

THE INITIAL PUBLIC
OFFERINGS LAW
REVIEW

THIRD EDITION

Editor
David J Goldschmidt

THE LAWREVIEWS

THE INITIAL PUBLIC
OFFERINGS
LAW REVIEW

THIRD EDITION

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PREFACE

Welcome to the third edition of *The Initial Public Offerings Law Review*. This publication introduces the reader to the main stock exchanges around the globe and their related initial public offering (IPO) regulatory environments, and provides insight into the legal and procedural IPO landscapes in 18 different jurisdictions. Each chapter gives a general overview of the IPO process in the region, addresses regulatory and exchange requirements, and presents key offering considerations.

The global IPO landscape is ever-changing. While several of the oldest stock exchanges, such as the New York Stock Exchange and London Stock Exchange, are still at the forefront of the global IPO market, the world's major stock exchanges now are scattered around the globe and many are publicly traded companies themselves. IPOs take place in nearly every corner of the world and involve a wide variety of companies in terms of size, industry and geography. Aside from general globalisation, shifting investor sentiment and economic, political and regulatory factors have also influenced the development and evolution of the global IPO market.

Virtually all markets around the globe have experienced significant volatility in recent years; however, 2018 marked a year of continued resurgence for many IPO markets. The number of 2018 IPOs and total proceeds raised were led by the Asia-Pacific exchanges, which accounted for almost 50 per cent of deals in terms of both number and deal volume. China alone was responsible for 307 IPOs valued at US\$56.7 billion. Many other regions also experienced strong IPO markets in 2018. Despite the temperamental nature of global economics, and the potential repercussions of various ongoing and expected geopolitical events, there is continued cautious optimism for 2019 in terms of both global deal count and proceeds. The global IPO pipeline includes many well-known companies across a range of industries, and it is anticipated that these companies will seek to list on a variety of stock exchanges around the world.

Every exchange operates with its own set of rules and requirements for conducting an IPO. Country-specific regulatory landscapes are often dramatically different among jurisdictions as well. Whether a company is looking to list in its home country or is exploring listing outside of its own jurisdiction, it is important that the company and its management are aware from the outset of the legal requirements as well as potential pitfalls that may impact the offering. Moreover, once a company is public, there are ongoing jurisdiction-specific disclosure and other requirements with which it must comply. This third edition of *The Initial Public Offerings Law Review* introduces the intricacies of taking a company public in these jurisdictions, and serves as a guide for issuers and their directors and management.

David J Goldschmidt

Skadden, Arps, Slate, Meagher & Flom LLP

New York

March 2019

PORTUGAL

Eduardo Paulino, Margarida Torres Gama and Un I Wong¹

I INTRODUCTION

The Portuguese initial public offerings (IPOs) market recorded its peak at the end of the 1980s because of a significant number of IPOs taking place as a result of, among other reasons, the re-implementation and stabilisation of a democratic regime after a 48-year dictatorship; the investor's positivism in the face of Portugal's recent membership of the European Economic Community; and the friendly investment environment incentivised by the Portuguese government through the privatisation policy. The largest Portuguese companies, including banks, and insurance, telecommunications, electricity, and oil and gas companies, were nationalised in 1975 and have subsequently been privatised since the 1980s, in most cases by means of IPOs.

After experiencing rapid growth, the number of IPOs has significantly reduced in recent years, especially since the financial crisis of 2008 – from which the Portuguese IPO market is still recovering.

In recent years, there has been a different market dynamic because of the participation of more privately held companies, and of small and medium-sized enterprises (SMEs). SMEs, unlike state-owned companies (which always opted for the regulated market), have requested to be listed on either the Portuguese regulated market (Euronext Lisbon) or another platform (in particular, multilateral trading facilities such as Euronext Access and Euronext Growth).

Nevertheless, the uncertainty of the global economy and the unfavourable conditions of the international market have hindered investors' confidence. In 2018, the biggest Portuguese food retailer Sonae MC's IPO process in Euronext Lisbon began successfully; however, it was cancelled because of the adverse conditions of the international markets. This also occurred in the IPO in Euronext Growth of the Portuguese start-up company Science4You.

II GOVERNING RULES

i Main stock exchanges

In Portugal, there is currently only one regulated market for the trading of shares, Euronext Lisbon, which is managed by Euronext Lisbon – Sociedade Gestora de Mercados Regulamentados, SA (the Euronext Lisbon Managing Entity). This main stock exchange was

¹ Eduardo Paulino is a partner, Margarida Torres Gama is a senior associate and Un I Wong is a junior lawyer at Morais Leitão, Galvão Teles, Soares da Silva & Associados.

founded in 1769 in Lisbon and was known as the Lisbon Stock Exchange; it later merged with the Porto Stock Exchange and was acquired in 2002 by Euronext, which currently also operates regulated markets in Belgium, France, Ireland, the Netherlands and the United Kingdom.

As provided for under the Markets in Financial Instruments Directive (MiFID) framework,² shares may also be traded in multilateral trading facilities and systematic internalisers. There are currently two multilateral trading facilities operating in Portugal – Euronext Growth and Euronext Access – both of which are managed by the Euronext group.

Companies listed by Euronext Lisbon are mainly domestic issuers. There are a few exceptions, where foreign issuers list their shares in Portugal, but this is usually made under a dual-listing structure, meaning that these companies admit their shares in Portugal for capitalisation and expansion strategy purposes, while maintaining simultaneous listing of their share capital in their home stock exchange.

ii Overview of listing requirements

Listing requirements in the Portuguese regulated market are ruled by the Portuguese Securities Code (PSC), by regulations approved by the Portuguese Securities Market Commission (CMVM) and by the Euronext Rule Books, which comprise Rule Book I (harmonised rules, applicable to all Euronext entities) and Rule Book II (non-harmonised market rules, applicable only to the securities markets, non-regulated markets and derivatives markets operated by the Euronext Lisbon Managing Entity).

To be admitted to trading in the Portuguese regulated market, the relevant issuer shall comply with the requirements set forth by Articles 227 and 228 of the PSC.

Notably, the issuer:

- a* should be incorporated and validly operate in accordance with its respective governing law;
- b* should prove that its economic and financial position is adequate considering the nature of securities to be listed and the market where the listing is requested;
- c* shall have carried out its business activity for at least three years; and
- d* shall have published its annual accounts and financial reports, as required by law, for three years preceding the year when the listing is requested.

If the issuer is a company that has resulted from a merger or split, the requirements referred to in points (c) and (d) must be fulfilled, respectively, by one of the merged companies or the demerged company. Moreover, these two requirements may be waived by CMVM if advisable for the interests of the issuer and investors, and if the requirement referred to in point (b), by itself, allows the investors to make an informed judgement on the issuer and the securities.

Concerning requirements applicable to the shares to be admitted to trading in the regulated market, according to Rule Book I, Euronext must verify whether the shares of the

2 The MiFID framework currently comprises MiFID 2 (Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU), MiFIR (Regulation (EU) No. 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No. 648/2012) and their respective implementing legislation.

same class have identical rights, and whether such shares are freely transferable and negotiable in accordance with Portuguese law, as well as whether they are compliant with the issuer's by-laws.

Article 229 of the PSC further requires:

- a* a minimum public float: a suitable level of public dissemination of shares by the date of admission, which is presumed to be achieved when the shares that are subject to the request of admission to trading are dispersed to the public in a proportion of at least 25 per cent of the subscribed share capital represented by such class of shares, or, if the regular functioning market is ensured, at an even lower percentage; and
- b* market capitalisation: an expected market capitalisation of at least €1 million. If it is not possible to determine the market capitalisation of the shares, the company's own funds, including the results of the preceding financial year, must be at least €1 million.

In an IPO, the application for the admission to trading and required documentation should be presented to the Euronext Lisbon Managing Entity, generally by the issuer.

The admission to trading in the multilateral trading facilities identified above is, in general, subject to less stringent requirements than those applicable to the admission to trading in the regulated market.

iii Overview of law and regulations

The Portuguese framework for an IPO comprises three main sets of rules:

- a* the PSC;
- b* regulations and instructions issued by the CMVM; and
- c* the Euronext Rule Books.

In addition, the Portuguese legal framework reflects, through either direct application or by means of transposition, EU legislation, most notably the MiFID framework, the Prospectus Directive,³ the Prospectus Regulation⁴ and the new Prospectus Regulation,⁵ the Market Abuse Regulation⁶ and the Transparency Directive.⁷

3 Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC, as amended.

4 Commission Regulation (EC) No. 809/2004 of 29 April 2004 implementing Directive 2003/71/EC of the European Parliament and of the Council as regards information contained in prospectuses as well as the format, incorporation by reference and publication of such prospectuses and dissemination of advertisements.

5 Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC.

6 Regulation (EU) No. 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC.

7 Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC, as amended.

III THE OFFERING PROCESS

i General overview of the IPO process

An IPO in Portugal is conducted through a public offer for distribution of shares, in most cases through an offer for subscription of new shares⁸ targeted at undetermined investors. The IPO will entail the subsequent admission of the issuer's shares to trading on a market, most commonly the regulated market. The subsequent overview will focus on IPOs in the regulated market for trading shares in Portugal.

The IPO process normally consists of the following stages.

Preliminary stage

The preliminary stage comprises preparation and study of the company and the transaction, celebration of intermediation agreements and preparation of a prospectus.

In this stage, the company that seeks to go public will often begin with a due diligence process, analysing different aspects of the company's activity, such as legal, tax, financial and others, in which it may be assisted by lawyers, accountants, bankers or other experts.

The issuer shall also select a financial intermediary (e.g., an investment bank) to assist the company in its IPO process (as legally required for all public offers entailing the preparation of a prospectus), as well as to provide underwriting or, more generally, placement services of the company's securities in the market.

A public offer of securities entails the preparation and publication of a prospectus, except in some particular cases foreseen by law. The PSC and the Prospectus Regulation (as well as the new Prospectus Regulation and its implementing and delegated acts) set out in detail various requirements on both the contents and disclosure of the prospectus. In general, the information in a prospectus should be complete, true, up-to-date, clear, objective and lawful, enabling a grounded assessment of, *inter alia*, the offer and the securities, the rights attached thereto, the assets, economic and financial situation, and prospects for the business, and the earnings of the issuer (and the guarantor, if applicable). The prospectus must also include a summary for investors that presents information in a concise way, using non-technical language.

The prospectus shall be drafted in a language accepted by the CMVM. Historically, all prospectuses relating to the offer or listing of equity in Portugal are drafted in Portuguese, but in a recent transaction the use of English was allowed (provided that investors were given a Portuguese translation of the prospectus summary).

Considering that the admission to trading of securities also requires, in general, the publication of a prospectus, usually the offer prospectus is prepared as an offer and listing prospectus.⁹

8 If the IPO entails a share capital increase of the issuer, the shareholders will be entitled to preemption rights in the subscription of the new shares; these rights will be able to be excluded under certain circumstances.

9 An additional possible step in the IPO process is the collection of investment intentions in public, to help determine the price of the offer or assess the potential success of the offer in accordance with the level of demand. The company should issue a preliminary prospectus for this purpose (which needs to be approved by CMVM). Preliminary prospectuses are very unusual in the Portuguese market.

Preparation of the offer and admission to trading with the CMVM, Euronext and Interbolsa

CMVM

The (offer and listing) prospectus is subject to the approval of the CMVM, as the Portuguese regulatory entity responsible for the regulation and supervision of the securities market and its agents. The request for approval shall be accompanied by corporate documentation (e.g. copies of resolutions of the relevant corporate bodies of the offeror and the issuer, certificates of commercial registry, by-laws and financial statements), as well as agreements and other documentation related to the offer.

The CMVM shall notify the issuer of the approval of the prospectus within a maximum of 20 days from submission of any required additional information, the absence of notification within this period being deemed as a refusal of the approval.

In the case of approval by the CMVM, the prospectus must be disclosed by one of the following means:

- a* publication in one or more nationwide newspapers;
- b* a printed version made available to the public, free of charge, in the facilities of the market where the admission to trading is requested, or at the issuer's registered office and at branches of the financial intermediary that is responsible for the placement of the securities;
- c* an electronic version made available on the issuer's website, or on the website of the financial intermediary that is responsible for the placement of the securities (if it is the case);
- d* an electronic version made available on the website of the Euronext Lisbon; or
- e* an electronic version made available on the website of the CMVM.¹⁰

All marketing materials and publicity in connection to the public offer are subject to prior approval by the CMVM.

Euronext Lisbon

To have its shares admitted to trading in Euronext Lisbon, the issuer must submit an application to the market's managing entity, together with the information required by the PSC and Euronext's Rule Book 1¹¹ (part of which coincides with the information that shall be provided to the CMVM for the purposes of approval of the prospectus). The required documentation and information include, for instance, evidence that adequate procedures are available for the clearing and settlement of transactions in respect of the shares, the Legal Entity Identifier code for the issuer, and the identification of the paying agent and the representative for the relations with the market, among others. All documentation shall be submitted in English or in a language accepted by Euronext and, if necessary, translated.

The Euronext Lisbon Managing Entity and the applicant shall jointly agree on a timetable in respect of the admission to trading, and the issuer shall appoint a listing agent, who will be responsible for guiding the issuer through the entire listing process.

10 If the prospectus is disclosed as provided for in points (a) or (b), it should also be disclosed as set out in point (c).

11 Available at <https://www.euronext.com/en/regulation/harmonised-rules>.

The decision on the admission shall be taken by the Euronext Lisbon Managing Entity within 30 days of receiving a complete set of the required documentation and information (unless otherwise agreed with the issuer). The admission decision shall remain valid for a maximum of 90 days, except if the Euronext Lisbon Managing Entity becomes aware that any information provided regarding the application for the admission to listing has changed during this period. This period may be extended by no more than 90 days at the request of the issuer.

Interbolsa

Simultaneously with the above-mentioned proceedings, the issuer shall register the shares with the Portuguese Centralised System of Registration of Securities managed by Interbolsa – Sociedade Gestora de Sistemas de Liquidação de Sistemas Centralizados de Valores Mobiliários SA, which is mandatory for the shares admitted to trading in the Portuguese regulated market.

Execution of the offer

After publication of the prospectus, the period for the acceptance of the offer begins. The acceptance of the offer is performed by means of subscription or acquisition orders placed by the investors with the relevant financial intermediaries.

It is common for the final price of the offer not to be set out in the prospectus, which is only determined at the end of the offer period, taking into account the book-building. The prospectus must nonetheless include a maximum price, and the orders already placed for the acquisition of shares will be able to be withdrawn by the investors for no less than two business days after the pricing announcement.

Assessment and publication of results, and admission to trading

After the end of the offer period, the results of the offer are immediately assessed and published, and the shares are admitted to trading.

ii Pitfalls and considerations

Despite the advantages it may bring for the purposes of raising capital for the growth of a company, an IPO (more relevantly in regulated markets) is a complex process, involving significant risks and costs.

In terms of costs, in addition to those related to legal, accounting and marketing advisory services (many of which arise not only in the launch of the operation – for instance, for the preparation of the prospectus and of the financial statements – but are instead ongoing and inherent to the quality of the listed company), an issuer who applies for the admission to trading on the regulated market is required, *inter alia*, to pay annual listing fees and other fees charged by the Euronext Lisbon, which vary according to the type of securities, the nature of the issuer and the amount of market capitalisation.

Issuers should also consider that the publication of a prospectus for the purposes of offering and listing shares entails liability of the issuer (and the offeror), the members of its management bodies and some other entities involved in the offer and listing, for damage caused by the non-compliance of the information contained in the prospectus with the applicable requirements (most notably its truthfulness and completeness).

Additionally, going public means a company must meet and maintain certain standards of corporate governance, responsible management, information (in the prospectus and afterwards) and transparency, which, once again, involve ongoing costs and may imply changes in the company's corporate structure.

Also to be borne in mind by public companies and their shareholders are the specificities of the legislation governing the former type of companies, including the provisions regarding mandatory takeovers, according to which anyone whose holding in a public company exceeds one-third or half of the voting rights attributable to the share capital has the obligation of launching a takeover for the totality of shares and other securities issued by the company that granted the right to their subscription or acquisition.

iii Considerations for foreign issuers

Portuguese law does not make a distinction in terms of requirements between domestic and foreign issuers, except where the securities are not listed in a regulated market located or operating in the European Union, in which case CMVM may, for the purposes of the admission to trading in Portugal, request the issuer to present a legal opinion to attest the compliance of the issuer and the securities with its governing law.

In any case, the listing in Portugal of securities subject to the law of another EU Member State may not be conditioned on the prior admission of the securities to trading in the regulated market located and operating in that Member State.

The EU passporting framework, implemented into Portugal by the PSC, allows – in relation to a public offer to be undertaken in Portugal and in another EU Member State – the use of the prospectus approved by the competent authority of the other EU Member State in Portugal, provided that the CMVM receives the following from the competent authority:

- a* a certificate of approval, which attests that the prospectus has been prepared in accordance with the Prospectus Directive, and that justifies, if it is the case, the waiver of the inclusion of information in the prospectus; and
- b* a copy of the referred prospectus and a translation of the respective summary, if applicable.

The CMVM may also approve a prospectus for a public offer of distribution of securities of an issuer with headquarters in a non-EU country and drafted according to the governing law of that non-EU Member State, provided that the following requirements are met:

- a* the prospectus has been drafted in accordance with the international rules set by international organisations of securities' supervisors, including the rules of the International Organization of Securities Commissions; and
- b* the prospectus contains information, notably financial information, equivalent to the information required by the PSC and the Prospectus Regulation.

IV POST-IPO REQUIREMENTS

An IPO is a transformative process for a company and encompasses various changes in terms of duties and compliance for the issuer. The company that is subject to the IPO process will be qualified automatically as a publicly held corporation or public company. This qualification gives rise to a broad set of obligations related to reporting, disclosure and corporate governance.

i Disclosure of information

Information is fundamental for guaranteeing equality among investors. Accordingly, a listed company has the duty to disclose its inside information to the public, namely any event that has already occurred, is ongoing or may be reasonably expected to occur, regardless of the degree of materialisation, which, if known, would likely be used by investors as a basis for their investment decision, considering that it would likely have a significant effect on the price of the relevant security. Nevertheless, in certain cases and under certain conditions, disclosure will be able to be deferred.¹²

A listed company is further required to disclose a defined set of financial information (which includes the management report, the annual accounts and the statutory audit report) within four months of the closing of the financial year, and maintain it, available to the public, for 10 years. The publication of certain half-yearly and (in some cases) quarterly information is also required.

The PSC additionally imposes on companies listed in Portugal the duty to disclose, *inter alia*:

- a* notices convening general meetings of the holders of listed securities;
- b* the issue of shares and bonds, with an indication of beneficial privileges and guarantees, including information on any procedures for their allotment, subscription, cancellation, conversion, exchange or repayment;
- c* amendments to the details that have been required for the admission to trading of securities; and
- d* the acquisition or disposal of own shares, whenever as a result thereof the proportion of the same exceeds or falls below the thresholds of 5 per cent and 10 per cent, respectively.

In turn, CMVM Regulation No. 5/2008 (as amended) imposes the disclosure of:

- a* the exercise of subscription, incorporation and acquisition rights in relation to securities, namely as a result of mergers or demergers;
- b* the exercise of any rights to convert securities into shares;
- c* changes to the attribution of voting rights in qualifying holdings;
- d* any filing for insolvency, a judgment initiating the insolvency proceedings or dismissing the filing for insolvency, and the approval and official confirmation of the insolvency plan;
- e* the increase or reduction of share capital;
- f* information on applications for admission to regulated markets and respective decisions; and
- g* convening of a general meeting to determine the loss of public company status.

According to Articles 16 and 17 of the PSC, public companies should disclose qualified shareholdings, as defined therein, as well as certain cases where a shareholder reaches or exceeds certain thresholds of the voting rights corresponding to the capital, or reduces its holding to an amount lower than any of those thresholds.

The CMVM may waive some of the disclosure duties referred to above, if disclosure could be against the public interest or could be deemed significantly detrimental to the issuer, if the omission of disclosure would not likely mislead the public in the assessment of the securities.

12 Under the terms of the Market Abuse Regulation.

ii Corporate governance

Public companies obey specific corporate governance rules (including in respect of disclosure), most notably set out in the Companies Code, the PSC, CMVM Regulation No. 4/2013 and the recommendations included in the 2018 Corporate Governance Code of the Portuguese Institute for Corporate Governanc.

Regarding the annual corporate governance report, the issuer of shares admitted to trading in the regulated market located or operating in Portugal shall disclose in a chapter of its annual management report the structure and practices of the company in terms of corporate governance, containing at least the information listed in Article 245-A of the PSC. A model of the corporate governance report is available in CMVM Regulation No. 4/2013.¹³

V OUTLOOK AND CONCLUSION

Though complex, the regulatory regime for IPOs in Portugal draws almost completely from EU legislation, being thus aligned with the equivalent regimes in other EU Member States and relatively stabilised; accordingly, no major changes are expected in the near future, except perhaps for the entry into force of the (non-revolutionary) new European Prospectus Regulation.

Most interestingly, for the purposes of reducing costs, there is an increasing trend of companies resorting to alternative (and less burdensome) ways to capture new investors and funding, other than IPOs in the regulated market. A recent and successful case is the subscription of 369 per cent in the public offer of distribution of the share capital of the peer-to-peer crowdfunding platform Raize, and its admission to trading in Euronext Access. Another example is the launch of the offer and admission to trading in Euronext Growth of the share capital of the Portuguese toy company Science4you (which was, however, cancelled owing to adverse market conditions). In 2018, almost half of the Portuguese shares were negotiated outside of the regulated market, according to statistics published by the CMVM.¹⁴

13 This regulation also comprises a list of the minimum information that should be made available on the issuer's website, which includes: (1) the company's name, public company status, headquarters and other information mentioned in Article 171 of the Commercial Companies Code; (2) the articles of Association; (3) the identity of corporate body members and the market liaison officer; (4) the investor's support office or equivalent structure, its duties and access means; (5) the financial statements, which should be made available for at least five years; (6) half-yearly calendar of events, released at the beginning of each half-year, including, *inter alia*, the general meetings, disclosure of annual and half-yearly accounts and, as applicable, quarterly accounts.

14 <https://www.jornaldenegocios.pt/mercados/bolsa/detalhe/quase-metade-das-accoes-sao-negociadas-fora-de-mercado-regulamentado>.

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Eduardo Paulino joined the firm in 2002 and became a partner in 2015. He is a member of the corporate, M&A and capital markets team.

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He has recently been involved in complex high-profile M&A transactions in the banking sector, and in the process of recapitalisation of the Portuguese banking sector. Eduardo regularly acts in equity, and debt public and private offerings, public takeover processes in the banking, telecommunications, construction, paper and media sectors, as well as in privatisations of Portuguese and foreign companies, and complex financing transactions.

Eduardo Paulino also participates in various inter-disciplinary teams working in domestic and cross-border M&A transactions, acting for both Portuguese and foreign clients.

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Margarida has also been involved in several transactions regarding the issue and offering of equity and debt securities.

UN I WONG

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Un I Wong joined the firm in September 2017. She is a member of the corporate, M&A and capital markets team.

Un did an internship at DECO (2016), as well as a summer internship at the office of Dr José Chui Sai Peng, member of the Legislative Assembly (Macau, 2014).

She is also the president of the general assembly of the Luso-Macaense Students' Association, vice president of the general meeting of the Portugal-China Young Entrepreneurs Association and the executive vice president of the Direction Board of Macau Youth Summit.

Un was awarded special merit-based scholarships to study in Portugal by the government of Macau and the Macau Foundation.

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