International Comparative Legal Guides

Private Equity 2020

A practical cross-border insight into private equity law

Sixth Edition

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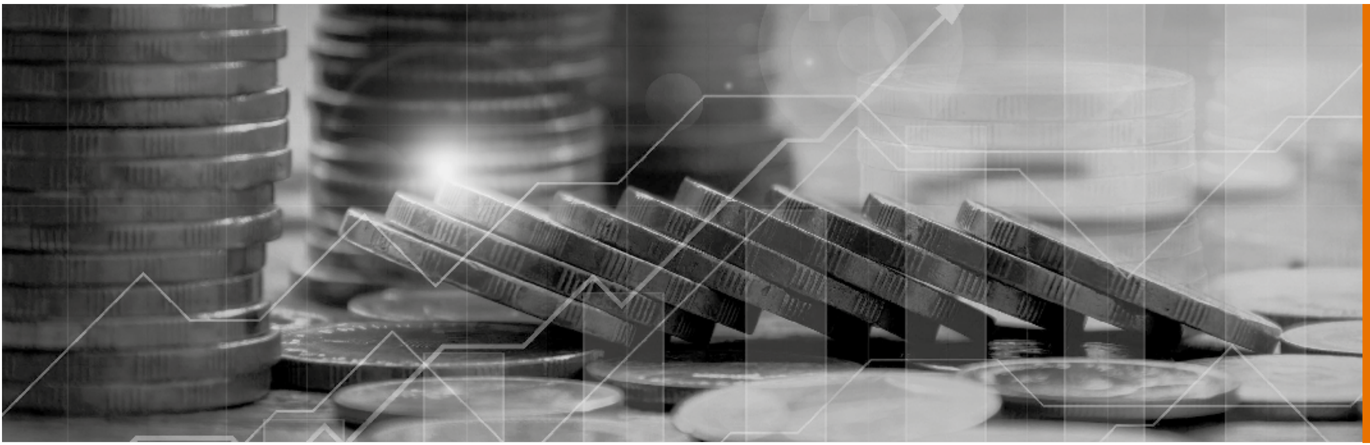

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Private Equity 2020

Sixth Edition

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Dechert LLP

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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?

Private equity in Portugal has experienced significant growth despite the financial crisis and sovereign debt crisis, which loomed over the country until 2014. According to the latest data available (the Portuguese Securities Market Commission – "CMVM", 2018), value under management by private equity players has been steadily rising since 2003, reaching upwards of €4.8 billion by the end of 2018.

Turnaround or distressed transactions have still been the most relevant types of private equity deals in Portugal in the last few years, followed by growth capital investment (approximately one-third of the value invested). Nevertheless, venture capital (start-up, seed and early stage) investing and management buyouts maintained their relevance throughout the year of 2018.

Sector-wise, the main sectors invested by private equity are real estate and construction, manufacturing, and information technologies.

It is implausible that these market dynamics will continue following the wake of the economic downturn caused by the COVID-19 pandemic. However, given the lag in the availability of the relevant data, it will take a considerable amount of time before we can know for sure the effects the health crisis and lockdown measures will have on the industry.

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

Prior to the COVID-19 pandemic, some of the most relevant trends that were encouraging transactions in Portugal were: (i) low interest rates and an accommodative monetary policy from the European Central Bank; (ii) the launching of public tenders by State-owned entities to capitalise companies, such as tenders to award EU funds to entities organised as private equity fund managers; and (iii) the use of private equity funds as conduits for obtaining investment residence permits, which also encourage fundraising and consequently private equity and venture capital transactions in Portugal.

While each of these trends is set to continue (in particular, given the recently announced stimulus package from the European Union and the resiliency in the appetite for investment residence permit projects), it may be the case that they will be outweighed by the economic demand-side and supply-side effects of the COVID-19 pandemic (see next question).

1.3 What are going to be the long-term effects for private equity in your jurisdiction as a result of the COVID-19 pandemic?

Given that the effects of the pandemic are likely to be protracted, it may be too early to tell exactly what the repercussions will be for the private equity industry.

On the one hand, the effects for the industry may be positive: various opportunities may arise regarding transactions in companies in financial distress or in need of equity support to resume growth, particularly if economic activity is able to rebound relatively quickly after the brunt of the crisis.

On the other hand, a lengthy recovery could ultimately hurt existing portfolio companies and make future fundraising processes more difficult, which could then have a negative effect on the prospects of (particularly local) private equity fund managers.

1.4 Are you seeing any types of investors other than traditional private equity firms executing private equity-style transactions in your jurisdiction? If so, please explain which investors, and briefly identify any significant points of difference between the deal terms offered, or approach taken, by this type of investor and that of traditional private equity firms.

Yes. In relation to "traditional" private equity transactions, we are seeing "family offices" or wealthy investors also stepping into the space. Their approach relative to private equity investors is usually more long term.

Where venture capital transactions (start-up, seed and early stage) are concerned, corporate venture capital units of large companies are also participating. These investors are not only focused on pure financial returns, but are also integrating into their investment rationale the ability of the invested company to contribute to the overall business of the sponsor (innovative products or services, technology transfers, etc.).

In infrastructures, we are seeing pension funds competing with traditional private equity investors for assets with long-term regulated revenues.

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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 limited partners ("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).

Under Portuguese law, only the management entity can manage/take decisions for the private equity fund and there are no "general partners" affiliated with management with decision-making powers.

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.

Investments 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 the operational risks and regulatory hurdles that 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 depend essentially on the mode of management departure: if management are deemed a "bad leaver", unvested shares are acquired at nominal value; or alternatively, if management are considered a "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 is required 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 that 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 a 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. whose shares are exchanged in a regulated market) or financial companies, need not be made public and will almost surely contain confidentiality provisions.

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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 director 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 shareholder 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 that 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 are therefore 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 that restrict 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 their voting right in exchange for "special advantages" (i.e. prohibition of vote-selling).

As regards 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), while non-compete provisions 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, whose 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 that arise from private equity management having directorships in several portfolio companies (usually by providing protections to the private equity investor).

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4 Transaction Terms: General

4.1 What are the major issues impacting the timetable for transactions in your jurisdiction, including antitrust, foreign direct investment 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) and formalities related to employment matters, notably town hall meetings and opinions from employee representative structures;
d) waivers from competition authorities;
e) deals in some regulated sectors (especially banks, insurance companies and other financial institutions) require prior approval from the respective regulatory authorities; and
f) in critical infrastructure transactions involving investors outside of the European Economic Area ("EEA"), these are generally required to be reviewed by the government.

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 effectively limit the protections that can be afforded to private equity investors, such as recommendations 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?

Consideration structures in the price payable by private equity investors in Portugal to shareholders of portfolio companies often include "closing accounts" mechanisms, whereby the price changes according to variations in cash, (net-)debt and working capital from a reference date to closing date.

Earn-outs are also common (buy-side) price variations, notably in management buy-out transactions or other deals when the selling shareholders are expected to continue to play a key role in the business.

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 (i) a private equity seller, and (ii) the 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 and environmental matters, fraud, and matters known to the buyer during due diligence or not covered by the due diligence at all.

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 common limitations to liability in private equity exit transactions. Specific disclosures against warranties (typically included in disclosure letters) are also commonly used.

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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 those 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 benefit the buyers.

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

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 buyer (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 buyer-friendly deals, financing is sometimes even established as a condition precedent to closing.

In case of non-performance of funding obligations, the seller's typical remedy is to claim for damages (or terminate the agreement if the same has not yet "closed").

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, even more so, the issuance of high-yield bonds.

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 that exist are subscribed by banking syndicates (notably for tax reasons).

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 making leveraged buyouts harder to structure (and with limitations, notably in what concerns the terms of the security package).

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

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 since 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 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).

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If the unit holder in the private equity fund (i.e. 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% nor the exemption rule are applicable when: (i) the beneficiary is an entity resident in a blacklisted jurisdiction; or (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% CIT withholding tax.

Off-shore 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 their shareholders do not receive any special treatment (i.e. a 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% corporate and personal income tax 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, as in many other jurisdictions, to 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 the 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 personal income tax ("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:

a) 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.
b) 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 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 nominal corporate income 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, however, appear to be 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 private equity funds that 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 that may be exercised during a five-year period counting from the date of initial investment.

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Such funds are now subject to, *inter alia*, the following obligations arising from the regime implemented by the Alternative Investment Fund Managers Directive ("AIFMD"):

a) their incorporation is subject to the prior authorisation of the 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) the 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).

As of January 1, 2020, Decree-Law no. 144/2019, of September 23 came into force. Among other innovations, this statute imposes more stringent regulatory requirements for the incorporation of private equity fund managers below the "AIFMD" thresholds (notably regarding the adequacy of qualified shareholders and members of corporate bodies of such fund managers).

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 that 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 that 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 Fifth 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 is the controlling structure of its clients (the fund LPs) and who is the ultimate beneficial owner of such LPs. 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 their 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 also reflects in the private equity sector.

Alas, some challenges remain, notably in what concerns timings for 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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