

## Private equity in Portugal: market and regulatory overview

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### MARKET OVERVIEW

#### 1. How do private equity funds typically obtain their funding?

There is no publicly available information as to the funding composition of private equity funds in Portugal. From experience and anecdotal evidence we estimate that banks have subscribed the largest share of units in private equity funds (either in funds managed by banks' affiliates or in "independently" managed private equity funds). Other significant investor classes include:

- Family office vehicles.
- Sometimes the state, either through specific investment vehicles that are state or EU funded or direct granting of funds to existing private equity investment structures.

#### 2. What are the current major trends in the private equity market?

The private equity market in Portugal is dominated by private equity funds run by Portuguese based management entities. Private equity investment done directly through private equity companies is currently at negligible levels in relation to investments made through private equity funds.

The biggest and most prominent funds in Portugal are "distressed" or "turnaround" funds. These funds invest in companies whose funding relies on bank finance and are in financial distress (that is, pre-insolvent, insolvent or under a judicial recovery procedure).

Recently, however, the financial crisis, deleveraging of domestic groups and other events, have brought Portuguese assets to the attention of yield searching international private equity fund managers. In this respect, several high-profile deals have been entered into recently in a variety of assets, ranging from infrastructure to industrial enterprises and also to financial sector companies.

Venture capital, a sub-sector of private equity, appears to be gaining pace in Portugal, with several "seed investment rounds" being made by national and international funds in Portuguese based start-ups.

Another interesting trend is the launching of public tenders by state-owned entities to capitalise companies. These tenders award EU funds (QREN) to entities organised as private equity fund managers.

#### 3. What has been the level of private equity activity in recent years?

##### Fundraising

No public data is available on fundraising of private equity funds. It is apparent that fundraising for private equity funds in Portugal is dynamic after the last few years of tepid activity. Factors that may influence this rebound of fundraising include the Portuguese economy returning to growth (although modest) and deployment of EU funds into programmes designed specifically to fund private equity investment structures (and which are "crowding-in" private co-investment as a result).

##### Investment

According to the latest data available (2015, *Portuguese Securities Market Commission*), private equity investment (using as proxy the figures for assets under management) has been growing overall (5.5% compound annual growth rate (CAGR) between 2012 and 2015).

In relation to changes in levels of activity in different stages of development of portfolio companies, venture capital investing is on the rise. However, more traditional private equity investment in mature companies still dominates the market.

##### Transactions

According to the latest data available (2015, *Portuguese Securities Market Commission*), "turnaround" transactions have emerged from the financial and sovereign debt crisis as the main private equity financed transaction (around 50% of transactions involving private equity financing are distressed or "turnaround" deals). Growth capital and venture capital investing are also very relevant. On the other hand, replacement capital and management buy-out transactions have diminished considerably in the last few years. Leveraged buyouts in Portugal are essentially performed by foreign private equity investors and are still not a trend in the local private equity market.

##### Exits

According to the latest data available (2015, *Portuguese Securities Market Commission*), exits from private equity investments in Portugal have occurred mainly through trade sales. Buybacks from shareholders or management team and write-offs have also been frequent in the last few years. There is no history of exits through initial public offering (IPO) in the Portuguese private equity market.

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## REFORM

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### 4. What recent reforms or proposals for reform affect private equity in your jurisdiction?

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New crowdfunding legislation, yet to be regulated, 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.

The private equity sector has witnessed material changes with the enactment of legal instruments implementing Directive 2011/61/EU on alternative investment fund managers (AIFM Directive). The new regulatory framework has introduced important changes to private equity fund managers that fall under the scope of the AIFM Directive, imposing several additional compliance requirements, in particular adopting rules on conflicts of interest, remuneration and risk management.

There also are a number of legislative instruments in the pipeline which will indirectly be relevant to the regulatory landscape in the coming years, notably the:

- Amendment to Directive 2007/36/EC on the exercise of certain rights of shareholders in listed companies (Shareholders' Rights Directive), which, if approved, will force member states to implement procedures for the approval of related party transactions.
- Implementation of Directive 2015/849/EU on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (Fourth EU Anti-Money Laundering Directive), which will impose further requirements on procedures to prevent money laundering and terrorism financing activities.

## TAX INCENTIVE SCHEMES

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### 5. What tax incentive or other schemes exist to encourage investment in unlisted companies? At whom are the incentives or schemes directed? What conditions must be met?

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#### Incentive schemes

Tax incentive schemes are not specifically directed to unlisted or listed companies. However, there are a number of existing tax incentives, including incentives especially applicable to private equity undertakings such as private equity funds and private equity companies.

The tax system comprises several tax incentives, which can be attractive to private equity investors, depending on the activity and area of investment (for example, there are specific tax benefits applicable to research and development (R&D) activities and to investment in small enterprises).

The relevant general tax exemptions are the:

- Participation exemption regime, applicable to dividends received and capital gains realised by a resident company from a domestic or foreign shareholding. These types of income are tax exempt, provided the shareholder:
  - is not considered a transparent entity; and
  - has held, directly or indirectly, at least 10% of the capital or voting rights of the investee company for at least 12 months.
- The exemption for dividends is not applicable if the payment is deductible for the payer.
- "Outbound" regime, under which payments paid by a company resident in Portugal to a non-resident entity may be withholding

tax exempt. To benefit from this exemption the beneficiary of the income must:

- be subject in its residence state to a corporate income nominal tax rate of at least 12.6% (that is, 60% of the current Portuguese corporate income tax rate); and
- hold, directly or indirectly, at least a 10% stake in the company resident in Portugal for, uninterruptedly, 12 months before the distribution of dividends.

#### At whom directed

Tax benefits are, generally, applicable to all companies (whether they are listed or unlisted).

## FUND STRUCTURING

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### 6. What legal structure(s) are most commonly used as a vehicle for private equity funds in your jurisdiction?

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Private equity investment in Portugal is usually done onshore. The notable exception occurs when international private equity funds acquire assets in Portugal. In these cases, acquisition structures often encompass foreign special purpose vehicles (such as LuxCos), investing directly or through Portuguese subsidiaries.

The most common legal structure to invest in private equity in Portugal is through a private equity fund, which in turn is managed by a private equity company, both domestic entities incorporated under the provisions of Law no. 18/2015.

Newcomers in the market usually start by investing through proprietary structures, notably through holding companies. Typically, it is only when these entrants to the market seek to attract outside investment that they advance to the regulated structures.

### 7. Are these structures subject to entity level taxation, tax exempt or tax transparent (flow through structures) for domestic and foreign investors?

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#### Investment through private equity funds

Private equity funds are tax exempt.

Tax resident entities investing in private equity funds will generally benefit from both:

- 10% final withholding tax rate on income paid by the private equity funds or through redemption of participation units.
- 10% tax rate on capital gains made with the disposal of participation units.

Both benefits are only applicable when the beneficiary is either:

- An entity that is not resident in a blacklisted jurisdiction.
- A non-resident entity held, directly or indirectly (more than 25%), by entities resident in Portugal. In this case, the general withholding tax is 35% in the case of blacklisted entities, and 25% in the case of non-resident entities held by resident entities.

Foreign individuals or companies (if 25% or more of them are not ultimately held by residents and not resident for tax purposes in a blacklisted jurisdiction) are generally exempt from income paid by private equity funds and, if not exempt from taxation on capital gains made with the disposal of private equity fund participation units, can benefit from a 10% tax rate on these capital gains.

Finally, private equity companies can 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 that deduction is used to invest

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in companies with high growth potential. On the other hand, dividends payable by a private equity company to its shareholders do not receive any special treatment (currently, they are subject to a 28% final rate for individuals and the current general corporate income tax rates for companies).

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**8. What (if any) structures commonly used for private equity funds in other jurisdictions are regarded in your jurisdiction as being tax inefficient (whether by not being recognised as tax transparent or otherwise)? What alternative structures are typically used in these circumstances?**

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The regime for tax transparency does not apply to private equity companies or funds. Investors who wish to benefit from transparency can invest through other EU companies of jurisdictions that recognise the tax transparency of private equity funds incorporated in other jurisdictions.

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**FUND DURATION AND INVESTMENT OBJECTIVES**

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**9. What is the average duration of a private equity fund? What are the most common investment objectives of private equity funds?**

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**Duration**

Official data concerning effective fund duration is not available. The life of funds is usually about ten years (the typical limitation to the period of time funds can hold equity or debt instruments in portfolio companies). It is also usual to extend the initial duration of private equity funds for one to two additional years, to allow smooth divestment of the latter's assets (through share deals). Usually the investment period is about half of the initial duration of the fund (five years), although there is no statutory provision in this respect.

**Investment objectives**

Private equity funds typically pursue:

- Restructuring or turnaround transactions in companies that are experiencing financial distress.
- Growth transactions in small and medium scale enterprises aiming at internationalisation.
- Seed, start-up and early stage funding to start-ups.

A trend is emerging where investment is being directed to building or revamping retail or consumer brands with potential.

There is no public data on rates of return sought. However, certain private equity fund regulations set hurdle rates (that is, minimum internal return rates payable to common unit holders before the fund manager is entitled to receive carried interest), which vary from 5% to 8%. These variations appear to be correlated to the risk profiles of each fund but may also be caused by other idiosyncratic or market wide factors.

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**FUND REGULATION AND LICENSING**

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**10. Do a private equity fund's promoter, principals and manager require authorisation or other licences?**

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Private equity fund managers require an authorisation from the securities market regulator to operate under Portuguese law.

Management of private equity funds can be carried out by:

- Private equity companies.
- AIFM Directive compliant private equity fund management companies.

- Regional development companies.
- Entities authorised to manage close-ended alternative investment funds.

In relation to the two most common types of management entities, private equity companies and AIFM Directive compliant private equity fund management companies, the following differences apply:

- Private equity fund managers regulated under the provisions of Law no. 18/2015 must obtain authorisation before the Portuguese Securities Market Commission to operate as AIFM Directive compliant private equity fund management companies, if they exceed the following thresholds:
  - EUR100 million, when the respective portfolio includes assets acquired through leverage;
  - EUR500 million, when the portfolio does not include assets acquired through leverage and regarding which there are no redemption rights which may be exercised during a five year period from the date of the initial investment.
- Authorisation is made in accordance with the relevant provisions of Law no. 18/2015 and the AIFM Directive, and relevant regulations (notably Regulation (EU) 231/2013 on exemptions, general operating conditions, depositaries, leverage, transparency and supervision).
- Private equity fund managers regulated under the provisions of Law no. 18/2015 that do not meet the above thresholds must register with the Portuguese Securities Market Commission.
- Private equity funds are also subject to registration before the Portuguese Securities Market Commission. Registration is not required under the fast track procedure (which requires only prior notice to the regulator), where the:
  - fund is not marketed to the general public; and
  - fund's unitholders are solely qualified investors or the minimum subscription value per investor is of EUR500,000.

Private equity investors do not require a particular authorisation or licence to subscribe units in private equity funds.

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**11. Are private equity funds regulated as investment companies or otherwise and, if so, what are the consequences? Are there any exemptions?**

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**Regulation**

Private equity vehicles (funds and companies) are subject to regulation under Portuguese law and to the supervision of the Portuguese Securities Market Commission. This regulation and supervision is, however, less stringent than that of other fund management companies.

Private equity vehicles, being issuers of securities, are subject to the general restrictions on marketing and advertisement of securities set out under the Portuguese Securities Code, in particular rules on public offers. A public offer entails a number of disclosure obligations, notably the preparation of a prospectus subject to the approval of the Portuguese Securities Market Commission.

**Exemptions**

Usually units are placed through private placement. The following offers are not deemed public offers:

- Offers addressed solely to qualified investors (that is, financial institutions, high net-worth individuals, pension funds, and investment fund management companies).

- Offers addressed to fewer than 150 persons who are not qualified investors.
- One or more offers within a 12 month period with an aggregate value of less than EUR5 million.

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## 12. Are there any restrictions on investors in private equity funds?

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No restrictions exist, apart from applicable rules and regulations governing certain sectors (for example, banking, insurance, and pension funds sectors), in particular arising from Basel III and similar regulations. Among other things, marketing units in private equity funds to non-qualified investors may require a public offer.

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## 13. Are there any statutory or other maximum or minimum investment periods, amounts or transfers of investments in private equity funds?

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There is no statutory minimum or maximum investment period in a private equity fund (although in practice there is a maximum duration of a fund of ten years). There are also no limits to investment amounts or transfers of investments.

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## 14. How is the relationship between the investor and the fund governed? What protections do investors in the fund typically seek?

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Relationships between investors and the fund and fund manager are primarily governed by a set of general principles and protections granted by the law. Additionally, those relationships are also governed under fund bye-laws (also known as management regulation).

Common protections sought by investors typically include:

- Establishment of rights of first refusal in transferring participation units in the fund.
- Set-up of investment committees with advisory powers.
- Establishing minimum hurdle rates.
- Establishing rules on co-investments.
- Supermajority provisions in resolving on certain governance matters.

A number of private equity fund managers comply with the Handbook of Professional Standards published by Invest Europe, which provides a number of recommendations for fund governance and in particular for the relationship between investors and fund managers.

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## INTERESTS IN PORTFOLIO COMPANIES

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### 15. What forms of equity and debt interest are commonly taken by a private equity fund in a portfolio company? Are there any restrictions on the issue or transfer of shares by law? Do any withholding taxes or capital gains taxes apply?

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#### Most common form

According to the latest data available (2015, *Portuguese Securities Market Commission*), investment by private equity funds is in its majority made through:

- The acquisition of receivables, including shareholder loans (loans and quasi-equity contributions).

- Debt instruments (around 62% of assets under management).

This perhaps reflects the predominance of turnaround investing in the sector.

However, many management regulations self-limit investments in debt instruments.

#### Other forms

Receivables and other credits are followed at a distance by:

- Equity participations (that is, shares or other equity participations representative of share capital in companies) at 23% of assets under management.
- Investments in participation units in other private equity funds at 3.37% of assets under management.

Seed and start-up private equity investments are usually made through acquisition or subscription of symbolic equity participations and the funding is made through shareholder loans or quasi-equity contributions. Shareholder credits and quasi-equity contributions are considered subordinated instruments and do not confer voting, dividend or otherwise control rights in the target company.

The law prohibits concentrations of investments (either in equity or debt instruments) of more than one-third of fund assets in one company or group of companies.

No data is available on investments made through convertible instruments.

#### Restrictions

Restrictions on issuance and transfer of equity and/or debt interests are as follows:

- Transfers of shares or other equity instruments in limited liability companies under Portuguese law may be limited under the law or the articles of association by:
  - the need for consent by the company;
  - pre-emption rights.
- Transfers of credits under Portuguese law are valid without the consent of the debtor but are subject to notice to the latter for the transfer to be opposable to the debtor.
- Issuance of equity interests are subject to resolution of the competent corporate bodies. In addition, shareholders may have a pre-emption right on the subscription of new equity interests in cash capital increases (which may be limited or suppressed by a shareholders' resolution).
- Issuance of bonds is subject to the pre-requisite, among others, that the company's share capital is fully paid-up. In addition, shareholders have a pre-emption right in the subscription of convertible bonds (which may be limited or suppressed by a shareholders' resolution).

Other contractual restrictions not opposable to third parties (set out in shareholders' agreements) may also apply.

#### Taxes

Distribution of dividends and payment interest is subject to tax (with the withholding mechanism being generally applicable). A tax rate of 35% applies to dividends paid to residents in blacklisted jurisdictions.

Further, as quasi-equity contributions are not legally considered to be share capital, they are treated (for tax purposes) as debt and may be subject to stamp duty, unless the persons holding the instruments have owned a minimum 10% of the company's share capital for at least one year. The same stamp duty regime applies for shareholder loans.

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## BUYOUTS

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### 16. Is it common for buyouts of private companies to take place by auction? If so, which legislation and rules apply?

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Buyouts of private companies occasionally take place through an auction procedure. No specific legislation applies to auction procedures. General contract and civil law provisions apply.

### 17. Are buyouts of listed companies (public-to-private transactions) common? If so, which legislation and rules apply?

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Buyouts of listed companies are uncommon. It appears that only one private equity type public-to-private transaction has ever been recorded in Portugal (that is, 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 through a public takeover).

The Portuguese Securities Code applies to public takeovers of listed companies.

#### Principal documentation

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### 18. What are the principal documents produced in a buyout?

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The main legal instruments executed in a buyout are the following (chronologically):

- Non-disclosure agreement.
- Non-binding and binding offers (if an auction procedure is undertaken).
- Share purchase agreement.
- Shareholders' agreements (when less than 100% of the target company is acquired).
- Financing documents (when buyouts are leveraged).
- Closing documents.

#### Buyer protection

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### 19. What forms of contractual buyer protection do private equity funds commonly request from sellers and/or management? Are these contractual protections different for buyouts of listed companies (public-to-private transactions)?

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Private equity investor protection mechanisms typically include:

- Fund's own due diligence on the target investment.
- General information rights.
- Representations and warranties, often combined with escrow mechanisms to ensure liquidity if a breach is claimed.
- Tax specific indemnities.
- Exit mechanisms in shareholders' agreements, such as put options or tag/drag along rights. These mechanisms may be exercised at zero or very low prices (for example, following a "failed" investment) or at a price incorporating a specified internal rate of return (IRR) (after the term of a stand-still/lock-up period).

- Conversion rights of the shareholders' loans or quasi-equity contributions.
- Good and bad leaver rules (including indemnification) applicable to key managers and/or anchor shareholders.
- Stand-still and/or lock-up provisions for periods of three to five years.
- Supermajorities and right of first refusal for share capital increases.
- Price adjustments (through earn-outs).
- Liquidation preferences (which tend to be more common in venture capital).

Breach of private equity protections provided by managers or selling shareholders are usually governed under general indemnification rules and capped to a certain amount that varies from 20% to 100% of the investment. Tax specific indemnities are usually not limited or less limited.

Public-to-private transactions are governed essentially by public takeover rules. Solely public information is known by the private equity provider and non-public information cannot be disclosed unless it is disclosed to the market and the general public. The private equity provider's protection is then granted under general rules of liability of managers, independent directors and supervising boards of listed companies (*Portuguese Securities Code*).

### 20. What non-contractual duties do the portfolio company managers owe and to whom?

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Members of management bodies of portfolio companies are bound by several statutory fiduciary duties towards the company and its shareholders:

- Duty of care.
- Duty of loyalty.
- Non-competition.

Obligations of managers are governed by company law and not by employment law (save for very few exceptional circumstances). Therefore, managers can be found liable before the shareholders, the general creditors, tax and social security and the company itself. These duties essentially lead managers to take all actions deemed rational from a business standpoint as opposed to any other interests (including their own or even the shareholders').

The law does not prohibit directors from being involved in a management buyout (MBO), but they must act in good faith and avoid conflicts of interests or breach of fiduciary duties. Directors involved in a MBO should abstain from voting on matters relevant to the transaction.

### 21. What terms of employment are typically imposed on management by the private equity investor in an MBO?

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MBOs are not common transactions in Portugal. Managers' functions are governed by companies' law (and not by employment law, as it is the case of most European jurisdictions). From a contractual standpoint, managers' duties are usually governed under either/both:

- A management agreement entered into between the manager and the target company (and occasionally also with the shareholders).

- The shareholders' agreement, when managers are simultaneously shareholders.

Contractual arrangements usually contain non-compete, non-solicitation and confidentiality obligations.

Economic incentives may also be agreed, notably incentive schemes under which the level of remuneration is linked to the achievement of business plan prospects or good and bad leaver provisions.

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## 22. What measures are commonly used to give a private equity fund a level of management control over the activities of the portfolio company? Are such protections more likely to be given in the shareholders' agreement or company governance documents?

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The most commonly used measures to give a private equity fund a level of management control include:

- Restrictions on the management's actions without the consent of the private equity fund, until exit is achieved (veto rights and negative covenants).
- Right to be represented at the board level of the target investment and subsidiaries.
- Limitations preventing the management from developing competing businesses for a period of time after the investment and/or them ceasing to be a manager or shareholder of the target investment.

Articles of association of Portuguese companies are available to the public. On the other hand, not all governance rules in Portuguese companies can be included in articles of association. This is why contractual control rights are usually included in shareholders' agreements and not in the articles of association.

## DEBT FINANCING

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### 23. What percentage of finance is typically provided by debt and what form does that debt financing usually take?

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Because the average value of private equity transactions in Portugal is small, deals involving private equity investors are made usually through a fund's equity, raised from its investors. Debt financing of transactions is therefore reserved for the largest 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) and several high profile acquisitions involving international funds have recently been carried out.

#### Lender protection

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### 24. What forms of protection do debt providers typically use to protect their investments?

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#### Security

Securities commonly provided under financing transactions include:

- Pledges on shares (Bidcos and target companies) and credits (receivables, bank account balances).
- Mortgages on real estate properties.

#### Contractual and structural mechanisms

Lenders usually demand covenants, such as financial ratios. Other common mechanisms include:

- Representations and warranties on assets and financial situation of the borrower.
- Mandatory repayment (cash sweep) provisions.
- Shareholder loan subordination.

#### Financial assistance

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### 25. Are there rules preventing a company from giving financial assistance for the purpose of assisting a purchase of shares in the company? If so, how does this affect the ability of a target company in a buyout to give security to lenders? Are there exemptions and, if so, which are most commonly used in the context of private equity transactions?

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#### Rules

A company by shares cannot provide loans or securities (or moneys in any other way) to assist in the purchase (or in any other transaction that leads to the purchase) of its shares by a third party, including a private equity fund.

#### Exemptions

Exceptions to the rule are:

- Transactions carried out in the ordinary course of business of banks and other financial institutions.
- Operations aiming to acquire shares by or for the employees of the company (or a related company).

However, these transactions cannot result in the net assets of the company being lower than the sum of the amount of the subscribed share capital of the company and the statutory reserves.

#### Insolvent liquidation

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### 26. What is the order of priority on insolvent liquidation?

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First, the debts of the insolvency estate are liquidated. Following that, the order of priority on insolvent liquidation is:

- Secured debts (debts secured by guarantees in rem). Payment is made with the proceeds of the liquidation of the assets secured. If the proceeds of the sale of the secured assets are not enough to pay the secured debts, the part of the debt which is not paid becomes an ordinary debt.
- Debts with credit privileges. These are paid with proceeds of the liquidation of assets that are not guaranteed in rem. There are some credit privileges provided by law that are ranked with priority over secured debts, although they are not paid with the proceeds of the secured assets.
- Ordinary debts. All the debts that are not subordinated, secured or privileged are considered ordinary debts. If the insolvent estate does not possess sufficient assets to repay all creditors, ordinary debts are paid on a pro rata basis.
- Subordinated debts. These are paid, in order of priority:
  - debts to related parties;
  - debts acquired up to two years before the insolvency proceedings;
  - interests of subordinated debts arising after the insolvency proceedings;
  - debts agreed as such in the contract;

- claims based on services provided free of charge by the debtor;
- debts owed to creditors in bad faith;
- shareholder loans.

### Equity appreciation

#### 27. Can a debt holder achieve equity appreciation through conversion features such as rights, warrants or options?

Credits (such as receivables or shareholder loans and quasi-equity instruments) can be converted into share capital through a share capital increase. Option rights to enact appreciation rights (by, for example, triggering the conversion of credits into share capital) can be contractually agreed by the parties. Issuance of warrants is also admitted under Portuguese law.

## PORTFOLIO COMPANY MANAGEMENT

#### 28. What management incentives are most commonly used to encourage portfolio company management to produce healthy income returns and facilitate a successful exit from a private equity transaction?

Commonly used management incentives are:

- Remuneration schemes partially based on the achievement of key metrics (business plan/EBITDA) by the target investment.
- Stock options structured as a right for an individual manager to buy shares or vested shares of the company at a discounted price, or even to be granted shares without payment.
- Fixed or variable bonus on exit, including a percentage of the proceeds on a share deal or an IPO.

#### 29. Are any tax reliefs or incentives available to portfolio company managers investing in their company?

There are no tax reliefs or incentives with the specific intent of granting an incentive for managers to invest in the company.

For example, the investment (and subsequent income on the vesting) in a company through a stock option plan is, generally, considered employment income and therefore does not benefit from any specific tax relief.

#### 30. Are there any restrictions on dividends, interest payments and other payments by a portfolio company to its investors?

Company law subjects any distribution of company assets to its shareholders (that is, not only cash or cash equivalents but any assets owned by the company) to the following requirements/restrictions:

- Distribution of profits is subject to a resolution by the company's shareholders, unless the bye-laws provide otherwise, by simple majority of the shareholders attending the relevant shareholders' meeting.
- Distribution of profits cannot be made if, as a result of the distribution, the company's equity drops below the sum of company's share capital, legal reserves and statutory reserves which according to the bye-laws cannot be freely distributed.
- Profits resulting from increments in the fair value of equity components can only be distributed to shareholders when the

underlying assets or rights which have originated those increments are realised (that is, sold, redeemed and so on).

- Amounts regarding hidden reserves cannot be distributed.
- Income and other positive changes in a company's net worth accounted as a consequence of the use of the equity method can only be distributed to shareholders when they are realised.

### Distribution of dividends

According to mandatory corporate law provisions, shareholders are entitled to receive, annually, at least 50% of the company's year-end profits, except if the company's bye-laws or a resolution approved by shareholders holding 75% or more of the voting rights representative of the company's share capital provide otherwise.

In addition to these restrictions, year-end profits cannot be distributed to shareholders if they are required to:

- Cover losses carried forward.
- Replenish legal or contractual reserves.
- Cover expenses related to the incorporation of the company or to research and development.

Profits carried forward and reserves that are distributable can be distributed at any time, subject to the requirements and restrictions set out above and provided that a special balance sheet is drawn-up for that purpose.

### Advance payments on profits (interim dividends)

Advance payments on year-end profits are allowed under company law, provided that the following rules are complied with:

- The bye-laws of the company allow advance payments on profits.
- The board of directors, with the consent of the relevant audit body, resolves paying year-end profits in advance.
- Resolution of the relevant management body is preceded by an interim balance sheet prepared for this purpose and certified by the company's statutory auditor. That balance sheet must have an end date of up to 30 days' older than the date of the resolution.
- Only one advance payment of year-end profits can be resolved per year.
- Sums to be paid in advance to shareholders cannot exceed half of the value of year-end profits that would in theory be distributable to shareholders.

### Interest

Interest resulting from shareholder loans is paid under the relevant agreement between the company and the shareholder, if the agreement (and the agreed interest rate) has been entered into on an arm's-length basis.

#### 31. What anti-corruption/anti-bribery protections are typically included in investment documents? What local law penalties apply to fund executives who are directors if the portfolio company or its agents are found guilty under applicable anti-corruption or anti-bribery laws?

Anti-corruption/bribery provisions are usually included in the investment document through representations and warranties. Restrictive covenants on anti-corruption/bribery are commonly included in the shareholders' agreement.

Directors who are convicted of criminal offences related to corruption and bribery can be imprisoned or fined depending on the applicable quantum of the sentence. Also, if convicted, those persons may be impeded from being appointed as members of

corporate bodies of various types of companies in the financial industry, including private equity companies.

## EXIT STRATEGIES

### 32. What forms of exit are typically used to realise a private equity fund's investment in a successful company? What are the relative advantages and disadvantages of each?

#### Forms of exit

The most common form of exit is a trade sale. There are a few cases of secondary buyout.

Initial public offering (IPO) is the preferred exit form, but at this stage there is no record of these transactions in Portugal.

#### Advantages and disadvantages

The following advantages/disadvantages apply:

- **Trade sale.** This is a smooth process well known and tested in the industry. It is the less expensive process, but typically it is not the one allowing higher proceeds. Sellers (that is, private equity funds) are usually requested to provide representations and warranties with an expiry date that needs to be adjusted to the duration of the fund.
- **Secondary buyout.** This is a transaction between peers in industry, which can make negotiations easier and limit the issues with representations and warranties. The proceeds tend to be lower than in a trade sale.

- **IPO.** While this would be the preferred form of exit for sellers and managers, it is very difficult to achieve. The structuring fees are substantially higher.

### 33. What forms of exit are typically used to end the private equity fund's investment in an unsuccessful/distressed company? What are the relative advantages and disadvantages of each?

#### Forms of exit

The most common forms of exit are:

- Secondary buyouts to specialist turnaround funds.
- MBOs.
- Liquidation or insolvency.

#### Advantages and disadvantages

The following advantages/disadvantages apply:

- A sale of the company (to a fund or the management) or its assets allows the fund to receive at least part of its investment.
- In liquidation, the company must satisfy all of its debtors, before making any distributions to shareholders. The liquidation procedure is time consuming.
- MBOs are smoother and less disruptive to the company, employees and suppliers.

## PRIVATE EQUITY/VENTURE CAPITAL ASSOCIATIONS

### Portuguese Association of Venture Capital (*Associação Portuguesa de Capital de Risco*) (APCRI)

W [www.apcri.pt/](http://www.apcri.pt/)

**Status.** This is a non-governmental organisation which represents the private equity industry in Portugal.

**Membership.** The following entities can be members: investment companies, private equity companies, banks, insurance companies and pension fund management companies, public institutes, foundations and relevant industry personalities.

**Principal activities.** The APCRI intervenes mainly in the areas of information, marketing and training.

**Published guidelines.** The Practical Guide to Venture Capital (*Guia prático do capital de risco*) which may be found at [www.apcri.pt/capital-de-risco](http://www.apcri.pt/capital-de-risco).

## ONLINE RESOURCES

### Portuguese Official Gazette

W [www.dre.pt](http://www.dre.pt)

**Description.** Online official gazette where relevant legislative and regulatory instruments can be searched in Portuguese.

### Upper echelon court decisions

W [www.dgsi.pt](http://www.dgsi.pt)

**Description.** Website which provides integral or excerpts of decisions issued by higher administrative and civil courts.

### Documentation and Comparative Law Office

W [www.gddc.pt/legislacao-lingua-estrangeira/english.html](http://www.gddc.pt/legislacao-lingua-estrangeira/english.html)

**Description.** Site which provides links to often reliable but not always up-to-date English unofficial translations of relevant Portuguese legislation (for example, Portuguese Securities Code).



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## Practical Law Contributor profiles

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**Professional qualifications.** Advogada, Portuguese Bar Association, 2008.

**Areas of practice.** Corporate and commercial (corporate law, mergers, acquisitions and joint ventures, private equity); capital markets (IPOs, takeovers and other public offerings).

**Non-professional qualifications.** Law Degree, Law Faculty of the University of Lisbon, 2005; Postgraduate Studies in Commercial Law, Law Faculty of the Portuguese Catholic University, 2008.

#### Recent transactions

- Acting for leading Portuguese utility "corporate venture capital" unit in the incorporation of private equity fund manager and private equity fund.
- Acting for EDP in relation to the divestment of minority participation in wind energy assets in favour of China Three Gorges.
- Acting for INAPA in cross-border equity participations swap (that is, the acquisition of a French company and the sale of a Swiss company).
- Acting for Celesio in acquisition of pharmaceuticals wholesale buying group.

**Languages.** Portuguese and English.

**Publications.** *Securities World, Jurisdictional comparisons (The European Lawyer Reference), Third edition 2011 (with Ricardo Andrade Amaro); Securities World, Jurisdictional comparisons (The European Lawyer Reference), Fourth edition 2014 (with Ricardo Andrade Amaro).*

**Professional qualifications.** Advogado, Portuguese Bar Association, 2014.

**Areas of practice.** Corporate and commercial (corporate law, mergers, acquisitions and joint ventures, private equity); capital markets (IPOs, takeovers and other public offerings).

**Non-professional qualifications.** Law Degree, Law Faculty of Nova University of Lisbon, 2010; LL.M in Finance and Law, Duisenberg School of Finance, 2011.

#### Recent transactions

- Acting for leading Portuguese utility corporate venture capital unit in the incorporation of private equity fund manager and private equity fund.
- Acting for selling shareholders in the sale of Norscut (highway toll operator).
- Acting for WELink Energy in the acquisition and development of 221MW solar power plant project in Southern Portugal.
- Acting for consortium of wind energy developers in sale of portfolio of wind energy assets to international fund manager.

**Languages.** Portuguese, English and Spanish.

**Publications.** *International Comparative Legal Guides, Private Equity (Portugal Chapter), 2015 edition and 2016 edition (with Ricardo Andrade Amaro).*