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# Private Equity
# 2021

Portugal: Law & Practice
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# PORTUGAL

## Law and Practice


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# 1. TRANSACTION ACTIVITY

## 1.1 M&A Transactions and Deals

In the fallout of the COVID-19 pandemic, from anecdotal evidence, the Portuguese transactional private equity environment during 2021 appears to be somewhat tepid so far; however, some bright spots are potentially appearing on the horizon, notably those involving private equity investors.

To date, one of the most important deals of the year consisted of the acquisition of a shareholding position corresponding to 33.07% of the votes in Mota-Engil (Portugal's largest construction company) by China Communications Construction Co, Ltd. The acquisition of the stake in Mota-Engil corresponds to a mixed transaction of purchase of shares and subscription of new shares in the context of the share capital increase of Mota-Engil. The respective prospectus was one of the first to benefit from the recently approved EU Recovery Plan.

Another relevant transaction was the acquisition, by Ontario Teachers' Pension Plan, of the stake held by private equity giant Carlyle in Logoplaste, one of the world's leading companies in the design and manufacture of plastic containers.

## 1.2 Market Activity

Market activity involving private equity players has followed the trend of the wider M&A market and has been slow so far, although it is steadily gaining pace.

In 2021 to date, the mergers and acquisitions market in Portugal regressed in the first five months, compared to the same period last year, both in the number and value of deals. The technology and real estate sectors remained the most active. Specifically regarding private equity, up to May, there were eight major transactions with a total value of EUR204 million. This was a 33% decrease in the number of transactions and a 93% decrease in total value compared to the same period in 2020.

In other types of developments with a potentially significant impact on the industry, in December 2020, EU leaders agreed on the next long-term EU budget, closing more than two years of negotiations. Indeed, the new "Multi-annual Financial Framework" (MFF) consists of an extraordinary EUR1 trillion (approximately), laying out the next spending plans for the 2021 to 2027 period. This budget will also be used to embed the EU's recovery fund package, "Next Generation EU", consisting of a further EUR750 billion in funds and investments in addition to the normal budget.

As regards Portugal in particular, it will benefit from EUR16.6 billion within the Recovery and Resilience Plan. A significant part of this amount will be directed towards fomenting private investment, especially in the areas of green and digital transition, opening up relevant opportunities for private equity (and private capital in general) players both to raise funds (through European Structural and Investment Funds) and find new types of target companies/investments.

# 2. PRIVATE EQUITY DEVELOPMENTS

## 2.1 Impact on Funds and Transactions

In line with the trend in the rest of the European Union, the demands regarding regulatory compliance for (alternative) fund managers have been steadily increasing in the past few years. Private equity has been no exception.

### Harmonising of the Regulatory Regime

Law No 144/2019, of 23 September has transferred many prudential supervision competencies previously allocated to the Bank of Portugal to the Portuguese Securities Market Commission (CMVM). Although private equity was not regulated by the Bank of Portugal before, this law was a step forward to harmonise the regulatory regime between non-private equity fund managers and private equity fund managers. notably those which operate below the thresholds, to be authorised as an alternative investment fund manager under the Alternative Investment Fund Directive (ie, having assets under management of EUR500 million, if operating without leverage, or having assets under management of EUR100 million, if operating with leverage).

The most relevant changes brought by this statute for private equity fund managers concern the heightened scrutiny by CMVM of the adequacy of the respective holders of qualified positions and members of the corporate bodies.

### Adapting to ESG Rules

Also noteworthy is that private equity fund managers are starting to adapt to European rules on environmental, social and governance (ESG) matters, via the mandatory disclosure requirements of Regulation (EU) 2019/2088 of the European Parliament and of the Council, which have recently come into force.

### More Stringent KYC and Other AML Policies

Also fairly recent is the new anti-money laundering (AML) legislation, approved by Law No 83/2017 (implementing EU Directives and FATF recommendations), which has significantly changed "compliance" practices for both private equity managers (which are subject to the obligations established in said statute) and the respective funds' portfolio companies.

With the new legislation, fund managers have been forced to implement more stringent "know your customer" (KYC) and other AML policies (as well as anti-sanctions), for them and their funds' subsidiaries, which are also included in the subjective scope of the law (financial institutions, real estate companies, etc). These enhanced obligations add complexity and length to M&A transactions and operating costs for private equity funds.

## 3. REGULATORY FRAMEWORK

### 3.1 Primary Regulators and Regulatory Issues

The main body which provides regulatory oversight for private equity funds (incorporated in Portugal) is CMVM. CMVM assesses the legality of the registration and incorporation of private equity funds and monitors their governance, activities and financial standing.

Regarding M&A activity and foreign investment, the main regulators are:

- the Portuguese Competition Authority and the European Commission for merger control (which also have jurisdiction when the seller or purchaser is private equity-backed);
- CMVM for offers to acquire listed companies and for public-to-private transactions;
- the Portuguese government in what concerns foreign investment control and concessions for the operation of certain public goods; and
- sectoral regulators such as ANACOM (telecommunications), ERSE and DGEG (energy), the Bank of Portugal (credit institutions) and ASF (insurance companies and pension funds) also play a role in reviewing and clearing acquisitions of companies in those sectors.

For foreign investment control, review is triggered if the potential purchaser is ultimately owned by an entity outside of the European Economic Area and also if the target assets are deemed "strategic assets" for the country (meaning the main infrastructure and assets assigned to national security or defence or to the rendering of essential services in the areas of energy, transportation and communications).

With regards to antitrust, private equity-backed companies are subject to merger control rules, essentially in the same manner as corporates. Turnover and other relevant metrics are normally assessed at the level of the management entity (ie, taking into account the aggregate of the funds managed by the management entity).

## 4. DUE DILIGENCE

### 4.1 General Information

Legal due diligence is common in private equity-driven transactions in Portugal, especially when private equity sponsors are involved.

Due diligence is usually conducted on a "by-exception" or "red flag" basis (except when there are key contracts or other legal instruments upon which the target business is predicated, in which case, the respective main legal terms are described).

Key areas include material agreements, licences and regulatory environment, corporate and intragroup relationships (services agreements, cash pooling, etc) and financing. Tax is naturally also a common concern (but is often dealt with separately from the legal due diligence).

### 4.2 Vendor Due Diligence

Vendor due diligence is often conducted in transactions where there is a private equity seller, mainly to (pre-emptively) resolve problems of a legal nature that the target may have prior to sale and/or to get buyers up to speed on the company and to impose "fair disclosure" exceptions (regarding the conclusions in the report) on the sale and purchase documents.

Advisers involved in preparing the vendor's due diligence reports are often asked to offer reliance to the reports to the financing banks of the buyer. The buyers' advisers typically also offer such reliance in their own reports (to banks and to insurance companies, in the latter case, if warranty and indemnity (W&I) insurance is procured for the transaction).

General disclosure to buy-side advisers is common, although not accompanied with reliance (except for financing banks, as mentioned, and W&I insurance providers).

## 5. STRUCTURE OF TRANSACTIONS

### 5.1 Structure of the Acquisition

Most acquisitions by private equity funds are made via private sale and purchase agreements of equity participations in the target company. Asset sales occur less often, due to tax and legal structuring reasons.

When companies wish to divest an unincorporated part of their business, they typically restructure the same in advance through a carve-out process.

Court-approved schemes in insolvency or reorganisation proceedings have also gained popularity in distressed transactions, notably debt-equity swaps in real estate assets and related businesses (hospitality, logistics).

In terms of process, auction sales are becoming more common, notably in larger deals; by encouraging competition between potential bidders, auction sales typically make the transaction more seller-friendly (by improving the price, as well as offering more favourable terms in warranties and indemnities).

### 5.2 Structure of the Buyer

A typical private equity investment structure in Portugal involves a private equity fund, managed by a regulated management entity, which in turn incorporates a wholly owned special-purpose vehicle (SPV) to perform the acquisition (mostly for liability ring-fencing purposes).

The SPV is then funded with equity from the fund (capital, quasi-equity contributions or shareholder loans) to perform the acquisition, and in larger deals, bank financing is also procured.

### 5.3 Funding Structure of Private Equity Transactions

Private equity deals are normally financed with equity or quasi-equity, from the private equity fund, and debt (depending on the size of the transaction, the financing structure and the type of assets involved).

To increase certainty from the seller's side to receive the price, equity commitment letters are often requested from the private equity buyer's structure, either from a corporate entity higher up in the fund's chain of control or from the fund itself, more often in auction sales.

As far as ownership is concerned, the level of equity participation of the private equity fund depends on the type and circumstances of the transaction: for example, in management buyouts and "growth" transactions, funds typically hold a minority portion of the equity, while in distressed transactions the fund will retain the majority or all of the entity's capital.

### 5.4 Multiple Investors

#### Consortium Deals

Deals involving a consortium of sponsors in Portugal are not common; however, when the size of the target so demands, consortia composed of private equity sponsors may become involved (notably, in the purchase of an 81% stake in Brisa – Portugal's largest highway toll operator – by a consortium of three private equity pension fund investors and six hydro plants in the North of Portugal from EDP – the largest industry and utility company in Portugal).

#### Co-investment Business Models

Some fund managers are currently exploring co-investment business models with unit holders (the parallel to the limited partner's figure in the Portuguese environment, eg, institutional asset managers and "first tier" foreign private equity houses) in large deals.

In these cases, the fund will own a minority (also largely passive) stake in the acquisition vehicle which is majority-owned by one or more of the unit holders of the fund.

#### Club Deals

There also appears to be heightened interest in the market for club deals, both on the part of traditional players and newcomers to the private equity space. Investors should, however, be wary of the regulatory implications of going down this route, as the definition of alternative investment fund under European law (and the regulatory restrictions which consequently apply) may be broad enough to capture certain co-investment structures.

## 6. TERMS OF ACQUISITION DOCUMENTATION

### 6.1 Types of Consideration Mechanisms

Price adjustment mechanisms in M&A transactions (involving both private equity and corporates) usually have either locked box or completion account mechanisms. Fixed price transactions (ie, with no adjustment whatsoever) are not common.

Locked-box mechanisms are being increasingly utilised due to their ease of use over the "completion accounts" mechanism (which entails the preparation of target accounts as of the date of closing, a process that is usually costly and time-consuming).

To protect the interests of buyers, private equity sellers agree not to, for instance:

- undertake transactions which would cause value to "leak" from the target group (in locked-box structures);
- allow the buyer to dispute draft completion accounts (in completion account structures); and/or
- cause material changes to the company in the period between signing and closing (in both cases).

This does not differ materially from deals where sellers are corporates.

#### Private Equity Buyers and Volatile Turnovers

Private equity buyers provide equity support/commitment letters as a way to provide surety to the seller that the price will be paid (and other eventual pecuniary obligations fulfilled). Parent company guarantees (which in theory offer stronger protection vis-à-vis equity support instruments) or having the private equity fund enter the agreement as a joint and several obligor are situations which are not seen as often.

In transactions regarding businesses with volatile turnover and where management remains in the company (such as MBOs) earn-outs are often agreed by the parties to the transaction.

### 6.2 Locked-Box Consideration Structures

In locked-box structures, interest is usually charged on amounts classified as leakage, albeit not always.

### 6.3 Dispute Resolution for Consideration Structures

It is typical to have an independent expert (indicated via a joint selection process of buyer and seller, and usually an international audit/consultancy firm or investment bank) determine leakage values in locked-box models and cash/debt/change in working capital values in completion account models. Resolving such disputes through arbitration or judicial courts is far less common.

### 6.4 Conditionality in Acquisition Documentation

Albeit common when it comes to conditions of a regulatory nature, conditionality in acquisition documentation is not prevalent, notably in an auction sale, because it reduces certainty for the seller that it will be able to complete the deal.

In particular prior to the COVID-19 pandemic, conditions other than those of a regulatory nature were not common, although sometimes third-party consents in key contracts (notably pre-existing financing arrangements or concession agreements) and prior corporate restructurings are included. Making the transaction conditional on obtaining financing is rare (and usually "prohibited" in auction sales' process letters).

In turn, the pandemic brought an increase in:

- the use of material adverse change/effect clauses; and
- the use of conditional and deferred price structures (making the calculation of the purchase price more complex).

### 6.5 "Hell or High Water" Undertakings

Sellers usually propose that such undertakings be included in transaction documents, particularly in auction sales, again to increase certainty in execution; however, they are usually successfully pushed back by the buyers, particularly private equity buyers with demanding financial return objectives (which could be hurt by divesting certain portfolio companies too soon) and which are often constrained in their investment mandates.

## 6.6 Break Fees

Break fees and reverse break fees are rarely used in Portugal.

## 6.7 Termination Rights in Acquisition Documentation

Termination rights are usually assigned to a private equity seller, ie, if the closing of the agreement does not occur by the long-stop date.

As for private equity buyers, they are typically allowed to terminate in the following cases:

- closing of the agreement does not occur by the long-stop date;
- failure by the seller to comply with material closing actions; and/or
- (in buyer-friendly transactions) the occurrence of a "material adverse change".

## 6.8 Allocation of Risk

In transactions where the seller is a private equity fund, the allocation of risk is typically shifted favourably towards it (in relation to a "corporate" seller). The main reason being that the private equity seller is constrained in the period in which it can be exposed to liability (as private equity funds are eventually dissolved and wound up). This reduces the efficacy (and acceptability by the private equity seller) of long lists of warranties, extended warranty claims' periods and indemnities.

In relation to cases where the buyer is a private equity fund, there are no fundamental differences in risk allocation in relation to a "corporate" buyer: these will depend mainly on the economics and circumstances of the transaction.

The main limitations of liability for private equity sellers are those related to breach of representations and warranties in acquisition agreements (detailed in **6.9 Warranty Protection**), although such limitations (quantitative and with regard to time) on liability will sometimes also apply to breach of other undertakings or covenants under the agreement by the seller.

## 6.9 Warranty Protection

Warranties provided by a private equity seller to a buyer on an exit are usually limited. "Fundamental warranties" on the existence (of the seller and the target), capacity to enter into the agreement, and share ownership are usually granted. "Business" warranties are more limited and reserved for certain key matters. Private equity sellers' liabilities arising from breach of warranties are usually subject to caps in liability for breach of warranties, de minimis and basket provisions.

The contents of the data room and disclosure letters typically exempt the seller from liability in the case of breach of warranties. This has an advantage for the buyer as well, as it precipitates disclosure of many issues that could otherwise be kept "under the radar".

Typical quantitative limitations on liability include:

- cap for breach of warranties – 10% to 20% of the aggregate consideration;
- time limitations to claim for breach of warranties – 12 to 24 months;
- de minimis – 0.1% of aggregate consideration; and
- basket – 1% of aggregate consideration.

In turn, qualitative limitations in the acquisition agreement usually include:

- issues known and fairly disclosed;
- changes in the law;

- liabilities provisioned in accounts; and
- actions which have been agreed in writing with the purchaser.

If warranties and indemnities (W&I) insurance is contracted, however, these limitations will necessarily be different (ie, in that the buyer acknowledges that it will not make a claim under the acquisition agreement and that limits to a claim for breach of warranties will be made to the insurance company under the terms of the insurance policy, which in turn also includes its own limitations).

### 6.10 Other Protections in Acquisition Documentation

Besides warranties, other protections granted by a private equity seller in an acquisition agreement include interim period obligations (such as restrictions to managing the target company outside of the ordinary course of business) and certain pre or post-closing undertakings (idiosyncratic to the transaction). Price retentions mechanisms also occur but indemnities are rarely provided.

With relation to W&I insurance, the same is an increasingly common feature in Portuguese PE transactions. Policy costs (which are relatively expensive) are usually borne by the buyer and cover a wide range of business warranties, based on the due diligence performed by the insurance company (which, in turn, takes into account the vendors due diligence and due diligence performed by the buyer). Common exclusions include pollution liability, pension underfunding, certain tax liabilities and sanctions.

### 6.11 Commonly Litigated Provisions

It is not common for transactions involving private equity buyers or sellers to reach litigation (the cost thereof, especially when arbitration is the mode of dispute resolution, acting as a relevant deterrent). Pre-litigation disputes usually revolve around (alleged) breaches of warranties and the applicability of earn-out provisions (eg, discussing whether the respective earn-out events have been triggered or not).

## 7. TAKEOVERS

### 7.1 Public-to-Private

Public-to-private transactions are not common in Portugal. It appears that only one public-to-private (P2P) transaction has ever succeeded, which was the takeover of Brisa, the abovementioned highway toll operator (see **5.4 Multiple Investors**), by its reference shareholder and a private equity sponsor (Arcus).

### 7.2 Material Shareholding Thresholds

Under the provision of Article 16 of the Portuguese Securities Code, any person that reaches 2%, 5%, 10%, 15%, 20%, 25%, 33%, 50%, 66% and 90% of the voting rights of a listed company subject to Portuguese law (or reduces its level of voting rights below said thresholds) must, as soon as possible, and within a maximum period of four trading days after the occurrence of the fact or knowledge of the same:

- inform CMVM and the target company; or
- explain the situation by which voting rights are attributable to the relevant person disclosing the information.

The communication must demonstrate:

- the identification of the entire chain of entities to which the participation is attributed (whether national or foreign);
- the percentage of voting rights attributable to the holder of the participation, the percentage of share capital and the number of corresponding shares, as well as, when applicable, the identification of the participation by category of shares (when the issuer has

several categories outstanding) and the title of attribution of voting rights; and/or
- the date on which the participation reached, surpassed or was reduced to the above-mentioned thresholds.

Mere changes to the chain of attribution of voting rights must also be notified to CMVM and the target listed company.

## 7.3 Mandatory Offer Thresholds

A person that has over 33% or 50% of the voting rights of a listed company has a duty to launch a public tender offer over the entire share capital and other securities issued by such listed company which grant the right for their subscription or acquisition (Article 187 of the Portuguese Securities Code).

If a person exceeds only 33% of the voting rights of the listed company, the obligation to launch a mandatory tender offer will not be due if the person that is bound by such obligation proves before CMVM that it does not have control of the target company nor is it in a group relationship with the target company.

The consideration offered in a mandatory offer must be the highest of:

- the highest price paid by the offeror or any of the persons whose voting rights are attributable to it during the six months prior to the announcement of the offer; or
- the volume weighted average price of the stock in the six months prior to the offer.

## 7.4 Consideration

Consideration in public tender offers may be made either in cash or in securities.

Cash is usually the consideration of choice in tender offers, possibly due to the relative "shallowness" of Portuguese equity capital markets.

## 7.5 Conditions in Takeovers

Common conditions to launch the offer, incorporated in the offer announcements, include unblocking of voting limitations in the general shareholders' meeting (when by-laws of the target include such voting limitations) and regulatory clearances.

The effectiveness of the offer (when the offeror seeks to obtain control of the target company) is usually subject to the condition of obtaining more than 50% of the voting rights in the offer.

It is not generally allowed under Portuguese law for a takeover offer to be conditional on obtaining financing, given the fact that the buyer must have funds available to pay the full price resulting from the offer.

To ensure the protection of the bidder in the offer, break fees have been referenced as a way for the bidder to cover its costs should the offer not be successful. While not expressly prohibited under Portuguese law, break fees carry a considerable degree of risk for the target company's directors, given that:

- the fee could be considered a breach of directors' duties (if the fee is proven to be a way to entrench management or to favour one shareholder over the others); and/or
- if the fee is large enough, this could breach the "passivity rule", whereby management cannot take decisions which materially affect the target company before the offer is over.

As a matter of law, bidders are also able to increase the price offered at any time, notably in the case of a competitive bid.

## 7.6 Acquiring Less than 100%

Outside their shareholding, a person acquiring less than 100% in a tender offer can make use of the statutory squeeze-out procedure to acquire the entire share capital of the target.

If a purchaser (by itself or through related entities whose voting rights are attributable to it) holds more than 90% of the voting rights in a Portuguese listed company up to the offer results or 90% of the voting rights encompassed by the offer, may in the three subsequent months acquire the remaining shares through fair consideration, in cash.

The consideration offered must be the highest of:

- the highest price paid by the offeror or any of the persons whose voting rights are attributable to it during the six months prior to the announcement of the offer; or
- the volume weighted average price of the stock in the six months prior to the offer.

The offeror that intends to launch a squeeze-out procedure must immediately announce it and send it to CMVM to be registered. The offeror must also deposit the total consideration in a credit institution, at the order of the holders of the remaining shares.

The acquisition of the remaining shareholders under a squeeze-out procedure is effective from the date of publication, by the offeror, of the registration before CMVM.

### 7.7 Irrevocable Commitments

Irrevocable commitments in tender offers, the negotiation of which occurs prior to the announcement of the transaction, are not common in Portugal.

As care is usually taken for these commitments, which in principle are required to be disclosed, not to lead CMVM to consider the voting rights of the committing shareholders to be attributed to the offeror (as that may trigger mandatory public offer thresholds), protections are sometimes included for investors to be able to accept competing offers or other types of exit.

### 7.8 Hostile Takeover Offers

As a matter of law, hostile takeovers are admitted in Portugal and a few have been announced and launched.

However, there have never apparently been unsolicited (and unsanctioned) tender offers by a private equity player to a Portuguese company.

## 8. MANAGEMENT INCENTIVES

### 8.1 Equity Incentivisation and Ownership

Offering managers equity incentives/ownership is a common, but not inevitable, feature of private equity transactions in Portugal.

There is no standard way to attribute management shares, and equity participations can range anywhere from residual (5–10%) to significant (40–49%). In certain management buyout transactions, management will hold the majority of the share capital post-transaction.

Employee stock option plans (virtual or physical) are sometimes also used for management and other relevant company employees.

### 8.2 Management Participation

Managers are often attributed common shares with associated vesting provisions and the use of preferred instruments in management equity is not common.

### 8.3 Vesting/Leaver Provisions

Good leaver/bad leaver provisions, which qualify the circumstances in which managers cease holding participations or directorships/employment positions in the target, are usually included in shareholders agreements regarding the target, entered into between management and the private equity sponsor.

Good leaver provisions are triggered if managers are forced to depart from the company due to extreme circumstances outside of their control (such as a serious disease or injury). In turn, bad leaver provisions are usually triggered if managers exit the company without being considered good leavers.

Particularly in venture capital, vesting provisions (where management is prevented, through contractual means, from enjoying full ownership of the equity participations acquired/subscribed in the transaction) will also be included in the relevant shareholders' agreement. The vesting period will run for a period of three to four years, with a one-year cliff (ie, following which a certain percentage vests) and two to three years of "linear" vesting (of the remaining shares).

If the manager is deemed a bad leaver, private equity sponsors will be granted the right to purchase the former's shares at nominal value. If, however, the manager parts ways with the company as a good leaver (and the agreement is negotiated in a balanced manner), private equity sponsors will usually be required (or have the right) to purchase the manager's shares at fair value.

## 8.4 Restrictions on Manager Shareholders

Management shareholders frequently commit to non-compete and non-solicitation undertakings. These raise concerns from an employment law standpoint, restricting fundamental rights to work and the pursuit of professional livelihood and, from a competition law standpoint, by stifling competition and, therefore, they may be subject to limitations.

Statutory restrictions to non-compete clauses include:

- they must be entered into in writing;
- they have a time limitation of two years (extendable to three years in certain cases); and
- consideration must be given to the employee/director in exchange for accepting this clause.

Non-disparagement clauses, where managers agree not to publicly make negative statements regarding the company, are unusual.

## 8.5 Minority Protection for Manager Shareholders

Manager shareholders, when holding minority participations, are usually afforded contractual protections (in the transaction documents, notably shareholders' agreements) to maintain the integrity of their investments.

First and foremost, managers will usually be entitled to be appointed to the company's board of directors (with executive functions).

### Veto Rights

Veto rights and legal pre-emption rights in share capital increases are common mechanisms used to avoid dilution of manager shareholders. Managers also hold veto rights (in both shareholders' meetings and board of directors' meetings) to prevent the private equity sponsor from unilaterally taking fundamental decisions regarding the company's governance (eg, amending the by-laws), legal characteristics (eg, transform, merge or demerger the company) and strategy (eg, amending the business plan).

These veto rights are typically structured either around a shareholders' agreement (where the protection is contractual, and therefore enforceable only against the management's counterparties) or through shares carrying special rights (where the protection is enforceable against the company and, therefore, company resolutions in violation of such "special rights" may be challenged on that basis).

## 9. PORTFOLIO COMPANY OVERSIGHT

### 9.1 Shareholder Control

#### Majority Participation

When the private equity fund shareholder has a majority participation in the target company, typical control mechanisms are provided under statute (notably, the possibility to single-handedly appoint the members of the target's corporate bodies – under Portuguese corporate law there is no statutory mechanism of proportional representation in the company's management or audit bodies).

#### Minority Participation

When the private equity fund shareholder has a minority participation in the target company, board appointment rights in shareholders' agreements (proportional or not) are common; other rights typically requested are: veto rights at the shareholder level in critical matters (eg, reorganisations, share capital increases and decreases), information rights (eg, the right to receive monthly information on accounts and KPIs) and exit rights (eg, pre-emption rights and tag-along rights, drag-along rights, etc).

### 9.2 Shareholder Liability

A Portuguese company (extended to EU companies) that wholly owns another Portuguese company is responsible for compliance with the obligations of the subsidiary, both before and after the latter has been incorporated.

However, it is doubtful whether this provision is applicable to private equity funds vis-à-vis other companies (given that private equity funds are not incorporated and furthermore have a "proprietary" legal regime of their own that does not include a similar provision).

Nevertheless, there are (rare) cases where it would be conceivable (applying certain general civil law principles) for the legal personality of the portfolio company or special purpose vehicle incorporated for the acquisition to be disregarded and the "corporate veil pierced". This requires proof of behaviour which is fraudulent or obviously against good faith principles.

### 9.3 Shareholder Compliance Policy

Increasingly, sophisticated private equity fund managers with compliance policies are imposing the terms of the same (or parts thereof) on portfolio companies, notably with regards to anti-bribery and anti-money laundering, as a way for such fund managers to comply with the legal obligations to which they are bound.

Implementation of other policies, such as ESG, by private equity shareholders regarding their portfolio companies are rarer. However, with the coming into force of Regulation 2019/2088 (from 10 March 2021) and the respective regulatory technical standards (for topics including disclosure of information on "green" financial products) in 2022, the implementation of ESG-related policies across the spectrum of portfolio companies is expected to increase significantly.

## 10. EXITS

### 10.1 Types of Exit

A typical holding period for a private equity investment would run anywhere from four to seven years before an exit occurs.

The most common forms of exit seen in 2021 thus far are trade sales and secondary sales to other asset managers. Write-offs also sometimes occur.

IPOs and dual-track processes initiated by private equity sponsors have not yet occurred in Portugal.

### 10.2 Drag Rights

Drag-along rights are typically included in investment documentation to ensure management and (often) other co-investors are required to sell if an exit opportunity arises.

Typical tag-along thresholds are 75% or more, however, in some cases, the bar is lowered further still.

### 10.3 Tag Rights

Typically, management shareholders enjoy tag-along rights when the private equity shareholder sells its stake.

A typical tag-along threshold is 50%.

### 10.4 IPO

In Portugal there has never been an IPO promoted by a private equity seller (the only approximation was one venture capital-backed firm having made a debut in an alternative trading exchange).

In other IPOs in the Portuguese market (not caused by a private equity exit), where the sponsor retains a majority participation, relationship agreements are entered into between this dominant shareholder and the listed company to ensure dealings between the two entities are done on an arm's length basis.

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**Morais Leitão, Galvão Teles, Soares da Silva & Associados** is a leading full-service law firm in Portugal, with a solid background of decades of experience. The firm's private equity (PE) team offers a holistic approach to the private equity sector and brings a wealth of expertise in transactional work and fund formation/regulatory work. The PE team is divided as follows: transactional work where one of the parties is a private equity or venture capital player, and fund formation and regulatory work for private equity or venture capital vehicles. The firm regularly advises some of the most sophisticated funds active in Portugal and helps a considerable number of new clients to expand into PE business each year. The firm's lawyers have experience in the following sectors: energy and clean tech, infrastructure, banking and insurance, retail and consumer goods, and telecommunications.

## AUTHORS

**Ricardo Andrade Amaro** has a great deal of experience in private equity matters and co-heads Morais Leitão's private equity team. He acted as legal adviser in the setting-up of the first private equity fund in Portugal exclusively dedicated to the recovery of companies (turnaround fund), which is currently the largest Portuguese private equity fund. He regularly acts as legal adviser in the setting up of private equity funds, as well as assisting with day-to-day regulatory advice.

**Diana Ribeiro Duarte** co-heads Morais Leitão's private equity team and is a powerhouse in the firm's corporate practice areas. Diana has invested extensively in acquiring in-depth knowledge of the legal challenges that confront the setting up and operation of private equity vehicles, including the complex regulatory procedures to which they are subject under EU and Portuguese law. Her legal practice in this field has focused increasingly on advising private equity investors in M&A transactions, including share deals, leveraged investments, joint ventures, structuring and executing the investment and the investment rounds, and the exit.

**Pedro Capitão Barbosa** is focused on private equity and venture capital, both from a corporate and transactional perspective. He advises Morais Leitão's clients (equity sponsors or management) in fundraising, public and private M&A, joint ventures and corporate restructuring transactions (domestic and cross-border), and from a regulatory perspective, in the setting up, day-to-day regulatory matters and winding up of investment funds, notably private equity funds.

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