ICLG

The International Comparative Legal Guide to:

Private Equity 2019

5th Edition

A practical cross-border insight into private equity

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PREFACE

We are privileged to have been invited to preface the 2019 edition of *The International Comparative Legal Guide to: Private Equity*, one of the most comprehensive comparative guides to the practice of private equity available today. The Guide is in its fifth edition, which is itself a testament to its value to practitioners and clients alike. Dechert LLP is delighted to serve as the Guide's Editor.

With developments in private equity law, it is critical to maintain an accurate and up-to-date guide regarding relevant practices and legislation in a variety of jurisdictions. The 2019 edition of this Guide accomplishes that objective by providing global businesses leaders, in-house counsel, and international legal practitioners with ready access to important information regarding the legislative frameworks for private equity in 31 different jurisdictions. This edition also includes five general chapters, which discuss pertinent issues affecting private equity transactions and legislation.

The fifth edition of the Guide serves as a valuable, authoritative source of reference material for lawyers in industry and private practice seeking information regarding the procedural laws and practice of private equity, provided by experienced practitioners from around the world.

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1 Overview

1.1 What are the most common types of private equity transactions in your jurisdiction? What is the current state of the market for these transactions? Have you seen any changes in the types of private equity transactions being implemented in the last two to three years?

Private equity in Portugal has experienced significant growth despite the financial crisis and sovereign debt crisis, which have loomed over the country in the last few years. According to the latest data available (the Portuguese Securities Market Commission – "CMVM", 2017), value under management by private equity players has been steadily rising since 2003, reaching €4.8 billion by the end of 2017.

Turnaround or distressed transactions have been the most relevant types of private equity deals in Portugal in the last few years, followed by growth capital investment. Nevertheless, venture capital (start-up, seed and early-stage) investing and management buyouts have maintained their relevance throughout 2017.

Other recent trends in the Portuguese market include: (i) the award of European structural and investment funds to capitalise SMEs; (ii) the emergence of in-house venture capital units in large Portuguese corporations, which do early- and mid-stage investments in seed and start-up companies; and (iii) following recent changes in immigration law, the incorporation of private equity funds specifically structured for non-EEA residents to obtain investment residence permits.

With regards to sector allocation of investments, in 2017 real estate, hospitality, manufacturing and information technologies took the lead.

1.2 What are the most significant factors encouraging or inhibiting private equity transactions in your jurisdiction?

The search for yield by investors, as the ECB continues its accommodative monetary policy, still plays an important role in the demand for private equity transactions (notably those concerning infrastructure assets).

Also, as mentioned in the previous question, (i) the launching of public tenders by State-owned entities to capitalise companies, such as tenders to award European Union funds to entities organised as private equity fund managers, and (ii) the use of private equity funds as conduits for obtaining investment residence permits, are also encouraging fundraising and consequently, private equity and venture capital transactions in Portugal.

1.3 What trends do you anticipate seeing in (i) the next 12 months and (ii) the longer term for private equity transactions in your jurisdiction?

For the next 12 months, we expect to continue to see strong numbers in venture capital transactions given the relevance of European structural funds and the success acquired by Lisbon as a start-up hub.

In the longer term, our supposition is that with the end of the first large private equity "investment cycle" in Portugal, many funds will need to be unwound, generating significant volume in transactions with private equity on the sell-side; management entities on the other hand will need to explore new strategies to stay profitable, especially large ones which traditionally focused on turnaround investments.

2 Structuring Matters

2.1 What are the most common acquisition structures adopted for private equity transactions in your jurisdiction?

The typical private equity transaction in Portugal is made through a private equity fund. Pursuant to this structure, the fund participants or LPs (as well as the managing entity, which retains some "skin in the game") subscribe and pay-up units in the fund, after the latter is registered before the relevant regulatory authority in Portugal (CMVM).

The aforementioned investment vehicles then either: (i) acquire equity participations directly or through a wholly owned "BidCo" or subscribe newly issued shares by the target company (in a typical buyout, growth or venture capital deal); or (ii) acquire debt instruments or securities (notably senior bank loans) and convert such instruments into equity, thereby gaining control of the target (in distressed or turnaround transactions).

If the private equity investor does not ultimately come to hold the entirety of the company's equity, a shareholder agreement is generally entered into with the surviving shareholders.

2.2 What are the main drivers for these acquisition structures?

The main drivers for these structures relate to incentive alignment and tax reasons.

Investment using private equity funds is an efficient way for various institutional investors to pool money into alternative asset classes which potentially offer higher yields than public equities or bonds, while avoiding operational risks and regulatory hurdles which would arise from investing directly in non-listed companies. In private equity funds, the managing entity retains a residual equity participation in the fund to signal that it is committed to act in the best interests of the LPs. The carried interest remuneration structure (detailed below) also helps align incentives.

Tax-wise, private equity funds incorporated in Portugal are exempt from corporate income tax and any gains made are directly attributed to its LPs, at a favourable rate.

2.3 How is the equity commonly structured in private equity transactions in your jurisdiction (including institutional, management and carried interests)?

Usually the equity is divided in share classes and quasi-equity shareholder contributions with the private equity investor subscribing the latter as well as preferred shares, granting the latter special "political rights" and preference in liquidation.

Management, on the other hand, will typically own common shares and be the recipient of an incentive plan, which may or may not include the attribution of additional "physical" equity instruments (alternatives include phantom shares or performance-based cash pay-outs).

2.4 If a private equity investor is taking a minority position, are there different structuring considerations?

Besides the capital structure being markedly different, in minority investments (notably in venture capital transactions) the private equity investor usually requests veto rights in shareholder and board decisions, anti-dilution provisions and pre-emption/tag-along rights.

2.5 In relation to management equity, what is the typical range of equity allocated to the management, and what are the typical vesting and compulsory acquisition provisions?

Equity attributable to management in majority acquisitions may vary considerably, from single digits to a sizeable minority participation.

Vesting usually occurs during a three to four-year period, with the period being structured with a one-year cliff and "linear" vesting thereafter.

Compulsory acquisition provisions essentially depend on the mode of management departure: (i) if management are deemed a "bad leaver", unvested shares are acquired at nominal value; or (ii) if, alternatively, the management are considered "good leaver", shares are acquired at fair value.

2.6 For what reasons is a management equity holder usually treated as a good leaver or a bad leaver in your jurisdiction?

A manager will be treated as a good leaver if private equity investors deem it so or, alternatively, if the former requires to leave the company for serious reasons unrelated to professional factors (illness, serious injury, attending to family members).

In investor-friendly deals, the "bad leaver" concept is usually defined by exclusion, meaning that a manager will be deemed a bad leaver towards the company unless it is determined that it has parted ways with the same in a manner which would allow her to be considered a "good leaver".

In more manager/founder-friendly transactions, the bad leaver definition often contains a "discrete" set of premises (for instance, resigning at own volition from board functions before a certain date, being dismissed with cause from board functions).

3 Governance Matters

3.1 What are the typical governance arrangements for private equity portfolio companies? Are such arrangements required to be made publicly available in your jurisdiction?

Private equity investors will commonly have one or more representatives on the board of directors of portfolio companies to serve as non-executive directors. Another typical feature of governance structures of (the larger) portfolio companies is the set-up of a remuneration committee and/or related party transactions committee used for the private equity investor to monitor the company.

These governance arrangements are typically regulated in a shareholder agreement. Such agreements, unless they relate to public (i.e. which shares are exchanged in a regulated market) or financial companies, need not be made public and will almost surely contain confidentiality provisions.

3.2 Do private equity investors and/or their director nominees typically enjoy veto rights over major corporate actions (such as acquisitions and disposals, business plans, related party transactions, etc.)? If a private equity investor takes a minority position, what veto rights would they typically enjoy?

Yes. Usually shareholder agreements entered into between private equity investors and management/surviving shareholders/partnering shareholders will have "restricted matters" at board of directors and shareholder level (via supermajorities or share classes) involving material aspects of the business regarding which the private equity investor enjoys a veto right.

Veto rights enjoyed by private equity investors in portfolio companies at shareholder level typically include fundamental corporate matters such as amendments to articles of association, mergers, demergers, approval of annual accounts and distributions. "Restricted matters" at board level are more managerial in nature and include relevant expansions or divestments in the business, approvals of business plans and dealings with related parties.

3.3 Are there any limitations on the effectiveness of veto arrangements: (i) at the shareholder level; and (ii) at the director nominee level? If so, how are these typically addressed?

No limitations usually exist. Restricted board matters are, almost without exception, transposed into the company's by-laws, making them enforceable towards third parties.

Similarly, on matters where shareholders have the last say (which would depend on the type of company in question), the shareholders' agreement and by-laws create a set of restricted matters (again supermajorities or share classes) for shareholders' resolutions as well, granting a veto right to the private equity investor.

3.4 Are there any duties owed by a private equity investor to minority shareholders such as management shareholders (or *vice versa*)? If so, how are these typically addressed?

No special statutory duties exist regarding private equity investors in relation to minority shareholders or otherwise. It is argued that there are, in any case, general corporate law duties which should be observed by shareholders (towards other shareholders and the company) such as duties of loyalty.

It is also worth noting that Portuguese law provides for several special rights of minority shareholders, such as the right to appoint directors from a separate list (if such mechanism is included in the by-laws) or the right to annul resolutions approved by the majority shareholders, if proved to be to their detriment (e.g. on self-dealing transactions). In addition, the law provides for "opt-out" rights for minority shareholders in case of (i) mergers and demergers (when minority shareholders vote against such transactions), and (ii) in case there is a majority shareholder holding more than 90% of the share capital in the company.

3.5 Are there any limitations or restrictions on the contents or enforceability of shareholder agreements (including (i) governing law and jurisdiction, and (ii) non-compete and non-solicit provisions)?

Under Portuguese law, it is generally understood that the provisions of shareholder agreements are binding only upon the parties and, thus, are not enforceable towards third parties, nor towards the company itself.

Other restrictions set out in the law regarding the contents of shareholder agreements include: (i) no provisions may be included restricting the actions of members of the company's management or audit bodies; (ii) no shareholder may commit to always vote in accordance with the instructions or proposals given/made by the company or its management or audit bodies; and (iii) no shareholder may exercise or not exercise its voting right in exchange for "special advantages" (i.e. prohibition of vote selling).

Regarding: (i) governing law and jurisdiction of shareholder agreements, no particular restrictions exist (although any shareholder agreements regarding Portuguese companies should respect the restrictions set out in the previous paragraph as well as other mandatory Portuguese law provisions); and (ii) non-compete provisions, these should be weighed against mandatory labour and competition law provisions to assess their validity.

3.6 Are there any legal restrictions or other requirements that a private equity investor should be aware of in appointing its nominees to boards of portfolio companies? What are the key potential risks and liabilities for (i) directors nominated by private equity investors to portfolio company boards, and (ii) private equity investors that nominate directors to boards of portfolio companies?

As a general rule, legal persons are entitled to appoint persons to, on their behalf, exercise functions as directors.

Concretely, directors appointed by private equity investors should be aware that, under Portuguese law, they owe fiduciary duties (care and loyalty) to all shareholders of the portfolio company and may not cater only to the interests of the private equity investor.

On the other hand, private equity investors, if they exercise a significant influence in the company to allow it to be qualified as a *de facto* board member, may be held liable should the company be declared insolvent if it is proven that the insolvency was the result of culpable action by the investor.

3.7 How do directors nominated by private equity investors deal with actual and potential conflicts of interest arising from (i) their relationship with the party nominating them, and (ii) positions as directors of other portfolio companies?

At fund level, conflicts of interest are typically addressed through an Advisory Council, of which attributions typically entail issuing opinions on certain transactions undertaken by the fund, notably related-party transactions, and other conflicts of interest.

At portfolio company level, a related-party transaction committee is often set up to deal with vertical (company-fund) and horizontal (portfolio company-portfolio company) conflicts of interest.

More generally, statutory corporate law provisions contain mandatory provisions whereby shareholders and board members are impeded to vote in the relevant meetings if they are deemed to be in a conflict of interest.

Agreements implementing the investment often attempt to regulate conflicts of interests which arise from private equity management having directorships in several portfolio companies (usually by providing protections to the private equity investor).

4 Transaction Terms: General

4.1 What are the major issues impacting the timetable for transactions in your jurisdiction, including antitrust and other regulatory approval requirements, disclosure obligations and financing issues?

Timetable constraints and other formalities for transactions in Portugal generally involve the following:

a) waivers from financing banks, in direct or, sometimes, indirect changes of control;

b) securing financing for the transaction;

c) in asset deals (e.g. transfer of business via agreement or prior statutory demerger), formalities related to employment matters, notably town hall meetings and opinions from employees' representative structures;

d) waivers from competition authorities; and

e) deals in some regulated sectors (especially banks, insurance companies and other financial institutions) require prior approval from the respective regulatory authorities.

4.2 Have there been any discernible trends in transaction terms over recent years?

In recent years, "locked-box" price adjustment mechanisms have become more common in transactions.

In addition, warranties and indemnities insurance policies are slowly being introduced in the Portuguese market, notably where private equity sellers are involved.

5 Transaction Terms: Public Acquisitions

5.1 What particular features and/or challenges apply to private equity investors involved in public-to-private transactions (and their financing) and how are these commonly dealt with?

Only one private equity type public-to-private transaction has ever been recorded in Portugal (i.e. the acquisition of Brisa, a highway toll operator, in 2012, by a joint venture formed by a Portuguese family office holding company and a European infrastructure fund).

Since there is but one example of this type of transaction in Portugal, it is not possible to assess patterns or trends.

5.2 What deal protections are available to private equity investors in your jurisdiction in relation to public acquisitions?

See the answer to question 5.1 above. There are, however, recommendations in the Corporate Governance Code applicable to Portuguese listed companies which advise against the adoption of break fees or similar pay-outs in public tender offers.

6 Transaction Terms: Private Acquisitions

6.1 What consideration structures are typically preferred by private equity investors (i) on the sell-side, and (ii) on the buy-side, in your jurisdiction?

Common variations to the price payable by private equity investors in Portugal to shareholders of portfolio companies include: (i) deduction of the amount corresponding to non-current net debt; and (ii) when relevant, accrual of net working capital. This structure is usually preferred by private equity investors acting on the buy-side.

On the other hand, "locked-box" consideration structures are increasingly being used (more prevalent on the sell-side).

6.2 What is the typical package of warranties/indemnities offered by a private equity seller and its management team to a buyer?

Standard representations and warranties involving mostly the underlying assets of the portfolio companies (as opposed to management) are offered. Especially in more "buyer-friendly" deals, specific indemnities (notably tax indemnities) are also included.

6.3 What is the typical scope of other covenants, undertakings and indemnities provided by a private equity seller and its management team to a buyer?

Covenants and other undertakings usually include non-compete provisions. Asset-specific covenants are also provided, when applicable.

6.4 To what extent is representation & warranty insurance used in your jurisdiction? If so, what are the typical (i) excesses / policy limits, and (ii) carve-outs / exclusions from such insurance policies, and what is the typical cost of such insurance?

Warranty and indemnity insurance was scarcely used but is now more common in transactions involving private equity sellers.

Typical exclusions include: criminal liability; certain tax matters; fraud; and matters known to the buyer during due diligence.

The insurance premium is usually calculated as a percentage of the liability cap.

6.5 What limitations will typically apply to the liability of a private equity seller and management team under warranties, covenants, indemnities and undertakings?

Caps and baskets are the most usual limitations to liability in private equity exit transactions. Specific disclosures against warranties (typically included in disclosure letters) are also commonly used.

6.6 Do (i) private equity sellers provide security (e.g. escrow accounts) for any warranties / liabilities, and (ii) private equity buyers insist on any security for warranties / liabilities (including any obtained from the management team)?

Private equity sellers, especially ones backed by funds reaching maturity, prefer to shy away from providing securities for breach of representations and warranties but may occasionally provide escrow account/price retention mechanisms to the benefit buyers.

Private equity buyers, on the other hand, are keener (and it occurs frequently) on having escrow accounts with part of the price.

6.7 How do private equity buyers typically provide comfort as to the availability of (i) debt finance, and (ii) equity finance? What rights of enforcement do sellers typically obtain in the absence of compliance by the buying entity (e.g. equity underwrite of debt funding, right to specific performance of obligations under an equity commitment letter, damages, etc.)?

Corporate guarantees/comfort letters are common. To a limited extent, bank guarantees are also provided.

In case of non-performance of funding obligations, the seller's typical remedy is to claim for damages.

6.8 Are reverse break fees prevalent in private equity transactions to limit private equity buyers' exposure? If so, what terms are typical?

Reverse break fees are not common.

7 Transaction Terms: IPOs

7.1 What particular features and/or challenges should a private equity seller be aware of in considering an IPO exit?

No private equity investment has ever generated an exit involving a listing in Portugal.

7.2 What customary lock-ups would be imposed on private equity sellers on an IPO exit?

As mentioned above, there is no factual basis to answer the question as no IPO exit from a private equity investment has ever been made.

7.3 Do private equity sellers generally pursue a dual-track exit process? If so, (i) how late in the process are private equity sellers continuing to run the dual-track, and (ii) were more dual-track deals ultimately realised through a sale or IPO?

We are not aware of any dual-track process for the sale of a private equity portfolio company ever being initiated in Portugal.

8 Financing

8.1 Please outline the most common sources of debt finance used to fund private equity transactions in your jurisdiction and provide an overview of the current state of the finance market in your jurisdiction for such debt (particularly the market for high yield bonds).

Due to the fact that the average value of private equity transactions in Portugal is small, deals involving private equity investors are made almost exclusively through the funds' equity, raised from its unit holders. Debt financing of transactions is thus rare and the issuance of high-yield bonds even more so.

When it does occur (in larger transactions), debt financing of private equity transactions is usually made through senior secured loan facilities (usually composed of an acquisition facility and a revolving facility). Bond issuances are rare in private equity acquisition finance and the few issuances which exist are subscribed by banking syndicates.

8.2 Are there any relevant legal requirements or restrictions impacting the nature or structure of the debt financing (or any particular type of debt financing) of private equity transactions?

Notwithstanding the above-mentioned response, it is worth noting that financial assistance (i.e. contracting loans or providing securities for the acquisition of the company's own shares) is restricted under Portuguese law, thus limiting the possibility of pursuing leveraged buyouts.

When planning raising debt financing, "interest stripping" rules under Portuguese law which limit the deductibility of financial expenses, should also be taken into account.

8.3 What recent trends have there been in the debt financing market in your jurisdiction?

Due in part to a blooming real estate market in large Portuguese urban centres, as well as to the continuance of low interest rates, debt financing activity (acquisition finance, project finance) has risen in recent years.

This debt is being syndicated increasingly by foreign banks as Portuguese banks are still improving their balance sheets following the sovereign debt crisis and ensuing recapitalisation measures.

Finally, in recent times there have been various refinancing transactions as a consequence of diminishing rates and increasing borrower credit profiles.

9 Tax Matters

9.1 What are the key tax considerations for private equity investors and transactions in your jurisdiction? Are off-shore structures common?

Private equity funds are considered neutral vehicles, for tax purposes, and as such are exempt from corporate income tax. Income derived by the unit holders in the private equity funds, on the other hand, is subject to a 10% withholding tax (whether personal or corporate income tax), provided the unit holder is a non-resident entity (without permanent establishment in Portugal), or an individual resident in Portugal (that derives this income out of a business activity).

If the unit holder in the private equity fund (i.e. when the beneficiary of such income) is an entity exempted from tax on capital gains (resident or non-resident) or if they are an entity with no permanent establishment in Portugal to which the income is attributable, the derived income may be exempted from tax in Portugal.

Neither the 10% or the exemption rule are applicable when: (i) the beneficiary is an entity resident in a blacklisted jurisdiction; and (ii) when the beneficiaries are non-resident entities held, directly or indirectly (more than 25%), by resident entities. The general withholding tax is 35% in the case of blacklisted entities; in other cases, there is 25% corporate income tax ("CIT") withholding tax.

Offshore structures are not common owing mostly to the disadvantageous tax repercussions of setting up transactions in blacklisted entities (see paragraph above). Nevertheless, international fund managers usually invest through Luxembourg vehicles (typically then incorporating a Portuguese BidCo to execute the transaction).

Private equity companies (*sociedades de capital de risco*) also benefit from a tax allowance of a sum corresponding to the limit of the sum of the tax base of the five preceding years, as long as such deduction is used to invest in companies with high growth potential. On the other hand, dividends payable by private equity companies to its shareholders do not receive any special treatment (i.e. 28% final rate for individuals and the current corporate income tax rates for companies).

Capital gains derived by the sale of units in the private equity funds are subject to 10% CIT and personal income tax ("PIT") if the resident entity derives the income out of a business activity and, regarding the non-resident entity, if it is not exempted under the general exemption on capital gains obtained by non-residents.

Alas, the treatment of income derived from carried interest and other variable private equity managers' compensation is not clear from tax legislation. As such, due to the fact that, from a tax perspective, treatment of such income is not clear, there have been several calls to, as in many other jurisdictions, clearly state that variable management compensation is taxed as capital gains.

9.2 What are the key tax-efficient arrangements that are typically considered by management teams in private equity acquisitions (such as growth shares, incentive shares, deferred / vesting arrangements)?

Tax considerations invariably play a role in structuring management

compensation packages, whether they are in a form of physical shares, "phantom" shares or earn-outs, but there is no one typical tax-efficient arrangement to remunerate management in private equity transactions.

It is worth mentioning, however, that the 2018 State Budget includes a tax benefit that foresees the exemption for PIT of gains arising from stock option plans up to the amount of €40,000 received by the start-ups/emerging companies' employees.

For this tax exemption to apply:

- Employers must qualify as micro or small enterprises and have developed their activities for a period not longer than six years within the technological sector.
- Employees must own the relevant stocks for at least two years, not be a member of any corporate body and not hold a participation higher than 5% in the respective company.

9.3 What are the key tax considerations for management teams that are selling and/or rolling-over part of their investment into a new acquisition structure?

A tax neutrality regime on the corporate reorganisations is also available, allowing for cases of merger, de-merger, and/or asset contribution, in order that no step up in value is realised, but at the same time preserving the original date of acquisition of the participations.

Additionally, there are two key tax considerations: the participation exemption regime; and the tax treatment of dividends distributed by a Portuguese company.

The Portuguese Participation Exemption regime currently in force foresees that dividends distributed by a company resident in Portugal (and not subject to the tax transparency regime) to its corporate shareholder are tax-exempt, provided some requirements are met, such as a continuous 12-month holding period of at least 10% of the shares or voting rights.

Under the outbound regime, to benefit from the 0% withholding tax rate on the dividends paid by a company in Portugal, besides the fact that the beneficiary of the income has to be subject in its residence State to a CIT nominal tax rate of at least 12.6%, it has to hold, directly or indirectly, at least a 10% stake in the company resident in Portugal uninterruptedly held in the 12 months prior to the distribution of dividends.

9.4 Have there been any significant changes in tax legislation or the practices of tax authorities (including in relation to tax rulings or clearances) impacting private equity investors, management teams or private equity transactions and are any anticipated?

A recent change in the law has caused Portuguese tax authorities to consider management fees charged by management entities to funds as being subject to stamp duty (*imposto do selo*). This interpretation does not appear to be, however, unanimous and it may face challenges from taxpayers in the future.

10 Legal and Regulatory Matters

10.1 Have there been any significant legal and/or regulatory developments over recent years impacting private equity investors or transactions and are any anticipated?

Law no. 16/2015 and Law no. 18/2015 provided several major changes to the regulation of private equity in Portugal. Highlights include:

a) Investment compartments – the management regulations of private equity or venture capital funds may now establish that the fund may be divided into several investment compartments, named "subfunds".

b) Management may change certain aspects of the management regulations (e.g. details of the manager and reduction in management fees) in private equity funds without the consent of unit holders.

c) Own funds requirements – private equity and venture capital companies must have their own funds corresponding to 0.02% of the amount of the net value of assets under management exceeding €250 million.

However, the main innovation put in place by the enactment of Law no. 18/2015 is imposing a more demanding regulatory framework to management entities of collective undertakings which have assets under management with a value exceeding: (i) €100 million, when the respective portfolios include assets acquired with leverage; or (ii) €500 million, when the respective portfolios do not include assets acquired through leverage and regarding which there are no reimbursement rights which may be exercised during a five-year period counting from the date of initial investment.

Such funds are now subject to, *inter alia*, the following obligations:

a) their incorporation is subject to the prior authorisation of CMVM;

b) risk management should be functionally and hierarchically separated from the operating units, including the portfolio management function;

c) measures should be taken to identify situations of possible conflicts of interest as well as to prevent, manage and monitor conflicts of interest;

d) CMVM shall be informed of the intention to delegate services to third parties for carrying out functions in the name of the above-mentioned managing entities;

e) managing entities shall employ an appropriate liquidity management system; and

f) applicability of "EU passport rules" (i.e. the ability to market units of private equity funds in other EU countries or third countries).

Also worth noting, is the new crowdfunding legislation, which provides a framework for the creation of equity crowdfunding platforms in Portugal, which is becoming increasingly relevant for venture capital investment in the Portuguese market.

10.2 Are private equity investors or particular transactions subject to enhanced regulatory scrutiny in your jurisdiction (e.g. on national security grounds)?

There is no enhanced scrutiny of private equity transactions in Portugal. In any case, certain rules exist which apply to foreign investment controls in critical infrastructure.

Under the provisions of Decree-Law no. 138/2014, of September 15, acquisitions of control of critical infrastructure by non-EEA

residents may be subject to review by the Portuguese government. Transactions which have not been previously cleared and are subject to opposition by the government are null and void.

10.3 How detailed is the legal due diligence (including compliance) conducted by private equity investors prior to any acquisitions (e.g. typical timeframes, materiality, scope etc.)?

Private equity investors usually undertake legal due diligence before investing in a company. Timeframes for conducting due diligence range from one to three months and will typically have materiality thresholds for litigation and material agreements under review. Often, insurance, competition and tax matters will be excluded from due diligence (sometimes because other advisors will be engaged to perform the review in such matters).

10.4 Has anti-bribery or anti-corruption legislation impacted private equity investment and/or investors' approach to private equity transactions (e.g. diligence, contractual protection, etc.)?

Law no. 83/2017, of August 18 (which partially transposes the 5th Money Laundering Directive to the Portuguese jurisdiction), establishes several obligations on, among others, "know your customer" and due diligence procedures and disclosure of monetary flows for purposes of preventing money laundering transactions and the financing of terrorism. These obligations are applicable to private equity fund managers (as well as to banks and other financial institutions).

The aforementioned reporting duties have an impact on due diligence procedures taken during fund structuring, as the private equity investor shall, for instance, be obliged to know what the controlling structure of its clients is (the fund LPs) and who the ultimate beneficial owner of such LPs is. Consequently, the major private equity players in Portugal have instated official "know your customer" procedures in an effort to not fall foul of the law's provisions.

10.5 Are there any circumstances in which: (i) a private equity investor may be held liable for the liabilities of the underlying portfolio companies (including due to breach of applicable laws by the portfolio companies); and (ii) one portfolio company may be held liable for the liabilities of another portfolio company?

Private equity funds enjoy full limited liability and asset partitioning in relation to its portfolio companies and participants, respectively. In this sense, the fund may not be liable for debts and other liabilities of the portfolio companies, unless it has provided guarantees for the benefit of such companies.

As for private equity companies, if the latter holds 100% of the share capital of a portfolio company incorporated in Portugal, mandatory corporate law provisions assume a "co-mingling of assets" of sorts and state that they are jointly and severally liable before the creditors of said portfolio companies (following a 30-day delay in performance of the obligation in question).

In the case of portfolio companies being liable before one another, assuming that they are both directly held by the same private equity investor (i.e. horizontal group relationship), no subsidiary liability may arise.

11 Other Useful Facts

11.1 What other factors commonly give rise to concerns for private equity investors in your jurisdiction or should such investors otherwise be aware of in considering an investment in your jurisdiction?

Portugal has been establishing itself to both inside and outside investors as a "business"- and "transaction"-friendly jurisdiction. This is also reflected in the private equity sector.

Alas, some challenges remain, notably concerning timings for the resolution of disputes in the State courts (which is why transaction agreements usually contain arbitration clauses).

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In the area of corporate and commercial law, he has acted as legal advisor in several mergers, restructuring, acquisitions and sales of companies, on behalf of domestic and foreign clients.

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Morais Leitão, Galvão Teles, Soares da Silva & Associados (Morais Leitão) is a leading full-service law firm in Portugal, with a solid background of decades of experience. Broadly recognised, Morais Leitão is referenced in several branches and sectors of the law on national and international level.

The firm's reputation amongst both peers and clients stems from the excellence of the legal services provided. The firm's work is characterised by unique technical expertise, combined with a distinctive approach and cutting-edge solutions that often challenge some of the most conventional practices.

With a team comprising over 250 lawyers at a client's disposal, Morais Leitão is headquartered in Lisbon with additional offices in Porto and Funchal. Due to its network of associations and alliances with local firms and the creation of the Morais Leitão Legal Circle in 2010, the firm can also offer support through offices in Angola (ALC Advogados), Hong Kong and Macau (MdME Lawyers), and Mozambique (HRA Advogados).

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