The Private Equity Review

Ninth Edition

Editor
Stephen L Ritchie

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THE PRIVATE EQUITY REVIEW

NINTH EDITION

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PREFACE

The ninth edition of *The Private Equity Review* follows another extremely active year for dealmakers in 2019. While the number and value of global private equity deals completed declined slightly from 2018, deal activity was still robust, weighted towards the upper end of the market, and included several large take-private transactions. Fundraising activity was also strong with aggregate capital raised just slightly below 2018's record levels, as institutional investors remained extremely interested in private equity as an asset class because of its continued strong performance. That, combined with some caution due to an uncertain market environment, has resulted in private equity funds having significant amounts of available capital, or dry powder. This dry powder, together with competition from non-traditional dealmakers, such as sovereign wealth funds, family offices and pension funds, led to very competitive transactions being completed at increasing 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. Given private equity funds' dry powder and creativity, we expect private equity will continue to play an important role in global financial markets, not only in North America and western Europe, but also in developing and emerging markets in Asia, South America, the Middle East and Africa. In addition, we expect the trend of incumbent private equity firms and new players expanding into new and less established geographical markets to continue.

While there are potential headwinds – including trade tensions, the upcoming US election and an eventual end to one of the longest-running recoveries in US history – on the horizon for 2020 and beyond, we are confident that private equity will continue to play an important role in the global economy, and is likely to further expand its reach and influence.

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 22 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.

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I want to thank everyone who contributed their time and labour to making this ninth edition of *The Private Equity Review* possible. Each of these contributors is a leader in their 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 2020

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Part II

INVESTING

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Chapter 14

PORTUGAL

Mariana Norton dos Reis and Miguel Lencastre Monteiro[1]

I OVERVIEW

i Deal activity

According to the 2018 European Private Equity Activity Report,[2] approximately €80.6 billion of equity was invested in European companies in 2018, with €58.8 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 €11.9 billion, meaning that seed, start-up and later-stage financing (venture capital) make up 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 €51.2 billion capital investment made domestically within European countries and €25 billion made in cross-border investments within Europe. The most targeted sectors were business products and services, ICT (communications, computing and electronics) and consumer goods and services, with a combined share of approximately 62.5 per cent of all private equity investment made in Europe.

This conjuncture was reflected in Portugal, whose economic growth, albeit with some deceleration, affected its private equity market while maintaining similar distributions of investment by stage and sector.[3] Following the growth trend of previous years, assets under management (sum of equity, financing, liquidity, options on derivatives and other private equity assets) reached €4.8 billion by the end of 2018, with an increase of €42.9 million in comparison with the previous year. This positive development was due to an increase in the number of equity funds operating in the Portuguese private equity sector (from 95 to 117). Notwithstanding, the investment amount (i.e., the sum of equity and other investments) decreased 2.9 per cent in 2018. Equity only accounted for 33.2 per cent of the total amount invested in the national private equity sector, while other investments appear as the major target in 2018, amounting to up to 66.8 per cent (€2.3 billion). Of these other investments, accessory contributions, shareholder loans 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, 6.1 per cent and 21 per cent, mainly due to investments in domestic targets. The value of other investments decreased (6.3 per cent) but

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 www.investeurope.eu/media/2585/invest-europe-2018-european-private-equity-activity.pdf.

3 www.cmvm.pt/pt/EstatisticasEstudosEPublicacoes/Publicacoes/CapitaldeRisco/Documents/CMVM-Relat%C3%B3rio%20Anual%20de%20Capital%20de%20Risco-2018b.pdf.

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only for domestic companies (6.4 per cent). In fact, the amount invested in non-domestic other investment targets increased significantly (115.3 per cent), although this represents a very small percentage of total investments. Furthermore, investments through deposits and cash decreased by 3.8 per cent (to €17.7 million).

Currently, there are 50 private equity companies and 134 private equity funds operating in the Portuguese private equity sector.[4] By the end of 2018, investments of these private equity funds were spread out over 554 targets and investment units in 18 private equity funds, totalling €4.6 billion. Investments of private equity companies are spread out over 63 private equity companies and investment units in 42 private equity funds, totalling €237.5 million. This shows that investment via private equity funds, comprising 95.1 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 is a significant concentration of the Portuguese market, with nine private equity funds representing around 58.9 per cent of total assets under management, with management being carried out by six operators, three of which manage 57.8 per cent of the global fund value. This concentration is also apparent from the fact that eight out of a total of 1,259 equity participations represent approximately 34 per cent of all assets under management registered in Portugal, and the 46 participations with a minimum value of €5 million represent 61.3 per cent of the total managed 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 are quite popular, as they allow end investments not to be disclosed. Excluding such holding companies, the activities that captured the largest amounts of private equity investment in 2018 were the real estate and process industry sectors, which jointly represent 20.4 per cent of the total investment in private equity in Portugal. ICT and hospitality and food service activities also represent an important private equity investment stake in Portugal, following the growth trend verified in the sectors closely linked to tourism.

In respect of the stages of investment, private equity comprises 82.5 per cent of the total investment, with the largest branch of this stage of investment being the turnaround (which represented 33.5 per cent of the total, but with a slight decrease (0.3 per cent) in comparison with 2017) followed by the expansion stage (22.4 per cent). The growth of both the expansion and the replacement capital stages rose from an aggregate proportion of 25.9 per cent to 28.2 per cent. Venture capital evidenced a downturn in the number of participations (from 771 to 754) and the amount of investment captured. At this point, and contrary to the expectations occasioned by the multiple measures implemented by the Portuguese state, the start-up stage holds at 8.4 per cent of the total amount invested, as against 9 per cent in 2017.

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 2018, 64.9 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 28.5 per cent of private equity investment had a term of less than four years and 9.6 per cent were kept for more than 10 years.

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

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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.

Since 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. However, a framework for the acquisition of control over strategic assets was created by Decree-Law No. 138/2014 of 15 September 2014, aiming to ensure national defence and safety, as well as the guarantee the country's supply of national-interest structural services such as energy, transport and communications. Takeovers of assets in any of these areas, which are deemed to be strategic, by nationals of a non-European Economic Area country, either an individual or legal entity, may require a prior assessment 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 might be prevented from occurring.

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

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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.

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 management reports, accounts, supervisory boards and certified public accountants' reports for the previous three years; convening notices, minutes and attendance lists of the general or special shareholders' meetings or bondholders' meetings for the previous three years; the global remuneration amounts paid to members of the company bodies for the previous three years; the global remuneration amounts paid to the highest-paid employees; and 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.

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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 business person 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.

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.[5] 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

5 Law No. 18/2015 of 4 March 2015, as amended by Decree-Law No. 56/2018 of 9 July 2018, and, more recently, by Decree-Law No. 144/2019 of 23 September 2019, 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.

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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 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 due to 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

Even though the amount of assets under management registered an increase of €42.9 million in comparison with 2017, reaching a total of €4.8 billion by the end of 2018, the value of local private equity investment suffered a decrease of 2.9 per cent in 2018, mainly because of a decrease of €103 million in investments made by private equity funds. This dichotomy between the number and the value of deals made shows that the Portuguese market is quite irregular.

In spite of this, various deals were recently completed by private equity funds or companies.

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An investment fund managed by UBS acquired from the Spanish investment fund Artá Capital, SA for a price of €100 million, the Portuguese gas company Gascan-Gases Combustíveis, SA, which distributes around 13,000 tonnes of propane gas per year to more than 700,000 clients.

Sonae Investment Management, AITEC and BPI reached a deal to sell 100 per cent of Saphety Level – Trusted Services, SA to its management team. Saphety's group is divided into three companies that provide communication services, including training and consulting, electronic data processing and certification, marketing, development and electronic software invoicing. The management buyout was supported by Oxy Capital.

An investment fund managed by Atena Equity Partners – SCR, SA acquired Malo Clinic, a health company with a turnover of €30 million and more than 500 employees.

In the insurance sector, Apollo Global Management sold its wholly owned subsidiaries Company Seguradoras Unidas and AdvanceCare to Group Assicarazioni Generali SpA for a total amount of €600 million. The Seguradoras Unidas Group (which owns Tranquilidade, Açoreana and Logo) generated a total value of €800 million in insurance premiums and a profit of €50 million in 2018.

At the end of 2019, in the telecoms sector, MEO (Altice Europe's Portuguese subsidiary) sold almost half of the fibre optic network in Portugal to Morgan Stanley Infrastructure Partners. The transaction was implemented through the spin-off of the fibre optic network into a wholesale vehicle and subsequent transfer of 49.99 per cent of such vehicle to the purchaser. The transaction was based on an enterprise value of €4.63 billion, with €1.565 billion being paid in 2020 and, subject to performance, €375 million in December 2021 and €375 million in December 2026.

In 2020, the Portuguese state has announced that the Development Finance Institution and the European Investment Fund (EIF) have committed €100 million into Portugal Growth Capital Initiative II (PGCi II), the largest private equity and growth capital programme in Portugal, which aims to mobilise more than €500 million to finance small and medium-sized companies. PGCi II will involve an investment period of four years, during which time EIF will select six to seven growth capital and private equity funds managed from Portugal.

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 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.

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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 very much used in private equity deals and particularly favourable to the seller since there will be no subsequent purchase price adjustment and it results in a swifter, simpler and more cost-friendly deal, since 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 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

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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.

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,[6] which is in force in Portugal.

iv Exits

In 2018, divestments were in large part made through third-party sales, which amounted to 67.8 per cent of the total divestment in private equity assets and are mainly concentrated in companies in the expansion 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.[7] As regulator, the CMVM has legislative competencies 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.[8]

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

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

7 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.

8 CMVM Regulations Nos. 3/2015 and 12/2005.

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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 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; introduced further clarification of the calculation methodology to be followed to determine the legal framework applicable to private equity entities; and 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.

The CMVM recently submitted for public consultation a proposal amending CMVM Regulation No. 3/2015 to set up the legal framework applicable to loan funds, as provided for in Decree-Law No. 144/2019. The public hearing ended on 10 January 2020, but there is no information on the enactment of the legal framework.

The CMVM has also recently submitted for public consultation[9] a regulation 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. The public hearing ended on 17 December 2019, but the regulation has not yet been enacted.

9 Public Consultation No. 7/2019.

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V OUTLOOK

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 2018, 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.

Other factors, such as new private equity firms becoming active in the domestic market, increased 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, and several positive macroeconomic forecasts, all augur well for the development of the private equity sector in Portugal in the coming years.

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Appendix 1

ABOUT THE AUTHORS

MARIANA NORTON DOS REIS

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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 infrastructure, advising sponsors, developers and financing entities on creating joint ventures, and acquiring, selling and developing projects.

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. She has recently completed a number of major transactions in the infrastructure, energy, retail, real estate and financial industry sectors in Spain and Portugal.

On an international level, she has extensive experience in advising on M&A transactions for multinational companies in Europe, Latin America and the United States.

In March 2015, *Expansión*, a Spanish business and finance newspaper, named her one of the most active lawyers in M&A in Spain based on the number of deals closed in 2014. In 2017 and 2018, *Iberian Lawyer* included Mariana in its InspiraLAw list of top 50 women in the legal sector and, in 2013, Mariana received the same publication's '40 under Forty Award'.

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 was also named a Harlan Fiske Stone Scholar of Columbia Law School (1998) and received a scholarship from the Luso-American Development Foundation.

Mariana lectured on the master's degree in business law in cross-border mergers at the Autonomous University of Madrid and on the bachelor's of law degree in business administration and management at CEU San Pablo University, Madrid. She is the founder and coordinator of the Women in Business programme at Cuatrecasas and a member of the Women Lawyers' Interest Group Committee of the International Bar Association.

Mariana Norton dos Reis is a member of the Portuguese Bar Association and the Madrid Bar Association. She was admitted to the New York State Bar Association in 2000.

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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.

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