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& ASSOCIADOS
SOCIEDADE DE ADVOGADOS

BRIEFING

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NEWS ON REMUNERATION MATTERS – PRIVATE EQUITY

CAPITAL MARKETS

1. EVOLUTION OF THE REGULATORY CONTEXT

Private equity activity has assumed growing relevance in Portugal as an alternative approach to financing the expansion and development of small and medium-sized national companies. Accordingly the private equity legal framework has been reviewed and updated during the course of the last decade, in order to become a mechanism that promotes investment in the context of the Portuguese economy.

In 2002 private equity companies were excluded from the category of financial companies, and, as a result, they were prohibited from carrying out activities exclusive to credit institutions and financial companies, such as the placement of securities. Similarly, private equity companies ceased to be subject to the supervision of the Bank of Portugal (Banco de Portugal), and were no longer subject to provisions exclusively applicable to credit institutions and financial companies, and became subject solely to the supervision of the Portuguese Securities Commission ("CMVM").

Thereafter, Decree-Law no. 375/2007, of November 8, simplified the private equity legal framework. In particular the incorporation of private equity funds and the commencement of activity of private equity companies, which are currently subject to simplified prior registration with the CMVM, were streamlined. Moreover, in certain cases, including instances where the relevant capital is not offered to the general public, the incorporation of private equity funds and the commencement of activity of private equity companies depends solely on prior notification to the CMVM.

2. NEW OBLIGATIONS REGARDING REMUNERATION POLICY

Clearly veering away from the path that had been forged towards the simplification of the private equity legal framework, Law no. 28/2009, of 19 June, has determined the applicability to private equity companies and managing entities of private equity funds - and, apparently to private equity funds - of a legal framework similar to that of credit institutions and financial companies, in that which pertains to the approval and disclosure of the remuneration policy of its corporate bodies.

Therefore, the management body or the remuneration committee, if applicable, of a private equity company or of a managing entity of a private equity fund will be legally obliged to prepare and submit annually to the general shareholders' meeting a statement on the remuneration policy of the respective management and supervisory bodies.

The declaration must contain, in particular, information on:

a) The mechanisms that allow the alignment of the interests of the members of the management body with the interests of the private equity company;
b) The criteria for defining the variable component of the remuneration;

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c) The existence of stock allocation plans or stock option plans for the members of the management and supervisory corporate bodies;
d) The possibility to pay the variable component of the remuneration, if any, in whole or in part, after the assessment of the accounts of the financial year corresponding to the entire term;
e) The limitation mechanisms for the variable remuneration, if the results evidence significant deterioration in the company's performance over the last financial year or when such deterioration is predicted during the relevant financial year.

As such, and as of the current year, the remuneration policy of the management and supervisory bodies shall be approved at the annual general shareholders' meeting of private equity companies and managing entities of private equity funds, and must be disclosed, jointly with the annual remuneration amount received by the members of said corporate bodies, in aggregate and individual terms, in the annual accounting documents.

It does not seem justifiable, however, that the above regime regarding the preparation and approval of the statement concerning remuneration policy applies to private equity funds, as indeed seems to be the legislator's intention. In fact, private equity funds are managed by a private equity company, or by another type of managing entity of private equity funds (i.e., a managing entity of mutual close-ended funds), and it is mandatory that the remuneration of such entities is disclosed in the respective management regulations, and, therefore, the assemblies of participants do not need to approve the remuneration due to the management of the fund. Conversely, it may be possible to interpret the provision established in Law no. 28/2009, of June 19, in the sense that, in the case of private equity funds, only disclosure is required, in the respective assembly of participants, of the annual remuneration amount paid to the managing entity.

It should be noted that a breach of obligations in respect of the disclosure of the remuneration policy is deemed to be a very serious misdemeanor, which is punishable with a fine of between €25,000 and €5,000,000.

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