reference is not Portugal:** management companies from the European Union and from foreign countries which exclusively manage this kind of undertakings may carry on in Portugal the activities covered by the authorisation granted by CMVM, through the establishment of a branch office, or under the freedom to provide services.

**Marketing of PUs:** MCVCs, VCICs and management companies from the European Union which exclusively manage specialised alternative investment undertakings may market, in Portugal and in all Member States, participation units of venture capital investment undertakings or of specialised alternative investment undertakings to qualified investors, provided that they notify the CMVM.

## VI. FRAMEWORK OF SANCTIONS

The CMVM still has the exclusive power to supervise venture capital activity. One of the innovations introduced by the NLFVC is a special framework of sanctions that defines administrative offences and the applicable sanctions, and gives coactivity to the rules on venture capital, social entrepreneurship and specialised alternative investment.

The administrative offences relate to both the breach of the duties provided for in the NLFVC and the infringement of the obligations set out in Portuguese and European legislation on that subject. The NLFVC now provides for a specific and detailed framework of sanctions which divides administrative offences into: (i) very serious offences (punishable with a fine ranging from €25,000 to €5,000,000), and (ii) serious offences (punishable with a fine ranging from €12,500 to €2,500,000).

Notwithstanding the applicability of the general regulation of administrative offences and the subsidiary applicability of the Securities Code, the new framework also provides for accompanying sanctions which apply according to the gravity of the infringement and to the agent's guilt, and which can include, for instance, a prohibition on engaging in activity for a 5-year period.

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