CUATRECASAS

Corporate Law

Newsletter | Portugal

3rd Quarter 2019

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I. 200M Co-investment Fund and amendments introduced by Decree-Law 99/2019 of July 31

Decree-Law 126-C/2017, of October 6, established the 200M Co-investment Fund (the "**Fund**"), managed by PME Investmentos, to carry out equity and quasi-equity investments in commercial small and medium enterprises (SMEs) under the co-investment regime. With an initial capital of €100 million, it is supported by the Portugal 2020 programs and fully financed by the European Structural and Investment Funds (ESIF). Its purpose is to encourage private investors to finance 50% of the final amount delivered to product and process innovation projects. Based on this premise, the Fund pursues the following objectives:

- Encouraging incorporation or capitalization of companies, primarily in the start-up stages (seed, start-up, later stage venture – Series A and B).
- Fostering the increase of venture capital activity in Portugal through mobilization of specialized national and international venture capital entities that, besides the financial investment, will allow companies to acquire knowledge and technical, commercial and financial experience.

Operation and investment policy

Highlights

- The Fund's contribution to each investment operation may not exceed the total investment of the co-investors, with a minimum of €500,000 and maximum of €5 million.
- The Fund and the co-investor cannot hold a joint interest equal to or greater than half the share capital or voting rights in the investee company.
- The Fund's investment takes place under the same terms and conditions as the investment by the co-investors.
- The financial involvement of the co-investors and the Fund in the SMEs must include at least 70% of equity or quasi-equity instruments.
- Preference is given to investments in life sciences or biotechnology, information technologies, tourism and activities within the scope of Industry 4.0.
- The total amount of the investment co-financed by the ESIF cannot exceed €15 million per eligible company.
- The Fund grants private national and international co-investors a call option on its shares at a 4% IRR in the first two years and 6% IRR up to the end of the fourth year.
- The deadline for investments in eligible SMEs is December 31, 2020.

Investee eligibility criteria

- It must be a commercial company classified as an SME.[1]
- Its tax and social security situation must be in order, and it will be verified at the time of signing the financing agreement.
- It must have, or be able to ensure by the date of approval of the application, the necessary technical, physical and financial means and human resources to develop the operation.
- It must not be a company in difficulty.[2]
- It must keep its accounting under the terms of the applicable legislation.

Amendments introduced by Decree-Law 99/2019 of July 31

Decree-Law 99/2019 was published on July 31, 2019, introducing the second amendment to Decree-Law 126-C/2017 of October 6, "*to simplify and strengthen the equity and quasi-equity investment operations in small and medium enterprises.*"

Highlights

Co-investors with a permanent activity in Portugal are equal to co-investors with a temporary activity for the purposes of the Fund (changing the wording of article 2(a) of Decree-Law 126-C/2017, which excluded national co-investors from access to the program). Therefore, any domestic or foreign entity can now apply to the Fund as co-investor, provided it is one of the types of entities listed in article 1 of the Venture Capital, Social Entrepreneurship and Specialized Investment Legal Regime, enacted by Act 18/2015, of March 4, specifically (i) venture capital companies; (ii) venture capital fund management companies; (iii) venture capital investment companies; (iv) venture capital funds, including the "EuVECA"; (v) investors in venture capital; (vi) social entrepreneurship companies and funds, including "EuSEF"; (vii) specialized alternative investment companies and funds; or (viii) other entities or individuals who can participate in the share capital of companies in Portugal and have already carried out operations similar to those established under that legal regime.

Other important changes:

- Greater complementarity of the Development Financial Institution's financial instruments, aligning the Fund's operations with other funds through ESIF or national public offset (amending article 2(d) of Decree-Law 126-C/2017).
- Making the management of the Fund more flexible, allowing the expenses related to its day-to-day activity to remain within the scope of its management and activity.

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[1] Under the terms of Recommendation 2003/361/EC, as proven by Electronic Certification as SME, issued under Decree-Law 372/2007 of November 6

[2] Under the definition provided in article 2 of Regulation (EU) No. 651/2014 of June 16.

- The Fund will be able to keep in its portfolio the shares of companies that used to be classified as SMEs but no longer are.

These changes expand the pool of potential co-investors by relaxing the eligibility criteria. Recently, the Investment Committee approved three more operations (Barkyn, EatTasty and a third yet to be announced) with a total investment of €15 million, of which about €6 million is the Fund's investment. These new investments are in addition to those already made in Biosurfit, 360imprimir and LiMM Therapeutics, for a total investment of approximately €50 million.

Applications are still open, and 20 applications had already been submitted by August 2019.

II. EU legislation

Directive (EU) 2019/1151 of the European Parliament and of the Council of June 20, 2019

This Directive amends and updates Directive (EU) 2017/1132, which establishes rules on disclosure and interconnection of Member States' central, commercial and companies' registers.

Directive (EU) 2019/1156 of the European Parliament and of the Council of June 20, 2019

This regulation aims to facilitate crossborder distribution of collective investment activities and amends Regulations (EU) 345/2013, (EU) 346/2013 and (EU) 1286/2014.

Its main innovation is the creation of a central database on crossborder marketing of collective investment projects.

Some of the main purposes of this Directive include:

- increasing transparency and investor protection;
- fostering good investor protection practices; and
- providing access to information on national laws, regulations and administrative provisions applicable to marketing communications addressed to investors.

III. National legislation

Decree-Law 109/2019 - Diário da República No. 155/2019, Series I of 2019-08-14
This decree-law simplifies and harmonizes the procedures traders must follow in their communications to the Authority for Economic and Food Safety when they want to carry out sales or liquidation.
This decree-law entered into force on September 14.

Act 97/2019 - Diário da República No. 169/2019, Series I of 2019-09-04
This law is the first amendment to Decree-Law 19/2019, of January 28, which enacted the legislation governing investment and property management companies and entered into force on August 19, 2019.

Act 69/2019 – Diário da República No. 164/2019, Series I, of 2019-08-28
This law transposes into the national legal system Regulation (EU) 2017/2402 of the European Parliament and of the Council of December 12, 2017, establishing a general framework for securitization and creating a specific framework for simple, transparent and standardized securitization.

Decree-Law **127/2019 - Diário da República No. 165/2019, Series I of 2019-08-29**
This decree-law amends the governance model and the general rules on application of European Structural and Investment Funds.
This decree-law entered into force on August 30, 2019.

Decree-Law **128/2019 - Diário da República, Series I of 2019-08-29**
This decree-law amends the legislation on restrictive trade practices and will enter into force on October 29, 2019.

IV. National case law

Judgement of the Supreme Court of February 26, 2019

This ruling analyzes the validity of corporate resolutions on the dismissal of managing partners.

A company limited by shares passed a resolution to dismiss a director and subsequently passed a resolution of "endorsement" of the fact that the resolution had been passed without giving notice. The same company later passed a resolution to dismiss a partner.

On the question of the validity of the resolution to dismiss a director on the grounds of "*unilateral acts carried out by the director in her favor to the detriment of the company and without its knowledge,*" and of the endorsement resolution, it should be borne in mind that the capital

of the company was owned by two shareholders, and both resolutions had been voted on only by the majority shareholder.

The question was whether the company was entitled to dismiss the director out of court since it only had two partners, under article 257.5 of the Companies Code, which provides that "*if the company only has two partners, the dismissal of management on the grounds of due cause can only be decided by the court in an action brought by one of the parties*."

The court found that what was at issue was a dismissal for cause, stating that the latter relates to "*principles of trust and good faith that must be observed by those who hold this position in the company, principles that are very relevant in relations with the company creditors, shareholders and third parties, so that the transparency of behavior and the ethical rigor of the conduct can be objectively and subjectively evaluated*."

The court concluded that the dismissal through a resolution of one of the partners was null, further asserting that article 257.5 presupposes a situation of dismissal of a managing partner, and that its intention is to shift the dispute from the company-shareholder field to the partner-partner field. The endorsement resolution was also considered null for the same reasons.

With regard to the resolution to expel the partner, the court ruled that it was also invalid, noting that, *"as management does not constitute a special right, and the function or position is transient, the partner dismissed from management continues to be a partner; however, the exclusion of a partner is much more severe for the excluded person. A fortiori, exclusion of the partner, in the event that there are two partners, can only be validly decreed by a court ruling."*

The Supreme Court agreed with the Court of Appeal on everything and denied the review.

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