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Private Equity 2024

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Portugal: Law and Practice
Diana Ribeiro Duarte, Pedro Capitão Barbosa and Catarina Almeida Andrade
Morais Leitão, Galvão Teles, Soares da Silva & Associados

PORTUGAL

Law and Practice

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Morais Leitão, Galvão Teles, Soares da Silva & Associados is a full-service law firm in Portugal, with decades of experience in its area of expertise. In addition to transactional work, the firm's private equity (PE) team specialises in fund formation and regulatory matters. Its PE team consists of two divisions: transactional work in which a private equity or venture capital player is involved, and fund formation and regulatory work for private equity or venture capital vehicles. Aside from advising some of the most sophisticated funds operating in Portugal, the firm also assists new clients in establishing a presence in the PE sector each year. Its lawyers have experience in energy and clean tech, infrastructure, banking and insurance, retail and consumer goods, and telecommunications.

Authors

Diana Ribeiro Duarte co-heads Morais Leitão's private equity team and is an integral member of the firm's corporate practice areas, being also one of the team members providing Sustainability: ESG and Human Rights-related services in connection with the PE sector. She has extensive experience in the legal challenges presented by setting up and operating private equity vehicles, including the numerous regulatory procedures that they are subject to under EU and Portuguese law. Her legal practice is increasingly focused on advising private equity investors on mergers and acquisitions transactions, including share deals, leveraged investments, joint ventures, structuring and executing the investment rounds, and exits.

Pedro Capitão Barbosa is actively engaged in domestic and cross-border private transactions and restructurings (including joint ventures and minority acquisitions, investments and divestments of corporate divisions), as well as equity and convertible investment rounds, involving private equity and other private market sponsors in both cases. He also has considerable experience working with management companies and fund promoters with regard to the incorporation, restructuring, governance and regulation of alternative investment funds (primarily buyout funds, infrastructure funds, secondary funds, and venture capital funds). More recently, he has been involved in the design and implementation of club deals and other alternative investment structures.

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1. Transaction Activity

1.1 Private Equity Transactions and M&A Deals in General

In the first half of 2024, the Portuguese M&A market tallied 252 completed transactions, amounting to EUR4.6 billion, according to the latest TTR Data ranking (during the period ranging from 1 January to 30 June 2024). This represents a 24% reduction from the number of transactions recorded and a 16% reduction on capital deployed in the same period last year.

Regarding private equity transactions in Portugal, 24 transactions were recorded in the first half of the year, totalling EUR587 million (no data has been provided regarding changes vis-à-vis the same period of 2023).

The Amadeus (travel technology giant) acquisition of Vision-Box (provider of cutting-edge technology for biometrics identification platforms in travel ports), backed by a private equity fund managed by Keensight, was highlighted as the most notable deal of 2024 in Portugal to date involving private equity – the deal value amounted to approximately EUR320 million.

1.2 Market Activity and Impact of Macro-Economic Factors

From a macroeconomic perspective, Portugal is behaving like other advanced economies – the rise and now stabilisation in interest rates to curb inflationary pressures have continued to adversely impact M&A and private equity deal activity, while geopolitical tensions have also played a role in increasing the risk on financial stability and therefore deal appetite.

From a domestic perspective, the end of real estate-related investments as eligible towards benefiting from the Portuguese Golden Visa regime has prompted the launch of new private equity funds, focusing on a myriad of sectors from technology to R&D, in an attempt to reroute envisaged Golden Visa applicants towards new eligible activities.

Besides the Golden Visa scheme, growth of the Portuguese private equity market was supported by several other public programmes such as *Programa Consolidar* (attribution of EU COVID-19 recovery funds to support ailing but financially viable businesses), *Programa Venture Capital* (attribution of EU COVID-19 recovery funds to

invest in start-ups in priority sectors such as software, energy, climate and life sciences) and SIFIDE (tax break scheme given to investors of, inter alia, private equity funds which invest in R&D-focused companies), all having a positive impact and aiding in the increase of the competitiveness and attractiveness of the industry.

Lastly, Portugal's lively start-up ecosystem has also been attracting the attention of private equity and venture capital investors (Portuguese and foreign alike), with an increased interest in early-stage investment.

At the fundraising level, domestic fundamentals remain strong with the same trends from previous years influencing activity.

- Public funds to revitalise Portuguese SMEs and invest in Portuguese start-ups, some of which are mentioned above, are still available mostly through the Recovery and Resilience Plan (focusing mainly on supporting the green and digital transition).
- National and geopolitical tensions as well as the spotlight cast on Portugal as an investment and living destination continue to attract significant investment from high-income individuals in order to obtain a Golden Visa by investing in funds.

These fundamentals have caused considerable and steady growth in the Portuguese private equity industry over the last few years, with assets under management by domestic private equity companies and funds more than doubling from 2015 to 2023 (as assets under management grew from circa EUR4 billion to circa EUR9 billion).

2. Private Equity Developments

2.1 Impact of Legal Developments on Funds and Transactions

In line with the trend in the rest of the EU, the demands regarding regulatory compliance for (alternative) fund managers have been steadily increasing in the past few years. Private equity is not impervious to this.

Adapting to ESG Rules

Private equity fund managers are starting to adapt to European rules on ESG matters, via the mandatory disclosure requirements of Regulation (EU) 2019/2088 of the European Parliament and of the Council (SFDR) as well as Regulation (EU) 2020/852 of the European Parliament and of the Council (Taxonomy Regulation), and respective Level 2 Regulations.

To the knowledge of the authors, there are several private equity funds applying for, operating as and sometimes downgrading to "SFDR Article 8" funds, which reflects a growing interest from investors in the product and efforts from fund managers to structure and implement it (with the hope of improving their chances of successfully fundraising with ESG-driven LPs).

Moreover, the Corporate Sustainability Due Diligence Directive was approved in May 2024, aimed at obliging large EU companies and significant non-EU companies operating within the EU to conduct due diligence across their global supply chains, relating to actual and potential human rights, and environmental adverse impacts.

The Corporate Sustainability Reporting Directive, focused on requiring large and/or listed companies to disclose information on how they manage social and environmental challenges,

has also surpassed all the hurdles derived from the EU legislative process and is now in force.

Both of these regimes may have an impact on private equity, to the extent they have large corporates in their portfolios exceeding the relevant thresholds.

All of these changes show that the legislative evolution on corporate sustainability and sustainable finance matters has been relentless and it continues to be challenging for managers, investors, and regulators to be able to catch up.

New Fund Management Legal Framework

In April 2023, Decree-Law No 27/2003 of 28 April was published, having entered into force in 2023. This statute approved the New Asset Management Framework which performed a full revision of the former private equity legal regime (Law No 18/2015), as well as of the former Portuguese legal regime for UCITS and other alternative investment funds (Law No 16/2015), merging these two statutes into one and enacting noteworthy changes to private equity companies and private equity funds' activities.

With this revision, the Portuguese legislature aimed to create a unified legal framework for the asset management (including private equity) industry, envisaging a simpler, more coherent, and more credible regime by emphasising a risk-based approach and on ex-post supervision (as an alternative to burdensome and lengthy authorisation processes) and very importantly, eliminating excessive regulation over pre-existing Directive provisions (ie, "gold-plating").

Most importantly, the timeframe to incorporate new private equity funds has shortened significantly (given that the registration of most funds is now subject only to a prior notice procedure).

On the other hand, this comes at the expense of legal certainty, as the Portuguese Securities Market Commission (CMVM) currently does not vet the documents being submitted beforehand (ie, because the focus is now on ex-post, rather than ex-ante, supervision); also, with these new rules being approved, many small fund managers are now subject to more organisational requirements and regulation.

In conclusion, the simplification of the regime, making it easier for private equity companies to commence their activities, combined with the elimination of the minimum amount to invest in private equity funds (also an innovation of the new regime), might prove helpful in galvanising the Portuguese private equity market.

So far, since the law has been approved, the number of private equity companies and funds has continued to increase, but seemingly not at an accelerated pace, and it remains to be seen whether this is due to the enactment of the law or if there are other variables at play.

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 the CMVM. In addition to assessing the legality of the registration and incorporation of private equity funds, it monitors their governance, activities, and financial standing.

The main regulators of merger and acquisition activity and foreign investment are as follows:

- the Portuguese Competition Authority and the European Commission for merger control

(which also have jurisdiction when the seller or purchaser is backed by private equity);
- CMVM for offers to acquire listed companies and for public-to-private (P2P) transactions;
- the Portuguese government with regard to 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), ASF (insurers and pension funds) and CMVM itself (fund managers and financial intermediaries) also review and clear acquisitions of businesses in the above-mentioned sectors.

For foreign investment control, review is triggered if the potential purchaser is ultimately owned by an entity outside of the European Economic Area or if the target assets are deemed as “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).

As for foreign subsidies, and under Regulation (EU) 2022/2560 (the Foreign Subsidies Regulation (FSR), the European Commission was endowed with extensive investigative and sanctioning powers. Thus, the notification and compliance obligations for EU companies envisaging M&A transactions and entering into public procurement procedures that are triggered by the FSR (ie, if there is deemed to be a foreign subsidy, meaning if a “third country provides, directly or indirectly, a financial contribution which confers a benefit on an undertaking engaging in an economic activity in the internal market and which is limited, in law or in fact, to one or more undertakings or industries”) are being closely monitored by legal advisers when considering potential M&A transactions or the participation in a public procurement procedure. For M&A, the thresholds for the application of the FSR are (i) one of the businesses involved having turnover in the European Union of at least EUR500 million and (ii) subsidies from third countries of more than EUR50 million have been granted by the acquiring company or one of the merging companies in the last three years.

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).

If the buyer or co-investor is a sovereign wealth fund, from experience, the authors do not find this leads to enhanced FDI scrutiny relative to other third-country buyers; however, the authors also note that there are sometimes practical difficulties for these entities to go through KYC and onboarding procedures with banks and co-investors.

In relation to sanctions, from anecdotal evidence, there is awareness that the conflict in Ukraine with the ensuing and recently renewed sanctions against some individuals and companies of the Russian Federation make it increasingly difficult for Russian citizens and companies (including those not subject to sanctions) to open and operate bank accounts and use the financial system (in Portugal, as in the rest of the EU). The impact of sanctions on private equity fundraising and deal-making in Portugal, however, appears to have been minimal.

As outlined above (detailed in **2.1 Impact of Legal Developments on Funds and Transactions**), rules concerning anti-bribery and ESG

compliance have been approved and are being implemented by supervisory entities throughout Europe. In this respect (as a sign of the importance of these issues in the economy of regulatory policy), it is worth emphasising that CMVM has published a guide on sustainability for supervised entities with the aim of facilitating and encouraging the adoption of policies and procedures in line with both supervisory expectations and the recommendations of the CMVM and ESMA regarding compliance with the set of standards on sustainable finance.

4. Due Diligence

4.1 General Information

The practice of legal due diligence is common in private equity-driven transactions in Portugal, especially when private equity sponsors are involved.

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

The key areas include material agreements, licences and regulatory environment, corporate and intragroup relationships (services agreements, cash pooling, etc), and financing. Taxes are also a common concern (but are often dealt with separately from legal due diligence).

4.2 Vendor Due Diligence

A vendor due diligence is often conducted in transactions involving private equity sellers in order to (pre-emptively) resolve or flag any legal issues the target may be experiencing prior to a sale and/or to get buyers up to speed on the company and to impose "fair disclosure" exceptions on the purchase and sale agreements (pertaining to the report's conclusion).

Advisers involved in preparing the vendor's due diligence reports are often asked to provide a statement of reliance to the financing banks of the buyer. It is common for the buyers' advisers to provide such reliance in their own reports (to banks and to insurance companies, in the latter case, if warranty and indemnity (W&I) insurance is obtained for the transaction).

A general disclosure of information to buy-side advisers is common, but it is not accompanied by reliance (except for financing banks as previously mentioned and W&I insurance providers).

In an auction sale, the seller will also typically provide bidders with presentation decks (often accompanying management presentations) which contain highlights on the activities of the business or assets being sold, as well as non-public information on certain financial, operational and commercial metrics. Transaction structure and key legal matters are sometimes also addressed.

5. Structure of Transactions

5.1 Structure of the Acquisition

Most acquisitions by private equity funds are made through 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 and 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 that incorporates a wholly owned special-purpose vehicle (SPV) to complete the acquisition (usually for liability ring-fencing purposes).

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

5.3 Funding Structure of Private Equity Transactions

The typical funding structure has not seen significant developments or changes in the past few months, with private equity transactions being usually financed through equity or quasi-equity, from the private equity fund, and debt (depending on the transaction size, 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, especially 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 buy-outs and "growth" transactions, funds typically hold a minority share of the equity, whereas in distressed transactions, a fund retains the majority or all equity in the entity.

In some larger transactions, private equity purchasers sometimes present commitment letters issued by lenders with non-binding offers or binding offers, either because the certainty of funds is required by sellers in the auction or because they wish to strengthen their bid.

Usually, the debt-funded portion of the purchase price will not be fully binding at the signing stage of the transaction. Often, the full debt financing package remains subject to finalisation after the signing, and the debt commitment is contingent on certain conditions, such as the lenders' due diligence and fulfilment of specific financial and legal requirements.

Overall with higher interest rates, the authors find that financing M&A deals in general (and also private equity) has become more difficult.

5.4 Multiple Investors

Consortium Deals

Portugal does not commonly engage in deals involving consortium sponsors; however, when the target size is such that private equity sponsors are required, such a consortium may be formed. Such is the case 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 as well as six

hydroelectric plants in the North of Portugal from EDP, Portugal's largest industry and utility company.

Similarly, consortia comprising a private equity fund and a corporate investor are not very common in the realm of private equity deals in Portugal.

Co-investment Business Models

There are some fund managers (eg, institutional asset managers and "first tier" foreign private equity firms) who are exploring joint-investment arrangements in large transactions with unit holders (the equivalent of the limited partner in the Portuguese context).

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

Club Deals

There appears to be a heightened interest in the private equity market for club deals, both among traditional players and newcomers. Nonetheless, investors should be aware of the regulatory implications of taking this route, as the definition of alternative investment funds under European law (and the regulations resulting from that definition) may be broad enough to encompass certain co-investment structures as well.

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:

- engage in transactions that would cause value to "leak" from the target group (in locked-box structures);
- allow the buyer to dispute draft completion accounts; and/or
- cause material changes to the company during 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 (as well as other eventual pecuniary obligations fulfilled). A parent company guarantee (which would in theory offer stronger protection than equity support instruments) or the private equity fund as a joint and several obligor are situations that are not frequently encountered.

In transactions involving businesses with volatile turnover and in which management remains within the organisation (such as a management buyout) earn-outs are often agreed upon 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, although this is not always the case.

On the other hand, the practice of charging "reverse" interest on leakage during the locked-box period varies across deals and is not a standard feature. However, it is not unheard of; sometimes negotiation between the parties for the specific terms outlined in the locked-box provisions lands in such a result (notably if there is negotiation leverage from the buy side).

6.3 Dispute Resolution for Consideration Structures

Independent experts (indicated by a joint selection process of buyer and seller, and usually an international audit/consultancy firm or investment bank) are typically used to determine leakage values in locked-box models and cash/debt/change in working capital values in completion account models. It is far less common resolve such disputes through arbitration or judicial court proceedings.

The types of experts and mechanics of the dispute resolution mechanism usually depend more on the particularities of the transaction than the type of price structure used.

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).

The pandemic resulted in 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

To increase certainty in execution, sellers usually include such undertakings in transaction documents, particularly in auction sales, again to increase certainty in execution; however, these undertakings are usually successfully resisted by buyers, particularly private equity buyers who have demanding financial return objectives (which could be adversely affected if portfolio companies are divested too soon) and are often constrained by their investment mandates.

Although the authors have seen increasing FDI controls in cross-border transactions (including in the EU and US), and even with the new EU FSR regime, there has not been a material difference in Portugal in this regard (ie, the level of deal variation the purchaser is required to withstand as a result of the outcome of these clearance procedures is often included with no distinction for both merger control, FDI and FSR control).

6.6 Break Fees

In Portugal, break fees and reverse break fees are rarely applied.

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).

Private equity buyers are typically allowed to terminate their investments in the following circumstances:

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

The longstop date, typically agreed upon during the negotiation phase, can vary widely (anywhere from three months to a year, or even more) based on the deal's complexity, the number and type of conditions precedent it is subject to, industry, and other considerations.

6.8 Allocation of Risk

In transactions where the seller is a private equity fund, the risk allocation is typically shifted in its favour (compared to a "corporate" seller). The primary reason is that the private equity seller has a limited period in which it may be liable (private equity funds are eventually dissolved and wound up). Long lists of warranties, extended warranty claims periods, and indemnities are thus rendered less effective (and less acceptable to the private equity seller).

In cases where the buyer is a private equity fund, there are no fundamental differences in risk allocation in relation to a "corporate" buyer: those are determined primarily by 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 and Indemnity Protection**), however, these limitations (quantitative and with regard to time) on liability may also apply to a breach of other undertakings or covenants under the agreement by the seller.

6.9 Warranty and Indemnity Protection

The warranties provided by a private equity seller to a buyer on an exit are usually limited. In most cases, "Fundamental warranties" are provided regarding the existence (of the seller and the target), capacity to enter into the agreement, and share ownership. "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. Moreover, it has an advantage for the buyer as it precipitates the disclosure of many issues which might 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 the event that W&I insurance is contracted, however, these limitations will necessarily be different (ie, the buyer acknowledges that it will not make a claim under the acquisition agreement and that claims regarding breach of warranties will be brought against 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 offered by a private equity seller in an acquisition agreement include interim period obligations (including limitation on the management of the target company outside of the ordinary course of business) as well as pre- or post-closing undertakings (idiosyncratic to the transaction). There are also mechanisms for price retention, 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 due diligence conducted by the insurance company (which, in turn, takes into account the vendor's due diligence and the buyers' due diligence).

Fundamental warranties and "plain vanilla" tax warranties are increasingly being covered by W&I insurance as well. On the other hand, pollution liability, pension underfunding, certain tax liabilities and sanctions are some of the common exclusions.

6.11 Commonly Litigated Provisions

A private equity transaction rarely ends in litigation (especially when arbitration is used as a dispute resolution method, where its costs act as a relevant deterrent). The majority of pre-litigation disputes concern (alleged) breaches of warranty and the applicability of earn-out provisions (eg, whether the respective earn-out events have been triggered).

7. Takeovers

7.1 Public-to-Private

In Portugal, P2P transactions are uncommon. The only P2P transaction to have succeeded is the takeover of Brisa, the above-mentioned highway toll operator (see **5.4 Multiple Investors**) by its reference shareholder and a private equity sponsor (Arcus).

In the context of a public-to-private transaction, the target company and its board play a critical role, since the latter has a fiduciary duty to act in the best interests of the company and its shareholders. When evaluating a public-to-private offer, the board must thoroughly assess the offer's fairness and explore alternative options.

In addition, under the provisions of the Portuguese Securities Code, the board is required to produce a report on the fairness of the consideration being offered and its views on the impact of the transaction on the company's strategic outlook and employment conditions.

Given issues of equitable treatment of investors and market abuse rules, relationship agreements or transaction agreements between the bidder and the target company are not common.

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7.2 Material Shareholding Thresholds and Disclosure in Tender Offers

Under the provision of Article 16 of the Portuguese Securities Code, any person that reaches 5%, 10%, 15%, 20%, 25%, 33%, 50%, 66% and 90% of the voting rights of: (i) a company listed in a Portuguese regulated market (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.

The communication must:

- identify the market participant as well as the individual or legal person entitled to exercise voting rights on its behalf (when applicable);
- show the entire chain of entities to which the participation is attributed (whether national or foreign);
- explain the situation by which voting rights inherent to securities owned by third parties are attributable to the market participant;
- contain the percentage of voting rights attributable to the holder of the participation, the percentage of the share capital and the number of shares corresponding, 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
- show the date on which the participation reached, surpassed or was reduced to the above-mentioned thresholds.

Even simple changes in 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, however, not arise 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 or committed to be paid by the offeror or any person 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

The consideration in public tender offers can be made in cash or in securities.

Typically, cash is the consideration of choice in tender offers, perhaps due to the relative “shallowness” of the Portuguese equity capital market.

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 tar-

get 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 another); and/or
- if the fee is sufficiently high, this could breach the "passivity rule", which prevents management from making material decisions that would affect the target company before the offer is completed.

The law allows bidders to increase the price offered at any time, especially when a competitive bid is being submitted.

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 assessment of the offer results, it 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 or committed to be 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.

There is no statutory threshold for a private equity-backed bidder to achieve a debt push-down into the target following a successful offer.

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

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

The negotiation of irrevocable commitments in tender offers that occur prior to the announcement of the transaction is not common in Portugal.

In order to ensure that these commitments, which must in principle be disclosed, do not result in the CMVM evaluating the voting rights of the committing shareholders as being attributed to the offeror (which may trigger mandatory public offer thresholds), protections are sometimes provided for investors who wish to accept competing offers or exit in another manner.

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, with equity participations ranging 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 key company employees.

8.2 Management Participation

Managers are often granted common shares with vesting provisions, and preferred instruments are not commonly used in management equity. In addition, sweet equity (equity issued at par or at a discount to managers) is not commonly linked with standard business practices or legal structures in Portugal.

8.3 Vesting/Leaver Provisions

Vesting provisions for management equity have become increasingly popular in Portugal, especially among start-ups and high-growth companies backed by venture capital or private equity investors. The primary aim of introducing these provisions is to incentivise and align the interests of management with the company's long-term prosperity. Generally, these provisions outline that the rights associated with the equity shares granted to management will gradually become effective over a specified timeframe, subject to continuous employment or the achievement of predetermined performance objectives.

Good leaver/bad leaver provisions, which qualify the circumstances in which managers cease holding participation or directorships/employment positions in the target, are normally included in shareholders' agreements regarding the target, which are 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 leave the company without being considered good leavers.

In venture capital transactions, vesting provisions (where management is prevented through contractual means from fully owning the equity participations acquired/subscribed in the transaction) are also included in the relevant shareholders' agreement. The vesting period will be three to four years long, with a one-year cliff (ie, whereby some share vests) and two to three years of "linear" vesting (for 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. From an employment law standpoint, they raise concerns by restricting fundamental rights to work and the pursuit of professional livelihood and from a competition law standpoint, by stifling competition; therefore, they may be subject to limitations. With the recent United States Federal Trade Commission ban against non-compete agreements in employment relationships, further developments might also arise at the level of the European Union.

A non-compete clause is subject to the following statutory restrictions:

- they must be entered into in writing;
- they have a time limitation of two years (extendable to three years in certain cases); and
- they must allow consideration to 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.

Restrictive covenants have the flexibility to be included in multiple documents, encompassing both the equity package and the employment contract. They can be integrated into the shareholders' agreement or other equity-related documentation, specifying the roles and responsibilities of management shareholders. Furthermore, these covenants can also be seamlessly integrated into the employment or administration contracts of the management team, effectively governing their conduct throughout and after their tenure with the company.

8.5 Minority Protection for Manager Shareholders

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

In the first instance, managers will usually be entitled to be appointed to the company's board of directors (with executive functions).

Veto Rights

Sometimes manager shareholders are afforded veto rights in shareholders' decisions (eg, share capital increases, issue of options, etc), to prevent the company from engaging in dilutive transactions for the management.

It is common practice to use veto rights and legal pre-emption rights to prevent dilution of manager shareholders in share capital increases. 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 and Information Rights

Majority Participation

In the case where a private equity fund shareholder holds the majority interest in the target company, typical control mechanisms are provided by statute (particularly, the ability to appoint the members of the target company's corporate bodies on one's own – there is no statutory provision providing proportional representation in management or audit bodies under Portuguese corporate law).

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 commonly negotiated. Also commonly requested are veto rights at the shareholder level in critical matters (eg, reorganisations, further financing, capital increase and decrease), information rights (eg, the right to receive monthly information on accounts and KPIs) and exit rights (eg, pre-emption rights, 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 of the subsidiary's obligations, both before and after it has been incorporated.

Nonetheless, it is doubtful whether this provision applies to private equity funds as opposed to other companies (since private equity funds are not incorporated and 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.

10. Exits

10.1 Types of Exit

It is typical for a private equity investment to be held for a period of four to seven years before an exit occurs.

From anecdotal evidence, the most common forms of exit seen in recent years were trade sales and secondary sales to other asset managers. A write-off may also occur from time to time.

There have not yet been any initial public offerings (IPOs) or dual-track processes initiated by private equity sponsors in Portugal.

10.2 Drag and Tag Rights

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

In Portugal, the typical drag threshold can vary depending on the specific terms negotiated

between the parties. It is often observed that a drag threshold falls within the range of 50% to 75% of the total outstanding shares. This means that if shareholders holding this percentage or more of the company's shares agree to a sale, they can force the remaining shareholders to participate in the transaction through the drag-along rights.

Conversely, the typical tag threshold is usually set at a lower percentage, commonly around 50% of the total outstanding shares (if there is one at all). If shareholders holding this percentage or more decide to sell their shares, minority shareholders can exercise their tag-along rights to join the sale and sell their shares on the same terms.

It is not common for management and institutional investors to have different tag thresholds.

10.3 IPO

In Portugal, there has never been an IPO promoted by a private equity seller (the closest comparison was the debut of a venture capital-backed company on an alternative trading exchange).

In other IPOs in the Portuguese market (not triggered by a private equity exit), where the sponsor retains a majority participation, a relationship agreement is entered into between this dominant shareholder and the listed company to ensure the two entities conduct business in an arm's length manner.

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