THE PRIVATE EQUITY REVIEW

TENTH EDITION

Editor
Stephen L Ritchie

THE LAWREVIEWS

© 2021 Law Business Research Ltd

THE PRIVATE EQUITY REVIEW

TENTH EDITION

Reproduced with permission from Law Business Research Ltd
This article was first published in March 2021
For further information please contact Nick.Barette@thelawreviews.co.uk

Editor
Stephen L Ritchie

THE LAWREVIEWS

© 2021 Law Business Research Ltd

PUBLISHER
Tom Barnes

SENIOR BUSINESS DEVELOPMENT MANAGER
Nick Barette

BUSINESS DEVELOPMENT MANAGER
Joel Woods

SENIOR ACCOUNT MANAGERS
Pere Aspinall, Jack Bagnall

ACCOUNT MANAGERS
Olivia Budd, Katie Hodgetts, Reece Whelan

PRODUCT MARKETING EXECUTIVE
Rebecca Mogridge

RESEARCH LEAD
Kieran Hansen

EDITORIAL COORDINATOR
Tommy Lawson

PRODUCTION AND OPERATIONS DIRECTOR
Adam Myers

PRODUCTION EDITOR
Louise Robb

SUBEDITOR
Claire Ancell

CHIEF EXECUTIVE OFFICER
Nick Brailey

Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34–35 Farringdon Street, London, EC4A 4HL, UK
© 2021 Law Business Research Ltd
www.TheLawReviews.co.uk

No photocopying: copyright licences do not apply.
The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided was accurate as at March 2021, be advised that this is a developing area.
Enquiries concerning reproduction should be sent to Law Business Research, at the address above.
Enquiries concerning editorial content should be directed to the Publisher – tom.barnes@lbresearch.com

ISBN 978-1-83862-812-3

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

ACKNOWLEDGEMENTS

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

ALLEN & OVERY

ALTER LEGAL SL

BAHR

CUATRECASAS

FASKEN MARTINEAU DUMOULIN LLP

JINGTIAN & GONGCHENG

KIRKLAND & ELLIS

LEGANCE – AVVOCATI ASSOCIATI

LUIZ GOMES & ASSOCIADOS – SOCIEDADE DE ADVOGADOS SP, RL

MAPLES GROUP

MARVAL O'FARRELL & MAIRAL

MORI HAMADA & MATSUMOTO

NADER, HAYAUX Y GOEBEL, SC

NOERR PARTGMBB

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

PWC

SCHINDLER ATTORNEYS

SHARDUL AMARCHAND MANGALDAS & CO.

SHEARMAN & STERLING

SHIN & KIM LLC

TAVERNIER TSCHANZ

© 2021 Law Business Research Ltd

CONTENTS

PREFACE.......vii
Stephen L Ritchie

PART I FUNDRAISING

Chapter 1 AUSTRIA.......1
Martin Abram and Clemens Philipp Schindler

Chapter 2 CANADA.......9
Jonathan Halwagi, Tracy Hooey, Anabel Quessy and Ryan Rabinovitch

Chapter 3 CAYMAN ISLANDS.......18
Nicholas Butcher and Iain McMurdo

Chapter 4 CHINA.......28
James Yong Wang

Chapter 5 GERMANY.......43
Felix von der Planitz, Natalie Bär and Maxi Wilkowski

Chapter 6 HONG KONG.......57
Lorna Chen, Anil Motwani and Iris Wang

Chapter 7 INDIA.......65
Raghubir Menon, Ekta Gupta, Shiladitya Banerjee, Rohan Singh and Palak Dubey

Chapter 8 ITALY.......87
Enzo Schiavello and Marco Graziani

Chapter 9 JAPAN.......104
Mikito Ishida

© 2021 Law Business Research Ltd

Chapter 10 LUXEMBOURG.......113
Patrick Mischo, Frank Mausen, Jean-Christian Six and Peter Myners

Chapter 11 MEXICO.......120
Hans P Goebel C, Héctor Arangua L, Adalberto Valadez H and Miguel Á González J

Chapter 12 NORWAY.......133
Peter Hammerich and Markus Heistad

Chapter 13 PORTUGAL.......143
André Luiz Gomes, Catarina Correia da Silva and Vera Figueiredo

Chapter 14 SOUTH KOREA.......153
Chris Chang-Hyun Song, Tae-Yong Seo and Sang-Yeon Eom

Chapter 15 SPAIN.......160
Carlos de Cárdenas, Alejandra Font, Manuel García-Riestra and Víctor Doménech

Chapter 16 SWITZERLAND.......170
Phidias Ferrari, Vaïk Müller and Pierre-Yves Vuagniaux

Chapter 17 UNITED KINGDOM.......182
Jeremy Leggate, Prem Mohan and Ian Ferreira

PART II INVESTING

Chapter 1 ARGENTINA.......205
Diego S Krischcautzky and María Laura Bolatti Cristofaro

Chapter 2 AUSTRIA.......214
Florian Cvak and Clemens Philipp Schindler

Chapter 3 CHINA.......223
Julia Yu and Xiaoxi Lin

Chapter 4 GERMANY.......260
Volker Land, Holger Ebersberger and Robert Korndörfer

Chapter 5 HONG KONG.......271
Betty Yap, Edwin Chan and Ellen Mao

© 2021 Law Business Research Ltd

Chapter 6 INDIA 283
Raghubir Menon and Taranjeet Singh

Chapter 7 JAPAN 313
Shuhei Uchida

Chapter 8 LUXEMBOURG 321
Patrick Mischo, Frank Mausen, Jean-Christian Six and Peter Myners

Chapter 9 NORWAY 329
Peter Hammerich and Markus Heistad

Chapter 10 PORTUGAL 340
Mariana Norton dos Reis and Miguel Lencastre Monteiro

Chapter 11 SOUTH KOREA 352
Chris Chang-Hyun Song, Tong-Gun Lee, Brandon Ryu, Tom Henderson and Dong Il Shin

Chapter 12 SWITZERLAND 363
Phidias Ferrari, Vaïk Müller and Pierre-Yves Vuagniaux

Chapter 13 UNITED STATES 375
Aisha P Lavinier and Melanie B Harmon

Appendix 1 ABOUT THE AUTHORS 389
Appendix 2 CONTRIBUTORS' CONTACT DETAILS 411

© 2021 Law Business Research Ltd

PREFACE

The tenth edition of *The Private Equity Review* follows a turbulent year for dealmakers in 2020. Uncertainties created by the global covid-19 pandemic triggered a significant slowdown in deal activity in the first and second quarters. However, a combination of central bank interventions, fiscal stimulus, optimism about a vaccine and better virus management led to frenetic third and, especially, fourth quarters. The net result was that the number and value of global buyouts increased significantly over 2019's already robust activity, while there was a noticeable decline in private equity exits. The year 2020 also saw a flurry of IPO and merger and acquisition activity by special purpose acquisition corporations, or SPACs, some formed by private equity sponsors and others formed by other dealmakers. Fundraising activity was also strong, notwithstanding the pandemic, with aggregate capital of nearly US$1 trillion raised, as institutional investors remained extremely interested in private equity as an asset class because of its continued strong performance. As a result, private equity funds have record amounts – by one estimate, nearly US$1.5 trillion – of available capital, or dry powder. PE funds' dry powder (and the need to deploy it), together with competition from SPACs, sovereign wealth funds, family offices and pension funds, led to very competitive transactions being completed at increasing leverage levels and purchase price multiples. This has caused private equity firms to become even more creative as they seek opportunities in less competitive markets or in industries where they have unique expertise.

The year 2020 showed once again the resilience of the private equity market and the creativity of private equity dealmakers. Given PE funds' creativity and available capital, we are confident that private equity will continue to play an important role in the global economy, not only in North America and Western Europe, but also in developing and emerging markets in Asia, South America, the Middle East and Africa, and to further expand its reach and influence, even in the face of potential political, regulatory and economic challenges.

Private equity professionals need practical and informed guidance from local practitioners about how to raise money and close deals in multiple jurisdictions. *The Private Equity Review* has been prepared with this need in mind. It contains contributions from leading private equity practitioners in 25 different countries, with observations and advice on private equity dealmaking and fundraising in their respective jurisdictions.

As private equity has grown, it has also faced increasing regulatory scrutiny throughout the world. Adding to 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.

I want to thank everyone who contributed their time and labour to making this tenth edition of *The Private Equity Review* possible. Each of these contributors is a leader in their

© 2021 Law Business Research Ltd

respective markets, 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 2021

© 2021 Law Business Research Ltd

Part II

INVESTING

© 2021 Law Business Research Ltd

Chapter 10

PORTUGAL

Mariana Norton dos Reis and Miguel Lencastre Monteiro[1]

I OVERVIEW

i Deal activity

According to the 2019 European Private Equity Activity Report,[2] approximately €94 billion of equity was invested in European companies in 2019, with €65 billion relating to buyout investment. Growth investment, which is typically a minority investment in mature companies that are seeking primary capital to expand and improve operations or enter new markets to accelerate the growth of business, reached amounts close to €16 billion, meaning that seed, start-up and later-stage financing (venture capital) continues to make up – similarly to 2018 – a fraction of the total private equity investment made in the European market. In terms of geographical investment flows, the largest part of capital circulated inside the European territory, with €59 billion capital investment made domestically within European countries and €27.3 billion made in cross-border investments within Europe. The most targeted sectors were ICT (communications, computing and electronics), consumer goods and services and business products and services, with a combined share of approximately 69 per cent of all private equity investment made in Europe.

This conjuncture was reflected in Portugal, whose economic growth in 2019 affected its private equity market while maintaining similar distributions of investment by stage and sector.[3] In line with the growth trend of previous years, assets under management (sum of equity, financing, liquidity, options on derivatives and other private equity assets) reached €5.1 billion by the end of 2019, with a significant increase of €316 million (6.6 per cent) in comparison with the previous year. This positive development was mainly because of an increase in the number of equity funds operating in the Portuguese private equity sector (from 117 to 135). While the investment amount (i.e., the sum of equity and other investments) registered a slight increase (0.9 per cent in 2019), equity only accounted for 35.6 per cent of the total amount invested in the national private equity sector, while other investments appear as the major target in 2019 (albeit with a slight decrease in comparison with 2018), amounting to up to 64.4 per cent (€2.1 billion). Of these other investments, accessory contributions (€876.7 million), shareholder loans (€565.9 million) and other loans take on the largest role. In comparison with the previous year, investments in other assets (derivative positions and other assets) and equity increased by, respectively, 9.8 per cent

1 Mariana Norton dos Reis is a partner and Miguel Lencastre Monteiro is an associate at Cuatrecasas.
2 Published by Invest Europe and available at https://investeurope.eu/media/3052/20200512_invest-europe-investing-in-europe_-private-equity-activity-2019-final.pdf.
3 www.cmvm.pt/pt/EstatisticasEstudosEPublicacoes/Publicacoes/CapitaldeRisco/Documents/CMVM-Relat%C3%B3rio%20Anual%20de%20Capital%20de%20Risco-2019.pdf.

© 2021 Law Business Research Ltd

and 17.6 per cent, mainly as a result of investments in domestic targets. The value of other investments decreased (6.5 per cent) for both domestic and non-domestic companies. On another note, investments through deposits and cash significantly increased by 43.6 per cent (from €440.3 million to €632.5 million).

Currently, there are 52 private equity companies and 164 private equity funds operating in the Portuguese private equity sector.[4] By the end of 2019, investments of these private equity funds totalled €4.9 billion, while investments of private equity companies amounted to €273.4 million. This shows that investment via private equity funds, comprising 94.7 per cent of the total investment in private equity assets in Portugal, is staggeringly more significant than via direct investment through private equity companies.

There continues to be a significant concentration of the Portuguese market, with 11 private equity funds representing around 54.7 per cent of total assets under management.

By the end of 2019, there were 916 equity participations, of which 32.9 per cent comprised 96.3 per cent of the global value of all equity participations. Conversely, 68.1 per cent of all equity participations – largely related to targets in the seed and start-up stages – solely amounted to 3.7 of the global value of all equity participations. There is only one equity participation exceeding €100 million.

As for the targets that private equity agents generally envisage, holding companies that manage non-financial corporations acting as vehicles for investments in other companies continued to be quite popular in 2019, as they allow end investments not to be disclosed. Excluding such holding companies (whose investment amounted to €960.6 million), the activities that captured the largest amounts of private equity investment in 2019 were the ICT (€453.5 million), real estate (€434.9 million) and hospitality and food services (€313.6 million) sectors, which jointly represent close to one-third of the total investment in private equity in Portugal. On the other hand, financial and insurance companies continue to gather the clear majority of investment made by private equity companies (approximately 85.1 per cent).

In respect of the stages of investment, private equity comprises 80.8 per cent of the total investment (–1.7 per cent in comparison with 2018), with the largest branch of this stage of investment being the turnaround (which represented 28.8 per cent of the total, but with a decrease (4.7 per cent) in comparison with 2018) followed by the expansion stage (22.9 per cent). The growth of both the expansion and the replacement capital stages rose from an aggregate proportion of 28.2 per cent to 32 per cent. Venture capital evidenced an increase in the investment amount (up to €664 million in 2019). At any rate, and contrary to the expectations occasioned by the multiple measures and incentives implemented by the Portuguese state, the start-up stage holds at 7.8 per cent of the total amount invested, as against 8.4 per cent in 2018.

Private equity investments differ in terms of management approaches between hands-on (technical supervision and management involvement) and hands-off (restricted to the allocation of funds). This distinction is also related to the level of control that the investor intends to exercise. By the end of 2019, 61.3 per cent of all investments concerned shareholdings under 30 per cent of the total share capital of the targets.

Concerning the duration of investments, nearly 27.9 per cent of private equity investment had a term of less than four years and 9.2 per cent were kept for more than 10 years.

4 http://web3.cmvm.pt/english/sdi/capitalrisco/index.cfm.

© 2021 Law Business Research Ltd

At the time of writing, the exact repercussions of the covid-19 pandemic on the private equity sector remain unclear. According to the available data, most notably the H1 2020 European Private Equity Activity Report,[5] the first half of 2020 was marked by an overall decrease in fundraising (–4 per cent), investments (–17 per cent) and divestments (–49 per cent) with regard to the first half of 2019.

It is expected that these levels were also reflected in Portugal. In fact, the country is currently facing an economic downturn largely linked to the pandemic, which has halted the trends of systematic growth registered in the past years.

ii Operation of the market

Management incentive arrangements

Management incentives may be structured as compensation schemes linked to predetermined performance thresholds, equity-linked participation programmes, granting managers the option to acquire shares at a discount or vesting mechanisms where shares are gradually 'unlocked' and offered to managers at a discount. Furthermore, exit bonuses are standard market practice for almost any private equity entity in Portugal. From a strategic point of view, equity incentives are a reliable source of interest alignment between the management and the company, constricting both parties to equal goals and targets.

Because management incentive arrangements are designed to intersect interests of both the management and the investors, general prohibitions (or severe restrictions) on the transferability of equity or the incentive itself are used to ensure that it is exclusively held for the benefit of management. This kind of mechanism is complemented by the fact that, in the event of change of management, the interest may be transferred back to the company or to the majority shareholder. For this purpose, 'good-leaver' and 'bad-leaver' provisions are used to adjust the vested equity accordingly.

Ratchet arrangements are mechanisms designed to align the amount of equity held by owner managers with the performance of the company after the initial investment. However, ratchet arrangements are not regulated under Portuguese law, and the question of whether the gains obtained from such arrangements are taxed as labour remuneration (and consequently subject to personal income tax and social security) or as capital gains is currently still under discussion and may vary according to the particular structure implemented.

II LEGAL FRAMEWORK

i Acquisition of control and minority interests

Portuguese law sets no restrictions – neither legal nor regulatory in nature – on the ownership of companies and assets by foreign entities or individuals, except for a foreign investment control screening (approved by Decree-Law No. 138/2014 of 15 September 2014) over particularly sensitive industry sectors, based on reasons of national defence and security and/or security of supply of services fundamental to the national interest. Indeed, the acquisition of direct or indirect control over main infrastructures and assets related to (1) national defence and security and/or (2) the supply of essential services in the energy, transport and telecommunications sectors, by nationals of a non-European Economic Area

5 Published by Invest Europe and available at www.investeurope.eu/media/3497/invest-europe-h1-2020-activity-report-final-28102020.pdf.

© 2021 Law Business Research Ltd

country, either an individual or legal entity, may trigger an investigation procedure by the cabinet member overseeing the relevant sector. Should the government ultimately determine that the acquisition might harm national interest by threatening either the country's security or its provision of fundamental services, the transaction may be deemed null and void. Even though this screening mechanism has been in place since 2014, to our knowledge it has not been enforced to date. Also, contrarily to what happened in other European jurisdictions, no 'covid-19 specific' foreign investment control legislation has been enacted to date.

Even though the national regime seems to be compatible with the Regulation (EU) No. 2019/452 of the European Parliament and of the Council dated 19 March 2019, which establishes a framework for the screening of foreign direct investments into the Union, and which came into force on 11 October 2020 (the FDI Regulation), it is clearly less restrictive, being possible the amendment of the screening mechanisms in Portugal to accommodate the EU's recent guidance on this matter.

In fact, it is already apparent that players involved in M&A transactions show an increasing concern about this type of screening when selecting bidders or preparing a bid for assets in strategic sectors.

Portuguese law sets some rules on group companies, which are relevant for the acquisition of minority and control interests. Indeed, according to the provisions of the Portuguese Companies Code, whenever a simple interest relationship is established (i.e., a company holds an interest equal to or greater than 10 per cent in another company), the acquirer company must notify the acquired company, in writing, of all acquisitions and divestments in the latter's equity.

In the case of a company that establishes a relationship of control in another company, which is presumed after the acquisition of a majority stake, if the acquirer has more than half of the voting rights or if it has the possibility of appointing more than half of the members of the board of directors or of the supervisory board, the dependent company may not purchase shares of the former company.

Pursuant to the Portuguese Companies Code, if a company acquires 100 per cent of the share capital of another company, a general shareholders' meeting must be convened by the board of directors of the dominant company within six months, to decide whether to dissolve the dependent company, transfer the shares of the dependent company or maintain the existing situation.

Portuguese law also contains squeeze-out and sell-out rules applicable as follows: if a company acquires, directly or indirectly (by means of a company in the same group, or through a dependent company) an interest greater than 90 per cent in another company, the acquiring company must notify the latter of this fact within 30 days of the moment that this amount of interest was achieved. A squeeze-out mechanism is available within six months of the notification, whereby the dominant company may secure the remaining equity from the other shareholders. Similarly, if the dominant company does not squeeze out the remaining shareholders, any minority shareholder may, at any time, demand in writing that the majority shareholder purchases the remaining shares from it, within a time limit of not less than 30 days. In the absence of said purchase, or it being considered unsatisfactory, the minority shareholder may request a judicial purchase from a court of law.

Particularly relevant to private equity investors that do not acquire large interests in their targets, the Portuguese Company Codes ensures, through multiple provisions, that minority shareholders are protected from certain abuses.

© 2021 Law Business Research Ltd

First, in public limited liability companies (SAs), although the general shareholders' meeting must be convened according to the law or when any of the boards (board of directors, audit commission, executive management council, audit committee, general and supervisory council) deems it necessary, it will also be convened when one or more shareholders with an interest exceeding 5 per cent requires it. As for private limited liability companies (Ldas), all shareholders may request the managers to convene a general shareholders' meeting or include items in the agenda, and no shareholder may be restricted from participating in the general shareholders' meeting, even if it is prevented from exercising its voting rights.

For a public or private limited liability company to decide on matters such as changes to the company's by-laws, mergers, demergers, transformations or dissolution, a qualified majority is required.

Regarding information rights, public and private limited liability companies operate under different frameworks. Any shareholder of a public limited liability company that holds an interest equal to or greater than 1 per cent of the share capital may, on the basis of justified grounds, consult (1) management reports, accounts, supervisory boards and certified public accountants' reports for the previous three years; (2) convening notices, minutes and attendance lists of the general or special shareholders' meetings or bondholders' meetings for the previous three years; (3) the global remuneration amounts paid to members of the company bodies for the previous three years; (4) the global remuneration amounts paid to the highest-paid employees; and (5) share registry documents. In private limited liability companies, managers must provide true, complete and clear information on the company's management and ensure that inspection of books and documents can be made by any shareholder that so requests it. Although this information right may be further developed in the company's by-laws, its effective exercise may not be prevented or unjustifiably limited in the by-laws.

To prevent abuses by majority shareholders, resolutions approving the non-distribution of profit with the intent to pressure minority shareholders into relinquishing their shares; the increase of share capital with the intention of rendering minority shareholders unable to partake in such an increase; or the change of company headquarters may be annulled if the court finds that the resolution was intended to harm the interests of the company or some of its shareholders.

On the other hand, like majority shareholders, minority shareholders are also subject to the provisions of the Portuguese Companies Code, which may prevent improper conduct such as the abuse of judicial opposition to corporate resolutions with the intent of forcing the company to carry out a transaction that specifically benefits the objector, or even the withholding of votes in favour of a proposed change of the by-laws that is essential to preserving the corporate interests, when those votes are essential for the approval of the relevant resolution.

ii Fiduciary duties and liabilities

Pursuant to the Portuguese Companies Code, directors are subject to fiduciary duties, namely the general duties of care and of loyalty. The duty of care is defined as the standard of a diligent and responsible businessperson and requires directors to have the availability and willingness to carry out the company's management, the proper technical capacity and skills for the performance of the relevant functions and an understanding of the company's business, appropriate for the due performance of the role.

© 2021 Law Business Research Ltd

Directors are also bound by a duty of loyalty according to which they must exclusively act in the best interests of the company and of the stakeholders who are relevant for its sustainability, in particular employees, customers and creditors. In addition, the duty of loyalty also comprises three fundamental principles, namely: (1) a non-competition obligation towards the company; (2) a prohibition on taking advantage of corporate opportunities; and (3) a prohibition on trading with the company, except in specific, legally established, situations.

Furthermore, rules set out in the Portuguese Company's Code establish that directors must avoid any activity that can result in a conflict of interest with the company unless express consent has been granted by the general meeting of the shareholders and may not vote on resolutions of the board of directors if they are conflicted in any way (for example, if they are involved in a management buyout). Directors may only enter into agreements with the company in the situations strictly set out in law, may never use the company's assets for their own benefit or the unlawful benefit of third parties and are bound by a duty of confidentiality in respect of information related to the company that is not available to the public.

The duties directors are bound to may be further expanded by means of management agreements and in the by-laws of the company.

Managing entities of private equity funds are subject to specific provisions, established in Law No. 18/2015.[6] The managing entity, in the exercise of its functions, acts on behalf of the investors, independently and in their exclusive interest, with the obligation to perform all acts necessary for a diligent and responsible administration of the private equity fund, according to high levels of integrity, diligence and professional ability. In the performance of its duties, a managing entity shall safeguard the legitimate interests of the investors, refrain from entering into arrangements that may lead to a conflict of interests with investors and set up an organisational structure and internal procedures proportional to the size and complexity of their activity. Apart from being bound to the duties of care and loyalty set out above, directors of managing entities must satisfy demanding fit-and-proper criteria established by the Portuguese Securities Market Commission (CMVM).

In accordance with general principles governing civil liability, any director that wilfully or negligently infringes another person's right, or a legal provision designed to protect the interests of others, is obliged to indemnify the aggrieved party for the damage arising from the infringement. Damage caused to the company, shareholders or third parties may arise from an action or omission in breach of the legal or contractual duties of a director. In respect of damage caused to the company, Portuguese law lays down a rule of fault-based liability, albeit with a presumption of guilt, rather than one of strict liability. Therefore, directors are liable for the damage caused to the company, unless they prove that they did not act with fault. Directors are also liable for damage directly caused to shareholders and third parties to the extent that the aggrieved parties provide evidence of unlawful or negligent conduct on the part of the relevant director that resulted in the damage; furthermore, the director's liability is joint and several with the other directors. Furthermore, directors can be held responsible for damage to creditors of the company, and the applicable rules in this case do not differ

6 Law No. 18/2015 of 4 March 2015, as amended by Decree-Law No. 56/2018 of 9 July 2018, by Decree-Law No. 144/2019 of 23 September 2019, and, more recently, by Decree-Law No. 25/2020, of 7 July 2020, transposed Directives Nos. 2011/61/EU and 2013/14/EU of the European Parliament and of the Council and executed Regulations Nos. 345/2013 and 346/2013 of the European Parliament and of the Council, developing the legal framework applicable to private equity investment activities.

© 2021 Law Business Research Ltd

significantly from those regarding damage caused to shareholders and third parties, with the single difference that the aggrieved party bears the burden of proving that the non-payment of the claims is because of the insufficiency of assets of the company and that the insufficiency arises from the director's fault and the breach of the legal provisions designed to protect creditors of the company. The insufficiency of assets alone is not enough to establish the directors' liability.

One or more shareholders holding a minimum share quota of 5 per cent of the company (2 per cent in listed companies) may, in the name and on behalf of the company, file a lawsuit against a director with the intention of receiving compensation for the damage suffered, without prejudice to other lawsuits for compensation in respect of individual damage caused to that same shareholder.

III YEAR IN REVIEW

i Recent deal activity

In 2019, the amount of assets under management registered a notorious increase of €316 million in comparison with 2018, reaching a total of €5.1 billion by the end of the year. Contrary to 2018, this was accompanied by an increase in the value of local private equity investment (of approximately 17.6 per cent).

Turning now to 2020, the year was marked by the exceptional circumstances brought by the covid-19 pandemic, which lead to a reduction in the volume of deals. Despite this impact, there was a relevant increase in deal value, with some exceptional high-value private equity deals in Portugal, including the acquisition by Partners Group from Bridgepoint of a major equity stake in Rovensa (formerly Sapec Agro Business), a leading provider in the agrochemical industry, which was founded and is headquartered in Portugal (with offices in 223 countries). One of 2020's most significant buyouts in the Portuguese private equity sector, the transaction values Rovensa at an enterprise value of around €1 billion.

Considering the uncertainty with regard to the current context, private equity funds focused on the funding needs of their current portfolio, without prejudice of maintaining interest in deals over assets with good performances. There was an increase in the number of funds, both from international general partners targeting the Iberian market and from national players. Nonetheless, the concentration of funds, aligned with difficulties in identifying assets with adequate conditions for investment, may explain why some divesting funds opted to maintain a significant stake in the companies being sold, or even to re-invest with the buyer in such assets, leading to uncommonly high roll-over values.

ii Financing

Private equity transactions are generally carried out with resort to the equity raised by the private equity entity, but also with support in external financing.

Debt financing structures include senior term facilities, senior revolving facilities and mezzanine facilities, which usually require security packages, including pledges over shares, receivables and credit rights under the transaction documents, subject to financial assistance rules.

An important restriction that private equity entities face when resorting to leveraged acquisitions is the prohibition against financial assistance (financing or securing the acquisition of a public limited liability company's own shares). However, there are mechanisms to mitigate the effects of this prohibition, namely the granting of pledges over the target's shares by its

© 2021 Law Business Research Ltd

shareholders or the tranching of facility agreements to segregate amounts that may be secured by the target company (for example, in respect of working capital requirements) from those that may not (namely, those raised for the acquisition of the target's shares) and resorting to distributions of free reserves or reduction of share capital.

iii Key terms of recent control transactions

Private equity transactions each have their own characteristics, their terms depending on a number of factors, including, but not limited to, the quality and quantity of information disclosed by the seller, the timeline of the transaction taking place and whether due diligence is carried out beforehand.

To mitigate risk, a contractual framework of representations and warranties is usually negotiated between the buyer and seller (more or less robust depending on the profile of the parties, the assurance provided during the due diligence process and the negotiation phase of the transaction) that, if breached, may lead to a number of consequences, typically an indemnity in respect of a claim for damages subject to *de minimis*, thresholds and caps. Contingencies identified in the due diligence process are either addressed as a price reduction or a specific indemnity. In private equity deals, parties tend to resort to warranty and indemnity insurance (generally purchaser insurance) to cover the purchaser against a breach of the representations and warranties, subject to certain limitations, excluding the contingencies known by the purchaser (revealed in the disclosed information) and certain uninsurable matters.

Risk can also be mitigated by means of purchase price structure or adjustment clauses. The most common mechanisms for structuring the purchase price are the locked-box mechanism and a purchase price adjustment based on completion accounts, which are essentially distinguished by the date of transfer of economic risk. With the locked-box system, the valuation of an invested company is based on a historical set of reference accounts (the locked-box accounts), usually dated before the closing of the transaction. This mechanism is the most commonly used in private equity deals and particularly favourable to the seller as there will be no subsequent purchase price adjustment and it results in a swifter, simpler and more cost-friendly deal, as both parties will know the amounts each party has to receive or concede at a specific moment of the transaction. The locked-box system may have variables, namely by setting an interest in favour of the seller to compensate it for the earnings until closing. Recent deals bring more complexity to the locked-box system with 'hybrid' solutions as to the cash produced or date of valuation of the company. Under the completion accounts clause, the definition of the final price is deferred until the moment of the closing of the transaction, with the investor disbursing the purchase price in accordance with the real level of assets and liabilities of the target at closing. The parameters according to which the adjustments of the final value of the purchase price are calculated are usually contractually established in the share sale and purchase agreement.

Conditions precedent are also frequent and standard market practice in almost any private equity transaction, their terms and scope depending on, among other factors, the sector and industry of the target and the need to obtain any regulatory authorisations or third-party waivers or approvals.

As a general standard, the fulfilment of conditions precedent may include both best effort and cooperative obligations. The former determines the amount of effort expected and required of the buyer to satisfy the conditions precedent. The level typically agreed regarding the accomplishment of conditions precedent related to merger control or

© 2021 Law Business Research Ltd

regulatory authorisations is that of 'commercially reasonable efforts'. On the other hand, cooperative obligations set both parties' mutual duties to cooperate in the attainment of the conditions precedent (e.g., reciprocally providing sensitive information and reviewing filings to regulatory authorities). 'Hell-or-high-water' clauses, imposing upon buyers the obligation to do all that is necessary (as required by the relevant regulatory authorities) to satisfy the conditions precedent, are not common, because of their potential to harm the buyer or the target.

Considering the difficulties in ensuring the investor's willingness to obtain financing for the transaction between the signing and closing, there is usually some reluctance on the part of the seller to include related conditions precedent. Should a special purpose company be incorporated by the buyer to acquire the target shares upon the closing, it is common for the seller to ask for an equity commitment letter to be provided. This letter is only to be effective when the transaction's conditions precedent, as set out in the sale and purchase agreement, are fulfilled.

The exceptional circumstances brought by the covid-19 pandemic were also reflected in the contractual conditions, namely with more complex price structures including some seller financing mechanisms (e.g., deferred purchase price, earn-out mechanisms, among others).

While the legal system in place in Portugal is grounded in civil law, the importance of major common law jurisdictions such as the United Kingdom and the United States in international business has significantly shaped the framework for cross-border deals. Even though Portuguese law governs the overwhelming bulk of transactions involving Portuguese companies, it is within the parties' powers to freely choose a different governing law for the transaction documents. This is more common when one of the parties is a foreign investor. Accordingly, as long as Portuguese law's mandatory rules (such as governing provisions on the transfer of shares, assignment of credits and obligation, among others) are abided by, parties to contracts of either a civil or commercial nature have the right to determine the governing law as provided for in the Rome I Regulation,[7] which is in force in Portugal.

iv Exits

Conversely to 2018, overall divestment experienced a significant decline in 2019, totalling €51.3 million (from €163.4 million in the previous year). In 2019, divestments were in large part made through third-party sales, which amounted to 60.4 per cent of the total divestment in private equity assets and are mainly concentrated in companies in the start-up stage.

Following the trend of previous years, no divestments were made through an initial public offering.

IV REGULATORY DEVELOPMENTS

Pursuant to the Portuguese Securities Code and Law No. 18/2015 (the Legal Framework for Private Equity), prudential and market conduct supervision of private equity entities in Portugal is carried out by the CMVM.[8] As regulator, the CMVM has legislative competencies

7 Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations.

8 Regarding the supervision of managing entities of private equity investment undertakings, the CMVM may cooperate with the Portuguese Central Bank and the European Securities Market Authority.

© 2021 Law Business Research Ltd

and sets out the rules on, but not limited to, asset and debt valuation, accounting organisation, duties of information and fit-and-proper requirements of the members of the corporate bodies and holders of qualified shareholdings of and in private equity entities.[9]

With the introduction of the Legal Framework for Private Equity, private equity entities may be subject to one of two legal regimes, depending on the value of their assets under management. If the asset value under management of a private equity entity is greater than €100 million (in respect of portfolios containing assets acquired with recourse to leverage) or €500 million (in respect of portfolios not containing assets acquired with recourse to leverage and in respect of which there are no redemption rights for an initial five-year period), private equity entities are considered to be above a relevant, legally established threshold, and are subject to a more demanding legal framework than entities that do not have assets under management that cross any of these two thresholds. Private equity entities that fall under the more demanding framework are subject to, among other things, the following rights and obligations:

a the prior authorisation of the regulator for their incorporation;
b the EU passporting system for banks and financial services applicable to the private equity fund participation units concerned;
c disclosure to the regulator of outsourcing of management and other services; and
d a requirement for the implementation and maintenance of conflict-of-interest policies to avoid, identify and manage potential conflicts.

In 2018, Decree-Law No. 56/2018 of 9 July 2018 amended the Legal Framework for Private Equity. Among other changes, the Decree-Law (1) removed the 10-year time limit on the qualification of private equity investments, allowing private equity companies and funds to manage their portfolio in a more flexible way; (2) introduced further clarification of the calculation methodology to be followed to determine the legal framework applicable to private equity entities; and (3) extended the scope of private equity investments aimed at promoting social entrepreneurship to include entities other than companies, such as associations and foundations.

In 2019, Decree-Law No. 144/2019 of 23 September 2019 also amended the Legal Framework for Private Equity, which provides for the transfer to the CMVM of the powers and competences relating to the prudential supervision of investment fund management companies and securitisation fund management companies, which was previously carried out by the Bank of Portugal. This legal act incorporated credit funds (loan funds) in the Portuguese legal system and qualified them as specialised alternative investment schemes of credit, with a view to fostering the capital market and diversifying companies' sources of funding, providing financing. These funds are committed to financing the economy directly through the granting of credit to companies and indirectly through the acquisition of credits, including non-performing loans held by banks. Notwithstanding, these funds are not allowed to carry out certain operations, such as short sales of securities; securities financing transactions, including securities lending; or derivatives, except for the purpose of risk coverage. Additionally, these funds are not allowed to lend money to natural persons or financial institutions.

9 CMVM Regulations Nos. 3/2015 (as amended by Regulations Nos. 5/2020 and 6/2020) and 12/2005.

© 2021 Law Business Research Ltd

In 2020, the Legal Framework for Private Equity was once again amended by Law No. 25/2020, of 7 July 2020, which introduced slight adjustments to the terms and conditions of the administrative offences foreseen for the breach of the obligations set out in this legal regime.

Furthermore, within the scope of its legislative competencies, the CMVM has recently enacted new regulations, among which we can highlight: (1) CMVM Regulation No. 1/2020, defining the form and content of the transparency obligations of collective investment scheme management companies and credit securitisation fund management companies, to inform the CMVM on a quarterly basis of their economic and financial situation; as well as (2) CMVM Regulation No. 5/2020, which amends CMVM Regulation No. 3/2015 to set up the legal framework applicable to loan funds, as provided for in Decree-Law No. 144/2019, of 23 September 2019.

In light of the covid-19 pandemic, the Development Finance Institution has also approved solutions aimed at facilitating the execution of financing operations through private equity funds[10] (e.g., until 31 December 2020, private equity funds were entitled to carry out investment rounds without the mandatory entry of new independent investors).

V OUTLOOK

By the end of 2019, following the developments of private equity investment registered in Europe, the total amount of assets under management in the private equity sector maintained the growth trend of previous years.

However, although turnaround transactions still represented the majority of private equity deals in Portugal in 2019, there has been a continued decrease in this type of transaction, replaced by a trend for growth investment and management buyouts. This rebalancing of private equity, undertaken by more speculative participants through more conservative transactions, indicates that the market has matured and traditional investors are becoming more confident in the domestic business fabric.

While it is likely that this trend of systematic growth will no longer be experienced in 2020, there are several factors that can lead the sector to a swift recovery, reinstating 'pre-pandemic' standards.

For one, the Portuguese state has been making significant efforts to protect the economy from a potential recession, enacting remedies aimed at mitigating the economic impacts of this exceptional situation (e.g., credit lines and subsidies). Such solutions will also be complemented by an exceptional stimulus package from the European Union.

Besides this, the increased adaption of companies to this 'new normal', and the emergence of new sectors of activities can open the door to new investment opportunities. Other aspects, such as new private equity firms becoming active in the domestic market, continued appetite of global private equity firms in the Iberian and Portuguese markets, political and regulatory stability, low interest rates, an increase in financial fund willingness to invest in certain transactions may also prove crucial for the development of the private equity sector in Portugal in the coming years. In fact, it is possible that we assist to a recovery in deal volume in the post pandemic context, including transactions that started to be prepared

10 www.ifd.pt/pt/medidas-de-flexibilizacao/.

© 2021 Law Business Research Ltd

last year but were delayed because of the unfavourable economic environment caused by the covid-19 pandemic, as well as some opportunities for distressed investments in companies that had a worse performance during this period.

© 2021 Law Business Research Ltd

Appendix 1

ABOUT THE AUTHORS

MARIANA NORTON DOS REIS

Cuatrecasas

Mariana Norton dos Reis has been a partner in Cuatrecasas' corporate M&A group since 2010. She worked at the Madrid office from 2004 to 2017 and is currently based in the Lisbon office, where she started her career in 1998.

Her practice, both in Portuguese and Spanish law, is focused on cross-border M&A, joint ventures, private equity transactions and restructurings, and she has extensive experience in renewable energy and infrastructures. She regularly acts for private equity investors on their investments and divestments, and represents strategic investors in connection with cross-border acquisitions and sales of privately owned companies and assets.

Mariana obtained her Bachelor of Laws from the University of Lisbon School of Law (1997) and her Master of Laws (LLM) in advanced corporate law and securities from Columbia Law School, New York (1998).

She is a member of the Portuguese Bar Association and the Madrid Bar Association and was admitted to the New York State Bar Association.

Mariana is also the founder and coordinator of the Women in Business programme at Cuatrecasas and secretary of the Women's Interest Group at the IBA.

MIGUEL LENCASTRE MONTEIRO

Cuatrecasas

Miguel Lencastre Monteiro has been an associate in Cuatrecasas' corporate and commercial practice since 2018. He obtained his Bachelor of Laws from the Catholic University of Portugal in Porto (2015) and completed the curricular part of a master's degree in law and management at Nova University Lisbon. He has been a member of the Portuguese Bar Association since 2018.

His practice is focused on cross-border M&A in Portugal, joint ventures and private equity transactions, having been involved in major transactions within renewable energy (especially in hydroelectric, wind and solar power plants) and infrastructure sectors.

© 2021 Law Business Research Ltd

CUATRECASAS

Avenida Fontes Pereira de Melo, No. 6
1050-121 Lisbon
Portugal
Tel: +351 21 355 3800
Fax: +351 21 353 2362
mariana.norton@cuatrecasas.com
mlmonteiro@cuatrecasas.com
www.cuatrecasas.com

© 2021 Law Business Research Ltd

an **LBR** business

ISBN 978-1-83862-812-3

© 2021 Law Business Research Ltd