World Law Group

2021
Global Venture Capital Guide

INTRODUCTION

We are pleased to announce the release of the World Law Group 2021 Venture Capital Guide.

The turmoil of an ongoing pandemic notwithstanding, through 2020, WLG member firms continue to act on a number of investment and exit transactions for global venture capital investors and high-growth, innovative companies operating across a range of industry verticals.

The objective of this publication is to serve as a Q&A-style multi-jurisdictional guide to venture capital law in 33 countries where WLG member firms have offices. The guide intends to provide a high level overview of the venture capital market, including key sectors, preferred investment structures, regulatory approval requirements, limitations on acquisition of control in portfolio companies, restrictions on investment, investor protection, and exits; and hopes to provide readers the benefit of the shared global knowledge and local insights among the WLG member firms.

All information provided in this guide is up to date as of November 1, 2020 unless stated otherwise. This guide provides general information in relation to the venture capital market, and is not intended to be comprehensive. It does not replace professional and detailed legal advice, as facts and circumstances vary on a case-by-case basis and country-specific regulations may change.

We hope to update this guide annually, both to expand our current coverage of jurisdictions as well as to apprise the reader of changes to the venture capital regulatory framework in the relevant jurisdictions.

The WLG Venture Capital Group Co-Chairs wish to express their deep appreciation for the efforts of each of the contributing member firms of the WLG Venture Capital Group, as well as all others who contributed to the preparation of this guide.

WLG Venture Capital Group Co-Chairs

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ARGENTINA

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1) In your jurisdiction, which sectors do venture capital funds typically invest in?

Key sectors attracting venture capital (VC) investments in Argentina include information technology, e-commerce, healthcare, consumer, financial services (including mobile wallets and digital payment solutions), education, biotechnology, and agribusiness.

2) Do venture capital funds require any approvals before investing in your jurisdiction?

Foreign venture capital investment vehicles are required to obtain a registration with the public registry of commerce if they intend to participate and vote in shareholders' meetings (or a similar corporate body) in privately held companies. This registration must be obtained prior to the investment. So, in Argentina there is a lot of flexibility to consummate VC investments. Of course, depending on the regulatory framework applicable to the industry of the target of the investment, other government approvals or registrations may apply. But none of those regulations are aimed specifically at VC funds.

3) Are there any legal limitations to an offshore venture capital fund acquiring control or influencing the business, operations, or governance of an investee entity?

There are no restrictions on a foreign VC fund acquiring control or influencing operations of a private company, other than (I) if the target is the owner of rural land or land in a frontier zone, or (II) in certain sectors of media communications.

In case of a listed target, once an investor acquires control it has to make a mandatory tender offer to acquire the rest of the capital from public shareholders of the target. These mandatory tender offer requirements apply to any party achieving such a position, regardless of being a foreign investor.

4) Would an investor be required to undertake an antitrust analysis prior to investment? When would such a requirement be triggered?

The antitrust mandatory notification is required when the combined aggregate overall domestic turnover (net of discounts, VAT and any other taxes directly related to the turnover) of the acquiring group (including purchaser and affiliates) and the targeted business for the preceding fiscal year exceeds 100 million Economic Units (as of the submission date, equivalent to approx. USD 52.9 million). Generally, early stage VC transactions in Argentina rely on a statutory exemption from mandatory merger notification requirements under the merger control regime. Currently, merger control regulations allow for an exemption from notification where both the assets of the target and the price being paid do not exceed 20 million Economic Units (as of this submission, equivalent to approx. USD 10.5 million). Alternatively, if the investor has no prior activity or assets in Argentina (including no significant exports to our country in the last 36 months), the acquisition of only one company by only one foreign company without any assets or shares of other companies in Argentina is exempt under the so-called "first landing" exemption.

5) What are the preferred structures for investment in venture capital deals? What are the primary drivers for each of these structures?

Typically, VCs acquire equity stakes. Depending on the investment strategy of the fund it may entail a minority stake or a co-controlling stake. It is not usual to resort to preferred stock or convertible debt.

Subject to tax implications and foreign-exchange regulations analysis, most funds would rather invest in a holding company outside the country than directly in the local entity.

More recently, the Federal Congress passed law 27,349 aimed at fostering entrepreneurship in the country. Under this regime, certain tax advantages are contemplated for investment in small- to medium-sized entrepreneurship projects. Also, a government sponsored fund (FONCDE) was set up to finance entrepreneurs and even partially match the investment made by a VC fund. It also created a new corporate body called SAS (acronym of "*sociedad anónima simplificada*", or simplified corporation), a type of corporation that may be easily set up and where parties have significant leeway to build in the bylaws that would otherwise be only included in a shareholders' agreement. Please note that lately the new federal administration has taken a step back with respect to SAS as a desired legal form for investments and changed some of the features of its advantageous regime.

6) Is there any restriction on rights available to venture capital investors in public companies?

No. Securities regulations in Argentina apply uniformly to all investors and shareholders of a public company, regardless of domicile.

7) What protections are generally available to venture capital investors in your jurisdiction?

Aside from standard contractual protections, the investors shall have the rights set forth in the by-laws of the issuer of the equity or otherwise be subject to the terms of the General Companies Act 19,550. Our corporate law provides shareholders with certain information rights, preemptive and accretion (super pro rata preemptive rights), rights in the context of issuance of new securities, a mechanism to elect board members that allows in certain cases the minority to multiply its voting power, etc.

8) Is warranty and indemnity insurance common in your jurisdiction? Are there any legal or practical challenges associated with obtaining such insurance?

The use of warranty & indemnity insurance is not developed at all in Argentina. Parties rely on the contractual arrangements, including price adjustment mechanisms or typical reps. & warranties tied with indemnity provisions.

9) What are common exit mechanisms adopted in venture capital transactions, and what, if any, are the risks or challenges associated with such exits?

All US-style exit strategies that a VC fund would bargain for elsewhere may be used in Argentina at the contractual level, including drag-along rights or forcing an entity to go public (registration rights). Please note that the latter, while always negotiated, is seldom used as the level of maturity of Argentina's capital market is quite low. So, it is not a real exit alternative.

With respect to buybacks, Argentina's company law and securities regulations impose certain limitations to such an alternative and it is used for public companies in very limited cases (generally not linked to an investment of a VC) and almost never in the case of privately held companies.

10) Do investors typically opt for a public market exit via an IPO? Are there any specific public market challenges that need to be addressed?

While it is common for most VC deals to provide an exit via an IPO, it has only been used in very limited cases. As indicated above, the low level of volume and interest of equity traded in Argentina's capital market is certainly a very difficult burden to overcome in order for such a mechanism to be worth trying.

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AUSTRALIA

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1) In your jurisdiction, which sectors do venture capital funds typically invest in?

Venture capital funds invest across a range of sectors in Australia. The most common sectors (by aggregate funds invested) are typically:

1. Services;
2. Information Media and Telecommunications;
3. Health Care and Social Assistance; and
4. Specialty Manufacturing.

Other sectors that attract venture capital investment in Australia include:

1. Agriculture, Forestry, and Fishing;
2. Mining;
3. Education and Training;
4. Construction;
5. Wholesale and Retail Trade;
6. Public Administration and Safety; and
7. Transport, Postal, and Warehousing.

2) Do venture capital funds require any approvals before investing in your jurisdiction?

Australia's foreign investment regime

There is no specific regime relating to venture capital investment. Australia has a foreign investment regime which applies to certain acquisitions. The Australian Government's foreign investment regime, generally speaking, encourages foreign investment in Australia. The regime consists of the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (FATA), associated legislation and various regulations. The regime is also supported by Australia's Foreign Investment Policy (Policy) and around 50 guidance notes released by the Foreign Investment Review Board (FIRB), which are updated from time to time. The Australian Treasurer administers the FATA with the advice and assistance of FIRB.

Under Australia's foreign investment regime, foreign persons are required to notify FIRB of certain transactions and obtain clearance before proceeding with certain transactions. Voluntary notifications can also be made in certain circumstances.

COVID-19 related changes to foreign investment regime

As of March 29, 2020, temporary changes have been made to Australia's foreign investment rules as a result of the COVID-19 health crisis and its anticipated economic impact with a view to regulating opportunistic foreign acquisitions. The changes include lowering monetary screening thresholds (e.g., in relation to the purchase price), which trigger a requirement to seek approval for a transaction from the Australian Treasurer through FIRB, to AUD 0.

The effect of the amended rules on inbound foreign venture capital is that nearly all transactions, including lower value seed funding rounds, currently require compliance with the FIRB approval process if a *substantial interest* in an Australian entity or business is proposed to be acquired by a venture capital investor which is a foreign person.

An acquisition of a *substantial interest* includes an acquisition of any legal or equitable interest in the shares in an Australian entity over an applicable percentage threshold. Where shares are being acquired, the typically relevant threshold is where the transaction would result in the foreign venture capital investor and its associates holding at least 20% of the actual or potential voting power attached to shares in the relevant company. Any shares held by a foreign venture capital investor from a previous funding round will be aggregated with the shares it proposes to acquire (along with its associates) in the current funding round for the purposes of the threshold.

A foreign venture capital investor which is considered a *foreign government investor* will require prior FIRB approval if the transaction would result in that foreign venture capital investor and its associates (in aggregate) holding at least 10% of the actual or potential voting power attached to shares in the relevant company (or potentially a lower threshold if there is an element of influence or control). This is not a material change as foreign government investors were already subject to an AUD 0 monetary screening threshold for nearly all acquisitions (including offshore acquisitions with downstream Australian subsidiaries) prior to the March 29, 2020 amendments.

A venture capital investor is a *foreign government investor* under Australian foreign investment rules if at least 20% of the limited partners or stakeholders of a venture capital investor are foreign government investors of a particular jurisdiction or at least 40% of the limited partners or stakeholders of a venture capital investor are foreign government investors of multiple jurisdictions (in aggregate). Tracing provisions apply to the calculation of these thresholds which have the effect that the foreign person characterization of an entity is determined by the status of the ultimate legal and beneficial interest holders (and a relatively small economic interest upstream can result in downstream venture capital entities being foreign government investors).

Prior to the changes to the rules, generally, foreign venture capital investors which were not *foreign government investors* only required FIRB clearance to acquire a *substantial interest* in an Australian entity or business where that interest is valued in excess of an applicable monetary threshold depending on the investor and/or the asset being acquired - a monetary screening threshold of AUD 275 million is generally applied to M&A deals. Higher thresholds of up to AUD 1.192 billion are applied for certain Free Trade Agreement partners, with lower thresholds for agribusiness and land entities. The monetary thresholds exempt most venture capital transactions from the requirement to seek FIRB approval.

Transaction timetables

In addition to the reduction in monetary screening threshold, FIRB has also implemented up to a six-month extension on the FIRB decision making period when an application for approval is made.

The extended decision-making period and increased case load that FIRB is now managing has altered the typical timetable for completion of venture capital funding rounds in Australia where foreign venture capital investors are participating in the round. Where typically transactions could be expected to be completed within standard 30- to 45-day exclusivity periods, the transaction documents will now often require a condition precedent to closing of receipt of FIRB approval and an elongated sunset date for satisfaction of that condition. In some cases, the parties will structure a separate, later closing for foreign VCs seeking FIRB approval such that participants that are not subject to FIRB approval may close well in advance of participants subject to FIRB approval.

Where minimum round sizes are dependent on foreign venture capital investment before participants are willing to close (particularly where foreign venture capital investors are leading a round), this can present challenges to the structuring of the transaction and requires consideration well in advance.

An urgent application may be made to FIRB requesting a faster decision where funds are required on an urgent basis by the company raising capital (for example, due to potential liquidity issues or other reasons relating to the support and protection of Australian businesses and jobs). FIRB endeavors to meet genuinely urgent commercial deadlines, though there is no guarantee of a quicker decision - an appropriate early engagement strategy can assist in this regard.

Convertible notes

The rule changes also have implications for convertible note transactions.

Where foreign venture capital investors are subject to a requirement to seek FIRB approval and seek to restructure their investment as a convertible note so that the transaction can be closed sooner and the company can have access to the funds, the right to conversion (as well as any negative controls or veto rights conferred by the notes) must strictly be conditional on receipt of FIRB clearance. This would mean that should FIRB not ultimately grant clearance to the foreign venture capital investor, there would be no ability for the notes to covert to equity and the foreign venture capital investor may have to rely solely on the redemption terms of the notes. Bespoke terms on convertible note redemptions may be necessary to facilitate this route.

Exemption certificates

One option foreign venture capital investors can explore to avoid having to comply with the FIRB approval process in relation to each individual acquisition that the foreign venture capital investor proposes to make, is to apply for an exemption certificate which allows the grantee of the certificate to undertake multiple acquisitions subject to the terms and exceptions specified in the certificate. Exemption certificates are more likely to be granted to larger venture capital funds, particularly where its limited partners or stakeholders are considered low risk foreign government investors or where the exemption relates to more passive investments in sectors or industries that are typically not considered sensitive from a national interest perspective.

In practice, FIRB's willingness to grant broad exemption certificates has diminished during the pandemic and assessment timeframes for the granting of exemption certificates have also been pushed out. Nonetheless, exemption certificates are still worth exploring for 'repeat customers' looking to undertake multiple transactions in Australia.

Further changes

Since the temporary amendments on March 29, 2020, the Treasurer of Australia has announced that Australia's foreign investment rules will be subject to a sweeping overhaul with greater focus on Australia's national security. The Australian Federal Government is aiming to implement the new system by January 1, 2021. The particulars of the proposed reform are subject to an ongoing public consultation process and development. Until the new system is in force, the current March 29, 2020 amendments are likely to remain in place.

Wherever the final reforms land, it seems that the regime will not return to pre-COVID-19 levels of exemption and, accordingly, more transactions will be subject to the screening process than was previously the case.

3) Are there any legal limitations to an offshore venture capital fund acquiring control or influencing the business, operations or governance of an investee entity?

See limitations described in relation to Australia's foreign investment regime in **section 2** above.

In addition, the *Corporations Act 2001* (Cth) requires that if an Australian company is a *proprietary company* it must have at least one director ordinarily resident in Australia and if it is a public company (which does not necessarily mean it is listed on a stock exchange), it must have at least 3 directors (2 of which must be ordinarily resident in Australia).

Where an Australian company is *controlled* by a foreign company there may also be additional financial reporting requirements, including preparing and lodging audited financial reports with the Australian Securities and Investments Commission (ASIC) (although exceptions exist).

4) Would an investor be required to undertake an antitrust analysis prior to investment? When would such a requirement be triggered?

Australia's antitrust, competition, and trade practices regulations are predominately contained in the *Competition and Consumer Act 2010* (Cth) and overseen by the Australian Competition and Consumer Commission (ACCC). Section 50 of the *Competition and Consumer Act 2010* (Cth) prohibits a direct or indirect acquisition of shares or assets (including of minority stakes – as is often the case in a venture capital transaction) where the acquisition would have, or be likely to have, the effect of substantially lessening competition in any market (certain exceptions may apply).

The ACCC's policy is to conduct a more in-depth investigation into an acquisition or investment that would result in the acquirer gaining a market share of 20% or more in an Australian market. This may be particularly relevant in the case of corporate venture funds.

Where there are concerns that an acquisition proposed to be made by a venture capital investor as part of a venture capital transaction in Australia may result in contravention of section 50, prior confirmation from the ACCC is required to be sought and the transaction documents will typically reflect that completion of the transaction is conditional on the relevant venture capital investor(s) receiving notice in writing from the ACCC stating to the effect that:

1. the ACCC does not object to, or does not propose to intervene in, or does not intend to conduct a public review in relation to, or seek to prevent the acquisition by the relevant venture capital investor(s) contemplated by the transaction documents for the purposes of section 50 of the *Competition and Consumer Act 2010* (Cth); or

2. the ACCC does not seek to impose conditions on the acquisition by the relevant venture capital investor(s) or require undertakings from the relevant investor(s) in relation to the acquisition, other than undertakings or conditions that are reasonably satisfactory;

and that notice has not been withdrawn, revoked or amended, before completion of the transaction.

The FIRB application process described in **section 2** above also involves mandatory engagement with relevant Federal Government agencies, as well as relevant State and Territory agencies. For all applications, this customarily includes engagement with the ACCC, and a letter of no objection from Australia's Federal Treasurer under FATA will not be given unless the ACCC has informed FIRB that there are no competition law issues in relation to the acquisition.

There are also a number of other prohibitions under the *Competition and Consumer Act 2010* (Cth), including in relation to cartel conduct (price fixing, market sharing, output restrictions and bid rigging) and consumer protection matters.

5) What are the preferred structures for investment in venture capital deals? What are the primary drivers for each of these structures?

Acquisition structures

In terms of acquisition structure, in Australian venture capital transactions, the two most common forms of acquisition structures used by venture capital investors to acquire an interest in a target company are:

1. acquisition of convertible preference shares in the investee entity. This is typically brought about through the issue of new shares by the target company to the investor, but on occasion in a later funding round, a secondary sale of existing shares held by the founder(s) of the company may also occur; and

2. acquisition of convertible notes that will convert into the class of share issued in the next qualifying funding round at a discount to the price of that round (so long as that funding round meets certain minimum requirements, including the size of the round). This is typically used as bridge financing until the next full funding round.

Variation of the above acquisition structures, as well as other bespoke structures, are also used and should be considered with regard to the circumstances and objectives in relation to the specific transaction.

Investment structures

In terms of fund structures, the Australian federal government has established a number of programs and structures that certain eligible fund managers and investors can take advantage of, with the purpose of assisting Australian early-stage companies in gaining access to capital and people skilled and experienced in the commercialization process through venture capital investment. These include:

1. Early Stage Venture Capital Limited Partnerships (ESVCLP);
2. Venture Capital Limited Partnerships (VCLP);
3. Australian Venture Capital Fund of Funds (AFOF); and
4. Pooled Development Funds (PDF),

each which may attract various tax benefits and incentives, and other advantages, and should be considered carefully at the outset by prospective venture capital funds and investors.

6) Is there any restriction on rights available to venture capital investors in public companies?

In certain circumstances, once a company is admitted to listing on the ASX it will be subject to an escrow (lock-up) period on certain shareholders which prevents that shareholder from disposing of the escrowed shares for a prescribed period. In general terms, this will apply to an entity listing on ASX which does not have a track record of profitability.

The escrow is designed to prevent early shareholders from selling their shares before the market has had the opportunity to fully value, through trading, the company's securities. If mandatory escrow does apply, securities issued to the certain persons pre-IPO will be subject to mandatory escrow.

However, certain exceptions may apply for genuine venture capital enterprises. The exceptions (the applicability of which may also be dependent on the price paid by the venture capitalist as compared to the IPO price) may result in an exemption from escrow or a reduced escrow period (typically reduced from 24 months to 12 months).

7) What protections are generally available to venture capital investors in your jurisdiction?

In general, in Australia, business is conducted in a transparent, well-regulated and politically stable environment.

Venture capital investors doing business in Australia can rely on an independent and respected judiciary and legal tradition in relation to the enforcement of the commercial position and protections negotiated in transaction and governance documents in relation to a venture capital transaction.

Australia is also an arbitration-friendly jurisdiction and a signatory to the *1958 New York Convention on the Recognition and Enforcement of Arbitration Awards* (New York Convention) with corresponding enacted domestic legislation. Foreign venture capital investors often opt for arbitration agreement dispute resolution clauses in the shareholders' agreement that governs the conduct between a target company and its shareholders.

8) Is warranty and indemnity insurance common in your jurisdiction? Are there any legal or practical challenges associated with obtaining such insurance?

Warranty and indemnity insurance is relatively common in Australia's private M&A market. However, warranty and indemnity insurance in Australian venture capital transactions is uncommon (particularly in earlier funding rounds).

Warranty and indemnity insurance is an uncommon option in most venture capital transactions in Australia due to factors including:

1. the typical size and nature of most venture capital transactions in Australia;
2. the costs associated, including the premiums, fees, and the self-insured retention or deductible;
3. the typical exclusions to coverage offered in relation to most warranty and indemnity insurance products in the market;
4. the general high risk/ high reward profile of venture capital transactions;
5. the early-stage nature of target companies at the time of investment;
6. the level of due diligence required to be undertaken by investors before insurers are willing to offer coverage on certain warranties; and
7. the additional time that may be added to a transaction timetable to complete the W&I process.

Warranty and indemnity insurance is more often considered in an exit transaction.

9) What are common exit mechanisms adopted in venture capital transactions, and what, if any, are the risks or challenges associated with such exits?

The most common exist mechanisms adopted in venture capital transactions in Australia are:

1. an IPO (either on the Australian Securities Exchange (ASX) or a recognized foreign stock exchange);
2. a sale of all of the shares in the target company to a competitor or other third-party purchaser;

3. a sale of the assets and subsequent distribution and payment to shareholders of the proceeds of such sale;
4. a redemption or buyback of shares held by investors by the target company; and
5. less commonly, exit by way of granting an exclusive license of the target company's intellectual property rights.

The risks and challenges associated with IPO are generally considered to be greater than the other common exit mechanisms (but also present the potential for higher reward). Risks and challenges associated with an IPO include:

1. satisfying the rigorous compliance process and regulatory scrutiny to qualify for public listing and issuing a disclosure document (prospectus);
2. the large cost and time involved in structuring and effecting an IPO;
3. in certain circumstances the pre-IPO shares of the target company may be subject to an escrow period (although as noted above exceptions may exists for genuine venture capitalists);
4. in most IPOs at least some level of pre-IPO restructuring will be required;
5. the price and liquidity available to venture capitalists may be subject to fluctuating market forces and conditions.

By comparison, the other common exist mechanisms are largely a matter of commercial negotiation and, typically, involve far less regulatory considerations.

10) <u>Do investors typically opt for a public market exit via an IPO? Are there any specific public market challenges that need to be addressed?</u>

An IPO is a commonly sought and favored avenue of exit given the potential for high returns on original investment.

In order to list on the ASX the requirements of Chapters 1 and 2 of the ASX Listing Rules must be met by the company seeking to list, and a disclosure document issued. As noted above, the listing process is a complex, highly regulated, and highly scrutinized process, and the target company must meet various eligibility requirements in order to be listed.

In most IPOs at least some level of pre-IPO restructuring will be required. This may impact the current capital structure and rights of venture capital investors and specific advice will need to be sought in relation to the implication of any pre-IPO restructure.

As also noted above, in certain circumstances the pre-IPO shares of the target company may be subject to an escrow period (although exceptions may exist for genuine venture capitalists).

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BRAZIL

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1) In your jurisdiction, which sectors do venture capital funds typically invest in?

According to a survey published by the Brazilian Venture Capital and Private Equity Association (or *Associação Brasileira de Venture Capital e Private Equity* - ABVCAP) in August 2019[1], key sectors attracting venture capital ("VC") investments in Brazil currently include the financial and insurance sectors, transport and urban mobility, advertising and marketing, agriculture and (clean) energy, health, and information technology.

2) Do venture capital funds require any approvals before investing in your jurisdiction?

Foreign VC funds, in general, do not require any regulatory approvals prior to investing in Brazil for the first time, but need to register the investment with the Brazilian Central Bank, enroll with the National Corporate Taxpayer Registry (CNPJ), and appoint a legal representative in Brazil upon remitting the relevant funds.

If the foreign VC fund already has investments in Brazil, further investments may be subject to merger control procedures before the Brazilian antitrust authority, as further detailed in question 4 below.

There are certain regulated sectors, however, that require either approval prior to signing or confirmation of licensing procedures with relevant authorities after the transaction is closed. Examples of such regulated sectors that are the object of interest from foreign investors currently are: financial, insurance, health, telecom, energy, and education[2].

3) Are there any legal limitations to an offshore venture capital fund acquiring control or influencing the business, operations, or governance of an investee entity?

There are, generally, no restrictions on a foreign VC fund acquiring control or influencing operations of a private company. However, there are certain regulated sectors that may impose restrictions on the percentage of equity interest or other rights held by foreign entities or individuals. For instance, as a matter of border control and national security, the Brazilian Federal Government currently applies and enforces restrictions to the direct or indirect acquisition or lease of rural properties in Brazil by: (a) foreign individuals, (b) foreign entities, or (c) Brazilian companies with the majority of their capital or corporate control directly or indirectly held by foreign entities or individuals.

In addition, in the case of listed companies, there are general protections granted to minority shareholders, regardless of their nationality. For instance, among others, one of the requirements for transferring control of a listed company is a mandatory tender offer in which minority shareholders are guaranteed by law the payment of at least 80% of the price per share paid to the selling controlling shareholders.

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1 ABVCAP is a non-profit organization that represents the private equity and venture capital industry and promotes the development of long-term investments. The survey mentioned in this guide is named "Inside VC" and is available in Portuguese at https://www.abvcap.com.br/pesquisas/estudos.aspx?c=pt-br.

[2] Kindly note this list is not exhaustive.

4) Would an investor be required to undertake an antitrust analysis prior to investment? When would such a requirement be triggered?

Brazilian legislation requires a double turnover system for the triggering of merger control procedures. The legal thresholds for mandatory notification are turnover or volume of sales in Brazil in the year preceding the transaction, by one of the parties equal to or in excess of BRL 750 million, and by another party equal to or in excess of BRL 75 million.

Parties are considered as the consolidated economic groups to which they belong.

For the purposes of calculating the turnover, the Brazilian antitrust authority ("CADE") considers as part of the same economic group the companies that are subject to a common control (internal or external) and companies in which any of the companies under common control has, directly or indirectly, at least 20% of the voting or share capital.

For investment funds, the following will be considered as part of the same economic group: the quota holders with more than 50% participation in the fund directly involved in the transaction, and the companies of its economic group; and the companies in which the fund directly involved in the transaction has more than 20% of the voting or share capital.

CADE may require the submission of any transaction within a period of one year as of its closing date, even if it did not satisfy the notification thresholds mentioned herein.

Filing is mandatory whenever the transaction produces any effects in Brazil and satisfies the double Brazilian turnover jurisdictional threshold. The only exception contained in the Brazilian Competition Law concerns joint ventures, consortia or associative or collaborative agreements with the specific purpose of participating in public bids and the agreements derived from these public bids.

Also, foreign-to-foreign mergers must provide notice whenever they produce or can potentially produce effects in Brazil and the double Brazilian turnover jurisdictional threshold is met. The concept of "effects" for the purposes of Brazilian merger notification are defined very broadly to include the presence of assets or legal entities in Brazil or revenues originating in Brazil related to the business involved in the transaction, even if through exports only. There is no "minimum or sufficient effects" test in place, and even minimal sales or revenues generated in Brazil can trigger a notification.

On certain occasions, CADE has decided that it has jurisdiction over foreign-to-foreign/international transactions, in cases where a worldwide relevant market definition is possible, and the economic groups are active in the directly affected and/or related market(s) in Brazil.

5) What are the preferred structures for investment in venture capital deals? What are the primary drivers for each of these structures?

As venture capital investors usually invest in businesses that already exist and are relatively structured in a start-up stage, but that still do not generate income, this type of investment entails a material risk element. This is another driver of the VC investment: undertaking an active role in the management of the invested company. As such, VC investors in Brazil usually make direct investments that entail the transfer of control via purchase of shares or alternate instruments such as convertible debentures or stock option agreements. However, because Brazilian courts can pierce the corporate veil for certain labor, tax, environmental, and consumer liabilities, among others owed by the invested company, it is common to structure VC investment with the inclusion of blockers and possibly Brazilian holdings as vehicles for the investment, thus creating layers between the possible seizing of assets and the final VC investor.

The final structure of the investment will likely undergo an analysis related to tax efficiencies, costs related to the housekeeping of Brazilian holding companies vs. blockers incorporated in other jurisdictions, and possible antitrust issues, among others.

6) Is there any restriction on rights available to venture capital investors in public companies?

No. Securities regulation and legislation in Brazil apply uniformly to all investors and shareholders of a public company, regardless of domicile.

7) What protections are generally available to venture capital investors in your jurisdiction?

The transaction instruments (i.e., investment agreement, the share purchase and sale agreement, and the shareholders' agreements) give the investor contractual protection regarding the investment in the company. Among the provisions that may be included in these documents, the following protections are fairly common:

- obligations of the invested company to abide by the shareholders' agreement and of not giving effect to any decisions, acts, or omissions that are contrary to or deemed to be in breach of the shareholders' agreement;
- general governance provisions regarding the management structure of the company, including: composition and attributions of the Board of Directors, executive officers and any committees to the extent applicable, as well as rights of appointing their relevant members, as attributed to certain shareholders;
- exercise of voting rights related to matters that are subject to approval by a qualified majority of shareholders or members of the Board of Directors, or to veto rights by a given shareholder or member of the Board of Directors appointed by that same shareholder;
- information rights;
- restrictions on transfers of shares, such as lock-up, rights of first refusal and rights of first offer, as well as any applicable exceptions to restrictions on transfers;
- exit mechanisms and protections, by way of obligations of the invested company to become a publicly held corporation subject to certain parameters, drag-along rights, tag-along rights, liquidation preference upon the occurrence of certain deemed liquidation events, redemption of shares, and/or put/call option rights;
- anti-dilution protections;
- non-compete (normally limited to a maximum of five years and subject to a clear definition of territory and activities)/non-solicitation provisions (generally limited to a maximum of two years and not applicable in certain "good leaver" situations);
- confidentiality provisions and relevant exceptions;
- obligations of a third party that becomes a shareholder of the invested company to adhere to the shareholders' agreement, in writing (joinder);
- each party's representations and warranties, containing the relevant qualifications (knowledge, materiality, etc.) and disclosures against representations and warranties, by reference to exhibits attached to the agreement (in a few cases parties may prefer to deal with disclosures upon execution of a disclosure letter);
- covenants in relation to the conduct of the invested company's business between signing and closing, if closing is delayed as a consequence of being subject to conditions present;
- indemnification, respective limitations on parties' indemnification obligations and conduct of claims clause; and

- guarantees (in addition to the seller's(s') ultimate parent company/controlling shareholders' personal guarantees) such as escrow account, hold-back, guarantees on shares, or any other types of firm guarantees, in order to cover the seller's(s') indemnification obligations.

8) <u>Is warranty and indemnity insurance common in your jurisdiction? Are there any legal or practical challenges associated with obtaining such insurance?</u>

Traditionally, VC investors (whether Brazilian or foreign) rely on representations and warranties provided under investment documents, respective contractual indemnities, and the right to claim damages and specific relief in law.

The approval for Brazilian insurers to sell "M&A insurance" was granted relatively recently (2014) by the Brazilian insurance authority ("SUSEP") and the initial products offered by Brazilian insurers were more suitable to high-value transactions, providing limited coverage, and charging high premium rates[3].

The offer of M&A insurance in Brazil is further curtailed because Brazilian legislation and SUSEP's regulation prevent the contracting of foreign insurance products for risks located in Brazil. Although foreign VC investors may still contract insurance within their own jurisdictions according to respective applicable legislation, having an insurance company remit funds to Brazilian target companies to cover losses that were not covered under a Brazilian-issued insurance product may prove difficult. Typically, foreign VC investors choose to receive the amounts owed under the foreign insurance and remit amounts to the target company, as applicable or necessary.

Still, certain corruption scandals and increased interest in public assets and investments in Brazil have resulted in increased interest in M&A insurance products, but their contracting is still not as common within the Brazilian market as in the US or Europe.

9) <u>What are common exit mechanisms adopted in venture capital transactions, and what, if any, are the risks or challenges associated with such exits?</u>

Brazil offers most of the exit alternatives sought by VC investors across the globe, such as: (i) sale of the invested company to a buyer within the same industry (i.e., sale to a strategic buyer) or to another private equity or venture capital investor; (ii) secondary public offering and listing of securities issued by the company in the local stock exchange / over-the-counter market and/or other foreign stock exchanges or similar capital markets; (iii) exercise of contractual rights (namely put option and drag-along rights); and (iv) redemption of shares/repayment of debentures convertible into shares.

Selling companies to strategic buyers has been the most common way of exiting venture capital investments in Brazil. Among other factors, this is likely common because some industries in Brazil are still relatively fragmented, which provides opportunities for consolidation of certain local markets.

Exiting upon the exercise of contractual rights (namely drag-along or put option rights) tends to be rare. These provisions generally work as protections to investors against misalignment of interests with other shareholders. In addition, enforceability of these provisions has been tested little in the context of dispute resolution in Brazil.

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3 AIG was pioneer in having SUSEP approve the first M&A insurance product in Brazil and its website currently states that their coverage is suited for deals within the range of USD 20 million and USD 1 billion, available at https://www.aig.com.br/seguros/seguro-m-and-a.

Finally, a VC investor may also exit by requesting that the portfolio company redeems its shares (provided that they are structured as redeemable shares) or repays its convertible debentures into shares. This is also uncommon in practice, first because the company must have available reserves for these purposes, and second because only VC investors would be able to monetize their position, which could be potentially destructive in terms of value for the company and its remaining shareholders. In most cases this would be the last resource pursued by a VC investor and would typically be used with the purpose of recovering at least a portion of the capital invested in an underperforming venture.

10) Do investors typically opt for a public market exit via an IPO? Are there any specific public market challenges that need to be addressed?

In recent years, a combination of regulatory and macro-economic factors has driven significant growth of the Brazilian capital markets, turning it into a realistic alternative for investors to monetize their investments[4].

It is common, therefore, to include in the target company's shareholders' agreement a commitment of all shareholders to cause the invested company to initiate the public listing process and carry out an initial public offering of its shares (an IPO), within a certain timeframe and provided that the invested company achieves certain goals.

In addition, it is likely the shareholders' agreement determines that the invested company can only trade securities under the rules of a special listing segment, which may also include certain additional parameters that may increase the likelihood of a successful disposal of shares, such as a book-building process where at least a certain number of well recognized institutional investors are approached and demonstrate interest in the offer, valuation of the invested company exceeds a certain threshold, etc. These are usually labeled "Qualified IPOs."

Challenges related to going public in the Brazilian capital markets, however, include, among others: (i) significant costs and regulatory bureaucracy that needs to be very well studied in order to enable certain cost efficiencies in the decisions involved with the process of going public[5;] (ii) significant increase in costs related to corporate structure (hiring auditors, independent members of the Board of Directors, creating the role of ombudsman, comptroller, and investor relations departments, etc.); (iii) loss of control of sensitive information and publicity of financial and strategic information, specifically by means of the prospectus[6].

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4 As can be seen by the Data Consolidation 2019 Report published by KPMG and ABVCAP, available at https://www.abvcap.com.br/Download/Estudos/4166.pdf.
5 Such decisions can vary from accurately understanding the size of the IPO, to the need to include intermediaries and underwriters in the process (and which), to the need or not to print physical copies of the prospectus.
6 Findings of a case study of the first mid-level company to go public in Brazil in 2013, available in Portuguese at https://www.abvcap.com.br/Download/Artigos/3584.pdf.

CANADA

Goodmans LLP and Davies Ward Phillips & Vineberg LLP

1) In your jurisdiction, which sectors do venture capital funds typically invest in?

Key sectors attracting venture capital investments in Canada include information and communications technology, software, cleantech, life sciences, healthcare, commercial services, pharmaceuticals and biotechnology, and consumer products.

In Q2 2020, CDN 1.7 billion in venture capital was invested across a variety of Canadian companies. This was 23% higher than Q2 2019 and more than double the amount invested in Q1 2020. This was the highest investment in a second quarter since 2013. The average deal size in this period was CDN 11.45 million, 56% higher than the average deal size during the five-year period between 2015-2019.

2) Do venture capital funds require any approvals before investing in your jurisdiction?

With respect to issuing securities and raising funds in Canada, venture capital funds must comply with applicable securities laws. Depending on the facts underlying the investment, a person or firm issuing securities and raising funds may be required to register under more than one category unless an exemption is available. However, in some circumstances, venture capital and private equity funds may fall outside the definition of "investment fund" if the fund takes active involvement in managing the business and affairs of the investee business.

Furthermore, certain investments may require prior governmental approval depending on the industry of the investee company and the control and/or majority economic interest of the venture capital or private equity fund.

3) Are there any legal limitations to an offshore venture capital fund acquiring control or influencing the business, operations, or governance of an investee entity?

The *Investment Canada Act* (R.S.C. 1985) applies to foreign investments in Canadian businesses. A key issue is whether the transaction is subject to notification, which is straightforward, or review, which is more onerous.

Where a transaction is notifiable, the only applicable requirement is for the foreign investor to submit a notification containing basic information with respect to the transaction within 30 days of closing. Where a transaction is reviewable, however, the foreign investor must prove that the investment is of net benefit to Canada. Special rules apply to foreign investments involving cultural businesses, investments that may raise national security concerns, and investments by state-owned enterprises.

Investments are reviewable under the *Investment Canada A*ct when they involve an acquisition of control in a Canadian business by a non-Canadian and they meet the prescribed financial thresholds. The applicable thresholds depend on the type of investor (i.e., trade agreement, WTO, or state-owned enterprise), the type of investment (i.e., direct vs. indirect) and whether the investee entity is engaged in a “cultural business”, generally relating to books, newspapers, audio or video recordings, or magazines. Generally, the financial threshold attracting *Investment Canada Act* review is far higher than that of typical venture capital investments, and so these legal limitations are generally not an issue for venture capital investors (subject to the special rules relating to foreign investments involving cultural business, investments that may raise national security concerns, and investments by state-owned enterprises).

4) **Would an investor be required to undertake an antitrust analysis prior to investment? When would such a requirement be triggered?**

The Competition Act (R.S.C. 1985, c. C-34) requires that parties to a proposed transaction exceeding certain thresholds must make pre-merger notification filings, unless a regulatory exemption applies. If such filings are required, the transaction is "notifiable." In practice, most pre-merger filings involve applications for an advance ruling certificate or no-action letter from the Competition Bureau, with or without formal notification filings.

As a general rule, a transaction is notifiable if (a) an operating business is the subject of the transaction; (b) the parties to the transaction, together with their affiliates, have either assets or annual gross revenues in Canada that exceed CDN 400 million in aggregate value; (c) the transaction exceeds a "size of transaction" threshold (CDN 96 million for share purchases, asset purchases and amalgamations); and (d) in certain circumstances, a minimum ownership threshold is exceeded. Generally, venture capital transactions (even so-called "mega-deals") are too small to exceed any of the relevant thresholds and are therefore not notifiable.

5) **What are the preferred structures for investment in venture capital deals? What are the primary drivers for each of these structures?**

Most VC funds established in Canada are structured as limited partnerships, with investors becoming limited partners and a newly created corporation being the general partner. This structure is primarily driven by the following factors:

- Gains and losses flow through to the partners; and
- The liability of the limited partners is generally limited to their initial investment, provided that the limited partners are not involved in the business of the partnership (though participation on advisory committees is permitted).

6) **Is there any restriction on rights available to venture capital investors in public companies?**

No. The rights available to venture capital investors are the same as those available to any shareholder of a company.

7) **What protections are generally available to venture capital investors in your jurisdiction?**

When making an equity investment in Canada, typical contractual protections requested by the venture capital fund may include:

- Representations and warranties of the investee company regarding its capital structure, financial condition, operations, intellectual property, assets, rights and obligations (note that depending on the round of the capital raise, the scope of the representations and warranties will vary greatly);
- Indemnities in respect of the foregoing representations and warranties, given by either the investee company or by the founders personally;
- A preference with respect to dividends or the proceeds of any liquidation;
- Redemption rights;
- Anti-dilution rights;
- Conversion rights;
- Rights to information;
- Rights of first refusal;
- Tag-along rights;
- Drag-along rights;

- Board nomination rights and quorums requiring the presence of a board member nominated by the VC;
- Veto rights with respect to certain fundamental matters; and
- Registration rights with respect to a qualified initial public offering.

8) Is warranty and indemnity insurance common in your jurisdiction? Are there any legal or practical challenges associated with obtaining such insurance?

Warranty and indemnity insurance is becoming increasingly common in Canadian M&A and capital markets transactions. Purchasing an insurance policy can give a buyer increased comfort where they would otherwise be relying on contractual indemnities given by the company or by the founders personally, especially in a high-value transaction.

The following are the legal and practical challenges associated with obtaining such insurance:

- Some warranty and indemnity insurance policies exclude certain known risks from coverage, which detracts from the benefits provided by the insurance;
- Some strategic buyers and foreign buyers (who are less familiar with warranty and indemnity insurance) may be unwilling to rely on such policies;
- A buyer may seek special line-item indemnity for items that the insurer excludes from the warranty and indemnity policy, which mitigates the benefits of having such a policy in place; and
- Most insurance providers will not begin the underwriting process until the buyer has signed a binding letter of intent and has obtained exclusivity concerning the transaction.
- The cost associated with this type of insurance often makes it too expensive on venture capital transactions.

9) What are common exit mechanisms adopted in venture capital transactions, and what, if any, are the risks or challenges associated with such exits?

The common exit mechanisms in Canadian venture capital transactions include:

- A third-party sale of the investee company;
- An initial public offering ("IPO"); and
- A recapitalization of the investee company through private equity or institutional funding.

The most common exit option is a third-party sale of the company. Such an arrangement provides a complete exit for venture capital investors and generally is less expensive and time-consuming than an IPO. Some of the risks or challenges associated with such an approach include:

- Post-closing indemnification obligations of the seller may hinder the company's ability to return funds to investors (though this issue is often addressed through the purchase of representation and warranty insurance); and
- The transaction may be subject to regulatory review if it is "notifiable" from the perspective of the Competition Bureau, or if the company is being sold to a foreign investor.

Recently there have been a number of high-profile exits via IPO in the Canadian market. While an IPO can offer a substantially higher return on investment for the VC, such transactions come along with the following disadvantages:

- An IPO is a much more expensive undertaking than a third-party sale;

- An IPO is not an immediate 100% exit for a significant investor who will have to commit not to sell significant portions of its shareholdings for a prolonged period of time;
- Regulators, underwriters and prospective investors will have requirements with respect to how much of the IPO can be made up of existing stock to pay out departing shareholders versus new stock to raise money for the company itself; and
- Going public attracts ongoing securities law and regulatory requirements for the investee company and its significant investors. Complying with such requirements can be an expensive and time-consuming process.

10) Do investors typically opt for a public market exit via an IPO? Are there any specific public market challenges that need to be addressed?

There are a variety of public market challenges that need to be addressed in the event of an IPO in Canada, primarily that going public subjects the company to significant regulatory requirements and attendant costs. Further, it can take a significant amount of time to bring an IPO to market. In light of those challenges, a number of Canadian VCs have opted for faster exits through third-party sales.

Notwithstanding the foregoing, there have been some prominent recent VC-backed IPOs in Canada. In Q3 2019, Lightspeed POS Inc. completed its IPO, listing on the TSX with a market capitalization of CDN 1.1 billion. Additionally, Milestone Pharmaceuticals Inc. recently closed its IPO on the Nasdaq with a market capitalization of CDN 468 million. In 2018, Ceridian HCM Holding Inc. began trading on the TSX after its IPO, with a market capitalization of almost CDN 3 billion.

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CHILE

Urenda Rencoret Orrego y Dörr

1) <u>In your jurisdiction, which sectors do venture capital funds typically invest in?</u>

In Chile, venture capital funds, in general, invest in high potential technology or science-based enterprises with capacity to increase their operations and become regional or global companies.

2) <u>Do venture capital funds require any approvals before investing in your jurisdiction?</u>

It depends on the number of contributors to the fund, and whether or not they make a public offering of securities. Those funds that have less than 50 contributors and do not make public offerings of securities do not require any approvals before investing in Chile. Private investment funds shall be governed exclusively by the provisions contained in their internal regulations and by the rules of Chapter V of Law No. 20,712 (*Ley sobre Administración de Fondos de Terceros y Carteras Individuales*). These funds may be administered by General Funds Administrators (“AGF”) or by closed corporations registered in the Special Registry of Reporting Entities (“REEI”) kept by the Financial Market Commission ("CMF").

On the other hand, venture capital funds that have more than 50 contributors must be managed, on behalf and at the risk of the contributors or participants, through a “special” corporation supervised by the CMF, and whose exclusive purpose is the administration of third-party resources. Such special corporation must be incorporated in accordance with the provisions of Law No. 20,712 and its Regulations (Supreme Decree No. 129) and must include in its name the expression "General Fund Administrator". Additionally, this type of capital fund must permanently maintain equity of not less than the equivalent of UF 10,000 (USD 372,730 approx.) and have at least 50 participants. Also, in this type of capital fund, the AGF must constitute a guarantee for the benefit of each fund to ensure the administrator’s compliance with their obligations. In the event that the guarantee is not constituted or does not remain permanently in force, the administrator and its directors will be jointly and severally liable for the damages that this failure may cause to the participants of the fund.

3) <u>Are there any legal limitations to an offshore venture capital fund acquiring control or influencing the business, operations, or governance of an investee entity?</u>

As a general rule, in Chile there are no limitations to an offshore venture capital fund to acquire control or influence the business of an investee entity. Article 56 of Law No. 20,712 states: *"(…) the investment of the fund's resources must be made in all types of instruments (...) unless this is prohibited.*" Based on the foregoing, funds may acquire shares and/or rights in all kinds of companies, no matter if such investment may eventually give them control over such companies or the possibility to influence their administration.

As general limitations, among others, we can mention the following: (i) Article 57 of Law No. 20,712 states that funds (including private investment funds) "*may not invest directly in real estate, mining property, water rights, industrial or intellectual property rights and vehicles of any kind; nor may they directly carry out activities (...) involving the direct development of a commercial, professional, industrial or construction activity by the fund and in general any activity carried out directly by the fund other than investment and its complementary activities*"; and (ii) Article 58 of Law No. 20,712, states that funds may not invest in quotas of funds managed by their own AGF or by an AGF of their business group, or in shares issued by AGFs, nor in instruments, contracts or assets, issued, guaranteed or owned by persons related to the AGF. Likewise, Article 22 of Law No. 20,712 establishes the general rule which prohibits the acquisition or disposal of assets on behalf of the fund to persons related to the AGF or to funds managed by it or by related companies. In the case of private investment funds, they may not carry out transactions or operations with other funds regulated by Law No. 20,712, unless they are managed by unrelated companies.

4) **Would an investor be required to undertake an antitrust analysis prior to investment? When would such a requirement be triggered?**

Yes.

Pursuant to the general rules, the parties of a concentration transaction —as such term is defined in Article 47 of the Chilean Competition Law— that has effects in Chile shall notify the same to the National Economic Prosecutor (FNE), prior to its materialization (i.e., there is a no-close obligation), if the following conditions are met: (i) the sum of the sales in Chile of the economic agents that intend to concentrate reached, during the calendar year prior to the notification, an amount equal to or higher than the threshold fixed by the FNE, which as of September of 2020 is of UF 2,500,000 (USD 93,182,468 approx.); and (ii) at least two of the economic agents that intend to concentrate have individually generated sales in Chile, during the calendar year prior to the notification, for an amount equal to or higher than the threshold fixed by the FNE, which as of September of 2020 is UF 450,000 (USD 16,772,844 approx.).

Sales shall be calculated by adding: (i) in the case of a merger or any type of association to form a separate entity, the sales in Chile of the economic agents involved in the transaction and those of their respective business groups; (ii) in the case of the acquisition of rights that give the acquirer decisive influence on the acquired entity's management, the sales in Chile of the acquirer and of its business group and those of the acquired entity; and (iii) in the case of the acquisition of control over the assets of another agent, the sales in Chile of the acquirer and of its business group and those generated by the acquired assets.

Sales shall not include taxes, sales between agents of the same business group, sales not generated from the normal business activity of the agents and other exclusions that may be determined by the FNE.

In the case of investment funds, in addition to a fund's fees, sales shall be calculated by adding the sales of the fund's portfolio companies where the relevant AGF or administrator has, directly or indirectly, (i) the majority of the votes in the shareholders' or owners' meetings and the right to appoint the majority of the directors or administrators; or (ii) the possibility of exercising decisive influence, pursuant to article 99 of the Chilean Securities Law. Also, as explained above, depending on the type of concentration, the sales of the business group of the AGF or administrator shall also be added (including the sales of other investment funds administered by said AGF or administrator).

In addition, please note that in certain circumstances the Chilean Competition Act forbids interlocking directorates with respect to competing entities and also includes a post-closing reporting obligation regarding the acquisition of an interest in competing companies.

5) **What are the preferred structures for investment in venture capital deals? What are the primary drivers for each of these structures?**

In Chile, the venture capital industry is not regulated as such, so investors can opt for the various corporate structures contemplated by our law. Notwithstanding the foregoing, they are usually incorporated as join-stock companies, since they allow greater flexibility from the point of view of the management and administration of the company and their capital is represented by shares that can be transferred without need to modify the company's bylaws.

Venture capital operations are carried out in successive investment rounds involving investments between 10% and 30% of the company's capital in each of the rounds. The financing rounds usually give the investors a minority participation in the ownership through the issuance of new shares of the company being financed.

Venture capital funds establish protection measures that aim to enhance the investor's position when facing liquidity events, and provide certain guarantees regarding the corporate governance of the company and access to information. The purpose of these measures is to provide sufficient guarantees to the investor. As companies advance in their investment rounds and, consequently, the size of the investments involved increases, the protection measures become more intense.

6) Is there any restriction on rights available to venture capital investors in public companies?

No, the only limitations are those indicated in answer number 3 above.

7) What protections are generally available to venture capital investors in your jurisdiction?

In Chile there is no further regulation of the venture capital market, so the parties are quite free to agree on the terms of the investment and the way in which the financing will be carried out. Notwithstanding the above, the fact that the funds are under CMF's supervision provides protection to the investors. This security is also present in private investment funds, since, if they are managed by closed companies, they must be registered in the REEI maintained by the CMF and will be subject to the reporting obligations established by the CMF.

8) Is warranty and indemnity insurance common in your jurisdiction? Are there any legal or practical challenges associated with obtaining such insurance?

In Chile, warranty and indemnity insurance is not common.

9) What are common exit mechanisms adopted in venture capital transactions, and what, if any, are the risks or challenges associated with such exits?

Exits, meaning at least the disposal of the venture capital investors' participation in the company, usually occur in three ways: (i) sale of the company's shares outside the stock exchange to another investor; (ii) re-purchase of the investors' shares by the founders or company; or (iii) winding up of the company. Depending on the amount of the investment, this matter is generally regulated in a Shareholders' or Partners' Agreement.

10) Do investors typically opt for a public market exit via an IPO? Are there any specific public market challenges that need to be addressed?

IPOs are not common in Chile for the venture capital market.

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ENGLAND & WALES

Gowling WLG

1) **In your jurisdiction, which sectors do venture capital funds typically invest in?**

Key sectors for venture capital investors in the UK very broadly include business products and services, ICT (communications, computer and electronics), consumer goods and services, biotech and healthcare (including life sciences), financial and insurance services, and energy.

In 2019, the fastest growing specific sectors for venture capital investment were in the technology sector, more specifically FinTech, AI and deep tech, and energy and cleantech.

2) **Do venture capital funds require any approvals before investing in your jurisdiction?**

There is generally limited regulation in respect to the activity of venture capital funds deploying capital by investing into investee entities in the UK. Approvals tend to be at fund level in terms of the regulation of how venture capital funds raise funds and how their investment activities are regulated.

Investments into investee companies operating in certain regulated industries may require regulatory approval from the relevant regulatory body for that industry (particularly if change of control thresholds are triggered as a result of the proposed investment). Specific requirements will vary from industry to industry.

At fund level, venture capital firms themselves (as fund promoters) must generally be authorized by the Financial Conduct Authority (the "FCA") for the purposes of arranging deals in investments in the UK (where this occurs in the UK) and only certain types of investors can be marketed to (e.g., high net worth or sophisticated individuals).

Fund managers must be authorized by the FCA by virtue of the fact that they will be managing an investment fund (and will therefore be covered by the Alternative Investment Fund Managers Directive, or AIFMD) and the principals of the fund manager will also most often need to be approved by the FCA for carrying out controlled functions in respect to the fund.

There are also examples of listed venture capital funds operating in the UK; these will generally require an approved prospectus for their securities to be marketed to the public (subject to various exemptions).

3) **Are there any legal limitations to an offshore venture capital fund acquiring control or influencing the business, operations, or governance of an investee entity?**

There are generally no restrictions on foreign venture capital funds investing in and influencing the business and operations of a privately held investee company in the UK, subject to any regulatory approvals that may be granted regarding any change in control in respect to the investee company.

4) **Would an investor be required to undertake an antitrust (competition) analysis prior to investment? When would such a requirement be triggered?**

Although venture capital transactions may not typically raise any potential competition concerns, investors should be mindful that they may still be subject to merger control requirements. Currently the UK's relationship with the EU after the end of the transition period (end of 2020) remains subject to negotiation with the EU. Following the end of the transition period, the European Commission's review of a merger will no longer cover the UK. This will mean that mergers may be subject to review by both the UK Competition and Markets Authority and the European Commission (i.e., a transaction that qualifies under the EU Merger Regulations may also be subject to UK merger control provided the UK jurisdictional thresholds are met).

In the UK, merger control thresholds are triggered where a transaction results in two enterprises ceasing to be distinct (i.e., they are brought under common ownership or control), and either:

- the aggregate UK turnover of the target business (i.e., the investee company) exceeds GBP 70 million in the preceding business year; or
- the enterprises ceasing to be distinct supply or acquire goods or services of any description and, after the transaction, will supply or acquire at least 25% of all those particular goods or services supplied in the UK or in a substantial part of it; or
- if the transaction involves specified activities connected with military or dual-use goods which are subject to export control, computer processing units, and quantum technology:
    - the investee company's annual UK turnover exceeds GBP 1 million; or
    - the investee company has an existing share of supply of 25% or more of relevant goods or services in a substantial part of the UK.

Where these thresholds are met, the Competition and Markets Authority ("**CMA**") has jurisdiction to review a completed or anticipated transaction.

It is important to note that even an investor's minority stake in an investee company may give rise to a degree of common control, which may initiate a further review by the CMA. An investor may acquire direct or indirect control of an investee company by virtue of: (i) material influence, where an investor has the ability to influence policy relevant to the behavior of the investee company in the marketplace; (ii) "*de facto*" control, or the ability by an investor to control the policy of the investee company; and (iii) "*de jure*" control, where an investor obtains a controlling interest in the investee company. As such, it may be possible for investors to conduct a thorough assessment on the likelihood of potential further review by the CMA, prior to any investments being made. This also allows investors to address any potential competition concerns head on and avoid significant delay and costs which may prove beneficial where a transaction is time-sensitive.

5) What are the preferred structures for investment in venture capital deals? What are the primary drivers for each of these structures?

The most common structure for venture capital funds is an English Limited Partnership. English Limited Partnerships allow for commercial flexibility and are tax transparent. When making investments an English Limited Partnership will act by its fund manager, which will typically be a limited liability partnership.

Venture capital investors will typically acquire a minority stake in investee companies. Such acquired shares will most likely be a preferred class of share, although convertible loan notes are also a common feature.

Preferred shares are used as they typically have superior rights to capital returns (e.g., sitting at the top of the liquidation preference with a 1x (or higher) preferential return) and income (e.g., dividend rights), as well as other protections such as anti-dilution protection in the event of a down round.

Certain venture capital funds may make enterprise investment scheme ("**EIS**") and venture capital trust ("**VCT**") eligible investments. EIS and VCT both offer attractive tax benefits, although both carry specific requirements and will dictate the terms of the transaction documentation and will subject investee companies to specific eligibility criteria.

6) Is there any restriction on rights available to venture capital investors in public companies?

There are no specific restrictions imposed on venture capital investors in respect to interests in listed companies.

7) What protections are generally available to venture capital investors in your jurisdiction?

Venture capital investors typically receive significant contractual protection in the transaction documentation (which will most often consist of a shareholders' agreement, articles of association and a subscription agreement) – please see above re: Preference Shares. Often the subscription agreement and shareholders' agreement will be contained within the same document.

A key feature of a shareholders' agreement will be the list of reserved matters in respect to which the investee company requires the venture capital investor's consent. This will provide the venture capital investor a greater degree of control than the voting rights attaching to a minority shareholding would otherwise give.

In common with all other shareholders, statutes grant certain rights to shareholders (i.e., a right of pre-emption for existing shareholders), which can be amended/supplemented by the constitutional documents of the investee company.

Further inalienable remedies available to minority shareholders include:

- an unfair prejudice petition under the Companies Act 2006, which most likely arises where majority shareholders (who may also be directors) use their powers to promote their own interests to the detriment of a minority shareholder; and
- bringing a derivative action under the Companies Act 2006, where a shareholder brings a claim on behalf of the investee company against the directors for their negligence, default, or breach of duty or trust. In this respect, the duties of directors are also enshrined in the Companies Act 2006 and accompanying case law.

8) Is warranty and indemnity insurance common in your jurisdiction? Are there any legal or practical challenges associated with obtaining such insurance?

Warranty and indemnity insurance has become increasingly prevalent on M&A transactions in the UK, with minimum premiums falling to capture smaller transactions. Consideration as to its use may be particularly relevant in transactions where venture capital funds are seeking an exit (given that such investors will, most likely, not give warranties to buyers).

Warranty and Indemnity Insurance will therefore tend to be a feature on exits that involve a venture capital investor selling shareholder (as opposed to being a feature of the initial investment).

The need for the insurer to review due diligence reports for the buying entity and transaction documents (typically the sale and purchase agreement, and the disclosure letter) should be considered in the transaction timetable. As a minimum guideline, a two-week period is generally required in order to put in place such a policy.

It should also be noted that W&I insurance will typically not cover all liability under the sale and purchase agreement – matters disclosed by the warrantors in the disclosure letter and warranties relating to tax and pensions, for example, will most likely not be covered. W&I insurance is therefore not a substitute for a complete due diligence, disclosure exercise, and negotiation with regards to the warranties.

9) What are common exit mechanisms adopted in venture capital transactions, and what, if any, are the risks or challenges associated with such exits?

With respect to exit mechanisms from successful investee companies, the most commonly utilized in the UK are IPOs or a sale (either by way of a trade sale or a buyout by a private equity firm focused on later stage majority acquisitions).

There are a number of common risks associated with trade sales and buyouts. In particular, there is a risk that management time and external cost is expended trying to complete a transaction which ultimately does not proceed. Further, there is a risk when undertaking a trade sale that during the sale process competitors could access sensitive information which, if the transaction aborts (and notwithstanding that confidentiality arrangements have been entered into), will have been disclosed.

Some of the challenges specific to IPOs are explored below.

10) Do investors typically opt for a public market exit via an IPO? Are there any specific public market challenges that need to be addressed?

The options available to companies seeking an IPO, if such a listing occurs in the UK, are premium, standard, or high growth segments of the Main Market of the London Stock Exchange (each with their own regulatory regime) or more likely, the Alternative Investment Market (AIM). AIM is London Stock Exchange's market for smaller, growing companies.

Venture capital-backed IPOs are less likely to occur than exit by way of a trade sale or a buyout, but do occur. While an IPO gives credibility to a company and raises the public profile of the investee company, IPOs are a comparatively risky route to exit, being affected by prevailing market conditions and taking significant management time and effort, even in the event that initial marketing of the investee company shares does not result in sufficient interest to proceed to an IPO.

Shareholders of companies which exit through an IPO are often required to enter into lock in agreements, whereupon it is agreed that they shall not sell their shares for a set period of time.

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FRANCE

Soulier Avocats

1) In your jurisdiction, which sectors do venture capital funds typically invest in?

In 2018, the global amount of investment by venture capital funds reached EUR 1,619 million[1] in France.

The key sectors attracting venture capital investment in France include the IT and digital sectors (EUR 836 million[2]), healthcare and biotechnologies (EUR 413 million[3]), industrial goods and services and the chemical sector (EUR 112 million[4]), as well as consumer goods and services (EUR 103 million)[5].

2) Do venture capital funds require any approvals before investing in your jurisdiction?

a. With regard to venture capital funds established under **French law**, we distinguish between two main categories of vehicles depending on the type of investors to which they are open:

i. the **retail private equity funds**, which are open to non-professional investors and include several types of funds, each of which has its own specific strategy:

- Retail Private Equity Investment Funds (*Fonds Communs de Placement à Risque* or "**FCPRs**"),
- Retail Venture Capital Funds (*Fonds Communs de Placement dans l'Innovation* or "**FCPIs**"),
- Retail Local Investment Fund (*Fonds d'Investissement de Proximité* or "**FIPs**"), etc.

In terms of regulatory framework, the creation of retail private equity funds requires the prior authorization of the French Financial Market Authority (*Autorité des Marchés Financiers* or "**AMF**") as these funds are open to non-professional investors. The AMF also monitors these funds throughout their lifetime.

i. the **professional private equity investment funds**, which are dedicated to professional investors and include *inter alia*:

- Professional Private Equity Investment Funds (*Fonds Professionnels de Capital Investissement* or "**FPCI**"),
- Venture Capital Firms (*Sociétés de Capital-Risque* or "**SCR**").

In terms of regulatory framework, these professional private equity investment funds, which are reserved for professional investors (as defined by the AMF regulations) do not require any prior authorization by the AMF. However, they must be declared to the AMF within the month following their creation. The AMF also monitors these funds throughout their lifetime.

a. As for venture capital funds governed by a **foreign law**, they do not require any specific approvals for merely investing in France, except when investing in sensitive sectors, as detailed in question 3 below.

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1 2018 Key figures, French Venture Capital Guide (Chiffres clés 2018, Capital-Innovation français), published by France Invest.
2 Ibid.
3 Ibid.
4 Ibid.
5 Ibid.

By contrast, the marketing and retail of these offshore venture capital funds in France would be subject to the AMF regulations and require necessary approvals.

3) Are there any legal limitations to an offshore venture capital fund acquiring control or influencing the business, operations, or governance of an investee entity?

As a general rule, foreign investments in France are unrestricted.

However, foreign investments in sensitive sectors are subject to specific authorizations from the Minister of Economy and Finance prior to their completion.

In practice, foreign investments must be authorized by the Minister of Economy and Finance if the following three conditions are cumulatively met:

a. condition relating to the **origin of the considered investment**: the investment comes from a country other than France, and
b. condition relating to the **nature of the considered investment**: the forms of foreign investments subject to authorization are as follows:
    i. the acquisition of a controlling stake – within the meaning of Article L.233-3 of the French Commercial Code – in a company that has its registered office in France,
    ii. the acquisition of all or part of a branch of activity of a company that has its registered office in France,
    iii. the acquisition of 25%[6] of the share capital or voting rights in a company that has its registered office in France (this sub-condition does not apply to Member States of the European Union), and
c. condition relating to the **nature** of the target company's activities: the French foreign investment control applies to business sectors related to public order, public authority, public security or the interests of national defense.

The authorization request shall be sent by the investor to the Ministry of Economy and Finance prior to the closing of the considered transaction, and a failure to comply may result in the agreement giving rise to this foreign investment to be held null and void, in addition to a potential civil fine on the foreign investor (up to a maximum of EUR 5 million for legal entities and EUR 1 million for natural persons) and possible criminal sanctions.

4) Would an investor be required to undertake an antitrust analysis prior to investment? When would such a requirement be triggered?

Venture capital investments may be required to undergo an antitrust analysis when they trigger a change of control of the target company and provided certain turnover thresholds are met by the parties to the concentration.

Depending on these thresholds, the transaction may fall under the scope of either French or European Union merger control mechanisms, as described hereafter.

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6 In the wake of COVID-19 pandemic, Decree no. 2020-892 dated July 22, 2020 temporarily (until December 31, 2020) lowered the threshold triggering the foreign direct investment screening mechanism to 10% of the voting rights of French listed companies operating in sensitive sectors.

a. French merger control

Venture capital investments resulting in a change of control of the target company must be notified to the French Competition Authority (*Autorité de la Concurrence*) when the following three conditions are cumulatively met:

i. the aggregate worldwide pre-tax turnover (achieved during the previous financial year) of all the parties to the concentration exceeds EUR 150 million, and
ii. at least two of the parties to the concentration each achieved individually, during the previous financial year, a pre-tax turnover in France exceeding EUR 50 million, and
iii. the transaction does not fall under the European Commission's jurisdiction (normally described as not having a so-called "**EU dimension**").

Reduced thresholds will apply wherever:

- at least two of the parties are active in the retail trade sector, or
- at least one of the parties run(s) its/their activity or part of it in one or more French overseas departments or French overseas territories.

There are specific rules for calculating the turnover in sectors such as banking and finance, insurance, leasing, travelling, advertising, franchising, and for state-owned companies.

b. European Union merger control

The European Commission only examines larger mergers with an EU dimension, meaning that the concerned parties reach certain turnover thresholds. In a nutshell, one of the minimum thresholds to be met is a worldwide turnover of all the parties to the concentration over EUR 2.5 billion.

5) What are the preferred structures for investment in venture capital deals? What are the primary drivers for each of these structures?

Venture capital funds usually invest in venture capital deals by way of subscribing for ordinary shares (*actions ordinaires*) and/or preferred shares (*actions de préférence*). Preferred shares, which can grant their owners specific rights (such as multiple voting rights, prior access to information, priority dividend rights, etc.), are widely used in practice. However, the issuance of preferred shares can prove (i) costly, as an independent statutory auditor will have to be appointed, and (ii) complex insofar as special meetings of preferred shares' holders shall be convened to approve any modifications related to the preferred shares.

It is also common for venture capital investors to subscribe to hybrid securities of the target company in addition to ordinary and/or preferred shares. Hybrid securities have developed considerably over the last years in France.

In addition to subscriptions for ordinary or preferred shares, investments often also take the form of subscriptions for convertible bonds (*obligations convertibles*) or bonds redeemable in shares (*obligations remboursables en actions*).

6) Is there any restriction on rights available to venture capital investors in public companies?

The primary purpose of venture capital funds in France is not to invest in listed companies but to finance the creation or start-up phase of technology-intensive companies.

FRANCE

In this respect, it should be recalled that the venture capital activity is carried out mainly through dedicated investment vehicles such as FCPRs, FCPIs, FIPs, etc. (see question 2 above) that benefit from preferential tax regimes in return for restrictive investment rules, mainly regarding of the structure of their asset portfolio and in particular with regard to unlisted securities. For example, at least 50% of the assets of a FCPR must be made up of unlisted companies. This percentage is set at 70% minimum in FCPIs and FIPs and non-compliance with these thresholds entails a tax penalty.

As such, restrictions on investment in listed companies by venture capital investors take primarily the form of investment quotas.

7) <u>What protections are generally available to venture capital investors in your jurisdiction?</u>

Venture capital investors usually rely on the protection granted by the articles of association of the target company and the transactional documents, including *inter alia* the share transfer agreement and the shareholders' agreement.

Venture capital investors are also granted representations and warranties (*garantie d'actif et de passif*) in connection with the shares being sold, and related indemnity protection.

To secure its indemnification obligations under the representations and warranties agreement, the seller is usually required to provide a guarantee, in the form of a first demand bank guarantee or joint guarantees provided by the seller or a bank. Apart from these guarantees, an alternative solution usually consists of placing a portion of the sale price in an escrow account.

8) <u>Is warranty and indemnity insurance common in your jurisdiction? Are there any legal or practical challenges associated with obtaining such insurance?</u>

Although the use of warranty and indemnity insurance ("**W&I insurance**") has significantly developed over the last years, this type of insurance is not as widely used as other guarantees implemented to secure representations and warranties agreements, as detailed in question 7 above (first demand guarantee, joint and several guarantee, etc.). W&I insurance may either be effected by the buyer (typically) or the seller, or cumulatively effected by both of them. Given its specificities, W&I insurance is generally considered by the investor as a tool to complement the guarantees mentioned in question 7 above, not as a substitute for them.

9) <u>What are common exit mechanisms adopted in venture capital transactions, and what, if any, are the risks or challenges associated with such exits?</u>

In venture capital transactions, investors are expected to exit in the short or medium term. Several exit routes are available to venture capital investors:

- trade sale,
- transfer to the management team (known as "management buy-out" or "**MBO**"),
- sale to another investment fund (known as secondary "leveraged buy-out" or "**LBO**"),
- initial public offering ("**IPO**").

Trade sale is the most common exit channel. The main issue in this type of exit is the proper alignment of the financial interests of the venture capital investor and those of the other selling shareholders so that none of them are adversely affected by the sale.

The second most common exit channel is the transfer of the company to the management team. The main challenge is to raise the necessary financing to pay the purchase price. In addition to obtaining a bank loan, the purchasing manager(s) often applies to an investment fund that will participate in the acquisition alongside while remaining a minority shareholder.

A third option is for the venture capital investors to sell their shares to another investment fund via a secondary LBO. One of the main difficulties arises from the divergence of financial interests that may exist between the venture capital investors, who wish to maximize the value of their investment when exiting the company, and the remaining shareholder(s), who seek(s) a new financial partner who shares the same vision for the development of the company.

Finally, an IPO is a well-known exit strategy. In practice, however, it is rarely implemented. This is partly due to the fact that the holdings of venture capital investors in France are almost exclusively made up of start-ups and small- and medium-sized businesses. The complexity, constraints and costs associated with an IPO are often difficult to reconcile with the profile of these companies.

10) <u>Do investors typically opt for a public market exit via an IPO? Are there any specific public market challenges that need to be addressed?</u>

IPO exits only accounted for 4% of the amounts related to the main divested businesses in the venture capital sector between 2009 and 2018[7]. This type of exit strategy is therefore not (yet) very common in practice. IPO exits are also highly regulated as they are subject to the control of the AMF.

When considering an IPO exit strategy in France, the investors shall first identify the listing venue for share trading: Euronext Paris regulated market or multilateral trading facilities (*systèmes multilatéraux de négociation* or "**SMNs**").

a. Euronext Paris regulated market

The Euronext Paris regulated market is divided into four capitalization segments organized according to market capitalization: Compartment A for companies with capitalization over EUR 1 billion / Compartment B for companies valued between EUR 150 million and EUR 1 billion / Compartment C for companies valued below EUR 150 million / A professional Compartment (for admissions by French or foreign companies without a prior public offering of securities).

Rules for admission on Euronext Paris regulated market require that the following conditions to be met:

- a minimum distribution of at least 25% of the issuer's capital, or 5% if this represents at least EUR 5 million,
- three years of audited accounts and the most recent reviewed half-yearly accounts if admission takes place more than nine months after the close of the financial year,
- the use of IFRS accounting standards, and
- a prospectus previously approved by AMF.

IPOs are subject to strict transparency requirements covering *inter alia* performance, financial positions, and major changes to the shareholding structure. Listed companies are also required to publish without delay any information that may have a material impact on their share price.

b. Multilateral trading facilities

Alongside the regulated market, there exist multilateral trading systems which include *inter alia* Euronext Growth, an organized SMN dedicated to small and medium-sized businesses.

Rules for admission on Euronext Growth are less stringent than those applicable to the Euronext Paris regulated market.

7 2018 Key figures, French Venture Capital Guide (Chiffres clés 2018, Capital-Innovation français), published by France Invest.

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GERMANY

Taylor Wessing

1) In your jurisdiction, which sectors do venture capital funds typically invest in?

According to the latest studies, e-commerce is still the sector attracting the most venture capital (**VC**) investors in Germany. In addition, the number and volume of investments in FinTech and InsureTech start-ups grows constantly. Recently, we noticed a rapidly increasing interest and larger investment volumes in healthcare, artificial intelligence, food, and mobility.

2) Do venture capital funds require any approvals before investing in your jurisdiction?

No. Approvals (other than antitrust clearance, as the case may be) in general have minor significance for German VC investments.

3) Are there any legal limitations to an offshore venture capital fund acquiring control or influencing the business, operations, or governance of an investee entity?

Such legal limitation becomes relevant only if a foreign investor envisages investing in a company which operates in sectors that affect national security interests (e.g., war weapons, military key technology, IT security software). In this case, the acquisition of 10% or more of the shares in the investee entity is subject to a governmental control under the German Foreign Trade and Payments Act (*Außenwirtschaftsgesetz*). Recent amendments to the law identified additional critical technologies to be covered by the national investment screening, including artificial intelligence, robotics, semiconductors, biotechnology and quantum technology. In light of the Covid-19 pandemic also companies from the healthcare sector have been included in the list of particularly safety-relevant companies, such as vaccine manufacturers and manufacturers of medical protective equipment.

4) Would an investor be required to undertake an antitrust analysis prior to investment? When would such a requirement be triggered?

The acquisition of a majority shareholding may be subject to an antitrust analysis by the Federal Cartel Office (*Bundeskartellamt*) or, in EU-wide affairs, by the European Commission. In some cases, the acquisitions of minority shares may be subject to such analysis as well. A thorough analysis is required if an acquisition of shares enables the investor to exert a decisive and thus anti-competitive influence on the target company. Control over shares or voting rights of at least 25% is a precondition for such influence. An antitrust analysis also has to be carried out if two or more investors would exercise joint control. A filing with the Federal Cartel Office (*Bundeskartellamt*) is always required when the parties involved in a transaction have a combined worldwide turnover of more than EUR 500 million (*approx. USD 554 million*), and, within Germany, one of the parties achieves a turnover of more than EUR 25 million (*approx. USD 27 million*) and one of the other companies achieves a turnover of at least EUR 5 million (*approx. USD 5.5 million*). In cases of the aforementioned criteria of one of the other companies having a turnover of at least EUR 5 million not being met there would still be a requirement for a filing in cases where the value of the consideration for the transaction is higher than EUR 400 million (*approx. USD 443 million).*

5) What are the preferred structures for investment in venture capital deals? What are the primary drivers for each of these structures?

Due to a lower statutory share capital, a cheaper and quicker foundation process as well as less restrictive legal regulations, VC-funded companies tend to choose the legal form of the German limited liability company (*GmbH*) rather than the German stock company (*AG*).

VC deals take place in subsequent equity financing rounds and usually result in a minority shareholding for the investor(s). In the scope of an equity financing round, new "preferred shares" in the target company are issued by a shareholders' resolution. In most cases, the new preferred shares have divergent rights and obligations compared to the common shares and the already existing preferred shares. The preference rights usually include a liquidation preference leading to a preferred distribution of potential future proceeds. In earlier financing rounds (Series Seed and Series A) such liquidation preferences are senior; in Series B and later, *pari passu* liquidation preferences on the same level with existing preferred shares have become more common.

VC investors frequently provide companies with capital via convertible loans. The underlying agreements tend to be less complex and allow a quicker inflow of cash, which is often utilized in the company's seed stage or as a bridge financing between two equity rounds. The conversion is advantageous as it occurs with a discount on the share price of the new preferred shares or even with a valuation cap.

6) Is there any restriction on rights available to venture capital investors in public companies?

No. According to German law, there are no particularities with regard to VC investments in public companies.

7) What protections are generally available to venture capital investors in your jurisdiction?

Besides the liquidation preferences mentioned above, there are numerous protections to safeguard VC investors and their contributed capital. The statutory provisions entitle investors, as shareholders of the company, to a variety of information rights, access to the books and records of the company, dividends, voting, or subscription rights. In addition to such statutory rights, VC agreements usually contain further protective rights for the investors such as anti-dilution provisions, the establishment and composition of an advisory board, approval requirements for business matters, rights of first refusal, or co-sale rights.

8) Is warranty and indemnity insurance common in your jurisdiction? Are there any legal or practical challenges associated with obtaining such insurance?

Warranty and indemnity insurance is rather unusual in VC transactions. Such insurance appears more frequently in conventional private equity deals or majority sales. VC investors rely on contractual indemnities, the right to claim damages, and specific relief in law.

9) What are common exit mechanisms adopted in venture capital transactions, and what, if any, are the risks or challenges associated with such exits?

Exits, meaning at least the disposal of the VC investors' participation in the company, usually occur in four ways: (i) initial public offering (**IPO**), (ii) sale of the company's shares outside the stock exchange to another investor (**Trade Sale**), (iii) re-purchase of the investors' shares by the founders or company, as well as the (iv) winding up of the company subsequent to an asset deal involving the majority of assets and liabilities.

Each of these exits confronts the involved parties with its own challenges. This is especially the case with IPOs. The formation and administration costs of a German public company is a time-consuming and expensive process and the legal requirements for the structuring are restrictive. Furthermore, many IPO provisions contain lock-up periods that keep the investors from disposing their participation until a longer period of time (e.g., six or twelve months) has elapsed. Given this lack of flexibility, the IPO is rarely chosen as an exit in the VC environment. Instead, exits primarily occur in the form of a Trade Sale (particularly to strategic investors or private equity funds).

10) Do investors typically opt for a public market exit via an IPO? Are there any specific public market challenges that need to be addressed?

As mentioned above, the IPO as an exit mechanism is rather uncommon in German VC.

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GREECE

Bahas, Gramatidis & Partners

1) In your jurisdiction, which sectors do venture capital funds typically invest in?

In Greece, venture capital (VC) funds primarily invest in tourism, travel, agriculture, technology and e-commerce.

2) Do venture capital funds require any approvals before investing in your jurisdiction?

No, foreign VC funds do not require any prior approval; however, the managers of VC funds have to comply with the provisions of Law 4209/2013, as amended, which transposed Directive 2011/61/EU regarding Alternative Investment Fund Managers (AIFMs). Notwithstanding the legal structure and the form of the AIFs managed, the following fall within the scope of Law 4209/2013:

a. EU or non-EU AIFMs that manage one or more Greek AIFs, and
b. EU or non-EU AIFMs that market one or more AIFs in Greece.

A foreign manager performing fund management activities or providing services in Greece may not do so without a prior authorization by the Hellenic Capital Market Commission (HCMC) or an EU passport.

3) Are there any legal limitations to an offshore venture capital fund acquiring control or influencing the business, operations, or governance of an investee entity?

Generally, there are no restrictions on a foreign VC acquiring control or influencing the business, operations or governance of an investee entity. An exception to this rule applies to a transaction by which a foreign entity/person acquires shares of any type of company that owns real estate in the so-called Greek border areas.

In case the investee is a listed entity according to Law 3461/2006 (the Takeover Bid Law), if the percentage of voting rights which the acquiring entity possesses, as a result of the acquisition, exceeds the threshold of one-third (1/3) of the total voting rights of the investee entity, then a mandatory bid must be launched, within a 20-day time period from the acquisition, for the acquisition of the total outstanding capital of the investee entity by paying an equitable and fair consideration.

4) Would an investor be required to undertake an antitrust analysis prior to investment? When would such a requirement be triggered?

According to article 6.1 of Law 3959/2011 (the Competition Law): "All concentrations of undertakings shall be notified to the Competition Commission within thirty (30) days of conclusion of the agreement or the announcement of the bid or the acquisition of a controlling interest, where turnover by all undertakings in a concentration within the meaning of Article 10 totals at least EUR 150 million on the global market and each of at least two of the undertakings involved generate turnover totaling over EUR 15 million on the Greek market."

Within the meaning of concentration falls: i) a merger of two or more previously independent undertakings or parts thereof; ii) an acquisition of sole control over another undertaking or part thereof; or iii) an establishment of a full-function concentrative joint venture; or iv) an acquisition of joint control of an existing undertaking.

Acquisition of control may be either direct or indirect and may take place in a variety of ways including by contract and/or the acquisition of shares or other assets. The following transactions are, however, not considered a concentration: i) the acquisition of titles by credit or financing institutions or insurance companies for a maximum period of one year (which might be extended for a reasonable time period, not exceeding three months); ii) such control being exercised by a person appointed in the context of company liquidation, bankruptcy, reconciliation or other similar proceedings; and iii) the acquisition of whole or part of an undertaking by investment companies for the purpose of preserving its market value, rather than managing its business behavior and decision-making.

5) **What are the preferred structures for investment in venture capital deals? What are the primary drivers for each of these structures?**

In Greece, a VC investment usually takes the form of acquiring a shareholding percentage of the investees' equity or acquiring bonds convertible to shares, issued by the investee entity. The primary driver in determining the specific structure is the level of control over the activities of an investee company.

6) **Is there any restriction on rights available to venture capital investors in public companies?**

No, in public (listed) companies, no special restrictions apply to venture capital investors, apart from the general rules applicable to any person buying shares of such companies.

7) **What protections are generally available to venture capital investors in your jurisdiction?**

Generally, VC investors are protected by standard clauses in the investment documents (e.g., representations, warranties, guarantees, put option rights, tag-along rights). Aside from that, law 4548/2018 (art. 141) provides minority shareholders with a level of protection depending on the percentage of share capital that such shareholders hold i.e., 1/20, 1/10, 1/5 (a higher percentage gives a higher protection).

8) **Is warranty and indemnity insurance common in your jurisdiction? Are there any legal or practical challenges associated with obtaining such insurance?**

In Greece, warranty and indemnity insurance (W&I Insurance) is not common at all and Greek insurance firms do not market such a product. Thus, W&I Insurance would have to be obtained from a foreign insurance firm. No legal restrictions apply in relation to obtaining such insurance as long as the insurance firm providing the policy has the permission to offer such policy.

9) **What are common exit mechanisms adopted in venture capital transactions, and what, if any, are the risks or challenges associated with such exits?**

Three exit mechanisms exist, namely: i) the sale of the investee entity, ii) an IPO, and iii) a leveraged buyout. The most common exit mechanism is the sale of investee entity. No risks are associated with this exit strategy but the negotiations for the sale between sellers and buyers can sometimes be challenging.

10) **Do investors typically opt for a public market exit via an IPO? Are there any specific public market challenges that need to be addressed?**

No, investors typically exit via the sale of the investee entity.

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GREECE

INDIA

AZB & Partners and Vaish Associates

1) In your jurisdiction, which sectors do venture capital funds typically invest in?

Key sectors attracting venture capital (**VC**) investments in India include information technology, e-commerce, healthcare, consumer, financial services (including mobile wallets and digital payment solutions), education and hospitality.

2) Do venture capital funds require any approvals before investing in your jurisdiction?

Foreign Venture Capital Investors (**FVCI**) are required to obtain a one-time registration under the FVCI Regulations with the Securities Exchange Board of India (**SEBI**). Investments under the Foreign Direct Investment (FDI) route do not require any registration but may require prior government approval depending on the sector in which the investment is being made.

3) Are there any legal limitations to an offshore venture capital fund acquiring control or influencing the business, operations, or governance of an investee entity?

There are no restrictions on a foreign VC acquiring control or influencing operations of a private company.

In case of a listed target, however, a first-time investor (together with persons acting in concert) cannot acquire 25% or more of the voting rights or control unless it makes a mandatory tender offer to acquire an additional 26% of the capital from public shareholders of the target. A mandatory tender offer requirement is also triggered where an investor holding 25% or more voting interest seeks to acquire control, or additional shares or voting rights exceeding 5-10% (depending on certain regulatory conditions) in a financial year.

4) Would an investor be required to undertake an antitrust analysis prior to investment? When would such a requirement be triggered?

Generally, early-stage VC transactions in India rely on a statutory exemption from mandatory pre-merger notification requirements under the merger control regime. Currently, merger control regulations allow for an exemption from notification where the target either has assets not exceeding INR 3.5 billion *(approx. USD 54.17 million)* in India, or has a turnover not exceeding INR 10 billion *(approx. USD 154.77 million)* in India. This exemption is currently available until March 29, 2022.

5) What are the preferred structures for investment in venture capital deals? What are the primary drivers for each of these structures?

Typically, VCs acquire a minority stake of 10-15% in early-stage investments by way of compulsorily convertible preference shares (**CCPS**) or a combination of equity shares and CCPS. CCPS rank in priority to equity shares on dividend distribution and repayment of capital on liquidation. CCPS also allow the investor to link the ratio of conversion to pre-agreed valuation expectations.

FVCIs looking to invest in start-ups can also subscribe to convertible notes. The primary advantage of a convertible note is that it allows an investor the flexibility to determine, within a five-year period, whether the money invested should be repaid or be converted into equity shares on terms and conditions agreed upon with the target.

While determining the preferred structure, other considerations which play a key role include tax implications, exchange control considerations relating to the sector of investment, as well as antitrust and other regulatory analysis.

6) Is there any restriction on rights available to venture capital investors in public companies?

No. Securities regulations in India apply uniformly to all investors and shareholders of a public company, regardless of domicile.

Unlike private equity, VCs typically do not to invest in the listed space. An acquisition of control or 25% or more of voting rights in a listed company would trigger mandatory tender offer obligation. Financial investors are also generally cautious of not wanting to be categorized as 'promoters' of a listed company, on account of attendant legal and regulatory implications.

7) What protections are generally available to venture capital investors in your jurisdiction?

Aside from standard contractual protections, transaction documents can also provide for a return on capital invested, provided this does not exceed the fair market value of the investment made by the investor in the target. Typically, we have seen investors opt for the higher of 1x their investment amount or the fair market value of their investment.

In addition, statutory protections available to minority shareholders include, **(a)** the right to make an application with the national company law tribunal in case of mismanagement or where the company's affairs have been conducted in a manner that is oppressive to the interests of the members; **(b)** the right to file a class-action suit; and **(c)** the right of minority shareholders to appoint a director.

8) Is warranty and indemnity insurance common in your jurisdiction? Are there any legal or practical challenges associated with obtaining such insurance?

Traditionally, investors in the Indian context rely on contractual indemnities and the right to claim damages and specific relief in law. However, in recent years, we have seen investors increasingly opt for warranty and indemnity insurance in India. It is generally preferred in high value transactions where founders are exiting the company and the incoming investor would have to rely on personal guarantees of the promoters for performance of conditions under the transaction documents.

The exclusion of known risks, high premiums and a limited market of insurance brokers offering warranty and indemnity insurance in India is likely to pose some practical challenges in obtaining such insurance.

9) What are common exit mechanisms adopted in venture capital transactions, and what, if any, are the risks or challenges associated with such exits?

In a typical venture capital deal, investors opt for a waterfall exit mechanism with multiple exit options. This usually includes exit through an initial public offering (IPO), a put option on the founders and buyback of capital. If the company/founders are unable to provide an exit through any of these mechanisms, as a last resort, investors reserve the right to sell their investment to a third-party buyer along with the founders' stake in the entity by exercising a drag right.

Implementing each of these exit mechanisms is not without its challenges. The difficulties in achieving a successful IPO have been discussed in our response below. While exercising a put option on the resident founders, an investor is permitted to do so only after having held the security for a period of one year. Further, the sale price of the investor's securities cannot exceed fair market value.

For implementing a buyback, Indian company law imposes certain limitations such as: **(a)** it should be permitted under the articles of association of the target; **(b)** funds used for buyback should be out of free reserves, securities premium or proceeds from issue of any shares or other specified securities; **(c)** the buyback cannot exceed 25% of the aggregate of paid-up capital and free reserves of the company; and **(d)** the ratio of the aggregate of secured and unsecured debts owed by the company after buyback should not be more than twice its paid-up capital and free reserves. A subsequent offer of buyback cannot be made within a period of one year reckoned from the date of the closure of the preceding offer of buyback, if any.

10) Do investors typically opt for a public market exit via an IPO? Are there any specific public market challenges that need to be addressed?

While it is common for most VC deals to provide an exit via an IPO, a successful public market exit depends significantly on external factors such as market conditions and regulatory and political climate, which are beyond the control of exiting investors. This provides a very narrow timeframe during which the exit can be achieved. Public market exits are highly regulated, and managing and implementing an IPO is a long, drawn-out process typically taking a year to complete. It is also a promoter-driven process, with the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018 (**ICDR Regulations**) imposing several eligibility conditions on the issuer company, such as having net tangible assets of INR 30 million, operating profits of INR 150 million and a net worth criterion of at least INR 10 million in each of the three years preceding the IPO. Other key challenges include: **(a)** in an offer for sale to the public, ICDR Regulations impose a lock-in on the sellers' shareholding for a period of one year prior to filing the draft offer document with SEBI; and **(b)** the post-issue capital should account for a minimum contribution from promoters of 20% and will be locked in for a period of three years.

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INDONESIA

Makarim & Taira S.

1) In your jurisdiction, which sectors do venture capital funds typically invest in?

For a venture capital company established in Indonesia, under Financial Services Authority ("**OJK**") Regulation No. 35/POJK.05/2015 on Business Implementation by Venture Capital Companies ("**OJK Regulation 35/2015**"), the purpose of venture capital activities is to fund investees which have a productive business or ideas to develop a productive business.

In Indonesia, currently venture capital (either foreign or local) is mostly invested in technology start-ups (such as those engaged in e-commerce; financial technology; payment systems; and mobile applications, e.g., transportation, educational, travel, business applications, etc.) but there is also some investment in the offline consumer/retail sector such as food and beverage businesses, sports businesses, etc.

2) Do venture capital funds require any approvals before investing in your jurisdiction?

No, offshore venture capital funds do not require any approvals before investing in Indonesia. However, if the investment is made by an Indonesian venture capital company, the company must have the required license issued by the OJK and comply with the OJK regulations.

3) Are there any legal limitations to an offshore venture capital fund acquiring control or influencing the business, operations, or governance of an investee entity?

In Indonesia, the most common way for a venture capital fund to invest in an investee entity is either through providing a (convertible) loan or capital participation.

For investment through capital participation by an offshore venture capital fund, in general there is a legal limitation on foreign share ownership in certain lines of business. In Indonesia, foreign share ownership restrictions are imposed under the Negative List of Investment most recently updated in 2016. However, once the relevant offshore venture capital fund becomes a shareholder of an Indonesian company, it will be entitled to all rights as a shareholder of the company.

4) Would an investor be required to undertake an antitrust analysis prior to investment? When would such a requirement be triggered?

The investor will be required to undertake antitrust analysis if it acquires control of a company by way of a merger, acquisition, or consolidation. Law No. 5 of 1999 on Anti-Monopoly Practices and Unfair Business Competition prohibits business actors from conducting mergers, consolidations or acquisitions which might lead to monopolistic practices or unfair business competition. In which case, a post-merger, share acquisition or consolidation notification must be submitted to the Indonesian Competition Commission (*Komisi Pengawas Persaingan Usaha*) within 30 working days of the date of the transaction if the transaction meets the threshold for notification. The threshold is triggered when the transaction results in (i) the value of the assets of a business entity resulting from the merger, consolidation, or acquisition exceeding IDR 2.5 trillion; or (ii) the value of sales of a business entity resulting from the merger, consolidation, or acquisition exceeding IDR 5 trillion. A different threshold is applicable in the banking sector.

5) What are the preferred structures for investment in venture capital deals? What are the primary drivers for each of these structures?

Under OJK Regulation 35/2015, an Indonesian venture capital company may engage in the following business activities:

a. equity participation;
b. quasi equity participation by purchasing convertible bonds;
c. financing through the purchase of bonds issued by the investee at the start-up stage or business development stage; and
d. financing productive businesses.

In addition to the above business activities, an Indonesian venture capital company can also provide business assistance to the investees. It can also provide services in return for fees, and engage in other activities, with the OJK's approval.

OJK Regulation 35/2015 requires equity participation by an Indonesian venture capital company to be in the form of direct capital participation in an investee company which is a limited liability company. The maximum term of the investment is ten years, extendable twice for additional five years each to up to an aggregate additional ten years. At the end of the term of the investment, the shares must be divested through:

a. an initial public offering (IPO) in the capital market;
b. a private placement with new investors; or
c. being sold back to the investee (buyback),

so that the venture capital investor does not remain the controlling shareholder of the investee.

Participation through convertible bonds by an Indonesian venture capital company must be via the purchase of convertible bonds or sharia convertible bonds issued by an investee company which is a limited liability company, the purchase of which must be made in notarial deed form. On maturity, the convertible bonds or sharia convertible bonds can be converted into equity participation for a certain term. The conversion must be conducted under a joint agreement between the venture capital investor and the investee.

The above requirements for equity participation and participation through convertible bonds do not apply to foreign venture capital companies.

Participation by providing convertible loans and equity participation is the preferred structure of venture capital deals in Indonesia. The primary driver for selecting one of these structures is the goal of the venture capital investor's investment in the investee company. Usually, if the venture capital investor wants to invest on a short-term basis, or if it does not want to be too involved in the development of the business or its management, or its business line is not open to foreign investment (if the venture capital investor is a foreign entity), the preferred structure is providing convertible loans. However, if the venture capital investor wants to invest on a long-term basis, or it wants to develop or be actively involved in the company, or if the business line is open to foreign investment (if the venture capital investor is a foreign entity), the preferred structure is equity participation. Note that for offshore venture capital funds providing loans to an Indonesian company, the Indonesian company must file certain reports to Bank Indonesia and the Ministry of Finance.

6) Is there any restriction on rights available to venture capital investors in public companies?

There is no restriction on rights available to venture capital investors in public companies. However, it is still not common for venture capital investors to invest in public companies in Indonesia as public companies can raise funds by issuing bonds or rights or any other capital market instrument.

As mentioned earlier in question 1, under OJK Regulation 35/2015, Indonesian venture capital fund investees which have a productive business or ideas to develop a productive business for the purpose of:

a. Developing a new invention;
b. Developing a company or individual business whose early stage has financial difficulties;
c. Developing micro, small, and medium business and cooperatives;
d. Assisting companies or individual businesses in the development stage or business decline stage;
e. Taking over companies or individual businesses in the development stage or business decline stage;
f. Developing research and engineering;
g. Developing various new technologies and the transfer of technology from domestic and/or overseas; and/or
h. Assisting with the transfer of ownership of a company.

7) <u>What protections are generally available to venture capital investors in your jurisdiction?</u>

Generally, if a venture capital company invests in equity, it is deemed a shareholder of the investee company and accordingly, the protections available to shareholders apply. The liability of a shareholder is limited to the capital that it invests in the company. Usually, preferred shares are issued to venture capital companies, which can be in the form shares with voting rights, shares with a right to appoint directors and/or commissioners, shares with a preferred right to receive dividend, etc. Please note that a foreign venture capital company as a foreign shareholder will also be protected by the laws and regulations on investment.

On the other hand, if a venture capital company invests in convertible loans, it will be deemed a lender to the investee company. A loan is usually secured by certain securities provided by the company or the shareholders, usually share pledges provided by the shareholders.

Under OJK Regulation 35/2015, investors in an Indonesian venture capital fund can be individual persons or entities, either domestic or foreign. The fund is created under an investment contract between the venture capital company and a custodian bank. The investment contract, which is drawn up in notarial deed form, sets out the rights and obligations of the venture capital investors and therefore these investors are protected by the contractual relationship under the investment contract.

8) <u>Is warranty and indemnity insurance common in your jurisdiction? Are there any legal or practical challenges associated with obtaining such insurance?</u>

No, warranty and indemnity insurance is not common in Indonesia.

9) <u>What are common exit mechanisms adopted in venture capital transactions, and what, if any, are the risks or challenges associated with such exits?</u>

Typically, the common exit mechanisms adopted in venture capital transactions in the event of equity investment include a private sale to other parties, a buyback by the investee, or an initial public offering (IPO). If the investment is through convertible loans, the common exits are the repayment of the loan or executing the security (which is commonly in the form of a pledge of shares).

An IPO exit has the following challenges:

a. It could be time consuming and have extra costs as it involves many supporting parties, such as underwriters, appraisers, financial and legal consultants, etc.;
b. the venture capital investor must focus on and be committed to developing the investee to prepare it for the IPO, including to develop a profitable company with good corporate governance and a good portfolio; and
c. there were just over 3 million capital market investors in Indonesia at the end of July 2020 compared to more than 250 million Indonesian citizens.

Meanwhile, the challenge of selling to other parties is usually the failure to attract buyers. In many cases, the investee company is sold at a low or discounted price and the venture capital investor suffers a loss of some of the funds invested in the investee.

If the investment is made by way of a convertible loan, the challenge in obtaining repayment of the loan or executing the security is that sometimes the company does not have sufficient assets to repay the debt.

10) Do investors typically opt for a public market exit via an IPO? Are there any specific public market challenges that need to be addressed?

For investment by way of equity, in practice, venture capital investors usually prefer to exit through a private sale of the business to third parties rather than an IPO for the reasons explained in question 9 above.

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IRELAND

Mason Hayes & Curran LLP

1) **In your jurisdiction, which sectors do venture capital funds typically invest in?**

Venture capital funds in Ireland ("**VCs**") typically invest in the technology sector, with a strong focus on software, life sciences and FinTech.

2) **Do venture capital funds require any approvals before investing in your jurisdiction?**

There is generally limited regulation in respect to VCs deploying capital by investing into investee entities in Ireland. Approvals tend to be at the fund level in terms of the regulation of how VCs raise funds and how their investment activities are regulated.

Investments into investee companies operating in certain regulated industries may require regulatory approval from the relevant regulatory body for that industry (particularly if change of control thresholds are triggered as a result of the proposed investment). Specific requirements will vary from industry to industry.

Most VCs will fall within the definition of an "alternative investment fund" (commonly referred to as an "AIF") pursuant to the European Union (Alternative Investment Fund Managers) Regulations 2013. Accordingly, the VC, or AIF, will be required to appoint an approved "alternative investment fund manager" or "AIFM". The AIFM will be subject to the regulation and supervision of the Central Bank of Ireland.

3) **Are there any legal limitations to an offshore venture capital fund acquiring control or influencing the business, operations, or governance of an investee entity?**

There are generally no restrictions on foreign VCs acquiring control of and influencing the business and operations of a privately held investee company in Ireland, subject to any regulatory approvals that may be granted for any change in control in respect to the investee company.

4) **Would an investor be required to undertake an antitrust (competition) analysis prior to investment? When would such a requirement be triggered?**

Venture capital transactions, like any corporate transaction, can be subject to the Irish (and EU) competition law and merger control rules and may be subject to review by the Irish Competition and Consumer Protection Commission ("**CCPC**"). Under the Irish merger control rules, a transaction requires notification when it constitutes a "concentration" and satisfies the merger control notification thresholds. A transaction is considered a "concentration" when it involves one of the following:

a. the merger of two or more previously independent undertakings;
b. the acquisition of direct/indirect control of the whole or part of one or more undertakings by one or more undertakings; or
c. the acquisition of part of an undertaking, not involving the acquisition of a corporate legal entity, but the acquisition of assets/goodwill (i.e., that constitute a business to which a turnover can be attributed).

The definition of control under the Irish Competition Acts 2002 (as amended), is based on whether as a result of the transaction 'decisive influence' can be exercised over the strategic commercial decisions of the target company or asset. In this regard, the CCPC typically follows the guidance of the European Commission as set out in the Consolidated Jurisdictional Notice.

In Ireland, a merger or acquisition will require notification to the CCPC when in the most recent financial year the following thresholds are exceeded:

i. the undertakings involved had a combined turnover in Ireland of at least EUR 60 million; and
ii. at least two undertakings involved had individual turnover in Ireland of at least EUR 10 million.

The waiting period for the CCPC's assessment can be up to 30 days from the date of notification for a Phase I review (and up to 120 days for a Phase II review) and this can be extended where the CCPC issues a formal requirement for information ("**RFI**") which has the effect of stopping and resetting the review period, which only restarts when the RFI is complied with.

Failure to notify a merger or acquisition that satisfies the turnover thresholds is a criminal offense in Ireland which can attract fines of up to EUR 250,000 on conviction on indictment (and EUR 3,000 on summary conviction) and a maximum daily fine or EUR 25,000 for each day that an indictable offense continues after the date of its first occurrence (and EUR 300 a day for a summary offense). Therefore, venture capital transactions involving parties with activities operating in or through Ireland should be assessed for merger control at the outset of a transaction, to avoid unnecessary delays to the deal timetable and/or possible sanction from the CCPC.

5) What are the preferred structures for investment in venture capital deals? What are the primary drivers for each of these structures?

The most common structure for investment in venture capital deals is an Irish Limited Partnership. Irish Limited Partnerships allow for commercial flexibility and are tax transparent. When making investments an Irish Limited Partnership will act by its General Partner, which will typically be a limited liability company.

VCs typically invest in Irish limited companies and usually acquire a minority stake in these investee companies by way of preference shares. The preference shares generally have superior rights to the existing classes of shares in relation to liquidation preference, veto rights, dividend rights and participation / anti-dilution rights on future funding rounds.

VCs often also invest in Irish limited companies by way of a convertible loan note instrument enabling the VC to convert the convertible loan notes into shares in the investee company at a discount when a conversion trigger (typically the next equity financing round) occurs.

6) Is there any restriction on rights available to venture capital investors in public companies?

There are no specific restrictions imposed on VCs under Irish company or securities laws in respect of interests in listed companies.

7) What protections are generally available to venture capital investors in your jurisdiction?

VCs typically negotiate considerable contractual protections when investing, usually by way of shareholder and subscription agreements and amendments to the constitution of the investee company. These documents will typically incorporate the VCs liquidation preference, veto rights, dividend rights and participation / anti-dilution rights on future funding rounds along with information rights and often the right to appoint a VC director / observer to the board of the investee company.

As shareholders of the investee company, VCs have statutory protections under the Companies Act 2014 and contractual protections under the constitution of the investee company, the terms of which are negotiated on a deal-by-deal basis.

Other statutory protections include the shareholders' right to take court proceedings where the directors of an investee company are exercising their powers or conducting the affairs of the company in a manner oppressive to the shareholders or in disregard of their interests.

8) <u>Is warranty and indemnity insurance common in your jurisdiction? Are there any legal or practical challenges associated with obtaining such insurance?</u>

Warranty and indemnity insurance has become increasingly prevalent on M&A transactions in Ireland. Consideration as to its use may be particularly relevant in transactions where VCs are seeking an exit (given that such investors will, most likely, not give warranties to buyers).

Warranty and indemnity insurance will therefore tend to be a feature on exits that involve a venture capital investor selling shareholder (as opposed to being a feature of the initial investment).

The need for the insurer to review due diligence reports for the buying entity and transaction documents (typically the sale and purchase agreement, and the disclosure letter) should be considered in the transaction timetable. As a minimum guideline, a two-week period is generally required in order to put such a policy in place.

It should also be noted that warranty and indemnity insurance will typically not cover all liability under the sale and purchase agreement – matters disclosed by the warrantors in the disclosure letter and warranties relating to tax and pensions, for example, will most likely not be covered. Warranty and indemnity insurance is therefore not a substitute for a complete due diligence, disclosure exercise and negotiation with regard to the warranties.

9) <u>What are common exit mechanisms adopted in venture capital transactions, and what, if any, are the risks or challenges associated with such exits?</u>

The most commonly utilized exit mechanism for VCs in Ireland is a share sale (either by way of a trade sale or a buyout by a private equity firm focused on later stage majority acquisitions).

There are a number of common risks associated with trade sales and buyouts. In particular, there is a risk that management time and external cost is expended trying to complete a transaction which ultimately does not proceed. Further, there is a risk when undertaking a trade sale, that during the sale process, competitors could access sensitive information which, if the transaction aborts (and notwithstanding that confidentiality arrangements have been entered into), will have been disclosed.

IPOs, though much less common, are another exit mechanism. Some of the challenges specific to IPOs are explored below.

10) <u>Do investors typically opt for a public market exit via an IPO? Are there any specific public market challenges that need to be addressed?</u>

Venture capital backed IPOs are not common in Ireland. While an IPO gives credibility to a company and raises the public profile of the investee company, IPOs are a comparatively risky route to exit, being affected by prevailing market conditions and taking significant management time and effort, even in the event that initial marketing of the investee company shares does not result in sufficient interest to proceed to an IPO.

Shareholders of companies which exit through an IPO are often required to enter into lock-in agreements, where it is agreed that they cannot sell their shares for a set period of time.

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ISRAEL

Herzog, Fox & Neeman

1) In your jurisdiction, which sectors do venture capital funds typically invest in?

VC funds invest with the greatest frequency in high-tech companies: AI, cybersecurity, internet of things, FinTech, automotive, big data, and digital health.

2) Do venture capital funds require any approvals before investing in your jurisdiction?

A preexisting fund does not need approval simply to invest in an Israeli company. Some transactions may require specific approvals, depending on the company, field of business, and the size of investment. This usually applies to targets that have received funding or other support from governmental entities.

3) Are there any legal limitations to an offshore venture capital fund acquiring control or influencing the business, operations, or governance of an investee entity?

There are no specific legal limitations preventing an offshore VC fund from acquiring control or influencing the business, operations, or governance of an Israeli company.

If an offshore fund wishes to make this kind of investment, it would need to review together with its advisors the typical restrictions and requirements that apply in any change-of-control circumstance (such as restrictive trade practices laws, internal corporate governance documents and shareholder voting agreements, etc.). A foreign VC fund may also be required to file certain undertakings with governmental agencies in order to acquire control or influence the operations of an Israeli company. For example, prior to making an investment of this kind in a company that received funding from the Israel Innovation Authority, the investor would need to sign an undertaking to comply with the relevant laws and IIA program rules. Targets that operate in the defense industry may be required to update the Ministry of Defense upon an investment and provide undertakings by foreign investors and foreign directors, including an acknowledgement that they will not have access to classified information.

Israeli law prohibits the conduct of any commercial or investment activity between Israelis and the governments and residents of certain jurisdictions (Iran, Syria and Lebanon), as well as certain terrorist organizations and other entities and individuals listed on government-issued restricted parties lists. Thus, if the fund were controlled by a person or entity included within these sanctioned laws, it would be prohibited from investing in the Israeli company.

4) Would an investor be required to undertake an antitrust analysis prior to investment? When would such a requirement be triggered?

In general, an investment will not require an analysis of the Israeli antitrust laws unless the investor will be receiving 25% of the company's share capital, 25% of the voting rights, the right to receive 25% of the company's profits, or the right to appoint at least 25% of the board of directors. If the investment will approach more than one of these thresholds, we would advise consulting on a case-by-case basis with legal counsel.

5) What are the preferred structures for investment in venture capital deals? What are the primary drivers for each of these structures?

The most common investment structure for VC funds is the purchase of preferred shares. Other structures include convertible loans, SAFEs and, less commonly, the purchase of ordinary shares. Typically, the VC would take a minority position with veto rights.

VC funds are more likely to invest in more mature targets that are likely to already have preferred shares in their capital structure, and thus the investment would yield more senior preferred securities. If a company is not ready to set a valuation because it is early-stage, or is reluctant to set a valuation at a certain time because external factors (such as COVID-19) are driving down valuations generally, the parties may agree to the convertible loan or SAFE structure. Similarly, if the investor is willing to forego the formalities of a full round in order to provide bridge funding and rely on the protections that will be negotiated in the context of the next equity financing, these convertible securities would be a reasonable choice.

6) Is there any restriction on rights available to venture capital investors in public companies?

There is no absolute restriction on rights available to VC investors in public companies. Such investments may, however, have tax implications for those VC funds that are operating under a ruling granted by the Israel Tax Authority. We recommend consulting with tax and legal advisors about any particular circumstances.

7) What protections are generally available to venture capital investors in your jurisdiction?

A venture capital investor will typically take a minority position in a target, and thus may benefit from the variety of protections that are available to minority investors as well as protections that are typically offered to all substantial investors. VC investors will likely negotiate for veto rights in the target's articles of association, which would prohibit the company or its board from taking certain important actions, such as consummating an exit transaction below a certain valuation, winding up the business, changing the composition of the board, or entering into related party transactions, without the investor's approval. A VC investor will also likely enjoy preemptive rights to participate in future issuances by the company and a right of first refusal and right of co-sale with respect to proposed sales by other shareholders. The extent of each of these rights would be negotiated in the company's articles of association as part of the transaction terms. Similarly, VC investors can negotiate to include certain limitations within the articles to prevent being dragged to an undesirable exit, such as a requirement that investors need only give certain minimum representations in a drag sale.

Israeli statutory law also contains provisions to protect minority shareholders from a forced sale. Under these provisions, a potential buyer whose offer has been accepted by the disinterested holders of at least 80% of the target's shares (or other threshold set out in the company's articles of association) may force a sale of the remaining shares by notifying all shareholders who did not accept the initial offer, who are then given one month to petition a court to enjoin the sale.

Furthermore, Israeli law affords minority shareholders some protection from oppression by the majority shareholders, as well as the benefit of equal treatment by the board of directors, whose fiduciary duties require them to consider the interests of the minority on par with those of the majority.

8) Is warranty and indemnity insurance common in your jurisdiction? Are there any legal or practical challenges associated with obtaining such insurance?

Warranty and indemnity insurance is not common in Israel but it is becoming more so. There are no Israel-specific legal or practical challenges associated with obtaining the insurance. Many insurers may not provide coverage for small deals (below USD 100 million), and this may restrict its availability for the majority of Israeli transactions.

9) What are common exit mechanisms adopted in venture capital transactions, and what, if any, are the risks or challenges associated with such exits?

The most common exit mechanisms are M&A (sale of shares, assets or merger) or IPO. The explosion of SPACs in other markets has only slightly affected Israel, and all business combinations are carried out with SPACs listed in foreign jurisdictions. Secondary exits outside of sales of an entire portfolio are uncommon.

The primary risk of an IPO is that its success depends on the state of the capital markets at the relevant time. The primary challenge of M&A is that it is subject to much more negotiation between the parties. VC funds typically desire as clean an exit as possible, with no remaining indemnification obligations remaining after closing. In that respect an IPO carries less risk than a private M&A transaction, which usually carries indemnification obligations that last anywhere from 12 months to a number of years, or even longer in the case of fraud-based claims or for certain fundamental representations.

10) Do investors typically opt for a public market exit via an IPO? Are there any specific public market challenges that need to be addressed?

Investors typically do not have a real choice of whether a company in which they are invested exits via IPO or otherwise. If the capital markets are favorable at the time and an underwriter is willing to assist, then the IPO path may be viable. One challenge the company will have when planning for an IPO is determining where to list. Different markets have different strengths and weaknesses, and some may be more suitable for companies in certain fields of business or with other particular profiles. NASDAQ has been a popular choice for Israeli high-tech companies, with approximately 80 such entities currently quoted on that exchange.

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JAPAN

City-Yuwa Partners

1) <u>In your jurisdiction, which sectors do venture capital funds typically invest in?</u>

Venture capital (VC) funds in Japan mostly invest in the IT-related sector (52.8% of the total investment amount for FY2018[1]) and in the bio/medical/healthcare sector (19.9% of the same). The computer and related equipment/IT service sector, which comprises 44.9% of the same has received the largest investment from VC. The bio/pharmaceutical sector makes up 13.6% of the same.

2) <u>Do venture capital funds require any approvals before investing in your jurisdiction?</u>

1 Overview of restrictions

The following are three types of restrictions on investments by offshore venture capital funds in Japanese companies:

- Prior Notification or Post Reporting requirement under the Foreign Exchange and Foreign Trade Act of Japan ("Foreign Exchange Law");
- Prior Notification requirement under the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade of Japan ("Antimonopoly Law"); and
- Certain restriction to foreign investments in certain regulated sectors.

2-1 Prior Notification or Post Reporting requirement under the Foreign Exchange Law

If a foreign investor intends to acquire 10% or more of the shares of a target company whose business does not include a Designated Sector,[2] as a general rule, the investor is required to file a report with the Bank of Japan ("BOJ") after the acquisition.

On the other hand, if a target company's business operates in a Designated Sector, a foreign investor's acquisition of one or more unlisted shares of the target company, or 1% or more of the total outstanding listed shares in the target company, will require prior notification to be filed with the BOJ. However, a foreign investor who satisfies certain requirements, such as not assuming an officer position in the target company ("Requirements for Exemption of Prior Notification"), may only be required to file a report after the acquisition. If prior notification is required, a 30-day waiting period is applied as a general rule.

2-2 Certain restrictions to foreign investment in certain regulated sectors

To operate a business in communication, broadcasting, aviation or consigned freight forwarding sectors, a company must seek the approval of competent authorities. If a foreign corporation holds a certain number of voting rights or more in the company or if non-Japanese officers occupy a certain number of officer positions in the company, such approval will not be granted. This may restrict the offshore venture capital funds' investment in the above sectors.

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[1] "Venture White Paper 2019" published by Ippan Shadan Houjin Venture Enterprise Center

[2] The Japanese government has designated certain sectors that require protection, which include national security, maintenance of public order, safeguard of public safety and smooth functioning of Japanese economy.

3) Are there any legal limitations to an offshore venture capital fund acquiring control or influencing the business, operations or governance of an investee entity?

As discussed in above 2-1(2), if an offshore venture capital fund is expected to be involved in the target company's management, the Requirements for Exemption of Prior Notification are generally considered not satisfied. In such a case, the acquisition of one or more unlisted shares in the target company, or 1% or more of the total outstanding listed shares in the target company, by such a fund requires prior notification to be filed with the BOJ.

Additionally, subject to certain exceptions, prior notification must be filed with the BOJ if a foreign investor (i) consents to a proposal to add operations in a Designated Sector to the business purpose of a target company, (ii) consents to a proposal that the investor itself or a related person assume the position of director or statutory auditor of the target company which has been conducting businesses in a Designated Sector, or (iii) presents and consents to a proposal to transfer/abolish businesses in a Designated Sector of a target company.

4) Would an investor be required to undertake an antitrust analysis prior to investment? When would such a requirement be triggered?

Yes. Under the Antimonopoly Law, an investor (a member company or group of combined companies whose domestic total sales exceed JPY 20 billion) is required to file prior notification with the Fair Trade Commission ("FTC") if they intend to acquire shares in a target company (a company whose domestic total sales plus such sales of its subsidiaries exceed JPY 5 billion), and if the ratio of voting rights in the target company held by the group of combined companies is expected to exceed 20% or 50% respectively after the acquisition..

As a general rule, the investor is prohibited from acquiring the shares for 30 days from the day on which the above prior notification is accepted by the FTC.

5) What are the preferred structures for investment in venture capital deals? What are the primary drivers for each of these structures?

In Japan, using a stock company or a form of limited partnership (which is so called as "LPS") to invest in venture capital deals is fairly common. One of the advantages of using an LPS is the ability to limit the liabilities of investors to the amount of the investors' investment. In addition, an LPS enjoys preferential tax treatment.

For investors it is common to subscribe for a share class providing certain preferences or privileges. In particular, a combination of the following share structures are often used: (i) preferred shares for distribution of surplus, (ii) preferred shares for distribution of residual assets, (iii) shares with put option in which a company is obliged to purchase the shares upon shareholders' demand, and (iv) shares subject to call in which a company is permitted to compulsorily purchase the shares.

With respect to the preferred shares for distribution of residual assets in (iii) above, in exit stages, there are many cases in which a company is not dissolved or liquidated. Therefore, even in cases of M&A or disposition through share transfer, setting forth a structure granting shareholders preferential rights for distribution of consideration or for distribution of residual assets in a company's articles of incorporation or shareholders' agreement (Deemed Liquidation Clause) is fairly common.

Regarding shares with a put option in (iii) above and shares subject to a call option in (iv) above, conversion of such shares into ordinary shares is generally conducted before listing the shares. A company is permitted to compulsorily convert shares that are subject to a call option. However, if the ordinary shares converted to be delivered as consideration include a fractional share, and while such shares are held by shareholders who are unwilling to accept the conversion, court permission is required, which takes considerable effort and time. To avoid this situation, a company can issue the above shares with a put option to shareholders and set forth in a shareholders' agreement an obligation of shareholders to exercise their put options when the board of directors decides to go public.

6) Is there any restriction on rights available to venture capital investors in public companies?

If an investor intends to purchase shares in a listed company outside of a financial instruments exchange market and its shareholding ratio after the purchase is expected to exceed 5% of the total outstanding shares, such purchase is required to be conducted through takeover bid ("TOB"). However, even in such a case, if the investor purchases the shares from 10 shareholders or less within 60 days, the purchase is not subject to the above TOB requirement. Nevertheless, if the investor's shareholding ratio after the purchase is expected to exceed one-third (1/3) of the total outstanding shares, a formal TOB is still required to give equal selling opportunities to all shareholders.

In addition, listing rules may restrict the execution of an agreement between a venture capital investor and a public company-investee which grants the venture capital investor special rights (e.g., veto rights on important matters or rights to appoint officers).

7) What protections are generally available to venture capital investors in your jurisdiction?

Under the Companies Act of Japan, shareholders have claims in the distribution of surplus and residual assets by virtue of their rights to receive economic benefit directly from a company. Shareholders are also granted the right to participate in a company's management to some extent such as the right to vote, the right to ask questions and make proposals at shareholders' general meetings and the right to convene shareholders' general meetings. Moreover, shareholders have the right to supervise and correct acts conducted by directors including various rights to file actions such as (i) the right of action to rescind a resolution of shareholders' general meeting, (ii) the right of action to invalidate share issuances, (iii) the right to demand injunction against misconduct, and (iv) the right to demand inspection of various documents including board meeting minutes.

To be able to exercise the above rights (e.g., right to make a proposal at a shareholders' general meeting and right to convene a shareholders' general meeting), shareholders are required to hold a certain number of voting rights, a certain ratio of voting rights or a certain ratio of shares.

8) Is warranty and indemnity insurance common in your jurisdiction? Are there any legal or practical challenges associated with obtaining such insurance?

When compared to Europe and the US, warranty and indemnity insurance is not common in Japan. While warranty and indemnity insurance has recently become popular in M&A transactions conducted in Japan, the same is not true in venture capital investment agreements generally.

9) What are common exit mechanisms adopted in venture capital transactions, and what, if any, are the risks or challenges associated with such exits?

There are several exit mechanisms adopted by venture capital companies such as M&A, IPO and liquidation. In Japan, M&A including disposition of shares (62.8% of the total exit cases in FY2018[3]) and IPO (21.1% of the same) are the methods primarily adopted. In particular, selling shares to other companies and secondary

[3] The above "Venture White Paper 2019"

funds (29.3% of the same) is the most common, followed by the repurchase of shares by the company owners (23.1% of the same).

The share transfer method is often adopted because of the simple procedure as compared to the other methods. For example, in a share transfer, certain procedures to protect creditors or employees are not required. However, the share transfer method often results in a lower sales price when compared to the sales price of an exit done through an IPO.

The challenges inherent in IPO are as stated in 10) below.

10) Do investors typically opt for a public market exit via an IPO? Are there any specific public market challenges that need to be addressed?

In the past, an IPO was the most predominant exit method in Japan. Nowadays, however, because of the negative image associated with M&A, such as hostile acquisitions or forced selling, use of this exit method has waned. Due to the challenges related to an IPO, as stated below, the number of exit cases through M&A has been growing.

An IPO requires time to prepare for and is generally costly. The same is true to maintain a listing. Major shareholders who may be obliged to hold their shares for a certain period of time (e.g., a 90-day or 180-day "lock-up period") are not permitted to sell their shares or earn capital gains on them before the end of the lock-up period. Furthermore, an IPO is subject to insider trading regulations under the Financial Instruments and Exchange Act of Japan. A system supplementary to the regulations has been established, under which a listed company is entitled to claim a return of capital gains earned by a major shareholder who actually holds 10% or more of the total voting rights if such shareholder earns the gains from short-term trading (i.e., before the end of the lock-up period).

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LUXEMBOURG

Arendt & Medernach

1) **In your jurisdiction, which sectors do venture capital funds typically invest in?**

Sectors in which venture capital funds invest in the Luxembourg market are often related to development and integration of new technologies in the financial center in Luxembourg, which serves as catalyst for developments in this sector and is supported by several public and private innovation hubs. Notably, fund services and related support for the asset management industry, as well as payment services and related activities have been a focus of development. Others include blockchain applications in various sectors.

However, certain major VC investments have also occurred in big data, small data, and in the logistics sector.

2) **Do venture capital funds require any approvals before investing in your jurisdiction?**

Venture capital funds do not require an approval before investing in Luxembourg subject to any compliance requirements that apply to them or their managers pursuant to the laws of establishment of the fund vehicle. Venture capital funds established in Luxembourg may, for example, opt in to the SICAR or EuVECA regimes which would require prior approval or notification to the local regulator, CSSF, before commencing operations.

3) **Are there any legal limitations to an offshore venture capital fund acquiring control or influencing the business, operations, or governance of an investee entity?**

Offshore venture capital funds that have registered for marketing in one or more European Member States pursuant to Art. 42 of Directive 2011/61/EU of the European Parliament and of the Council of June 8, 2011 on Alternative Investment Fund Managers (AIFMD), will need to proceed with an acquisition of control-filing and ensure compliance with Art. 26 AIFMD seqq. under certain circumstances. These circumstances include where controlling stakes ($33^1/_3$% or 50% of voting rights depending on whether the entities are listed or not) are acquired and the investee entity does not qualify as a small and medium-sized enterprise within the meaning of Article 2(1) of the Annex to Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (i.e., enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding EUR 43 million). When an AIF acquires (or subsequently increases) a non-controlling stake (starting with a 10%-stake) in a non-listed company, it will need to inform the regulator pursuant to Art. 27 AIFMD.

Stemming from EU legislation, Luxembourg is subject to the rules set forth in Regulation (EU) 2019/452 of the European Parliament and of the Council of March 19, 2019 establishing a framework for the screening of foreign direct investments into the Union (the "**FDI Regulation**") which entered into force on April 10, 2019 and applies to transactions as of October 11, 2020 in all EU Member States directly. The FDI Regulation does not require an EU-wide control mechanism of foreign direct investments, but instead leaves the final decision thereon to EU Member States. The FDI Regulation does not require EU Member States to put foreign direct investment controls in place either, but it foresees coordination and cooperation between the EU Member States.

Luxembourg has not established foreign direct investment controls in its national legislation, but it has followed the strong recommendations of the EU Commission to all EU Member States to introduce a regime with a proposed bill of law (bill n°7578 of May 19, 2020). The bill is still subject to change, but aims in its current form to introduce a foreign direct investment control regime in accordance with the provisions of the

FDI Regulation, notably a requirement that an investor wanting to acquire at least 10% of the shares/voting rights in a Luxembourg-based enterprise submit a prior notification for authorization. If the appropriate authorities are not of the opinion that a foreign direct investment may affect security or public order, or essential national or European interests, they should authorize the transaction in a period not exceeding three months (which can be extended to four) from the date of receipt of the notification of planned investment.

4) Would an investor be required to undertake an antitrust analysis prior to investment? When would such a requirement be triggered?

Luxembourg law does not provide for a prior merger control regime for investments in a Luxembourg company unless EU merger control is triggered. However, the law on competition of October 23, 2011 prohibits agreements between undertakings or associations of undertakings, and concerted actions between undertakings, made with the aim of or having the effect of distorting competition or the abuse of a dominant position. A transaction may therefore subsequently become subject to scrutiny of the Luxembourg competition council.

5) What are the preferred structures for investment in venture capital deals? What are the primary drivers for each of these structures?

Investments not using a fund vehicle are often made through private limited companies (S.à r.l.) or public limited companies (S.A.), which offer flexibility to accommodate the typical venture capital contractual terms (see under 7) and is largely used in international transactions. Both can accommodate foreign investors without restrictions. Additional authorizations that may be required for the business of the investee company (if any) can be obtained for both.

6) Is there any restriction on rights available to venture capital investors in public companies?

Luxembourg law does not provide for specific restrictions for venture capital investors in public companies.

7) What protections are generally available to venture capital investors in your jurisdiction?

Luxembourg formed an economic union with Belgium in 1925, which has been adapted several times (the Belgium–Luxembourg Economic Union or "**BLEU**") with the purpose of setting up regional economic integration primarily based on a common external trade investment policy, customs and excises union. While the European Union achieves many of the objectives of BLEU, Luxembourg has, through BLEU together with Belgium, entered into over 100 bilateral investment treaties, which foresee protections of foreign investments on the basis of the model agreement (https://investmentpolicy.unctad.org/international-investment-agreements/countries/122/luxembourg).

Typical contractual protection mechanisms for the investment of a venture capital investor can also be found in Luxembourg investee companies: An investor can typically require observer seats, or, if desired, a board seat (no requirements of qualification or nationality to the extent the investee company is not subject to regulatory oversight). Important matters (including budget approvals, large expenditures, mergers and acquisitions, control rights in relation to an exit) are usually made subject to approval by investors.

The vesting timeline of founder shares to are regularly an important part of the investments, which would include typically a 48-month vesting, with a one-year cliff and possible accelerated vesting in case of exit. Both participating and non-participating liquidation preferences are common. Anti-dilution protections through subscription rights for new financing rounds and down round protections in early-stage investments have been common recently. Given financing needs and the rather difficult environment through the COVID-19 crisis, one could observe a larger portion of financing through convertible bond pre-funding rounds, as well as the granting of significant discounts on future pre-money valuations, and bridge financing up to a subsequent financing round. Regular and extensive reporting on financial and non-financial KPI is typically foreseen in investment agreements.

8) **Is warranty and indemnity insurance common in your jurisdiction? Are there any legal or practical challenges associated with obtaining such insurance?**

Warranty and indemnity insurance is frequently used in transactions exceeding a certain size, but remains rare in the Luxembourg VC context.

9) **What are common exit mechanisms adopted in venture capital transactions, and what, if any, are the risks or challenges associated with such exits?**

Exit mechanisms include notably the sale or a combination transaction with a strategic investor (such as banks or financial institutions), the operator of an investment exchange, or a competitor in the framework of an international expansion.

Secondary transactions have also been available, mostly for targets having reached greater maturity, but also through specialized secondary fund investors.

Finally, in the current market environment, an exit through the listing on a public market has become more frequent.

10) **Do investors typically opt for a public market exit via an IPO? Are there any specific public market challenges that need to be addressed?**

IPOs are not the usual exit route in a Luxembourg VC context.

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MEXICO

Santamarina y Steta S.C.

1) **In your jurisdiction, which sectors do venture capital funds typically invest in?**

Venture capital activity in Mexico has been less dynamic compared to other jurisdictions in Latin America, and therefore, sector participation is not clearly defined in Mexico. However, according to the Mexican Association of Private Capital (AMEXCAP, as per its acronym in Spanish), in recent years those key sectors attracting venture capital investments in Mexico include consumer services, consumer goods, technology, and FinTech.

2) **Do venture capital funds require any approvals before investing in your jurisdiction?**

There is no approval requirement per se for venture capital investments; however, there are certain sectors and activities that require approval from the National Foreign Investment Commission regardless of the vehicle for the investment. Such approval is required when the investment exceeds a certain percentage of equity or the assets of the target entity exceed a certain value. Some of those sectors and activities are private education, legal services, and shipping companies with deep sea vessels, among others.

Venture capital funds incorporated under Mexican law may be subject to approvals depending on the type of structure that will be adopted for the venture capital fund. For example, if the fund is created under the Investment Funds Law, the fund would require the authorization of the National Banking and Securities Commission (CNBV, as per its acronym in Spanish).

3) **Are there any legal limitations to an offshore venture capital fund acquiring control or influencing the business, operations, or governance of an investee entity?**

As any other private entity, offshore venture capital funds cannot participate in those activities that are reserved to the Government or Mexican individuals and companies (for example, nuclear energy, mints, operation of ports, airports, and heliports, domestic land transportation, and development bank activities, among others).

Additionally, and also as any other private entity, there are certain activities/companies in which foreign investment's participation has been restricted up to certain percentages, such as: (i) production cooperative companies; (ii) manufacturing and marketing of explosives, firearms, cartridges, and fireworks; (iii) printing and publishing newspapers for exclusive distribution in the national territory; and (iv) supply of fuel and lubricants for ships and aircraft railway equipment, among others. Foreign investment restriction may vary from 10% to 49%.

Note that foreign investment may exceed this percentage to the extent such is carried out through neutral investment in terms of the Foreign Investment Law. Although this type of investment does not compute as foreign investment, an authorization of the Ministry of Economy would be needed.

4) **Would an investor be required to undertake an antitrust analysis prior to investment? When would such a requirement be triggered?**

Yes, antitrust analysis and pre-merger clearance is required prior to carrying out the investment. Although Mexican law provides certain exemptions to mandatory pre-merger clearance, they are limited to investment funds participating in a target with limited rights and exercising no control, either de "*iure*" or "*de facto*".

The statutory 2020 thresholds requiring pre-merger clearance are as follows, regardless if the investment takes place as a result of a single or a series of acts:

- Value of the transaction: if there is an accumulation in Mexico, directly or indirectly, that exceeds approximately USD 80 million (regardless of the place of execution).
- Value of the assets/sales of the target: if there is an accumulation of 35% or more of the assets or equity of a target, whose assets located in Mexico or annual sales originated in Mexico exceed approximately USD 80 million.
- Accumulation of Mexican assets & value of the annual sales of the economic groups participating in the transaction: if there is an accumulation in Mexico of assets or equity that exceeds approximately USD 37.5 million and the transaction is between two or more economic agents whose annual sales or assets in Mexico (either jointly or separately) exceed approximately USD 214 million.

5) **What are the preferred structures for investment in venture capital deals? What are the primary drivers for each of these structures?**

Venture capital deals in Mexico are usually structured as a trust, a Mexican company, or a fund under the Investment Funds Law.

Generally, the primary driver to choose one structure over another is associated with tax efficiency, protection mechanisms that can be implemented for the investor (such as right of first refusal, drag-along, tag-along and preemptive right, among others), complexity of the transaction, and the number of investors.

These venture capital vehicles usually invest by acquiring shares of the target entity, Capital Development Certificates (CKD) issued by Mexican trusts, and/or other instruments issued by the target entity as a result of the issuance of debt.

6) **Is there any restriction on rights available to venture capital investors in public companies?**

Under Mexican Securities Market Law, venture capital investors have no restrictions, although other restrictions may be applicable depending on the type of fund. For example, retirement funds have strict investment regimes.

7) **What protections are generally available to venture capital investors in your jurisdiction?**

The protections available to venture capital investors depend on the type of entity in which they invest and the way in which the investment is structured (i.e., by acquisition of shares or by issuance of debt).

Mexican law contemplates rights that are available to shareholders or partners of Mexican companies, which include, among others, preemptive rights, supermajority resolutions, and deadlock mechanisms. Also, statutory protections are available to minority shareholders or partners, which include the possibility to appoint a member of the administration body of the company, appoint an examiner of the company, and oppose by means of a judicial proceeding those resolutions adopted at the general shareholders' meeting.

Mexico is party to 12 free trade agreements which incorporate common international standards to protect investments such as national treatment and most-favored-nation.

Finally, standard clauses can implement other protections for investors to ensure preferential rights over dividends or exit rights such as drag-along and tag-along.

8) Is warranty and indemnity insurance common in your jurisdiction? Are there any legal or practical challenges associated with obtaining such insurance?

Warranty and indemnity insurance is a relatively new product in Mexico of which use in M&A transactions is certainly not as enthusiastic as in to other jurisdictions. This may be explained in part by the Mexican culture considering that, generally speaking, Mexico's insurance activity represents 2.2% of Mexico's GDP compared to the average of 8.9% of the OECD countries (as of 2018). Also, there are many global transactions in which the Mexican target is indirectly acquired and for which it is reasonable to assume that when warranty and indemnity insurance is to be contracted, the placement of the policy will occur outside of Mexico to cover the whole transaction. Legally speaking there are no challenges, but as mentioned above, currently the implementation of this type of insurance is not very common in Mexico.

9) What are common exit mechanisms adopted in venture capital transactions, and what, if any, are the risks or challenges associated with such exits?

The most common exit mechanism adopted in venture capital transactions in Mexico is the strategic sale, which according to statistics published by AMEXCAP, represents 63% of the exits of venture capital that occurred from 2008 to 2018.

In addition to drag-along and tag-along, in the event of deadlock that would be triggered upon certain events, there are other standard mechanisms used by venture capital firms less frequently such as a recapitalization, sponsor-to-sponsor transactions, and liquidation.

Although we do not see many legal risks associated with adopting a strategic sale as an exit mechanism, a common challenge that we typically see is finding a buyer and agreeing on the exit price, especially if the target is underperforming.

10) Do investors typically opt for a public market exit via an IPO? Are there any specific public market challenges that need to be addressed?

Although the use of an IPO as an exit mechanism is viable from a legal perspective and even agreed upon as a possibility in transaction documents, this exit method is rarely used as it would require further financial analysis about the attractiveness of the target entity and the existence of the proper environment in the markets for an IPO to occur. Perhaps this is explained in part by the size of the Mexican stock market and number of private equity transactions, as well as the costs and time associated with this exit mechanism.

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NORWAY

Schjødt

1) **In your jurisdiction, which sectors do venture capital funds typically invest in?**

Key sectors attracting venture capital (**VC**) investments in Norway include information technology and digital media businesses, e-commerce, healthcare and life sciences, consumer, education and hospitality, and oilfield services.

2) **Do venture capital funds require any approvals before investing in your jurisdiction?**

No.

3) **Are there any legal limitations to an offshore venture capital fund acquiring control or influencing the business, operations, or governance of an investee entity?**

There are no restrictions on a foreign VC acquiring control or influencing operations of a private company within the sectors mentioned under Q1 above.

4) **Would an investor be required to undertake an antitrust analysis prior to investment? When would such a requirement be triggered?**

Generally, early-stage VC transactions in Norway will rarely require antitrust/merger-control filings as this is mandatory if the involved entities have a combined turnover in Norway of at least NOK 1 billion and more than one of the involved entities have a turnover in Norway of more than NOK 100 million.

5) **What are the preferred structures for investment in venture capital deals? What are the primary drivers for each of these structures?**

Typically, VC funds will invest through an initial minority stake in equity and then either have the right to apply for further equity through conditionally committed capital by way of issuance of capital calls, or by way of conversion of shareholder loans or convertible notes. The main driver would be to create flexibility as to the timing and amount of money to be invested as equity, and also retaining the possibility to remain a creditor. Tax implications for the specific VC funds may also be important for the structure.

6) **Is there any restriction on rights available to venture capital investors in public companies?**

No. VC funds would normally not invest in public companies in Norway as it would not constitute venture capital. The threshold for triggering a mandatory offer for all shares in a listed company is the control of 1/3 of the shares and votes pursuant to Norwegian take-over rules.

7) **What protections are generally available to venture capital investors in your jurisdiction?**

The Norwegian Private Limited Companies Act provides for certain minority protection rules, such as a requirement for equal treatment, a prohibition against unreasonable exercise of powers by the majority, different voting thresholds for certain decisions, and the right to have matters discussed at general meetings.

From a contractual point of view, protections are subject to negotiations and the basic principle of freedom of contract.

8) Is warranty and indemnity insurance common in your jurisdiction? Are there any legal or practical challenges associated with obtaining such insurance?

In Norway the W&I insurance market has become increasingly important and we see no particular legal or practical challenges compared with other European jurisdictions.

9) What are common exit mechanisms adopted in venture capital transactions, and what, if any, are the risks or challenges associated with such exits?

In a typical venture capital deal, investors opt for a waterfall exit mechanism with multiple exit options. This usually includes exit through an initial public offering (**IPO**), a put option on the founders and buyback of capital. If the company/founders are unable to provide an exit through any of these mechanisms, as a last resort, investors reserve the right to sell their investment to a third-party buyer along with the founders' stake in the entity by exercising a drag right.

Implementing each of these exit mechanisms is not without its challenges. A successful IPO or exercising of a drag right is highly dependent on market sentiments; exercising a put option on the resident founders assumes that founders have the financial clout to purchase back the VC fund's shares (and debt); and a buyback by the company is subject to several statutory limitations (e.g., that the company has distributable profits to pay for the shares).

10) Do investors typically opt for a public market exit via an IPO? Are there any specific public market challenges that need to be addressed?

IPOs for venture capital companies are not typical in Norway where the market for listed companies typically consists of more mature businesses. While IPOs are possible for VC entities, a successful public market exit depends significantly on external factors such as market conditions and regulatory and political climate, which are beyond the control of exiting investors. The listing of shares on a regulated market in Norway is subject to the listing rules of the Oslo Stock Exchange (alternatively Oslo Axess) and the Norwegian Securities Trading Act, which substantially incorporates EU legislation in this respect (including rules regarding listing and offering prospectuses).

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PARAGUAY

Gross Brown

1) In your jurisdiction, which sectors do venture capital funds typically invest in?

There is no official record indicating the sectors in which venture capital funds typically invest. Nevertheless, in practice, the sectors attracting venture capital investments are IT and FinTech.

2) Do venture capital funds require any approvals before investing in your jurisdiction?

No, venture capital funds do not require any approvals before investing in Paraguay.

3) Are there any legal limitations to an offshore venture capital fund acquiring control or influencing the business, operations, or governance of an investee entity?

Change of control

If the target company is a sociedad anónima (corporation), unless otherwise stated in the bylaws, shares can be freely transferred. Shareholders are required to provide notice of the acquisition of shares to the Subsecretaria de Estado de Tributación (local tax authority) and the Abogacia del Tesoro (corporate surveillance governmental agency) of the Ministry of Finance.

If the target company is a sociedad de responsabilidad limitada (limited liability corporation), unless otherwise stated in the bylaws, shares cannot be transferred to third parties without: (i) unanimous consent of the shareholders, if there are up to five shareholders; or (ii) consent of the shareholders representing three-quarters of the corporate capital, if there are more than five shareholders.

Except for the latter and the requirement stated in our response to question 4 of this Guide, there are no other rights or obligations applicable to the shareholders resulting from a change of control.

Shareholders' rights and obligations in corporate governance

Shareholders have the right to appoint the members of the board of directors (the "***BoD***") or a sole manager; to review and approve the financial statements and the BoD or the sole manager's report; and to remove the members of the BoD or the sole manager. Should a shareholder, who is a natural person, be a director of the company at the same time, then such person may also be liable for any (i) omission or negligence; (ii) breach of laws or regulation while acting as director; (iii) other damages caused to the company or third parties while acting as director resulting from willful misconduct, abuse of power, or gross negligence. This is applicable for all directors, regardless of whether they are also shareholders.

If the target company is a *sociedad anónima*, decisions made by the shareholders are subject to the following requirements:

i. The BoD must call for a shareholders' meeting, set the specific agenda in advance and publish the call in a local newspaper (the minimum statutory timeline for the shareholders' meeting to take place is 15 days after the first publication).
ii. Shareholders have the right to vote in person or by proxy.

iii. Local regulation sets different quorum and voting requirements, for different matters. The highest quorum requirement is 60% of voting shares; and highest voting requirement is absolute majority (50% + 1 of voting shares).
iv. Any shareholder (notwithstanding the percentage of shares held) has the right to challenge the decisions made by shareholders.

If the target company is a *sociedad de responsabilidad limitada*, decisions by the shareholders are subject to the following requirements:

i. Notice of shareholders' meetings must be delivered to each shareholder. There is no publication requirement or mandatory waiting period.
ii. Unless otherwise stated in the bylaws, quorum and voting requirements established for a *sociedad anónima* will apply.
iii. Decisions on the modification of the corporate purpose, merger, or any other modification that would entail additional obligations for the shareholders require a unanimous vote by the shareholders.

Any shareholder (notwithstanding the percentage held) has the right to challenge the decisions taken by other shareholders.

4) Would an investor be required to undertake an antitrust analysis prior to investment? When would such a requirement be triggered?

Under the Paraguayan merger control system, the obligation to notify a transaction to the Paraguayan competition authority is triggered by the signing of the agreement to acquire, sell or exchange a controlling share, provided that any of the following thresholds are met:

i. the transaction will result in the acquisition or holding of a 45% market share, or higher, of a relevant market; or
ii. the aggregated turnover in Paraguay of the parties to the transaction, during the last fiscal year preceding the relevant agreement, is above USD 100,000 minimum.[1]

5) What are the preferred structures for investment in venture capital deals? What are the primary drivers for each of these structures?

The *sociedad anónima* is the preferred structure for investment in venture capital deals, since shares can be freely transferred, and also considering that local laws provide for stricter rules as to the administration, constitution and control of such companies.

In contrast with corporations, if the target company is a *sociedad de responsabilidad limitada*, unless otherwise stated in the bylaws, shares cannot be transferred to third parties without consent of the shareholders and bylaw modification.[2]

6) Is there any restriction on rights available to venture capital investors in public companies?

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[1] As of February 21, 2020, PYG 219.283 million, approximately USD 33.6 million.
[2] Bylaw modification must be approved by the Abogacia del Tesoro and then registered with the Registry of Legal Persons and Associations of the Public Registry of Commerce.

No. Securities regulations in Paraguay apply uniformly to all investors and shareholders of a public company, whether they be natural or legal persons, or national or foreign, and regardless of domicile.

7) What protections are generally available to venture capital investors in your jurisdiction?

Paraguayan law grants equal treatment to foreign and domestic investment, except for the ownership of land near borders by foreigners. Sectors reserved for the Paraguayan state are not open to private investment (either domestic or foreign).

Paraguay has entered into 23 (twenty-three) agreements[3] on Reciprocal Investment Promotion and Protection, including agreements with South Africa, France, United Kingdom, Switzerland, Taiwan, Belgium, Luxembourg, the Netherlands, Korea, Hungary, Germany, Austria, Spain, Peru, Romania, Chile, Venezuela, Costa Rica, El Salvador, Czech Republic, Portugal, Cuba and Italy. For the 2013-2018 period, Paraguay signed but has not yet ratified agreements with the United Arab of Emirates (signed in January 2017) and the State of Qatar (signed in February 2018). These agreements establish favorable conditions and provide a framework of legal certainty to investors and their investments. Paraguay has also entered into bilateral investment treaties (each, a "BIT") with Argentina, Austria, Belgium, Bolivia, Brazil, Chile, Costa Rica, the Czech Republic, Ecuador, El Salvador, France, Germany, the Republic of Korea, the Netherlands, Peru, Portugal, Romania, South Africa, Switzerland, the United Kingdom, Spain, Hungary, Venezuela and, in January 2017, with the United Arab Emirates.

In order to improve the business and investment environment, Paraguay has developed and implemented reforms of its judicial system, including the introduction of amendments to the Criminal Code (made effective in 2009), with stricter provisions concerning money laundering, human trafficking and intellectual property rights.

Paraguay is also a member of the Multilateral Investment Guarantee Agency, which offers foreign investment guarantees for non-commercial risks in developing countries, as well as dispute settlement services for the investments covered. Paraguay has also accepted the terms and conditions of the Overseas Private Investment Corporation of the United States of America, which finances and insures investment projects against risks such as the non-convertibility of currency, expropriation and political violence, inter alia.

8) Is warranty and indemnity insurance common in your jurisdiction? Are there any legal or practical challenges associated with obtaining such insurance?

There is no market practice of warranty and indemnity insurance in our jurisdiction.

Pursuant to Law N° 827/96 "Of Insurance and Reinsurance", article N° 125, no insurance company can cover risks in Paraguay without authorization from the Superintendency of Insurance (*Superintendencia de Seguros*).

9) What are common exit mechanisms adopted in venture capital transactions, and what, if any, are the risks or challenges associated with such exits?

Since there is no regulation regarding exit mechanism for transactions, these mechanisms are usually agreed upon by the parties in their shareholder's agreement. Common exit mechanisms include management buyouts and secondary sales.

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[3] The list and text of all the treaties is available at: https://investmentpolicy.unctad.org/international-investment-agreements/countries/164/paraguay

10) <u>Do investors typically opt for a public market exit via an IPO? Are there any specific public market challenges that need to be addressed?</u>

Exits via an IPO are not often chosen by investors after a venture capital investment in Paraguay.

However, if the investor decides to pursue and IPO, the offering could be done either through local licensed entities (registered brokers) or on a private basis. This would not create onerous challenges, provided that it is conducted under the Private Placement Exemption described below:

- On a strictly limited and discrete basis (i.e., only to a limited number of pre-selected individuals). Any contact made with a potential investor should be on a personal basis (one person at a time) to avoid the sale being interpreted as a public offering.
- From outside of Paraguay (i.e., via emails/post/website/phone calls) or on a limited fly-in basis.
- Whereby no contractual documentation is signed by the marketing entity onshore (although the investor can sign onshore, provided the marketing entity subsequently signs offshore).
- Where an appropriate legend is used on all marketing materials (see 4.1 above) and where information on (a) liability, (b) risk and (c) profitability are properly disclosed (the "Private Placement Exemption").

Nevertheless, the offer and sale of Securities would be considered a public offer if it is not conducted under the Private Placement Exemption. This would trigger registration requirements and in the case of non-compliance, the application of sanctions.

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POLAND

Sołtysiński Kawecki & Szlęzak

1) In your jurisdiction, which sectors do venture capital funds typically invest in?

Venture capital funds generally invest in new technologies and innovations as they create opportunities for rapid growth. Although the data on Polish VC investments is not transparent, it appears that the e-commerce, communication, IT, FinTech and healthcare sectors have attracted most focus recently.

2) Do venture capital funds require any approvals before investing in your jurisdiction?

No general approval is required for VC funds to invest in Poland. Specific approval requirements may depend on the sectors (e.g., acquiring shares in licensed financial entities may require prior approval), or whether the target holds agricultural land (in such case the Polish public authority has the right of first refusal pertaining to shares in the target) or may apply to strategic entities (in particular in the energy sector), but they are rarely relevant to venture capital investments.

3) Are there any legal limitations to an offshore venture capital fund acquiring control or influencing the business, operations, or governance of an investee entity?

In relation to the COVID-19 situation, a new regulation on control of foreign investments in Poland was introduced in mid-2020. In general, non-EU entities (as well as EU entities that have had their registered office in the EU for less than two years) intending to directly or indirectly acquire significant interest (more than 20% of votes, shares in a partnership, or participation in profits) or control over a protected entity must make a proper filing, and the competent authority may oppose (prohibit) the investment. For the purpose of the regulation, a protected entity is an entrepreneur (in particular, a company) that meets the two following conditions: (a) having a turnover in Poland exceeding EUR 10,000,000 in either of the two preceding financial years; and (b) being a public company or conducting an activity listed in the regulation. The list of activities covers various activities related to the energy sector, telecommunication activity, preparing or modifying software used for purposes listed in the regulation and cloud computing services.

The Polish government also has a tool to control investments (in particular, foreign investments) in companies that are strategic to the national interest and security. However, this regulation is likely not relevant to venture capital investments, since the current list of protected entities includes major companies from the energy and telecommunication sectors, which are outside of VC funds' typical scope of interest.

Also, as a general rule, acquisition of real estate in Poland or shares in a company holding real estate by a foreign entity (or by a Polish entity controlled by a foreign entity) requires the prior approval of the Ministry of Internal Affairs. This restriction, subject to some minor exceptions, does not apply to foreigners from the EEA or Switzerland, nor does it apply to Polish law-governed investment funds (regardless of the sponsors' domicile) or to investing in public companies listed on the Warsaw Stock Exchange. Other foreign investors may decide to operate through holding companies incorporated in an EEA country to avoid the above requirements.

4) Would an investor be required to undertake an antitrust analysis prior to investment? When would such a requirement be triggered?

Larger-scale transactions that may influence the market come under the purview of both the Polish and European competition authorities (the President of the Office of Competition and Consumer Protection (UOKiK) and the European Commission, respectively). Any M&A transaction may require competition clearance from UOKiK, provided that the turnover thresholds are exceeded and the transaction leads to the acquisition of control over the target or the creation of a joint venture company. The transaction requires clearance of UOKiK if the combined worldwide turnover of all the entities involved (i.e., both the purchaser and the target or all JV shareholders) exceeds the equivalent of EUR 1,000,000,000 or the Polish turnover of such entities exceeds the equivalent of EUR 50,000,000 (unless the Polish turnover of the target or any of the JV shareholders does not exceed EUR 10,000,000). Until the UOKiK issues a decision allowing the transaction (or the lapse of the statutory deadlines for the UOKiK to issue the clearance, which is one or four months, depending on the complexity of the transaction), the acquirer should refrain from closing the deal. Antitrust issues are especially relevant in the case of a trade sale exit.

5) What are the preferred structures for investment in venture capital deals? What are the primary drivers for each of these structures?

Venture capital investment is typically structured as an equity investment through the new issuance of shares in the target's share capital. The target company is usually formed as either a limited liability company (Polish: *spółka z ograniczoną odpowiedzialnością*) or a joint-stock company (Polish: *spółka akcyjna*). The limited liability company is a simpler and less expensive than of capital company, while the joint stock company allows for the implementation of more complex equity structures (through e.g., subscription warrants or convertible bonds) and may be listed on a stock exchange. The main drivers for structuring venture capital investments are the level of control obtained by the VC fund and the planned exit mechanisms.

6) Is there any restriction on rights available to venture capital investors in public companies?

No, there are no such restrictions (except for the regulation described in point 3 regarding control over foreign investments in protected entities).

7) What protections are generally available to venture capital investors in your jurisdiction?

As a typical venture capital investment is made through acquisition of shares, the venture capital investors benefit from shareholder protection rights. The scope of these rights depends on the form of company, shareholding threshold and provisions of the statutes of the given company. In a limited liability company, a shareholder may benefit from an individual right of control (including access to all the company's files), while in a joint-stock company, the control rights are exercised by the supervisory board. Basic anti-dilution protection is a statutory preemptive right for the new issue of shares (such right may be excluded only by a shareholders' resolution adopted with a 4/5 majority in a joint-stock company and 2/3 majority in a limited liability company, unless the company's statute provides for more stringent requirements). Changes to a company's statute and the issuance of new shares require a shareholders' resolution.

Usually, the company's statute provides for specific protective measures through the individual rights of shareholders (in particular, the individual right of the shareholder to appoint members of the management and supervisory boards), right of veto with respect to certain resolutions, majority thresholds required for the adoption of certain resolutions aligned with the investors' stake or limitation on shares' transferability.

Investors' rights may also be contractually protected by a shareholders' agreement and/or investment agreement. Key issues regulated by these agreements often include representation and warranties (and liability for their incorrectness), control over the entry of new investors and provisions facilitating an exit from the investment (e.g., tag-along, drag-along, right of first refusal). The provisions of shareholders' agreements and/or investment agreements are usually mirrored – to some extent – in the company's statute.

8) **Is warranty and indemnity insurance common in your jurisdiction? Are there any legal or practical challenges associated with obtaining such insurance?**

In the past few years, warranty and indemnity insurance has become more common in Polish M&A transactions. However, it is not typical for venture capital investments due to the cost and the investors' generally higher tolerance for risk in this type of transaction.

9) **What are common exit mechanisms adopted in venture capital transactions, and what, if any, are the risks or challenges associated with such exits?**

Common exit routes are: (i) IPO; (ii) sale to a third-party buyer (e.g., private equity fund or another venture capital fund); (iii) management buy-out; and (iv) founders' buy-out. The IPO is most challenging from an organizational perspective and the most expensive way to exit, due to the legal and regulatory requirements. Therefore, private sale of shares to industry buyers, other funds, managers or founders is more common. The type of exit depends primarily on how successful the business is and, as a result, what entities are interested in investment at a later stage. From the legal point of view, the general risks and transaction structures, are generally similar for all forms of share sales. However, specific challenges can arise depending on the individual situation and the characteristics of the company as well as the goals of the new investor.

10) **Do investors typically opt for a public market exit via an IPO? Are there any specific public market challenges that need to be addressed?**

Although an IPO is not a common exit route due to the costs and organizational requirements, it takes place occasionally. Exit through NewConnect - a Polish multilateral trading facility - is much more likely than through the Warsaw Stock Exchange which is a regulated market.

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POLAND

PORTUGAL

PLMJ

1) In your jurisdiction, in which sectors do venture capital funds typically invest?

Although there is no specific sector in which private equity and venture capital entities typically invest and despite the history of investments actually made being difficult to ascertain (since only selected deals are disclosed), the Transactional Track Record (TTR) monthly report, issued in August 2020, highlights that the technology sectors are currently popular for private equity investment.

2) Do venture capital funds require any approvals before investing in your jurisdiction?

Private equity entities set up in Portugal are governed by the Private Equity, Social Entrepreneurship and Specialised Investment Legal Framework, approved by Law no. 18/2015 of March 4, 2015 (as amended) ("**PELAW**").

This legal regime specifically stipulates that the setting-up of private equity entities is subject to (i) prior registration[1] with the Portuguese Securities Market Commission ("**CMVM**"), or (ii) prior authorisation from and registration[2] with the CMVM.

The most common private equity entities are:

a. Private equity companies (*sociedades de capital de risco*)[3] / Management entities of private equity funds (*sociedades gestoras de fundos de capital de risco*)[4]: incorporated as private limited companies by shares;
b. Private equity investors: incorporated as sole shareholder private limited companies by quotas; and
c. Private equity funds: autonomous funds with no legal personality which can be managed by (i) private equity companies, (ii) management entities of private equity funds (*sociedades gestoras de fundos de capital de risco*), or (iii) entities legally qualified to manage closed alternative investment undertakings.

Under the PELAW, private entities set up in Portugal are subject to strict rules related to their organisation and operation (especially their asset valuation), remuneration policy, subcontracting, and depositary and transparency duties.

Once set up in accordance with Portuguese law, and before undertaking an investment, private equity entities must follow their internal procedures for the approval of the investment in the target company.

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[1] For companies managing assets with an aggregate amount below the following thresholds:
EUR 100 million, when using leverage; or
EUR 500 million if no leverage is used and there are no redemption rights with a maturity of up to 5 (five) years as from the initial investment date.
[2] For companies managing assets with an aggregate amount above the thresholds mentioned in the previous footnote.
[3] For companies managing assets with an aggregate amount below the following thresholds:
(i) EUR 100 million, when using leverage; or
(ii) EUR 500 million if no leverage is used and there are no redemption rights with a maturity of up to 5 (five) years from the initial investment date.
[4] For companies managing assets with an aggregate amount above the thresholds mentioned in the previous footnote.

Foreign private equity entities are not required to obtain any approval (other than those specifically triggered by the investment/transaction) before investing in a Portuguese target company. Nevertheless, if the purpose of the foreign private equity entity is to operate in Portugal (rather than investing), certain regulatory conditions must be complied with beforehand.

3) Are there any legal limitations to an offshore venture capital fund acquiring control or influencing the business, operations, or governance of an investee entity?

The Portuguese normative framework is guided by the principle that investment is not discriminated on the grounds of nationality, which means that there is no requirement to have a national partner and there are no limitations on the distribution of profits or dividends abroad.

Nevertheless, for tax compliance reasons, the holder of a stake in a Portuguese company must have a Portuguese taxpayer number.

4) Would an investor be required to undertake an antitrust analysis prior to investment? When would such a requirement be triggered?

In Portugal, some practices restricting competition, abuse of a dominant market position or predatory agreements are prohibited by law.

Under the Portuguese Competition Act, notice of concentration must be provided to the Portuguese Competition Authority if one of the following criteria is met:

a. As a consequence of the concentration, a market share equal to or greater than 50% of the domestic market in a specific product or service, or in a substantial part of it, is acquired, created or reinforced; or
b. As a consequence of the concentration, (i) a market share equal to or greater than 30% but smaller than 50% of the domestic market in a specific product or service, or in a substantial part of it, is acquired, created or reinforced, and (ii) the individual turnover in Portugal in the previous financial year for both the purchaser's group and the target company is greater than EUR 5 million, net of taxes directly related to such turnover; or
c. The purchaser group and the target company (i) have reached an aggregate turnover in Portugal in the previous financial year greater than EUR 100 million, net of taxes directly related to such turnover, provided that (ii) the individual turnover in Portugal for both the purchaser group and the target company is above EUR 5M.

In accordance with the Portuguese Competition Act, only the turnover relating to the part of the business that is the subject of the concentration must be considered with respect to the target company. With respect to the purchaser, however, the turnover for the whole group must be considered.

5) What are the preferred structures for investment in venture capital deals? What are the primary drivers for each of these structures?

All transactions are different, and their respective investment structures unique. The structures that are designed in the context of an investment essentially have the aim of (i) seeking limitation of liability, (ii) ring-fencing the risk associated with each investment (segregating each investment by each SPV), and (iii) allowing flexibility for different exit strategies.

In view of this, certain private equity entities design their investment structures around the new limited liability companies (*sociedades por quotas* or *sociedades anónimas*) that they incorporate for this purpose ("SPV") and through which the funds will be provided for the target companies.

Investment in the target company can be made either through (i) the acquisition of the direct or indirect shareholding in the target company from its direct or indirect shareholders, or (ii) investing in the target company through a share capital increase with other equity or debt instruments (or a combination of both).

With respect to equity instruments (other than holding ordinary shares), the most commonly used are so-called supplementary capital contributions or ancillary capital contributions (subject to the supplementary capital contributions regime), both of which must be accounted for as the target company's equity, whereas shareholders' loans are the most commonly used debt instruments.

In addition, private equity entities also resort to other instruments when investing in target companies, such as preferred shares, convertible bonds or warrants issued by the target companies, among others.
As published in a 2018 report by the CMVM on private equity, except for the acquisition of shareholdings in the companies, most investment was made through equity and debt instruments, and in particular through ancillary capital contributions (subject to the supplementary capital contributions regime).

6) Is there any restriction on rights available to venture capital investors in public companies?

According to the PELAW, private equity entities set up in Portugal are not allowed to invest more than 50% of their assets in securities subject to trading on a regulated market.

In addition, both for private equity entities set up in Portugal and foreign private equity entities that invest in Portugal, the Portuguese Securities Code stipulates that:

a. Any shareholder of a listed company that reaches or exceeds a shareholding of 10%, 20%, 1/3, 50%, 2/3 and 90% of the voting rights corresponding to the share capital of a listed company that is subject to Portuguese law or any party that reduces its shareholding to a value lower than these limits must, within certain parameters, inform the CMVM and the company in which the shares are held of this fact.
b. With a few exceptions, anyone whose shareholding in a limited company exceeds 1/3 or 50% of the voting rights corresponding to the share capital must make a compulsory offer to acquire all shares and other securities issued by the company that afford the right to subscription or acquisition. Making such an offer is not required when, if the limit of 1/3 has been exceeded, the party that would be required to make the offer proves to the CMVM that it does not have control over the target company (and does not have a group relationship with it).
c. Any party who holds at least 90% of the share capital or the respective voting rights thereto, both in the case of listed companies and private companies (the latter meaning those not having capital open to public investment), may acquire the remaining shares through a squeeze-out procedure. If successful, such an investor will then hold the entire share capital of the target company.

7) What protections are generally available to venture capital investors in your jurisdiction?

The protections available to private equity entities are generally the same as for any other investor in a Portuguese target company.

In addition to (i) the general rule that only the target company's (and not the shareholders') assets can be seized by creditors to settle the debts thereof, (ii) the contractual and pre-contractual liability set out in Portuguese Civil law, and/or (iii) minority rights granted by the Portuguese Companies Law (i.e., the need for qualified majorities for certain resolutions, information rights and the possibility of convening general meetings), protection mechanisms are typically sought under contractual arrangements (binding between the parties).

To that end, there are different mechanisms to protect investors that are usually agreed upon in the context of the negotiation for the transaction and which may vary in accordance with the transaction document at issue (e.g., Sale and Purchase Agreements or an Investment and Shareholders' Agreement).

The terms of the contractual protections will largely depend on the private equity entity's position with respect to the investment in the target company (e.g., if a minority or majority shareholding will be held, or the amount to be invested compared with the total investment sought by the target company).

The following are the most typical protections under a Sale and Purchase Agreement:

- Price methodology/adjustment: Investors may seek protection by implementing different price methodology/adjustment mechanisms depending on the risk of the deal. The most common are (i) locked box, where the parties agree to the purchase price before completion, and (ii) completion accounts, where the purchase price is determined with reference to the completion accounts. These can be combined with other mechanisms, such as earn-outs, where part of the consideration is determined with reference to the target company's future profitability.
- Representations and warranties: Inclusion of a complete and thorough list of the seller's representations and warranties. Depending on the type of representations and warranties being breached, they may bring about the seller's liability, termination rights for the investor or price adjustments.
- Conditions Precedent and Interim Period: When the deal is not signed and completed simultaneously, investors may seek restrictions on the target company's management during the period between signing and completion. This means that operations must be carried out in accordance with the ordinary course of business and past practices or that management decisions are conditional on prior consent from the investor.
- Specific indemnities: Inclusion of a list of potential contingencies for which the seller undertakes to be liable during a certain timeframe and up to a predetermined threshold.
- Limitation of liability: With the objective of reducing the sellers' liability for specific aspects of the company or business after the sale is complete.
- MAC Clause (material adverse changes): Inclusion of a MAC clause, in accordance with which investors can walk away from the transaction if certain events that have (or may have) a detrimental impact on the target company's business take place.
- Penalty clauses: Inclusion of penalties linked to noncompliance with obligations undertaken by a party in the deal. These are intended to work as an incentive both to comply with the agreement and to compensate the nonbreaching party for a breach.

The following are the most typical protections under an Investment and Shareholders' Agreement:

- Governance: Depending on how hands-on an investor is (and the amount invested), the investor's appointment of a number of directors to the target company's management may be negotiated to ensure control over its strategic and key decisions.
- Reserved matters: Whereby a qualified majority or a specific party's consent is required for certain key matters to be approved at the corporate bodies.
- Covenants: In accordance with which the target company must comply with certain financial covenants and ratios in order to continue to be an eligible investee. Breach of these covenants may trigger an early exit mechanism for the investor.
- Exit provisions: Which may vary among call and put options, drag and tag-along provisions, deadlock clauses and liquidation events. The aim is to allow investors to walk away from the investment if certain events take place and/or conditions are met.
- Information Rights: In accordance with which the target company must keep the investor informed on a regular basis, and the investor has the right to ask for information it deems appropriate to monitor the target company's activity.

8) **Is warranty and indemnity insurance common in your jurisdiction? Are there any legal or practical challenges associated with obtaining such insurance?**

Warranty and indemnity insurance solutions have become very common in Portugal in recent years, particularly in cross-border transactions, and the market trend clearly shows these solutions have been increasingly sought in different deals relating to various sectors.

There are no specific legal or practical challenges in Portugal associated with warranty and indemnity insurance.

9) **What are common exit mechanisms adopted in venture capital transactions, and what, if any, are the risks or challenges associated with such exits?**

The choice of exit route cannot be determined in advance as it will depend on the market conditions and the main features of the investment.

As indicated above, transaction documents will be drafted to prepare the grounds for an exit route that should be simple and have reduced costs and potential liabilities associated with it.

The main options are:

- Sale of the target company's shares: Either to another company or another investor. The sale is usually preceded by a competitive sale procedure.
- IPO: Please refer to our comment in Question 10 below.
- Liquidation of the target company: This may be done through a decision by the shareholders, in which case, depending on the assets/liabilities held by the target company, the process may be quite swift or via judicial proceedings, which includes the context of insolvency proceedings.

In Portugal, notwithstanding mechanisms that may be sought in the Investment and Shareholders' Agreement, an auction sale of the target company's shares to another (foreign) company is commonly adopted as an exit mechanism.

10) **Do investors typically opt for a public market exit via an IPO? Are there any specific public market challenges that need to be addressed?**

An IPO is one of the exit routes open to investors and in the last few years we have seen some small companies choosing to go public. However, this is not as common as in other jurisdictions and is often only used when an investor holds a minority stake.

Euronext provides specific solutions for smaller companies (Euronext Growth and Euronext Access) with lower requirements and has often been chosen as the listing venue by small and first-time issuer companies. However, the exit is typically made through the target company's shares being sold to the former holders or third parties, and not on the stock market.

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RUSSIA

CMS Russia

1) In your jurisdiction, which sectors do venture capital funds typically invest in?

Some of the main sectors attracting venture capital in Russia are IT and AI, educational technologies (EdTech), financial technologies (FinTech), logistics and transportation, e-commerce, food technologies (FoodTech), and others.

Currently the “hot topic” of venture capital investments in Russia are companies developing innovative technologies in AI/ML, SaaS, FinTech and EdTech.

2) Do venture capital funds require any approvals before investing in your jurisdiction?

Generally, no third-party or regulatory consents are specifically required for investment by venture capital funds (please see responses to questions 3 and 4 below for exceptions).

3) Are there any legal limitations to an offshore venture capital fund acquiring control or influencing the business, operations, or governance of an investee entity?

Prior governmental approval is required for an offshore venture capital fund acquiring control or influencing the business, operations or governance of an investee entity in certain business sectors (which are, however, rarely targets of venture capital investment). These business sectors, for instance, include aviation, nuclear and military industry, major mass media business, development of subsoil fields of federal significance and others (the “strategic” sectors).

Moreover, Russian law provides for further restrictions in relation to the strategic sectors. For example, only a Russian citizen may be appointed as the CEO of an entity carrying out aviation activities; foreign investors cannot directly own shares in the charter capital of an entity carrying out mass media activities, etc.

4) Would an investor be required to undertake an antitrust analysis prior to investment? When would such a requirement be triggered?

It is always advisable to conduct a preliminary antitrust analysis prior to an investment into a Russian company. The need to clear the investment with the antitrust authorities might be triggered, if the turnover or asset-based thresholds applicable to the companies and groups involved are met, by, for example:

- the acquisition of more than 25%, 50 % or 75 % of the voting shares in a Russian joint-stock company, or more than one-third, one-half or two-thirds of the participatory interests in a Russian limited liability company;
- the acquisition of direct or indirect rights to determine the business activities of a Russian company (including those based on voting arrangements or agreements such as the shareholders’ agreements providing for additional voting rights) or to act as its executive body; and
- the execution of a shareholders’ agreement or a similar arrangement, to the extent the venture fund may be recognized as a competitor of the target or any of the shareholders.

5) **<u>What are the preferred structures for investment in venture capital deals? What are the primary drivers for each of these structures?</u>**

Most commonly, the venture capital funds (often formed in foreign tax favorable jurisdictions, such as Cyprus, BVI or Luxemburg) acquire shares of the Russian investee company or establish a NewCo for the purposes of the investment together with the founders/strategic investors.

Less frequently used are the options of conclusion of the ordinary (investment) partnership agreement with a Russian party and conclusion of the fiduciary property management agreement with Russian party. The transfer of funds to "contract based" venture capital funds is not subject to additional taxation. This is one of the key advantages of these forms of venture capital deals. Nevertheless, they significantly restrict the change of parties and fund management. Due to that reason the "corporate" form of investment is more frequently used in Russia.

Currently (as of August 2020), the Russian Parliament is also considering a law on the regulation of convertible loans (convertible notes). If the law is adopted, this tool will also be available for venture capital investment.

6) **<u>Is there any restriction on rights available to venture capital investors in public companies?</u>**

Public companies are strictly regulated under Russian law, however, there are no specific regulations concerning acquisition of a stake in a public company by a venture capital investor. Certain restrictions (e.g., prohibition on disposal of shares, voting arrangements etc.) can be included in a shareholders' agreement between the investor and the founders/other shareholders.

Venture capital investors rarely invest in, or end up, following an IPO, in a public company, since these are often state-controlled and, if a start-up ends up going through an IPO, it is usually done through international — rather than domestic —capital markets.

7) **<u>What protections are generally available to venture capital investors in your jurisdiction?</u>**

The most common way of protecting the investor is agreeing to a shareholders' agreement, including a put option with a guaranteed return for the investor upon exit.

Further, Russian law provides for some general guarantees for foreign investors in certain instances, e.g., preferential regimes for distribution of profits, guarantee against adverse changes in the Russian legislation, etc.

Additionally, a venture capital investor and the investee company may provide for the application of foreign law and international arbitration in the transaction documents (subject to a "foreign element" in the deal).

8) **<u>Is warranty and indemnity insurance common in your jurisdiction? Are there any legal or practical challenges associated with obtaining such insurance?</u>**

The warranty and indemnity insurance market for Russian venture capital deals is still at quite an early stage of its development, and it is yet to be seen to what extent the relevant insurance product will be driven by any peculiarities of the sector in which the target business operates.

9) **<u>What are common exit mechanisms adopted in venture capital transactions, and what, if any, are the risks or challenges associated with such exits?</u>**

The exit mechanisms depend on the structure of the venture capital deal.

When investing into Russian businesses, venture capital funds usually negotiate a guaranteed "exit plan" from the business within three to seven years from the date of the investment. The investors are normally free to sell their shares to a third party after expiration of a certain lock-up period and may even have the right to drag along the founders, subject to the founders' ROFO/ROFR. The contractual exit plan is also often facilitated by a put option right of the investor, subject to the triggers to be commercially agreed upon between the parties. The option agreements under both Russian and foreign law (most commonly, English or Singaporean law) are also possible.

With respect to Russian limited liability companies (the most common legal form in Russia), the main challenge connected to such an exit is the potential blocking of the enforcement of the option agreement by the notary or the other side. To avoid such issues, option agreements and the relevant triggers for enforcement are carefully negotiated with a Russian notary who plays a crucial role in the share transfer enforcement.

10) Do investors typically opt for a public market exit via an IPO? Are there any specific public market challenges that need to be addressed?

In Russia, exits through an IPO are a rare occasion due to the complexity of the procedure and the adverse economic and political conditions (e.g., economic sanctions). Usually, the investors prefer to exit through a sale to the founders or third parties (please also see the response to question 9).

Moreover, as mentioned above, Russian companies prefer foreign stock exchanges for the purposes of conducting an IPO.

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RUSSIA

SINGAPORE

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1) In your jurisdiction, which sectors do venture capital funds typically invest in?

In Singapore, attractive targets for venture capital investments are typically start-ups in industries with high growth potential, such as technology sectors which include financial technology, advanced manufacturing technology, e-commerce, biotechnology, logistic and agri-food technology.

2) Do venture capital funds require any approvals before investing in your jurisdiction?

There are no general regulatory restrictions or foreign investment notification or approval requirements applicable to investments in Singapore-incorporated companies.

However, please note that:

a. companies that operate in certain specified sectors are subject to foreign ownership restrictions, for example newspaper and broadcasting companies; and
b. the ownership of shares exceeding prescribed thresholds in companies operating in certain regulated sectors would be subject to certain regulatory approval or notification requirements, for example, licensed banks and insurers incorporated in Singapore, capital markets services license holders as well as holders of other licenses issued by the Monetary Authority of Singapore ("**MAS**"), trust companies and certain designated telecommunications and electricity licensees.

3) Are there any legal limitations to an offshore venture capital fund acquiring control or influencing the business, operations, or governance of an investee entity?

Venture capital investments in Singapore by venture capital funds typically relate to start-ups which are private companies (rather than public companies, listed or unlisted). Control or influence over the business, operations, or governance of such start-ups are affected via contractual arrangements (for example, reserved matters and board seats) and are commercially negotiated. The extent of control or influence would depend on the bargaining positions of the founder(s)/start-ups and venture capital funds.

There are restrictions applicable to the ownership of shares in companies operating in certain sectors. Please refer to question 2 above for examples.

Similarly, the appointment of directors, officers and/or senior management personnel of companies operating in certain regulated sectors is also subject to regulatory approval, for example, licensed banks and insurers incorporated in Singapore, capital markets services license holders as well as holders of other licenses issued by the MAS, trust companies and certain designated telecommunications and electricity licensees. Such requirements apply regardless of whether the investor is local or offshore.

It is not usual for venture capital investors to invest in public or listed companies in Singapore. The Singapore Code on Take-overs and Mergers ("**Code**") will be applicable with respect to an investment in a public company (whether listed or unlisted). Pursuant to the Code, a mandatory general offer may be triggered if an investor acquires shares in a public company (whether listed or unlisted) under the following circumstances:

a. where the investor acquires such number of shares which, taken together with shares already held by itself and by parties acting in concert with it, amount to 30% or more of shares carrying voting rights of the company; or
b. where the investor and parties acting in concert with it cumulatively hold shares amounting to between 30% and 50% of shares holding voting rights of the company, and the investor acquires in any rolling six-month period additional shares carrying more than 1% of the voting rights of the company.

In terms of corporate governance, every Singapore-incorporated company is required under the Companies Act (Chapter 50 of Singapore) ("**Companies Act**") to have at least one director who is ordinarily resident in Singapore. Companies listed on the Singapore Exchange Securities Trading Limited ("**SGX-ST**") are also subject to the Code of Corporate Governance, which generally requires the board of directors of such listed companies to exhibit a strong element of independence (i.e., the board should comprise an appropriate number of independent directors).

4) Would an investor be required to undertake an antitrust analysis prior to investment? When would such a requirement be triggered?

Mergers which substantially lessen competition in any market in Singapore are prohibited under Singapore's Competition Act (Chapter 50B of Singapore). For this purpose, a "merger" would include an acquisition of control via a share acquisition, and may also include acquisition of minority stakes where accompanied by veto rights over strategic matters, e.g., appointment of senior management, budget and business plan.

While there is no mandatory requirement for mergers to be notified to the Competition and Consumer Commission of Singapore ("**CCCS**"), merger parties may voluntarily notify their transaction to the CCCS to seek confidential advice or a decision on whether the transaction will substantially lessen competition in Singapore. The CCCS has also indicated that mergers which raise serious anticompetitive concerns should be notified, and parties that fail to do so would risk the CCCS subsequently investigating the transaction and facing penalties or divestiture orders should the CCCS find that the merger has resulted in a substantial lessening of competition in Singapore.

As such, merger parties should assess if a transaction may raise competition concerns in Singapore, so as to decide whether a voluntary merger notification to the CCCS should be made.

5) What are the preferred structures for investment in venture capital deals? What are the primary drivers for each of these structures?

In the seed/early-stage (pre-Series A) financing rounds of a start-up company, investors can consider entering into a Convertible Agreement Regarding Equity ("**CARE**") with the investee start-up company. The CARE is a model agreement prepared by the Singapore Venture Capital & Private Equity Association in collaboration with the Singapore Academy of Law and various law firms, and is based on the Simple Agreement for Future Equity (also known as the SAFE note) commonly used for VC deals in the United States. Pursuant to the CARE, the investor makes a cash investment in exchange for the right to receive shares in the investee entity or cash proceeds (or such other assets as applicable) upon the occurrence of certain events. The CARE template affords investors the flexibility of customizing and tailoring template provisions to suit their investment needs.

For Series A and subsequent financing rounds, investors typically enter into share subscription agreements with the investee entity for the subscription of shares in the investee entity. Investors would also typically enter into shareholders' agreements and/or investor rights agreements with the investee entity with respect to their equity investments. In most cases, the equity investment is made by way of subscription for preference shares, which may confer on the investors' preferential dividends, preferential rights upon the occurrence of liquidity events, and/or the option to redeem the preference shares into cash for ease of exit.

6) Is there any restriction on rights available to venture capital investors in public companies?

Venture capital investors are not accorded any special rights or subject to any specific restrictions when investing in public companies (whether listed or unlisted). That said, we note that it is not usual for venture capital investors to invest in public or listed companies in Singapore.

Please also refer to question 3 above for further details on certain rules and requirements applicable to the acquisition of shares in and the governance of public companies.

7) What protections are generally available to venture capital investors in your jurisdiction?

Usual contractual protections for venture capital investors (who are likely to be the minority shareholders of the investee company) include reserved matters, anti-dilution, liquidation preference, pre-emption rights over issuances of new shares, transfer restrictions, rights of first refusal and co-sale rights. Venture capital investors are also usually granted certain corporate governance rights (such as the right to appoint directors or board observers).

Apart from contractual protections, minority shareholders are also statutorily protected under the Companies Act against acts of oppression, injustice and discrimination, or having their interests as shareholders disregarded, by the majority controllers of the company. A minority shareholder may make a court application to seek relief from the foregoing, and the court has broad discretion to make such order as it thinks fit to remedy or bring an end to the matters complained of. In cases where a case of minority oppression is made, Singapore courts have in some cases ordered that the majority buy out the minority's shares (or *vice versa*) or that the company be wound up.

8) Is warranty and indemnity insurance common in your jurisdiction? Are there any legal or practical challenges associated with obtaining such insurance?

The use of warranty and indemnity ("**W&I**") insurance is becoming increasingly popular in private M&A transactions in and originating out of Singapore, especially as private equity firms seek exits from investments on a no or limited-recourse basis. That said, W&I insurance is not commonly obtained for VC deals.

Typically, a W&I policy will not provide the policyholder with protection in respect of specific indemnities that may arise from the buyer's due diligence or disclosure by the seller. However, it is possible to negotiate insurance for known and specific contingent risks such as tax and environmental liabilities. Please note that a practical challenge to the implementation of W&I policies is that factors such as policy coverage and deal complexity may delay the implementation process (in some instances, the entire process may take more than two months).

9) What are common exit mechanisms adopted in venture capital transactions, and what, if any, are the risks or challenges associated with such exits?

Exit mechanisms commonly adopted with respect to Singapore-based venture capital transactions include a qualifying initial public offering (which is often benchmarked against a pre-agreed minimum pre-money valuation of the company) ("**Qualifying IPO**"), right of co-sale or the redemption of preference shares (in cases where the investment is made by way of subscription for redeemable preference shares).

The availability of an exit via the exercise of co-sale rights by minority shareholders is dependent on there being a willing third-party buyer. It is also usual to contractually stipulate that shares sold pursuant to such co-sale rights shall be "on terms no less favorable" than the terms on which the majority's shares are proposed to be sold, but this may not provide sufficient comfort for minority investors who may potentially get an undesirable valuation on the sale of their shares. One possible solution is to stipulate a price floor for shares sold pursuant to the exercise of co-sale rights.

The redemption of preference shares is subject to certain restrictions under the Companies Act. A start-up would need to have profits available to affect a redemption of shares (which would be unlikely in practice, as start-ups generally are not profitable and/or in the "cash burn" stage). Further, shares may not be redeemed out of the capital of the company unless the directors have made a solvency statement in relation to such redemption in accordance with the Companies Act.

A successful IPO exit is contingent on external factors such as market conditions (especially if parties have expectations regarding the pre-money valuation of the company) and regulatory and listing approvals. As listings and IPOs are heavily regulated, the process to execute a listing and an IPO may take between six months to one year or more to complete, depending on whether there are any issues that may be encountered during the listing process.

10) <u>Do investors typically opt for a public market exit via an IPO? Are there any specific public market challenges that need to be addressed?</u>

As mentioned at question 9 above, it is common for venture capital deals to provide an exit for shareholders via a Qualifying IPO as one of the exit mechanisms.

Also as mentioned above, there are challenges to achieving a successful IPO exit as factors such as market conditions and regulatory approvals would need to be considered and dovetailed appropriately. As an IPO would include an offering to the public, the regulatory requirements also tend to be more stringent and the consequential necessary diligence would also need to be undertaken by issue manager(s), underwriting banks and counsels. However, the IPO exit option remains popular as it is an opportunity for investors to realize value from an optimized portfolio which they otherwise may not be able to realize from a traditional third-party sale.

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SOUTH KOREA

Bae, Kim & Lee LLC

1) **In your jurisdiction, which sectors do venture capital funds typically invest in?**

Venture capital funds typically invest in the following industries: internet/mobile software, bio/healthcare and semiconductor-related businesses.

2) **Do venture capital funds require any approvals before investing in your jurisdiction?**

None.

3) **Are there any legal limitations to an offshore venture capital fund acquiring control or influencing the business, operations, or governance of an investee entity?**

There are no particular legal limitations, except that South Korea does not permit:

i. foreign investments in certain sectors, including (a) postal services, (b) education (pre-primary, primary, secondary, higher education, universities, graduate schools and schools for the disabled) and (c) artists', religious, business, professional, environmental advocacy, political, labor and other specialized organizations; and
ii. foreign investment ratios to be greater than 50% in certain sectors, including (a) media broadcasting, (b) newspaper/magazine publications and (c) air transportation businesses.

Note that venture capital funds do not typically invest in the above sectors.

4) **Would an investor be required to undertake an antitrust analysis prior to investment? When would such a requirement be triggered?**

Yes. An antitrust analysis needs to be cleared by filing a business combination report with the Korea Fair Trade Commission (KFTC) in respect of an acquisition of shares if:

i. the buyer acquires at least 20% of the issued and outstanding voting shares of the unlisted target company, or at least 15% of the issued and outstanding voting shares of the public target company;
ii. the buyer (together with its affiliates worldwide) had total assets or gross revenue of KRW 300 billion (approximately USD 250 million) or more as of the most recent fiscal year-end; and
iii. the target company (together with its affiliates worldwide) had total assets or gross revenue of KRW 30 billion (approximately USD 25 million) or more as of the most recent fiscal year end.

In general, filing of the business combination report is a post-closing requirement and the buyer is only required to file a business combination report within 30 days of the closing of the acquisition. However, if either the buyer (together with its affiliates worldwide) or the target company (together with its affiliates worldwide) had total assets or gross revenue of KRW 2 trillion (approximately USD 1.67 billion) or more as of the most recent fiscal year-end, the buyer must file the business combination report prior to the closing of the acquisition and the parties are not permitted to close the transaction until the KFTC grants clearance.

5) **What are the preferred structures for investment in venture capital deals? What are the primary drivers for each of these structures?**

Venture capital funds prefer to invest in redeemable convertible preferred shares (RCPS) (i.e., preferred shares with both a redemption and conversion right) or convertible preferred shares (CPS) (i.e., preferred shares with just a conversion right). It also not uncommon for them to invest in convertible bonds (CB) or bonds with warrants (BW).

The rationale behind investing in these securities is to (i) secure their investments by obtaining priority in terms of distribution payment and repayment upon liquidation and (ii) realize potential upside in the invested company by having a right to convert those securities into common stock.

6) **Is there any restriction on rights available to venture capital investors in public companies?**

No.

7) **What protections are generally available to venture capital investors in your jurisdiction?**

Venture capital investors generally negotiate the following protections:

- Liquidation/dividend distribution preference;
- Conversion rights (including any rights to adjust conversion price);
- Redemption rights;
- Anti-dilution protection;
- Consent rights over important matters;
- Right of First Refusal;
- Tag-along rights;
- Put option against the major/controlling shareholder of the target company; and
- Information rights.

Registrations rights, such as piggy-back and demand rights, are not typically negotiated in South Korea because if a company intends to do an IPO in South Korea, all shares of the company are required to be listed.

8) **Is warranty and indemnity insurance common in your jurisdiction? Are there any legal or practical challenges associated with obtaining such insurance?**

Warranty and indemnity insurance is used in South Korea and a number of local insurance companies have also begun selling similar insurance products. However, given the relatively small size of deals, venture capital firms do not typically utilize warranty and indemnity insurance.

There are no special legal challenges to obtaining warranty and indemnity insurance, but given the typical exclusions (e.g., issues known to investor, issues disclosed on the disclosure schedules to the transaction documents, consequential damages, anti-bribery and anti-corruption, product liability, and certain fines and penalties) and coverage limitations, the practicality of having a warranty and indemnity insurance is not significant.

9) **What are common exit mechanisms adopted in venture capital transactions, and what, if any, are the risks or challenges associated with such exits?**

Venture capital firms typically exit via a third-party sale, qualified IPO, an exercise of their redemption rights (in the case that they have RCPS) or an exercise of their put options.

While a third-party sale is ideal, it is difficult to come to an agreement on value especially with respect to a company at its growth stage.

For a qualified IPO, the company must meet certain standards (including management transparency and satisfaction of certain financial requirements). Meeting such standards may take longer than expected.

In the case of exercising a redemption right (for those RCPS holders), redemption is only feasible if the company has sufficient distributable earnings.

Finally, put options are generally only negotiated with the controlling/major shareholder of the company since there legal restrictions as to having the company itself grant a put option, so exercising put options as an exit option is only viable if the controlling/major shareholder has sufficient capital to buy out the venture capital firm.

10) **Do investors typically opt for a public market exit via an IPO? Are there any specific public market challenges that need to be addressed?**

Yes.

However, any shares acquired by an investor (whether transferred from the controlling/major shareholder or issued via a new stock issuance) immediately prior to a Company IPO is subject to a lock-up period, so in this case exit on the public market may be restricted. Even if an investor is exempt from a lock-up period, underwriters, in order to launch successful IPO, may request that financial investors such as venture capital hold their shares for a certain period and not trade on those shares in the secondary market.

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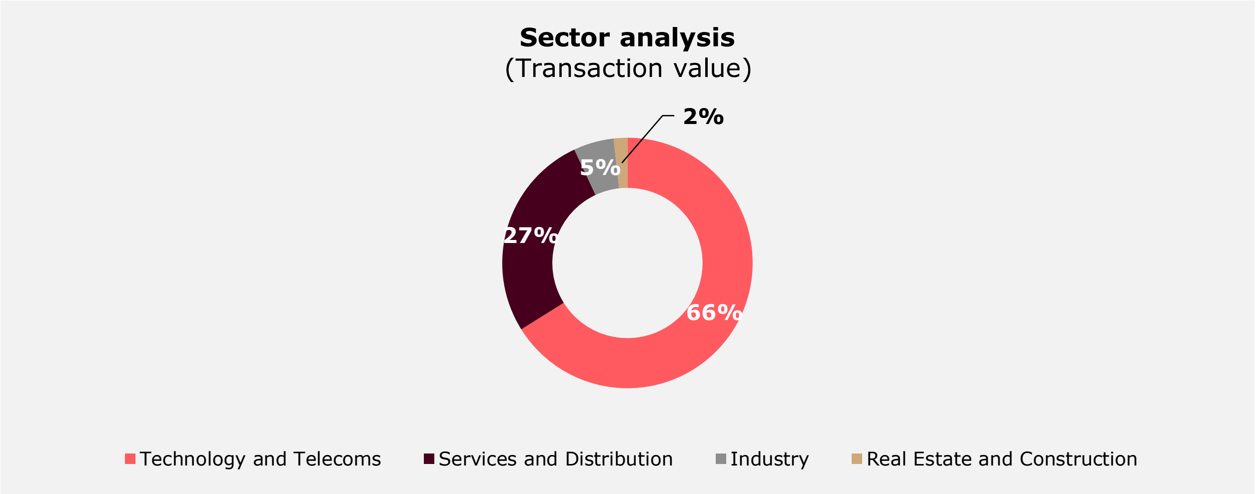
SPAIN

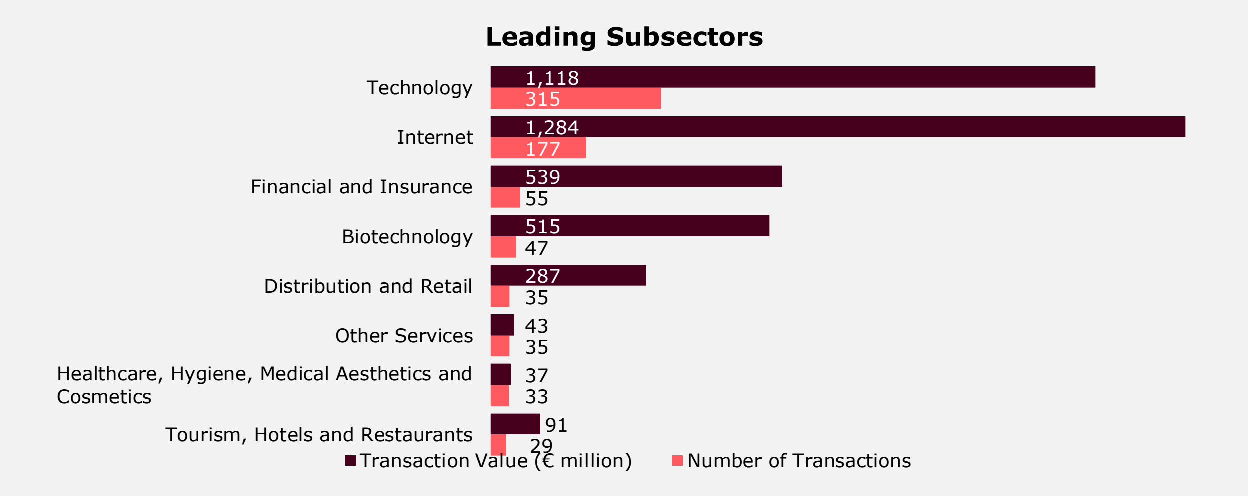
Cuatrecasas

1) In your jurisdiction, which sectors do venture capital funds typically invest in?

Key sectors attracting venture capital (**VC**) investments in Spain are clearly led by the technology and telecoms sector (66%), followed by services and distribution (27%).

According to TTR, VC deals in Spain from January 2018 to June 2019 are distributed in sectors and subsectors as follows:





2) Do venture capital funds require any approvals before investing in your jurisdiction?

Foreign venture capital funds do not need to register with the Spanish Capital Markets Authority ("CNMV") to invest in Spain. However, they must inform the Bank of Spain for statistical purposes.

If the venture capital fund is Spanish, it does not need any prior license (unlike fund managers) but it must register with the CNMV. As a matter of practice, the registration in the CNMV is not automatic, as the supervisor may require certain adjustments to the documentation of the vehicle.

As an exception, certain investments require a prior authorization as explained in question 3 below.

3) Are there any legal limitations to an offshore venture capital fund acquiring control or influencing the business, operations, or governance of an investee entity?

Foreign investments had been liberalized in Spain since 2003, with certain exceptions in specific sectors (e.g., defense). However, due to the health crisis caused by COVID-19 and following EU general guidelines, a prior authorization system has been implemented for “foreign direct investments” in two cases (with significant consequences for those investments carried out without pior authorization):

i. One based on the object of the investment (when this affects the main strategic sectors in Spain).
ii. The other based on the investor's profile (when the investor (a) is controlled directly or indirectly by a third-country government; (b) participates in sectors affecting the public order, public security, and public health of another Member State; or (c) represents a serious risk owing to its engagement in criminal or unlawful activities that may affect public order, public security or public health.)

“Foreign direct investments" are those:

i. made by (a) investors resident in countries outside the EU/EFTA; or (b) investors resident in an EU/EFTA country, whose beneficial ownership is held by a non-resident;
ii. in which the investor holds, as a result of the transaction, a share of at least 10% in the Spanish company’s capital or acquires control of it according to the terms of the Spanish Antitrust Act.

A simplified authorization system has been introduced for certain transactions that were under way and for transactions involving a small amount. Also, transactions for a value of under €1 million are exempt from the obligation of prior authorization.

As a temporary measure, until June 30, 2021, investments made in Spanish listed companies or unlisted companies (in this case, if the value of the investment exceeds EUR 500 million) by residents of EU/EFTA countries other than Spain or by residents in Spain with a beneficial owner in an EU/EFTA country will also be subject to prior authorization if the investor becomes the holder of a participation equal to or greater than 10% of the capital of a Spanish company or acquires the control of the company and the Spanish target company conducts its business in a strategic sector.

Non-resident investments that do not fall within the scope of the above “foreign direct investment” definition and do not affect restricted sectors (e.g., defense) are free, but must be reported to the State Secretary for Trade for statistical and tax purposes and to prevent infringements of law. As an exception, when investments proceed from a tax haven and exceed 50% of the share capital of the Spanish company, a prior declaration is required.

Implementing regulation on foreign investments is due to be approved in 2021 and it will have a relevant impact on the authorization of the “direct foreign investments” made by investors resident in countries outside the EU/EFTA in strategic sectors or due to the profile of the investor.

4) Would an investor be required to undertake an antitrust analysis prior to investment? When would such a requirement be triggered?

The Spanish Law for the Defense of Competition requires prior notification and authorization for mergers and other concentrations, including acquisitions and full-function joint ventures, which are not notifiable to the European Commission under the EU Merger Regulation, but which satisfy the thresholds below.

Parties to a concentration must notify the National Commission for Markets and Competition when either of the following alternative sets of thresholds is met:

i. A market share equal to or above 30% in the relevant product or service market in Spain (or in a geographical market defined within Spain) is acquired or increased as a result of the transaction (unless, under a *de minimis* exemption, the annual Spanish turnover of the acquired undertaking or assets does not exceed EUR 10 million (approximately USD 11.8 million) and the undertakings concerned have no individual or combined market share of 50% or more in any affected market in Spain or in a geographic market within Spain).
ii. The combined aggregate turnover in Spain of all the undertakings concerned in the transaction exceeds EUR 240 million (approximately USD 283.4 million) in the last financial year and the aggregate turnover in Spain of each of at least two undertakings concerned exceeds EUR 60 million (approximately USD 70.9 million).

5) What are the preferred structures for investment in venture capital deals? What are the primary drivers for each of these structures?

When a VC fund invests the target needs new funds to develop the business plan through different funding rounds. Therefore, the most typical transaction is that the VC fund acquires a minority shareholding in the target company (usually around 10-20%) through a capital increase by means of contribution in cash. This contrasts with private equity (PE) transactions, where PE funds usually buy 100% of the capital stock (or a wide majority) of a more consolidated target company or take a majority shareholding through a pure share purchase deal.

In some cases, VC funds also subscribe to convertible notes. The advantage of this structure is that the target receives funds immediately while the investor may decide its form of investment at a later stage. The

conversion rate and the main terms and conditions of the future shareholders' agreement are usually agreed on in the convertible note agreement.

While determining the preferred structure, tax implications must be considered in each case.

6) Is there any restriction on rights available to venture capital investors in public companies?

There is no restriction. Securities regulations in Spain apply uniformly to all investors and shareholders of a public company, regardless of where they are resident. However, VC funds tend not to invest in listed companies.

Securities regulations in Spain (implementing the EU Takeover Directive) provide for two types of takeover bids (**TOB**) related to the acquisition of a controlling interest in a listed company: (i) those triggered by acquiring control of a listed company (mandatory bids), and (ii) those voluntarily launched by a bidder to acquire shares in a listed company through a public offering (voluntary bids).

For TOB purposes, control of a listed company is gained when a shareholder acquires (i) 30% of the company's voting rights; or (ii) a stake of less than 30%, provided it appoints, within 24 months, a number of board members that, added to those it had already appointed, make up more than half of the company's board members. Control can be achieved not only by direct or indirect acquisition of securities conferring voting rights, but by reaching agreements with other holders of securities that will lead to the acquisition of 30% of the voting rights by consensus.

Acquiring control of a listed company does not always trigger a mandatory bid. There are certain legal exceptions and situations where the CNVM will waive or can waive the obligation to launch an offer (e.g., counterweight shareholders, rescue operations or mergers).

7) What protections are generally available to venture capital investors in your jurisdiction?

It is market practice in Spain to include some contractual provisions in the investment agreement to protect investors. The most used are (i) *de facto* vetoes (or request of reinforced majorities taking into account the classes of shares) for key resolutions of the governing bodies; (ii) a right to propose directors or observers of the board of directors; (iii) strong rights of information; (iv) tag-along and drag-along clauses, (v) right of first offer or preemptive acquisition right clauses; (vi) anti-dilution rights (economic compensation in case a new investor acquires new shares of the target for a lower price than the one paid by the investors); (vii) economic rights in case of a liquidation event; and (viii) founder's post-closing covenants regarding permanence, exclusivity and non-competition.

Some of the contractual provisions can be transferred to the company bylaws, strengthening the position of the investor who may not only claim a contractual breach, but also challenge a corporate resolution contrary to the bylaws. This can be done through the inclusion of (i) ancillary obligations of fulfilling the obligations established in the shareholders' agreement; (ii) different classes of shares giving their owners different rights in certain circumstances (i.e., a liquidation preference in a liquidation event or the possibility to propose directors); (iii) stronger rights of information; or (iv) creating *de facto* vetoes through bigger percentages of votes for key resolutions of the governing bodies.

An investor can also (i) challenge a resolution that damages the corporate interest to benefit one or more shareholders or third parties (damage to the corporate interest also occurs if the majority imposes a resolution abusively, even if it does not damage the corporate assets), or (ii) bring an action for liability against a director who has breached his or her duties of diligence and loyalty to the company (i.e., in case of mismanagement, but consider that directors are protected by the business judgment rule under Spanish law).

8) Is warranty and indemnity insurance common in your jurisdiction? Are there any legal or practical challenges associated with obtaining such insurance?

Although the VC market in Spain is currently very active, it has not seen big exits yet compared to other jurisdictions. Therefore, the use of W&I insurance in VC is still low and investors rely on contractual remedies for breach of R&Ws as the buyer's only remedy.

However, if we focus on the Spanish M&A market in general, since 2016, the use of W&I insurance has increased considerably. W&I insurance has become important in the PE sector, as it allows the PE fund to make a clean exit while disinvesting.

W&I insurance coverage depends on the policy negotiated, but usually it does not include (i) matters the insured party has actual knowledge of (i.e., matter discovered during the DD process); (ii) matters outside the DD scope; (iii) anti-bribery, anti-corruption, anti-money laundering, and anti-tax evasion warranties; (iv) fines and penalties (at least criminal penalties); (v) purchase price adjustment and locked-box mechanisms; (vi) forward-looking warranties; (vii) environmental liability; (viii) transfer pricing, and joint and several tax liability for belonging to a corporate group; (ix) asset's condition; (x) product liability; and (xi) seller's covenant or commitment related to managing the business during the interim period.

The policies are usually buyer-side policies. Seller-side policies do not tend to be the best option because of the general exclusion of actual knowledge. However, sellers often want to control and shorten the process. That is why sometimes there is a "seller-to-buyer flip," meaning the seller starts the process of negotiating the policy, but the purchaser finalizes it. This is common in auction processes.

Usually, when W&I insurance is taken out, the seller makes a clean exit (i.e., he or she does not grant any business warranty), meaning the purchaser has no action against the seller. However, in a clean exit, it is common for the purchaser to have an action against the seller in cases of fraud, willful misconduct and breach of fundamental warranties.

9) <u>What are common exit mechanisms adopted in venture capital transactions, and what, if any, are the risks or challenges associated with such exits?</u>

The main exit mechanisms VC funds use in Spain are (in this order of frequency):

i. Sale to a third party, which can be: (a) a trade sale (sales to industrial entities), or (b) a sale to another PE fund (secondary buyouts or SBO);
ii. shareholders repurchase of shares (buybacks); or
iii. IPOs.

The reasons that make the sale to third parties (trade sales or SBO) the main exit strategy compared to IPOs are mainly that (i) it is sometimes the only option for small investments; (ii) the transaction is executed in less time, as it is outside the scope of the regulator's supervision; and (iii) the transaction costs are lower.

Buyback agreements can also be implemented quickly and can have even lower transaction costs than a sale to a third party, but the relationship between the founders and VC investors may turn complicated if the business does not develop as expected, since the VC investors have already guaranteed their exit with a minimum return. Also, through the sale to a third party, the VC fund has (i) the possibility of obtaining a higher valuation of the shares or assets; and (ii) the possibility of obtaining an exit of 100% of the investment.

The sale to third parties (trade sale or SBO) are usually implemented through the regulation in the shareholders' agreement of a selling order to an investment bank (usually run as an auction) or a drag-along clause.

Buyback agreements are usually implemented through a put option on the founders. The buyback of shares by the target company is hardly seen due to the legal limitations on treasury stock for limited liability companies under Spanish law.

The IPO process is explained below.

10) <u>Do investors typically opt for a public market exit via an IPO? Are there any specific public market challenges that need to be addressed?</u>

In Spain, exiting through an IPO is starting to be considered by VC investors, but is still not as common as within the PE sector.

Only public limited companies (*sociedades anónimas*) can be listed. Therefore, usually, the target will need to be converted from a limited liability company (*sociedad de responsabilidad limitada*) to a public limited company.

The structure of the IPO will be influenced by a whole range of factors, including (i) the size of the company, (ii) the nature of its business, (iii) the reasons for going public (e.g., company wants to raise equity finance or existing shareholders want to realize part of their investment), or (iv) the market's entry requirements. The IPO will usually be led and managed by an investment bank, which will issue a report analyzing the target's suitability to make the IPO and provide the target with a specific proposal, including recommendations on (i) the structure, timing, type and geographical distribution of the addressees of the IPO; (ii) the best market on which to list its shares; (iii) the target's valuation rank and its estimated post-IPO market valuation, including the minimum return the investors will obtain; or (iv) the target's capital structure after listing and its corporate governance.

In Spain a company can choose to be listed on the regulated market (the Spanish Stock Exchanges) or on the alternative equity market (the MAB). The latter is a multilateral trading facility developed to meet the needs of smaller companies that might not meet the full criteria of a listing on the Spanish Stock Exchanges (e.g., free float requirements or market capitalization) or that need a more flexible regulatory environment.

Before listing the company, the shares can be offered to the public for subscription (if they are newly issued shares), for sale (if they are existing shares), or for both. An offer prospectus will be required before making such offer to the public. Alternatively, the shares can be offered to a select base of institutional investors within a private placement and no prospectus is required. Before an issuer can request admission to trade on the Spanish Stock Exchanges, it must file a listing prospectus.

There is a single rule throughout the EU governing the content, format, approval, publication and exemptions to offer and list prospectuses.

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SWEDEN

Setterwalls

1) In your jurisdiction, which sectors do venture capital funds typically invest in?

The following figures are based on information from the Swedish Private Equity and Venture Capital Association (www.svca.se) and The Swedish Agency for Growth Policy Analysis (www.tillvaxtanalys.se).

Between 2012 and 2017, International Corporate Transactions (ICT) and Life Sciences accounted for 78% of venture capital investments in Sweden. In 2018, those sectors together with consumer products, services, and retail accounted for 91% of the total venture capital investment volume in Sweden.

Between 2007 and 2019, the investment distribution by sector was as follows:

- ICT (41%)
- Biotech and healthcare (30%)
- Consumer goods and services (10%)
- Business and services (7%)
- Energy and environment (7%)
- Other* (5%)

**Other includes Agriculture, Chemicals and Materials, Construction, Financial and Insurance Activities, Real Estate & Transportation.*

2) Do venture capital funds require any approvals before investing in your jurisdiction?

No approvals are required before investing in Swedish entities.

3) Are there any legal limitations to an offshore venture capital fund acquiring control or influencing the business, operations, or governance of an investee entity?

Generally, there are no significant legal restrictions that would prevent foreign and/or offshore venture capital funds from acquiring control or exercising influence over a Swedish entity. However, certain residency requirements apply to Swedish limited liability companies. A managing director (CEO) and deputy managing director of a limited liability company must reside within the European Economic Area (EEA). At least half of the company's board members must also reside within the EEA and the same rule applies to the deputy board members, if any. If all members of the board of directors are residing outside of Sweden the company must have a representative in Sweden who can accept service of process on behalf of the company. This representative must be registered in the Swedish population register.

Please note that the abovementioned requirements concern residency, and not citizenship. It is possible to apply for an exemption from the residency requirements with the Swedish Companies Registration Office.

4) Would an investor be required to undertake an antitrust analysis prior to investment? When would such a requirement be triggered?

Although there are no statutory requirements to undertake an antitrust analysis prior to an investment, such analyses are usually necessary in practice, as both the Swedish Competition Act (Sw. *Konkurrenslagen (2008:579)*) and the EU's rules on competition include provisions on concentrations between undertakings that must be complied with.

A concentration between undertakings must be notified to the Swedish Competition Authority if (1) the combined aggregate turnover in Sweden of all of the undertakings concerned for the preceding financial year exceeded SEK 1 billion, and (2) at least two of the undertakings concerned had a turnover in Sweden the preceding financial year that exceeded SEK 200 million for each of the undertakings. If the aggregate turnover requirement according to point 1 is fulfilled but the individual turnover does not exceed the threshold set forth in point 2, the Swedish Competition Authority may require a party to a concentration to notify the concentration where particular grounds exist for doing so.

A concentration that is examined by the Swedish Competition Authority shall be prohibited if it would significantly impede the existence or development of effective competition within the country as a whole, or a substantial part thereof. In its review, the Swedish Competition Authority will especially take into consideration whether the concentration results in a dominant position being created or strengthened. If it is sufficient to eliminate the adverse effects of a concentration, the Swedish Competition Authority may, instead of prohibiting a concentration, issue an order to a party to the concentration to, for example, divest an undertaking or a part of an undertaking, or take some other measure which has a favorable effect on competition.

5) What are the preferred structures for investment in venture capital deals? What are the primary drivers for each of these structures?

Venture capital deals are primarily structured through issuances of, and subscriptions for, preference shares which entitle the security holders to certain rights that ordinary (common) shareholders are not entitled to (e.g., dividend and liquidation preferences, usually up to an amount corresponding to the invested amount plus, sometimes, added interest).

Investments in convertible loans which may be converted into shares when certain conversion events occur are relatively uncommon but can sometimes serve as an alternative or a supplement to a preference share financing.

The average life of a venture capital fund is estimated to be three to seven years.

6) Is there any restriction on rights available to venture capital investors in public companies?

Generally, there are no significant restrictions on rights available to venture capital investors in Swedish public companies.

7) What protections are generally available to venture capital investors in your jurisdiction?

Venture capital investors normally protect themselves by entering into a shareholders' agreement with the other shareholders or a majority of them. Such agreements offer protection in relation to how the investee entity is run, financed and eventually disposed of. Protection is also given by the articles of association, which is a mandatory document for all Swedish limited liability companies. Typical protections for investors in shareholders' agreements (and to some extent in the articles of association) relate to:

- dividend preferences;
- liquidation preferences;
- voting preferences;
- entitlements to board representation and to influence major decisions of the company;
- non-compete obligations for key employees and founders;
- limitations on share transferability (e.g., pre-emption rights and/or right of first refusal);
- drag-along and tag-along rights; and
- anti-dilution and exits.

8) Is warranty and indemnity insurance common in your jurisdiction? Are there any legal or practical challenges associated with obtaining such insurance?

Generally, no significant challenges are associated with obtaining W&I insurance as a venture capital investor in Sweden. The utilization of W&I insurance in Sweden started around ten years ago and has increased during the past five years, although venture capital transactions only account for a relatively small portion of the overall volume of transactions in the market.

9) What are common exit mechanisms adopted in venture capital transactions, and what, if any, are the risks or challenges associated with such exits?

The choice of exit mechanism is primarily based on the expected return on the investment, the expected length of the exit process, and the available exit opportunities. The following figures are based on information from the Swedish Private Equity and Venture Capital Association.

Between 2007 and 2019, the main exit routes for venture capital *by value* were trade sale (38%), public offering (19%), and write-off (12%), while the main exit routes *by number of companies* were trade sale (26%), other means (22%), and write-off (13%).

10) Do investors typically opt for a public market exit via an IPO? Are there any specific public market challenges that need to be addressed?

See Question 9.

The main challenge with an exit through an IPO lies within the listing procedure as the transaction process normally takes longer, and involves significant costs for auditors, financial and legal advisors, registration and marketing.

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SWITZERLAND

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1) In your jurisdiction, which sectors do venture capital funds typically invest in?

In Switzerland, investments in almost all sectors and during all stages have clearly increased in the last couple of years. The information technology sector (including FinTech) attracts most venture capital funds. Besides that, the life sciences sector (including biotech, MedTech and healthcare) is quite attractive for venture capital investments as well. Partly, this can be explained by the success and dynamism of the Swiss polytechnic universities as well as by the historically strong pharmaceutical and biotechnical industry in Switzerland.

2) Do venture capital funds require any approvals before investing in your jurisdiction?

Depending on how a venture capital fund is structured and how it conducts its business (i.e., incorporating or running permanent business operations in Switzerland vs. conducting investments on a cross-border basis), prior authorization from the Swiss Financial Market Supervisory Authority (FINMA) may be required.

On the transactional level, in the event certain turnover thresholds are met, the regulations of the Federal Act on Cartels and other Restraints of Competition need to be considered (see question 4 below). Further, for transactions in certain industries (e.g., banks, telecom, real estate, etc.), governmental approvals may be required.

3) Are there any legal limitations to an offshore venture capital fund acquiring control or influencing the business, operations or governance of an investee entity?

Currently, there are no specific restrictions on investments in a Swiss company's equity securities by foreign venture capital funds. Consequently, the latter can acquire control and thereby influence a company, its operations or governance.

However, it should be noted that anyone who alone or in concert with third parties acquires shares in a company whose equity securities are not listed on a stock exchange (as regards listed companies, see question 6 below), and thus reaches or exceeds the threshold of ownership of 25% of the share capital or voting rights must, within one month from exceeding such threshold, give notice to the company of the beneficial owner(s) for whom it is ultimately acting. Non-compliance with such obligation has severe consequences: the membership rights (in particular voting rights) are suspended for as long as the shareholder has not made the required notification. Financial rights (in particular the right to receive dividends) may only be exercised once disclosure has been made and are forfeited for the period until disclosure is made. In addition, failure to comply with the obligation to disclose the beneficial owner(s) is subject to a fine.

Further, despite the Swiss government's resistance, in March 2020 the Swiss Parliament instructed the government to propose legislation regarding the introduction of a foreign direct investment control regime. The legislative process is expected to take months or even years, and the final outcome cannot yet be predicted, especially given the strengths of promoters and opponents within the Swiss Parliament and the possibility of a potential public referendum.

4) Would an investor be required to undertake an antitrust analysis prior to investment? When would such a requirement be triggered?

Generally, any direct or indirect acquisition of control over a previously independent entity or parts thereof, including through the acquisition of equity interest or the conclusion of a corresponding agreement, must be reported to the Swiss Competition Commission in the event the following thresholds are cumulatively met in the last business year preceding such transaction: (i) the entities concerned must have reported an aggregate turnover of at least CHF 2 billion worldwide or an aggregate turnover in Switzerland of at least CHF 500 million, and (ii) at least two of the entities involved in the transaction must have reported individual turnovers in Switzerland of at least CHF 100 million.

Irrespective of the turnover achieved, a transaction is subject to the notification requirement if (a) one of the entities concerned has in a final decision been held to be dominant in a market in Switzerland, and (b) the transaction concerns either that market, an adjacent market, or a market upstream or downstream thereof.

Given that the notification must be submitted prior to the completion of a transaction, it is usually filed after the relevant agreements have been signed but prior to completion (typically, merger clearance is structured as a condition precedent to closing). Unless the Competition Commission decides to initiate a four-month phase II investigation, clearance is granted within one month (phase I) after filing the complete application.

5) What are the preferred structures for investment in venture capital deals? What are the primary drivers for each of these structures?

The vast majority of venture capital investee companies receive financing through equity capital, i.e., by venture capital investors subscribing for newly issued shares in the context of a capital increase. Usually, the issued shares provide for preferential rights, for example relating to dividends and liquidation proceeds. Such preferential rights may be of contractual nature only or be implemented into the investee company's articles of incorporation.

Sometimes, these equity investments are combined with convertible loans or alike instruments, i.e., debt that, provided certain conditions are met, can (or must) be converted into genuine equity participation (mezzanine capital financing). In this context, the convertible lender typically waives most of its security interests by agreeing to a subordination. As a result, the corresponding loan liability does not have to be covered by the investee company's assets when calculating whether or not insolvency proceedings must be initiated. On the other hand, the convertible lender benefits from a right to convert the loan into equity capital of the company at a reduced rate in the next financing round or at the latest at the end of the term (discount). Often, this type of investment/financing is used to bridge finance the investee company until the next equity financing round, when the loan is converted into shares.

6) Is there any restriction on rights available to venture capital investors in public companies?

There is no specific restriction on rights available to venture capital investors in listed companies; securities regulations in Switzerland apply uniformly to all shareholders of a listed company.

In this context, it should be noted that anyone who acquires equity securities which, together with the equity securities already held, exceed the threshold of $33^1/_3$ % of the voting rights of a Swiss listed company is obliged to make an offer for all listed equity securities of the company (mandatory tender offer), unless the Swiss Takeover Board grants an exemption or the respective company has either increased the threshold to a maximum of 49% of the voting rights (opting-up) or completely excluded the obligation to make an offer (opting-out).

Furthermore, anyone who exceeds certain thresholds of the voting rights in a Swiss listed company (the lowest threshold being 3%) is obliged to notify the respective company and the stock exchange (disclosure obligation).

7) What protections are generally available to venture capital investors in your jurisdiction?

Venture capital investors essentially receive the following contractual protections, some of which may also be included in the investee company's corporate documents:

- Right to be represented on the board.
- Reporting, information and inspection rights.
- Veto rights in relation to certain matters falling within the competence of either the shareholders or the board.
- Representations, warranties and indemnities typically granted by all or some of the existing shareholders.
- Pre-emption rights relating to the issuance of new shares are provided for by Swiss law and can only be withdrawn from a shareholder under certain specific circumstances (the resolution to withdraw the pre-emption right from existing shareholders is usually subject to the investors' consent).
- Restrictions on the transfer of existing shares, such as a general lock-up for a certain period of time, a right of first refusal/preemptive rights, and call-options. Moreover, the investee company's articles of incorporation usually provide for transfer restrictions enabling the board to refuse a transfer in certain situations.
- Anti-dilution protection.
- Preference relating to dividends, sales and liquidation proceeds.
- Agreement of the key employees to a minimum duration of their employment with the investee company.
- Incentivizing key employees by way of implementing good/bad leaver provisions.
- (Post-contractual) non-compete and non-solicitation undertakings of the founders, which, under mandatory Swiss law, however, are subject to various limitations and entail uncertainties regarding their enforceability.
- Mandatory accession to the shareholders' agreement for any new shareholder.
- Exit rights such as drag-along and tag-along rights, put and call options, as well as certain rights relating to initiating an IPO or a trade sale.

8) Is warranty and indemnity insurance common in your jurisdiction? Are there any legal or practical challenges associated with obtaining such insurance?

Historically, warranty and indemnity insurance was only rarely agreed upon in Switzerland. However, as a result of more attractive insurance solutions (lower premiums, a more efficient process for the conclusion of an insurance policy, increasingly flexible insurance packages, etc.) and due to the current sellers' market, the number of warranty insurance policies has increased significantly in recent years. Investors generally prefer it in high value transactions.

From a legal perspective, it should be noted that, in principle, liabilities arising from known matters, facts identified in the due diligence or information otherwise disclosed by the seller(s) cannot be covered by warranty and indemnity insurance. In addition, the following risks are typically excluded by the insurance policies as standard and are, therefore, not insurable with a customary warranty and indemnity insurance: (i) fines or penalties, (ii) product liability, (iii) pension underfunding, (iv) certain environmental matters, (v) forward-looking warranties, (vi) certain tax matters, (vii) fraud, corruption or bribery and (viii) purchase price adjustments as well as non-leakage covenants in locked-box deals.

As the underwriting process is running in parallel to the investment transaction process, the insurance policy must be negotiated with selected insurers while negotiating the transaction contracts, which makes the transaction process, from a practical point of view, even more demanding. In addition, although the insurers are able to quickly and professionally push ahead with the conclusion of a warranty and indemnity insurance policy, at least two to three weeks should be scheduled for this.

9) What are common exit mechanisms adopted in venture capital transactions, and what, if any, are the risks or challenges associated with such exits?

The investment period of venture capital funds typically is about three to five years. Depending on the situation of the investee company and the other shareholders' perspectives, an exit may take various forms: (i) sale of the entire company to a third party (trade sale), (ii) sale of the venture capital investor's shares to a third party (typically a larger corporation or a financial investor) while the remaining shareholders keep their shares (partial trade sale), (iii) sale of the venture capital investor's shares to other shareholders or managers (buy-out), (iv) listing of the investee company and sale of the shares on the public market (IPO, cf. below question 10), or (v) liquidation of the investee company.

Provided the investee company is successful, trade sales represent the most common exit route for venture capital investors in Switzerland. The advantages of a trade sale are that it usually can be achieved within a short time frame and involves lower transaction costs (compared to the transaction costs of an IPO). In addition, such approach allows the selling investor to get a control premium and to exit completely. Further, the respective transaction may remain confidential. Disadvantages, on the other hand, include that a change of control may have an adverse effect on the business partners and the employees. Additionally, even if a trade sale may be performed fairly rapidly, potential deferred purchase price components, such as earn-outs or escrows, might delay and reduce the venture capital investor's final pay out.

10) Do investors typically opt for a public market exit via an IPO? Are there any specific public market challenges that need to be addressed?

Public market exits via an IPO are not very frequent in Switzerland. This might be related to the fact that the process of an IPO consumes considerably more time and causes higher transaction costs compared to a trade sale. Other reasons might be that the investee company as well as the remaining investors become subject to additional obligations and restrictions under Swiss securities laws and exchange regulations (e.g., financial reporting, compensation of the board, ad-hoc publicity, disclosure of major shareholdings, etc.). Moreover, underwriters typically require important shareholders as well as members of the board of directors and the executive management to commit to lock-up undertakings for a period of 6 to 18 months after the IPO. Nevertheless, an IPO also includes advantages: first, an IPO is an attractive financing option for companies seeking to raise a large amount of money while retaining control over at least a portion of the voting rights. Further, investors who do not sell their entire participation may benefit from an increase in the value of the investee company's shares following the IPO. Finally, the management is likely to support an IPO given the fact that they usually remain in control of the company's business.

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SWITZERLAND

TAIWAN

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1) **In your jurisdiction, which sectors do venture capital funds typically invest in?**

In Taiwan, key sectors attracting venture capital (**VC**) investment include TMT (Technology, Media, Telecom), e-commerce, consumer goods, AI-based solutions, financial services (including mobile wallets and digital payment solutions), travel agencies, and education.

2) **Do venture capital funds require any approvals before investing in your jurisdiction?**

For offshore venture capital funds, Foreign Investment Approval (FIA) must be obtained before investing in Taiwan. The investment may require a prior permit depending on the sector in which the investment is being made, e.g., insurance industry and financial industry.

3) **Are there any legal limitations to an offshore venture capital fund acquiring control or influencing the business, operations, or governance of an investee entity?**

If offshore VC funds are determined as originating from "Chinese (PRC) Investors", because the funds are established with funds from China, or are under the control of Chinese citizens, the VC funds must obtain investment approval through a strict review procedure. In addition, investment from Chinese (PRC) Investors is limited or prohibited in sectors having significant influence on politics, society, culture, the economy, or Taiwan's national security.

In the case of a listed target, if the investor intends to acquire 20% shares or more of the outstanding shares of a listed company within 50 days, a mandatory tender offer requirement will be triggered.

4) **Would an investor be required to undertake an antitrust analysis prior to investment? When would such a requirement be triggered?**

A "Merger" under Taiwan Fair Trade Act includes (i) merger; (ii) acquisition of more than one-third of the total voting shares of a company; (iii) acquisition of the whole or a major part of the business or assets of a company; (iv) the establishment of a Joint Venture (JV) company with another company; or (v) directly or indirectly controlling the business operations or the appointment or discharge of personnel of a company.

The investor must file with the authority, i.e., the Fair Trade Commission, for merger clearance if (i) the investment will result in holding one-third of the market share; (ii) the target has held one-quarter of the market share; or (iii) sales for the preceding fiscal year of the enterprises in the merger exceed the threshold, e.g., the sales of one of the enterprises in Taiwan exceed NTD 2 billion (approximately USD 66 million) and the sales of the other enterprise in Taiwan exceed NTD 15 billion (approximately USD 495 million), or the aggregate sales of all of the group companies of the parties to the merger worldwide exceed NTD 40 billion (approximately USD 1.3 billion), and the respective sales of at least two of which in Taiwan exceed NTD 2 billion (approximately USD 66 million).

5) **What are the preferred structures for investment in venture capital deals? What are the primary drivers for each of these structures?**

Typically, VC funds invest by acquiring shares, including ordinary shares or preferred shares. VC funds mainly participate in fundraising deals in the stage of Series-A or Series-B rounds. Some VC funds have workshops to help the founders build start-ups and to find a founder. Where the investment is made without controlling the business operations of the target, the preferred shares on dividend distribution and repayment of capital on liquidation without voting rights are used. In order to not trigger a required merger filing, VC funds acquire less than one-third of the total shares of a target.

Before August 2018, a private company was unable to issue convertible bonds. A start-up was thus unable to raise funds by issuing convertible bonds. However, after the amendment of Taiwan's Company Act in 2018, VC funds have an additional choice of the manner in which they invest in start-ups, but, so far, this has not been a popular investment in Taiwan.

6) <u>Is there any restriction on rights available to venture capital investors in public companies?</u>

No. According to Taiwan's Securities and Exchange Act and the relevant securities regulations, there is no restriction on rights available to VC investors in public companies. If an offshore VC fund desires to acquire no more than 10% of the shares of a public company, it is not necessary to obtain FIA approval.

In addition, if the investor intends to acquire 20% or more of the shares of a listed company within 50 days, a mandatory tender offer requirement will be triggered. An investor holding more than 10% of the total shares of a public company is defined as an "Insider" and such investor bears some obligations under the Securities and Exchange Act, such as restrictions on transfers and a disclosure obligation before a transfer.

7) <u>What protections are generally available to venture capital investors in your jurisdiction?</u>

There are protections available to minority shareholders, but there is no special law or regulation protecting VC investors' rights. In Taiwan, investors require the founders to sign a Shareholders' Agreement and include clauses for specified matters that can only be dealt with at a shareholders' meeting, or with investors' veto rights.

Statutory protections available to minority shareholders include, (a) the right to initiate a lawsuit to discharge a director who has committed any act resulting in material damages to the company or in serious violation of applicable laws and/or regulations; (b) a right to require the board of directors to call a shareholders' meeting; and (c) a right to file to the court for inspection of the company's business and property.

8) <u>Is warranty and indemnity insurance common in your jurisdiction? Are there any legal or practical challenges associated with obtaining such insurance?</u>

In Taiwan, warranty and indemnity insurance is not common. However, in recent years, we have seen some offshore investors, such as Japanese investors, arrange warranty and indemnity insurance when acquiring Taiwan targets. Based on our experience, warranty and indemnity insurance is used in high value transactions where the original shareholders (or founders) are exiting the company and the incoming investor would otherwise have to rely only on the personal guarantees of the original shareholders for performance of conditions under the transaction documents.

However, warranty and indemnity insurance is rare and not provided by some insurance companies in Taiwan. If such insurance is available, there are practical challenges in procuring the same, including the complicated evaluation process, e.g., due diligence and interview by insurance company, before the underwriting, and high premiums.

9) **What are common exit mechanisms adopted in venture capital transactions, and what, if any, are the risks or challenges associated with such exits?**

This usually includes exit through an initial public offering (**IPO**), and secondary buyout. In case of short-term investment, investors will request founders to include a put option clause or a drag-along right clause in an investment agreement or shareholders' agreement in order to ensure that they can exit smoothly.

The difficulties in achieving a successful IPO are discussed in our response below. A secondary buyout is a VC fund exit through the transfer of capital shares to another VC fund. As a VC fund, the buyer is familiar with nature of VC funds and the structure of the investment, which may minimize the time needed for the negotiations. Thus, recently, some VC funds have opted for secondary buyouts as the exit mechanism. However, as Taiwan local VC funds are mainly mid- and small-sized, whether or not secondary buyout is used as an exit mechanism depends on factors such as the transaction terms and the sectors in which the targets operate.

For put option rights or drag-along rights, investors and founders may include clauses in the transaction documents; however, the clauses may not be enforceable in certain circumstances. According to the principle of the free transfer of shares, unless provided otherwise by law, a party cannot be forced to transfer or to not transfer shares by any means, and so the founders only have a contractual obligation under such clauses. While investors can exercise a put option right or drag-along right against the founders, if the founders refuse to buy back the shares or to sell the shares to a third party along with the investor, the investors can only claim damages resulting from the contract breach, but cannot compel the founder to fulfill the obligation.

10) **Do investors typically opt for a public market exit via an IPO? Are there any specific public market challenges that need to be addressed?**

When making an investment, investors typically negotiate a public market sale via an IPO; however, an IPO is uncertain and depends on the business performance of the target company and on external factors, such as market conditions and the regulatory and political climates. Although investors often opt for public market exits via an IPO, in some cases, investors exit through a transfer of shares to a third party or by putting shares to the founders.

Key market challenges include:

1. Eligibility criteria for applying for a listing on the Taiwan Stock Exchange, including that the duration of corporate existence must be at least 3 years at the time the application for listing is filed; paid-in capital of not less than NT 600 million (approximately USD 19.88 million); profitability; and dispersion of share ownership.
2. Directors and shareholders holding 10% or more of the shares are prohibited from transferring or pledging shares during a lock-in period starting from the listing date (for at least 6 months).
3. Directors, supervisors, managers, and/or shareholders holding 10% or more of the shares (collectively, "Insiders") are restricted from transferring the shares to designated persons satisfying the qualifications prescribed by the FSC (Taiwan Financial Supervisory Commission).
4. Insiders must report to the FSC the shareholding contemplated for transfer prior to a transfer, the current shareholding upon acting as insiders, and the balance of owned shares to be submitted every month.

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THAILAND

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1) **In your jurisdiction, which sectors do venture capital funds typically invest in?**

In recent years, FinTech, E-Commerce Marketplaces, FoodTech and Restaurants have been attractive sectors for venture capital fund (**VCF**) investments in Thailand.

VCF investments in the HealthTech, MedTech, AgriTech, FoodTech and MARTech sectors in Thailand occur occasionally, but mostly involve VCFs currently engaging in the same line of business. The Government has encouraged firms in Thailand (including start-ups) to participate in these sectors, which are considered to be a strength in Thailand. Therefore, an increase in the number of VCF investments in those sectors may occur in the near future depending on the measures adopted by the Government, including tax incentives.

2) **Do venture capital funds require any approvals before investing in your jurisdiction?**

There are no specific approval requirements for VCF investments in Thailand. Each VCF needs to comply with general requirements under the laws governing each type of investment or transaction and, for VCFs established in Thailand, the laws governing corporate entities. These requirements are found in, among other regulations, the private company law, trust law, etc. For example, a trust established in Thailand for the purpose of venture capital investment must comply with regulations under the Trust for Transactions in Capital Markets Act B.E. 2550 (2007).

3) **Are there any legal limitations to an offshore venture capital fund acquiring control or influencing the business, operations, or governance of an investee entity?**

There are no specific restrictions on foreign VCFs acquiring control of or influencing the operations of a Thai private company. However, if the investment by an offshore VCF (including the other non-Thai investors) results in non-Thai nationals holding 50% or more of the share capital of an investee entity, the investee entity is considered a "foreign entity." Foreign entities/companies are prohibited or restricted from operating or engaging in certain business activities in Thailand pursuant to the Foreign Business Act B.E. 2542 (1999) (**FBA**) as amended, unless the permission is granted.

Other than the FBA, there are several regulations that impose more restrictive shareholding ratio requirements for foreigners, depending on the business sector and business activity, such as insurance businesses.

4) **Would an investor be required to undertake an antitrust analysis prior to investment? When would such a requirement be triggered?**

It is recommended that an antitrust analysis is made prior to the investment in a Thai company if the investment is considered a 'merger' as defined by the Trade Competition Act B.E. 2560 (2017) and such "merger" could result in the creation of a monopoly, a dominant position or substantially lessened competition as prescribed by the Trade Competition Commission (**TCC**).

The definition of "merger" under the Trade Competition Act includes an acquisition of all or part of the shares of another business operator for the purpose of controlling the business's administration policies, administration or management. The share acquisition is deemed "for the purpose of controlling business administration policies, administration or management" if, in the case of a private company or a non-listed public company, the acquired shares represent more than 50% of the total voting rights of another business operator. Whether (or not) such share acquisition constitutes a monopoly resulting in a business operator gaining a dominant position or results in substantially lessened competition will be determined according to certain criteria set out by the TCC under the relevant sub-regulations under the Trade Competition Act.

5) What are the preferred structures for investment in venture capital deals? What are the primary drivers for each of these structures?

During the past few years, almost all VCF investments have been made through acquiring preference shares of investee entities. The primary drivers for such approach are the preferential rights attached to the preference shares which include ranking in priority against ordinary shares on voting rights, dividend distribution and return of capital upon liquidation.

The Civil and Commercial Code of Thailand (**CCC**) which governs private companies does not allow for the issuance of convertible preference shares or direct conversion (either voluntary or compulsory) of preference shares into ordinary shares. Such conversions must occur indirectly through mechanisms currently permissible under the CCC (i.e., decreasing the registered capital represented by a VCFs preference shares and then increasing the registered capital by issuing ordinary shares to replace the VCFs preference shares). These mechanisms for conversion require more cooperation among the shareholders, more steps and the process is time consuming. As such, a convertible preference share approach may be less attractive to investors.

In addition to preference share structures, some VCF investments have been implemented through convertible note/debt structures. While the CCC prohibits the settlement of share prices by means of offsetting such share price with debts, an investor may opt to implement such convertible note/debt structures through the combination of loan and share acquisition structures by agreement. This would be as permitted by laws governing the terms and conditions agreed to between the parties for manual debt-to-equity swaps (i.e., the investee entity repays the loan debts and the investor concurrently uses such repaid amounts to reinvest in the investee entity in the form of a capital injection). The convertible note/debt structure is preferable for VCF investments at the seed round or pre-series A round (pending company valuation until the next round of funding).

6) Is there any restriction on rights available to venture capital investors in public companies?

There are no restrictions specified by law that prevent VCF investments in public companies. The laws and regulations for public companies (both listed and not listed companies) apply to all shareholders uniformly whether they are Thai or not.

However, investors should be aware that an acquisition which results in a VCF investor gaining 25% or more of the voting rights in a listed company will result in the investor having an obligation to conduct a mandatory tender offer.

7) What protections are generally available to venture capital investors in your jurisdiction?

Aside from the preferential rights provided by preference shares (e.g., preferential voting rights, higher priority dividend payments and return of the capital investment in the event of liquidation), VCFs can also request other rights or protections under the relevant transaction documents or other contractual agreements (e.g., anti-dilution provisions, non-competition or non-solicitor provisions for founders or majority shareholders, lock-up periods that restrict founders from selling their shares for a certain period after completion of the venture capital transaction). The enforcement of those rights or protections may be subject to certain limitations under the relevant laws governing such matters or at a court's sole discretion. For example, the validity of non-competition provisions may be limited in terms of geography, business activity and the time period specified in the non-competition clause, as determined appropriate by a Thai court.

VCFs usually request minority shareholders protection when investments result in an acquisition of no more than 15-20% of a company's voting rights in an investee entity. These protections are generally in the form of 'reserved matters with respect to board of directors' and shareholders' meetings that require an affirmative vote from the VCF or require that the VCF be present at such meetings in order to constitute a quorum. Such reserved matters are permissible under Thai law.

In addition, statutory protections available to minority shareholders include, (a) the right to submit a case to the court in the case of misconduct by the directors; (b) the right to submit a petition to the court for cancelling any resolutions passed at improper general meetings; and (c) the right to subscribe to newly issued shares (preemptive rights) to maintain a proportionate share of the ownership of a company.

8) Is warranty and indemnity insurance common in your jurisdiction? Are there any legal or practical challenges associated with obtaining such insurance?

Traditionally in Thailand, investors generally rely on personal warranties and contractual indemnities of the founders (and, in some cases, the investee entity) to claim damages resulting from a breach of representations and warranties made by the founders and/or the investee entity, and for any nonperformance of the obligations by the founders and/or the investee entity under the transaction documents.

In recent years, investors are increasingly seeking to obtain warranty and indemnity insurance. However, insurers and brokers offering this kind of insurance are rare in Thailand. In addition, the coverage amount of such insurance can affect the cost of personal warranties and may result in lengthy negotiations on the terms of the insurance policy. This, in turn, can result in significant delays in closing the main transaction.

9) What are common exit mechanisms adopted in venture capital transactions, and what, if any, are the risks or challenges associated with such exits?

Exit mechanisms in Thailand are very common and are like those available in typical venture capital transactions in other jurisdictions. Exit mechanisms include an exit through an initial public offering (IPO), or through a put option requiring the founders/existing shareholders to buy the investors' shares in the case of deadlock or default or non-performance by the founders or a start-up company.

If the founders are unable to purchase the investors' shares back for any reason, the investors may request that the founders find a third party to purchase the investors' shares or they may sell their shares to any third-party buyer without any restriction (e.g., sale restrictions to company's competitors, rights of first refusal, or tag-along rights). In addition, investors may require the founders, by contractual obligations, to indemnify the investors for the difference in sale price if such amounts paid by the third-party buyer is lower than the put option price, or any other agreed amount that would have been paid by the founders if the founders had honored the terms under the transaction documents.

The risk or challenge associated with the exit mechanisms discussed above include, in the case of an IPO, the investee entity's post-transaction performance being poor and other qualifications for the IPO not being met (further discussion below). We have not encountered any challenges in exit mechanisms through put options requiring the founders to buy the investor shares or sales of shares to third-party purchasers. Note that there is no Thai Supreme Court precedent on the enforcement of put options against the founders.

Note that a private company in Thailand is not permitted to engage in share buybacks.

10) Do investors typically opt for a public market exit via an IPO? Are there any specific public market challenges that need to be addressed?

Exits via IPOs have never occurred in Thailand, although they are an available exit mechanism. The Stock Exchange of Thailand (**SET**) has started a platform to support start-ups in the early stages of operation and to facilitate their entry into the Market for Alternative Investments (MAI).

The SET requires companies to manage their finances with transparency. Start-ups that are not properly established and that do not adhere to the requirements as stipulated by the SET, may experience significant challenges entering the market.

Please see the listing criteria as below.
https://www.set.or.th/en/regulations/simplified_regulations/common_shares_p1.html

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TURKEY

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1) In your jurisdiction, which sectors do venture capital funds typically invest in?

In recent years, the sectors which attracted the most venture capital in Turkey have been (i) energy, due to Turkey's sizeable energy demand; (ii) technology (e.g., e-commerce, internet and mobile services), due to many early-stage investments by financial investors into smaller entities; and (iii) manufacturing and services (e.g., food and beverages, chemistry, wholesale and retail trade, and telecommunications).

2) Do venture capital funds require any approvals before investing in your jurisdiction?

International treaties, the Foreign Direct Investment Law numbered 4875 (**FDI Law**), and the Regulation on the Implementation of the FDI Law are the main legal sources governing foreign direct investments in Turkey. The FDI Law, which entered into force on July 17, 2003, introduced extensive changes in favor of foreign investors by abolishing the approval system and introducing a more liberal system based on the principles of equal treatment between foreign and domestic investments. Therefore, foreign investments are no longer subject to any governmental approval. Under the FDI Law, investors are only required to notify the Ministry of Industry and Technology's (**MoIT**) General Directorate of Incentive Implementation and Foreign Investment (**General Directorate of Foreign Investment**) of certain matters (e.g., the company's activities or any change in the shareholding structure or share transfer) through an online platform.

In general, mergers and acquisitions are not regulated by governmental bodies, except for those concerning companies operating in regulated sectors. Sectors such as energy, telecommunications, banking, financial services and insurance are regulated by specific legislation and are subject to supervision of certain governmental institutions. Therefore, the parties to M&A deals involving companies operating in regulated sectors may need to obtain certain approvals and clearances from relevant government agencies. Although not exhaustive, some of the authorities regulating specific industries – and whose approval may therefore need to be sought in M&A deals – are as follows:

a. the Energy Markets Regulatory Authority (EMRA) for the energy sector;
b. the Banking Regulation and Supervision Agency (BRSA) for the banking sector;
c. the Undersecretariat of Treasury (UoT) for the insurance sector;
d. the Information and Communication Technologies Authority (ICTA) for the telecommunications sector; and
e. the General Directorate of Mining Affairs (GDMA) for the mining sector.

The Turkish Competition Authority (**TCA**) is also relevant in M&A deals if the turnovers of the transaction parties exceed certain thresholds. Please refer to Question 4 below for further details.

Finally, parties to the deal usually have to complete certain procedural steps with the relevant trade registry and the Turkish Ministry of Trade (**MoT**) for registration of governance actions. Appointment of members of the board of directors, amendments to company articles of association, and similar corporate actions need to be registered with the relevant trade registry in order to complete and register the governance processes.

3) Are there any legal limitations to an offshore venture capital fund acquiring control or influencing the business, operations, or governance of an investee entity?

Cross-border transactions are not subject to any special legal requirements. However, certain restrictions apply to foreign investments in strategic sectors. For example, if the acquirer is a foreign party and the transaction involves the transfer of any real property, approval from the relevant regulators may be required. Although any acquirer where more than 50% of which is controlled by foreign shareholders can acquire title to real estate or rights in rem (property rights other than ownership) in Turkey, there are restrictions such as (among others) real estate acquisition being listed among the Turkish company's purposes and within its scope (as stated in the articles of association). Further, legal entities having at least 50% foreign shareholding must notify the government when they acquire real property in Turkey. In addition, for certain strategic sectors, the following restrictions apply:

a. For media service providers, foreign shareholders may not have more than 50% of the registered capital. In addition, foreign persons may not be shareholders of more than two media service providers as per Article 19(f) of the Law on Establishment and Broadcasting Services of Radios and Televisions numbered 6112;
b. For civil commercial aviation operators, the majority of the shareholders must be Turkish nationals as per Article 9 of the Commercial Air Transportation Regulation;
c. For the purchase of real estate in restricted military areas, military security zones, or strategic zones, further requirements may apply as per the Land Registry Law numbered 2644; and
d. For private education institutions, foreign investors may not hold any shares in private education institutions pursuant to the Law on Private Education Institutions numbered 5580.

4) Would an investor be required to undertake an antitrust analysis prior to investment? When would such a requirement be triggered?

Transactions exceeding certain thresholds established in the Communiqué Regarding Mergers and Acquisitions Requiring the TCA's Approval require the approval of the TCA prior to the consummation of the deal. A transaction is subject to the approval of the TCA prior to closing of the transaction if either of the following thresholds are met:

a. The total turnover of the transaction parties in Turkey exceeds TL 100 million (approximately USD 15,490,190) and the turnover of at least two of the transaction parties in Turkey exceed TL 30 million (approximately USD 4,647,057) each, or
b. The asset or activity is subject to acquisition in the transactions and at least one of the parties of the merger transactions have a turnover in Turkey exceeding TL 30 million (approximately USD 4,647,057) and the other party of the transaction has a global turnover exceeding TL 500 million (approximately USD 77,450,950).

5) What are the preferred structures for investment in venture capital deals? What are the primary drivers for each of these structures?

Venture capital investing, i.e., investing in early-stage and start-up businesses, has been on the rise in Turkey in recent years. The main strategy underlying the concept of venture capital is to acquire shares in newly formed or undervalued companies and exit from portfolio companies by selling shares through IPOs, private placements, or individual sales. The number of venture capital and angel investment deals has risen dramatically in the last few years making up almost 80% of all financial investor deals in 2019, particularly in the technology, internet and mobile services sectors, which made up around 30% of the total number of deals. Nonetheless, start-ups have very much become a trend in Turkey in recent years. With more and more business accelerators and incubators arriving on the Turkish start-up scene, this trend is expected to continue to grow in the near future, which should increase both the number and volume of investments made by venture capital firms and angel investors.

Investors may establish themselves in Turkey through acquisition of a Turkish company, which may be in the form of different company types depending on the necessity of the business. The most common types of capital companies used are joint-stock companies (**JSC**) and limited liability partnerships (**LLP**). The liability of shareholders of both JSCs and LLPs is limited to their capital contribution, save for potential secondary liability as to outstanding and unpaid public debts of the company. JSCs are better suited for large operations since the legal framework for the corporate governance of JSCs is more developed and more flexible compared to other business forms. Holding companies, telecoms companies, banks, financial institutions, intermediary institutions and insurance companies must be incorporated as JSCs. Also, only JSCs can make a public offering. One advantage of LLPs is that their corporate structure and documentation are well suited to reflect the parties' commercial understanding. For example, strict share transfer restrictions, ancillary tag-along rights and drag-along rights may only be included in an LLP's articles of association, which becomes enforceable vis-á-vis third parties.

6) Is there any restriction on rights available to venture capital investors in public companies?

Turkish Capital Markets Board (TCMB) regulations apply alike to local and foreign investors regardless of their domicile. As such, publicly held companies in Turkey can be 100% foreign owned with the exception of certain businesses (e.g., aviation or broadcasting companies), as detailed under Question 3 above. In addition, according to the TCMB legislation, in the event of the acquisition of shares leading to a change of control in the listed company (i.e., the acquisition of more than 50% of the shares or voting rights or the right to nominate a majority of the board), the buyer is required to launch a mandatory tender offer to the remaining shareholders. Also, as a general principle, publicly held companies are required to disclose to the public any inside information relating to transactions or events that may influence the value of their shares or investment decisions of investors. In any case, certain changes in share ownership or management control must be publicly disclosed by investors (e.g., any direct or indirect acquisition of 5%, 10%, 15%, 20%, 25%, 33%, 50%, 67% or 95% or more of the share capital or voting rights).

7) What protections are generally available to venture capital investors in your jurisdiction?

As for contractual protections; there are no mandatory representations, warranties or indemnities to be given by the parties to a corporate reorganization under Turkish law. With the exception of intra-group reorganizations, it is common to obtain certain representations, warranties or indemnities from the parties to a corporate reorganization. Special provisions may also be inserted to the share purchase agreement, such as a break-up fee if one of the parties walks away from the deal without any valid grounds. There is no specific requirement for break-up fees to be enforceable and the parties may contractually agree on and customize break-up fee provisions. Aside from standard contractual protections, venture capital investors may have board appointment or board nomination privileges attached to the shares they hold, which are usually set out in the shareholders' agreements and the articles of association of the target. It is also common for them to have veto rights over certain matters regarding the management of the company.

Moreover, there are certain protections available to minority shareholders under Turkish law. A shareholder or a group of shareholders owning shares of at least 10% (in publicly held companies: 5%) of the share capital of a privately held company may enjoy the minority shareholders' rights granted under the TCC. The aforementioned 10% threshold may be decreased by the articles of association (**AoA**) of a company. The following minority rights are regulated under the TCC: (i) postponement of the financial statement discussions (Article 420); (ii) appointment of an independent auditor (Article 438); (iii) request for a general assembly of shareholders (**GA**) meeting and addition of an item to the meeting agenda (Article 411-412); (iv) rights as to settlement and release of directors, auditors, and incorporators with respect to the incorporation and capital increase of a company (Article 559); (v) right to request the dissolution of a company (Article 531); (vi) right to request issuance of share certificates (Article 486/3); (vii) right to request the replacement of the auditor (Article 399/4(b)); and (viii) veto rights in GA meetings (Article 421).

8) Is warranty and indemnity insurance common in your jurisdiction? Are there any legal or practical challenges associated with obtaining such insurance?

Warranty and indemnity insurance (**W&I Insurance**) is relatively new to the Turkish market, and the number of closed deals involving W&I Insurance is still significantly low. It is a tool that is relatively more appealing to individual sellers and financial investors that have not been fully involved in the day-to-day operations of the target and are not willing to be held accountable vis-á-vis the buyer going forward. Recent policies are mostly taken out by non-Turkish deal parties through non-Turkish insurance companies. One major reason why is the lack of a specific legal framework surrounding W&I Insurance. Since W&I Insurance is not among the insurance categories specified under Turkish legislation, the only option for Turkish insurance companies for now is to obtain the approval of the Directorate General of Insurance to issue W&I Insurance policies within the scope of one of the general categories specified in their operation licenses (such as surety, general liability, or financial losses). Very few Turkish insurance companies have officially started to get the relevant authority's approval for the product.

9) What are common exit mechanisms adopted in venture capital transactions, and what, if any, are the risks or challenges associated with such exits?

The most common form of exit is a trade sale. However, there have been a number of IPOs in the previous years. Trade sales are advantageous because they are relatively easy to arrange. On the other hand, IPOs are likely to yield better proceeds for the investor but are more complicated to launch.

Should the investment fail to generate the expected revenues, investors may pursue an exit plan through put options, if they were negotiated in the shareholders' agreement or the share purchase agreement. The investor may also try to negotiate a share sale deal with the company's existing shareholders or other prospective shareholders. Minority shareholders mostly have tag/drag-along rights under the shareholders agreement. It would be wise to negotiate share transfer provisions such as put and call options or tag/drag-along rights in the shareholders' agreement by specifying the detailed conditions to secure a safe exit from the company. Investors may also acquire preferred shares that offer privileges on dividend distribution and which benefit from the profits at a maximum. Nomination of the directors and voting privileges as well as veto rights are also very favorable.

In addition, according to the TCMB legislation, in the event of the acquisition of shares leading to a change of control in the listed company (i.e., the acquisition of more than 50% of the shares or voting rights or the right to nominate a majority of the board), the buyer is required to launch a mandatory tender offer for the remaining shareholders. Also, as a general rule, shareholders holding a minimum of 10% of a company's share capital (5% for public companies) are deemed minority shareholders and benefit from a number of minority rights (e.g., may prevent the release of board members and request liquidation of the company).

As for buybacks, the TCC enables JSCs to acquire their own shares provided that such acquisition does not exceed 10% of the JSC's share capital. In order to do so, the GA should provide authorization to the board of directors; the board of directors will determine the amount to be paid for the acquisition of the shares having regard to the minimum and maximum amounts provided in the authorization. The purchase price should be paid from the distributable reserves of the JSC. The acquisition consent granted to the board of directors by the shareholders cannot exceed five years and such a decision should include nominal values of the shares together with upper and lower limits to be paid or those to be acquired. Only shares that are fully paid-in can be acquired. The foregoing rules also apply to the acquisition of a parent company's shares by its subsidiary.

10) <u>Do investors typically opt for a public market exit via an IPO? Are there any specific public market challenges that need to be addressed?</u>

The challenges faced in financing may cause Turkish entities to conduct IPOs or to conclude partnerships, especially with foreign investors. As noted in Question 5 above, only companies formed as a JSC may make a public offering. Please also refer to Question 9 above for further information regarding the IPO practice in Turkey.

The approval of the TCMB shall be sought in order to launch an IPO. A domestic prospectus (*izahname*) shall be prepared for the approval of the TCMB as well. The share capital of the company to be IPOed should be fully paid in and the shares should be freely transferable. It is mandatory to retain a brokerage house (*aracı kurum*) for the offering. Moreover, the AoA of the company to be IPOed shall be adapted to the regulations of the TCMB. If the IPO will be launched for the shares to be issued as a result of a share capital increase (instead of offering the existing shares), the GA should resolve that the statutory pre-emption right of the existing shareholders will be partially or entirely limited.

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UNITED ARAB EMIRATES

Al Tamimi & Company

1) In your jurisdiction, which sectors do venture capital funds typically invest in?

Venture capital funds in the United Arab Emirates (UAE) are primarily focused on technology and technology-enabled companies. Historically, there has been a heavy focus on localized versions of global e-commerce and urban mobility companies as well as digital content players offering Arabic language content. In the past year or two, there has been an increased interest in HealthTech (with COVID-19 driving a lot of the interest), FinTech, FoodTech, logistics and last-mile, and EdTech.

2) Do venture capital funds require any approvals before investing in your jurisdiction?

The promotion of foreign funds in the UAE would require the registration of the foreign fund with the UAE Securities and Commodities Authority and the appointment of a locally licensed promoter. However, if the foreign venture capital fund is intended to invest inside the UAE, it would not require any approvals, unless the investment involves a regulated sector (e.g., banking, energy, telecommunications, etc.), in which case the approval of the sector regulator may be required. The investment in the capital market is subject to trading conditions of each security, but generally, it is permitted.

The UAE is somewhat unique in that it contains multiple free zones, the most popular of which are financial free zones and are the Dubai International Financial Centre (DIFC) and the Abu Dhabi Global Market (ADGM), which come with their own financial regulators.

Onshore in the UAE, overseeing and regulating financial activities is generally the responsibility of the central bank and the securities and commodities authority (SCA). In the DIFC and the ADGM however, financial regulatory oversight is the responsibility of the Dubai Financial Services Authority (DFSA) and the Financial Services Regulatory Authority (FSRA) respectively.

3) Are there any legal limitations to an offshore venture capital fund acquiring control or influencing the business, operations, or governance of an investee entity?

There are strict foreign ownership restrictions applicable to companies incorporated in the UAE, including federal law stipulating that companies incorporated in the UAE must maintain a minimum 51% UAE ownership at all times. Nationals of other Gulf Co-operation Council (GCC) countries do have expanded investment privileges, but investors with nationalities outside the GCC need to find an Emirati national or company to participate as a majority venture partner. Approvals may also be required for investments in companies involved in certain regulated sectors.

With that said, venture capital funds in the region rarely if ever invest in onshore UAE companies and will almost always insist on investing in companies incorporated in a permissive common law jurisdiction. Founders seeking to raise venture capital therefore invariably establish their main corporate vehicle (in which the IP sits and which consolidates all subsidiary operating enterprises) in such a jurisdiction. Sometimes these will include offshore centers like Mauritius, the Cayman Islands or BVI and increasingly, such companies will be formed in the Dubai International Financial Centre (DIFC) or the Abu Dhabi Global Market (ADGM) which are both financial free zones adopting laws that are based on English law.

4) Would an investor be required to undertake an antitrust analysis prior to investment? When would such a requirement be triggered?

While it is not common for a venture capital transaction to trigger competition law notification requirements if a venture capital fund is planning to procure either horizontal or vertical integration activities through its investment in horizontally or vertically related portfolio companies, it would be well-advised to undertake an antitrust analysis to understand the requirements of the local law in the jurisdictions in which its portfolio companies (or their group entities) are domiciled. Additionally, if a venture capital fund has a board seat or management rights in a portfolio company, the VC investor would be well advised to procure that its director(s) requires the company to undertake an antitrust analysis if, for example, the portfolio company is planning to acquire a competing business.

The UAE Competition Law provides that notification is required where a proposed “economic concentration” may affect competition in a relevant market, particularly to create or enhance a dominant position. Notification is required where any party to the transaction has a market share of more than 40% or the combined market share of all parties to the transaction is more than 40%.

The law does allow for certain exemptions however, such as sector-based exemptions and exemptions for SMEs. To benefit from the exemption for SMEs, the UAE law lays down criteria that must be fulfilled for a company to qualify as an SME, and the criteria is based on whether the entity operates in the trading, manufacturing/industry, or service sectors. With respect to the trade and services sectors, a company will be considered an SME if it has 200 or fewer employees and if its annual revenues do not exceed AED 200 million. For the industry sectors, the thresholds are 250 employees and AED 250 million. VC investors should note these thresholds as, in the early life of a tech start-up, the exemptions may apply but if the portfolio company scales beyond these limits, it will eventually be subject to the competition law regime.

5) What are the preferred structures for investment in venture capital deals? What are the primary drivers for each of these structures?

The preferred structure typically depends on the growth stage of the investee company and the fundraising stage it has reached. Seed stage deals are normally undertaken on the simple agreement for future equity (“SAFE”) or keep it simple security (“KISS”) notes, but convertible loan note agreements are sometimes used as well. Occasionally, the first funding round is an equity round for ‘friends and family’ but without a shareholder agreement and this is followed by a convertible ‘bridge’ round to take the company to its Series A. The drivers behind which of these instruments is used tends to be the preference of the company or, more often, the lead investor in the round. The SAFE note is probably the most ubiquitously used convertible form in the UAE although, unfortunately, there are a few different forms of localized SAFE notes in circulation in our region. There is also no universal adoption in the UAE of the post-money version of the SAFE so both post-money and pre-money versions are used. Occasionally, a venture fund in the region will insist on the post-money form but many founders prefer the pre-money version and will try to raise on this form in the first instance.

As with most other markets, Series A rounds tend to be priced deals with preference shares issued to the Series A investor and with earlier convertible investors typically converting into the same share class as the Series A. Governance and participation rights tend to be similar to UK- or US-style VC deals. The same can be said for Series B and Series C growth rounds.

Aside from foreign ownership concerns, venture funds also favor financial free zones (such as DIFC and ADGM) because the typical investor rights in a venture deal are not capable of implementation or enforcement in relation to onshore or non-common-law free zones in the UAE. For example, separate classes of ordinary and preferred shares are not possible to implement in UAE companies. Additionally, any right that involves an advance agreement to issue or transfer shares (anti-dilution, drag rights, tag rights, ROFR rights, etc.) would not be enforceable.

6) Is there any restriction on rights available to venture capital investors in public companies?

Each publicly listed security in the UAE has its own trading conditions but generally, venture fund investments into locally listed companies is permitted.

7) What protections are generally available to venture capital investors in your jurisdiction?

Venture capital funds investing in companies incorporated in the common law financial free zones (such as ADGM and DIFC) enjoy the similar protections afforded to investors under other common law jurisdictions such as the UK, the Cayman Islands, or the British Virgin Islands.

Typically, protections are contractual in nature and would be enshrined in the Shareholders' Agreement. These include protections relating to governance, economic participation, share transfers, etc. In the UAE, it is typical for VC funds to negotiate a typical suite of reserved matters at both board and shareholder level. Lead investors in priced rounds tend to get a board seat. Many regional VCs also now tend to favor a board with independent directors.

In terms of share transfer, contractual pre-emptions on the issue of new shares by the company as well as ROFO and ROFR rights on the transfer of shares by certain shareholders are standard. Investor-friendly claw-back/vesting provisions with respect to the founding shareholder's share are also normal to see although anecdotally we do not see these all the time. With regard to economics, venture capital funds in the UAE will typically request liquidation preferences and anti-dilution protection provision clauses similar to those seen on US or UK deals.

8) Is warranty and indemnity insurance common in your jurisdiction? Are there any legal or practical challenges associated with obtaining such insurance?

It is not common for companies to have warranty and indemnity insurance in venture capital transactions, although such insurance may be seen at exit. There aren't any legal or practical challenges associated with obtaining such insurance in the UAE.

9) What are common exit mechanisms adopted in venture capital transactions, and what, if any, are the risks or challenges associated with such exits?

There are three possible exit mechanisms available for companies in the UAE: a) a trade sale in which a controlling interest in the company, or a substantial portion of its assets, are sold; b) secondary buyouts where the venture capital investor sells its shares to other investors and/or the founders; or c) an initial public offering on a stock exchange (IPO).

Currently, the most common exit mechanisms in the UAE are trade sales and secondary buyouts, with exits by venture-backed companies through an IPO on local markets being quite rare. On the other hand, there have been a few examples of companies financed by VC funds in the region seeking to exit via a US or UK IPO.

10) Do investors typically opt for a public market exit via an IPO? Are there any specific public market challenges that need to be addressed?

As mentioned above, exit by way of an IPO is rather rare for companies in the UAE. Trade sales and secondary sales tend to be much more common. This is partly because a trade sale is regarded as being a lower-friction route but also because liquidity and volumes in the regional capital markets can be low.

Additionally, the listing and disclosure rules set by the SCA, and restrictions on foreign ownership may kick in depending on the listed business activity and the Emirate in which the company is incorporated. Also, rights issues by public companies can be quite time-consuming in the UAE for various regulatory reasons and this does serve as a disincentive to companies would like to list in order to access the capital markets for expansion capital.

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UNITED STATES

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1) In your jurisdiction, which sectors do venture capital funds typically invest in?

Venture capital funds invest in a wide array of sectors and industries throughout the United States. According to the National Venture Capital Association, the venture industry deployed more than USD 130 billion in U.S.-based companies during 2019. The primary sector in the U.S. venture capital landscape is software, which accounted for approximately 34% of the total capital invested by venture capital funds in 2019. Additional industries that receive significant investments from venture capital funds in the U.S. are life sciences and business products and services. During 2020, the COVID-19 pandemic has further shifted focus within the venture capital space to the pharma and biotech industry within the life sciences sector, particularly companies focused on the discovery, development and production of vaccines, antivirals, and antibacterials, as well as HealthTech, telehealth and other healthcare companies.

Sources:

- *2020 NVCA Yearbook (https://nvca.org/wp-content/uploads/2020/04/NVCA-2020-Yearbook.pdf*
- *Pitchbook-NVCA Venture Monitor – Q3 2020 (https://pitchbook.com/news/reports/q3-2020-pitchbook-nvca-venture-monitor)*

2) Do venture capital funds require any approvals before investing in your jurisdiction?

While there are no specific third-party approvals that are required for a venture capital fund to invest in the United States, many funds have an internal investment committee that will need to authorize the transaction on behalf of the fund. Additionally, both the fund and the company in which the fund is looking to invest are subject to U.S. federal and state securities laws. At the federal level, the U.S. Securities and Exchange Commission (SEC) is the primary regulatory body. In connection with a venture capital transaction, the company receiving the investment generally relies on certain registration exemptions under the rules and regulations of the SEC, including the Securities Act of 1933, to qualify the issuance of the securities to the venture capital fund. Accordingly, the venture capital fund may be required to provide certain representations to the company with respect to the fund's ability to participate in the financing round, such as "accredited investor" and "bad actor" status. Each state also has separate "blue sky" registration requirements that may necessitate further representations by the venture capital fund in order to effectuate the investment. As a result, a venture capital fund should consult with its legal advisors prior to investing in the United States in order to understand the applicable federal and state requirements and restrictions that may apply to a particular transaction.

3) Are there any legal limitations to an offshore venture capital fund acquiring control or influencing the business, operations, or governance of an investee entity?

The Committee on Foreign Investment in the United States ("CFIUS") is an interagency committee of the United States Government authorized to review certain direct or indirect foreign investments in the United States to determine if they may adversely affect U.S. national security. CFIUS may make recommendations to the U.S. President on whether to block a proposed transaction involving a foreign investor. CFIUS and the U.S. President also have authority to force the unwinding of any transaction that was subject to CFIUS jurisdiction but not reviewed. As illustrated by several recent CFIUS actions, the unwinding order can be made many years after the closing of the investment and there is no statute of limitations.

Under the Foreign Investment Risk Review Modernization Act of 2018 ("FIRRMA") and new regulations that took effect in February 2020, CFIUS now has expanded authority to review controlling and certain non-controlling foreign investments in U.S. businesses engaged in producing, designing, testing, manufacturing, fabricating, or developing "critical technologies." In addition, a mandatory filing is now required for foreign investments in U.S. businesses that own, operate, manufacture, supply or service "critical infrastructure," or maintain or collect sensitive personal data of U.S. citizens. Finally, certain foreign investments in real estate, including leases and concessions, located in or near areas such as military installations, ports, and airports, as defined in new CFIUS regulations, may also be subject to CFIUS jurisdiction and review. In all of these scenarios, even investments that are as small as a few percentage points can be sufficient to warrant or mandate a filing of a declaration or notice with CFIUS.

FIRRMA greatly expanded the investigation and enforcement powers of CFIUS, and CFIUS Office of Investigation staff are now actively investigating transactions that were never notified to CFIUS. Failure to file with CFIUS when a filing is mandatory can result in civil penalties up to the total value of the investment. Both the seller and investor are jointly liable for such penalties.

In addition to the CFIUS review process, there are several statutes that require information gathering and disclosure relating to foreign investment in domestic companies. The International Investment and Trade in Services Survey Act of 1976 authorizes the U.S. President to collect information on international investments and U.S. foreign trade.

The Foreign Direct Investment and International Financial Data Improvements Act of 1990 directs the Bureau of the Census and the Bureau of Economic Analysis of the Department of Commerce to exchange business data obtained under the census that is relevant to the International Investment and Trade in Services Survey Act. Many of these surveys and filings are now mandatory and companies and investors that fail to file can face civil and criminal penalties.

4) Would an investor be required to undertake an antitrust analysis prior to investment? When would such a requirement be triggered?

The Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the "HSR Act") requires that certain acquisitions of equity or assets be reported to both the Department of Justice (the "DOJ") and the Federal Trade Commission (the "FTC") before consummation. The transaction cannot be consummated for a certain period of time following notification (typically 30 days (15 days in the case of a cash tender offer) but may be less if early termination of the waiting period is requested and granted). In instances where a proposed investment has the potential for adverse competitive effects under the antitrust laws, the DOJ or the FTC may further delay consummation while they conduct an investigation, negotiate procompetitive divestitures, or challenge the investment in federal court.

Notification to the DOJ and FTC is required under the HSR Act if: (i) either the acquiring person or the acquired person is engaged in commerce in the U.S. (the "Commerce Test"), (ii) if the parties to the transaction have total assets or net sales in excess of certain dollar thresholds (the "Size of the Parties Test"), and (iii) the acquiring person will hold voting securities or assets of the acquired person valued in excess of certain dollar thresholds (the "Size of Transaction Test"). The Size of the Parties Test and the Size of Transaction Test are subject to annual adjustment, typically in the first calendar quarter (for 2020, the Size of Parties Test is USD 18.8 million and USD 188 million, respectively, and the Size of Transaction Test is USD 94 million). In a transaction involving consideration in excess of USD 376 million (the adjusted figure for 2020), the reporting requirements of the HSR Act apply if the Commerce Test alone is met, and the Size of the Parties test is disregarded.

Each person required to provide notification under the HSR Act must submit separate notification forms and accompanying documents to both the FTC and the DOJ. Typically, notification is filed after the parties have agreed to the basic terms of the transaction and have memorialized their understanding in a letter of intent or definitive agreement. The acquiring person in the transaction is required to pay a filing fee. The filing fee ranges from USD 45,000 to USD 280,000, depending on the value of the transaction.

A civil penalty of over USD 43,000 may be imposed for each day that a person fails to substantially comply with the HSR Act.

In addition, even if an HSR filing is not required, the antitrust laws may limit the investor's activities pre- and post-consummation to the extent the investor is an actual or potential competitor of the target company. In particular, the antitrust laws prohibit agreements between competing firms relating to competitively sensitive topics such as prices, costs, margins, business strategy, and wages. During the due diligence phase, a competitor-investor generally should not review the target company's competitively sensitive information because having such information could facilitate collusion between competing firms. Similarly, unless the competitor-investor acquires legal control of the target company post-consummation, firewalls will need to be erected to prevent the competitor-investor from reviewing the target company's competitively sensitive information. The competitor-investor still may be able to review high-level, aggregated information, and may be able to rely on clean teams and third parties to provide a high-level assessment regarding the potential investment or the target company's performance.

Relatedly, the antitrust laws also prohibit so-called "interlocking directorates," where individuals serve on the boards for competing firms. Specifically, under Section 8 of the Clayton Act, a person may not serve as a director or board-appointed officer on two or more legally separate corporations if (1) the combined capital, surplus, and undivided profits of each of the corporations exceeds an inflation-adjusted multiple of USD 10 million; (2) each corporation is engaged in whole or in part in U.S. commerce; and (3) the corporations are "by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the antitrust laws."

5) What are the preferred structures for investment in venture capital deals? What are the primary drivers for each of these structures?

Venture capital funds are typically structured as limited partnerships in the U.S. In the limited partnership structure, investors contributing capital to the funds becoming limited partners. The general partner is often a corporation or other entity created specifically to manage the fund. The primary drivers for this structure include:

- As long as the venture capital fund's investors (limited partners) are not actively engaged in the management or operations of the fund, the liability of the limited partners is limited to the amount of capital contributed or agreed to be contributed; and
- The losses and gains of the fund flow through to the partners, avoiding the double-taxation associated with corporations.

With respect to individual investments made by venture capital funds in portfolio companies, the venture capital funds typically receive equity securities in the form of preferred shares in exchange for their investment. Although early-stage funds may participate in "seed" stage investing which may involve simple agreements for future equity (SAFE) instruments or convertible promissory notes, most of the total dollar value of venture capital comes from institutional investors in companies that have already raised one or more rounds of seed capital.

The typical venture capital fund investment in a series stage company (e.g., Series A, Series B, etc.) will receive preferred equity for the venture capital fund's investment. Holders of preferred shares typically have rights that are superior to holders of common stock. These rights are negotiated and vary accordingly, but will include:

- A liquidation preference that is senior to the rights of the common stockholders to receive distributions of assets in the event of the company's liquidation. This is a multiple of the original investment amount and is returned to the investor before the common stockholders receive any distribution in a liquidation (before the COVID-19 coronavirus pandemic, the liquidation preference multiple for most early-stage deals was typically x1. It remains to be seen whether this will change in the future as funds seek more protections for the increased risks they may perceive in the current macroeconomic downturn). In addition to the liquidation preference, the investor may also participate in the distribution of the remaining proceeds on an as-converted-to-common-stock basis alongside the common stockholders (participating preferred stock). This participating feature can be capped at x1, x2, x3 and so on. Before the COVID-19 coronavirus pandemic, most VCs received non-participating preferred stock (where there is no participation after the liquidation preference is satisfied. Again, it remains to be seen whether this will change in the future in the current macroeconomic downturn).
- Price-based anti-dilution protection (typically broad-based weighted average anti-dilution).
- A seat on the company's board of directors, or the right to be present at meetings of the board of directors.
- Veto rights over certain company actions, including over:
  - raising subsequent rounds of equity financing or debt;
  - amending the charter or bylaws of the company;
  - selling, merging or dissolving the company.

6) Is there any restriction on rights available to venture capital investors in public companies?

Venture capital investors are not restricted from investing in public companies *per se* but based on the typical venture capital fund's investment objectives and targeted internal rate of return, venture capital funds tend to invest in companies that are in earlier stages (i.e., before a company's initial public offering). If a venture capital fund or investor seeks to invest in a public company, the fund or investor will of course remain subject to the vast legal and regulatory framework governing public companies and their investors (e.g., Securities Exchange Act of 1934, Securities Act of 1933, etc.)

A recent trend has been for the U.S. government (more specifically, the Committee on Foreign Investment in the U.S. (CFIUS)) to look much more closely at foreign ownership of companies in sensitive industries or companies with critical technology or sensitive personal data. Such companies are often squarely within the investment focus of VC funds.

Depending on the level of non-U.S. ownership of a venture capital fund and whether non-U.S. parties manage a VC fund, transactions may require filings with the U.S. government, with the risk that the U.S. government will disapprove transactions or cause prior transactions to be unwound. In response, VC fund documents often give the fund manager/general partner a general authority to take steps to mitigate CFIUS risk. This is a developing area, with future regulatory (and political) developments likely to affect industry practices.

7) What protections are generally available to venture capital investors in your jurisdiction?

Venture capital investors are primarily protected through the contractual investment documentation. The principal legal documents for a venture transaction typically include:

- The amended and restated certificate of incorporation of the company.
- The stock purchase agreement.
- The voting agreement.
- The investors' rights agreement.

- The right of first refusal and co-sale right agreement.

The stock purchase agreement typically includes representations and warranties by the company to the investor. However, an early-stage start-up is unlikely to have many assets, and the investors will be reluctant to pursue an action against their own portfolio company and cause its value to decrease. Instead, the representations and warranties serve to flush out diligence issues before signing, while venture capital funds can seek rescission rights and other remedies in the event of fraud.

Additional protections venture capital investors may receive include, among other things:

- A liquidation preference over common shares, which helps to serve as downside protection.
- A board seat or board observer rights to help oversee its investment and management.
- Price-based anti-dilution protection.
- Pro rata rights to help maintain its ownership percentage.
- Veto rights on certain material company events and actions.
- Rights of first refusal and co-sale to ensure the investor can obtain liquidity before or at the same time as the founders.

The lead investor in a venture capital financing often receives a seat on the board of directors of the investee company, and certain acts of the company may require the express consent of the venture capital fund's representative on the board of directors. In addition, the investors typically receive veto rights in the form of "protective provisions" in the amended and restated certificate of incorporation. The investors also receive information rights to help monitor their investment.

The company's founders are also typically subject to a right of first refusal and co-sale agreement, which gives the company and certain investors a right of first refusal on the founders' shares and those investors a right to co-sell their shares alongside the founders in the event the founders try to exit the company and the investors do not want to exercise their rights of first refusal. Also, the investors typically receive a preemptive right of first offer or right of first refusal on further issuances. Investors also often receive the right to veto future financings and have price-based anti-dilution rights.

Investors often have veto rights over sales of the company embodied in the protective provisions in the amended and restated certificate of incorporation. Typically, there is also a requirement for them to approve a sale for the drag-along provisions to be triggered. They can also typically exercise their co-sale rights to sell their shares in the event the founders try to sell their shares. Finally, the liquidation preferences of the investors must typically be satisfied first before any proceeds can go to the common stockholders.

8) <u>Is warranty and indemnity insurance common in your jurisdiction? Are there any legal or practical challenges associated with obtaining such insurance?</u>

Representation and warranty insurance (RWI) has become commonplace in acquisition transactions, especially in the context of auctions. Invariably, the form of purchase agreement proposed by a seller in an auction will provide that the buyer will look exclusively to RWI insurance for recourse following the closing. The effect has been to make many private company transactions functionally equivalent to public company acquisitions, subject to certain exclusions.

Private equity buyers and sellers were early adopters of RWI and have led the broad adoption of RWI. On the sell-side, RWI allows a private equity seller to distribute all of the transaction proceeds at closing without having to escrow funds for indemnity purposes. RWI avoids potentially costly indemnity disputes between sellers and buyers, so there is also no need for investment vehicles with limited lives, like private equity funds, to hold back transaction proceeds to fund future administrative and litigation expenses. Likewise, on the buy-side, RWI makes a buyer's offer more attractive because it allows sellers to avoid indemnity escrows and to "walk away" from a transaction without continuing indemnification obligations.

Like any other insurance, RWI will only cover unanticipated and unknown losses. Accordingly, RWI does not replace due diligence or provide a full replacement for traditional concepts of indemnity. For example, RWI will not cover risks that are difficult to diligence, and RWI carriers may exclude coverage for certain risks. Common exclusions from RWI include the following: violations of anti-corruption laws (e.g., U.S. Foreign Corrupt Practices Act), certain environmental issues, certain pension liabilities, representations regarding the collectability of accounts receivable, and representations regarding forward-looking statements. If the acquisition includes subsidiaries outside of the United States, certain other matters may be excluded with respect to foreign operations, including certain tax matters and matters relating to privacy laws. Typically, policies covering non-U.S. matters also tend to be more expensive than policies that cover only U.S. operations. Carriers may also exclude or subject to higher scrutiny certain matters based on the target's industry (e.g., products liability for manufacturers). In certain cases, such as environmental liability, RWI insurance can be combined with other commercially available insurance to provide coverage in excess of what could be obtained solely from an RWI carrier.

With several insurance providers offering RWI coverage, RWI is widely available in the U.S. market. Even on very large deals, an RWI broker may be able to "stack" coverage among several RWI carriers to provide broad coverage.

Given that private equity funds have adopted RWI for most transactions, any buyer in an auction scenario or other competitive acquisition process in the U.S. should assume that other bidders are likely to use RWI as a structure to make their bids more attractive to sellers.

9) <u>What are common exit mechanisms adopted in venture capital transactions, and what, if any, are the risks or challenges associated with such exits?</u>

In our experience, the most common exit mechanism for venture capital transactions is a sale, in most cases, to a strategic buyer (i.e., an enterprise in the same business as the target that is looking to vertically or horizontally integrate the target into its business). Although there are cases where the buyer may be another venture capital or private equity investor, strategic buyers are more likely where there is a sale of 100% of the business, and a private equity or other financial buyer is more likely in transactions where there is only a partial exit (i.e., an exit by a venture capital investor only, with management and other investors remaining in the business). As for risks, although sales processes are structured as confidential, there is always the risk that the marketplace will become aware of a potential transaction, which could create instability within an organization (e.g., employees becoming concerned), as well as with customers and competitors. Given that strategic buyers are likely to participate in any sales process, sellers should also take care to limit access to confidential information, such as customer lists, product information and strategy initiatives, to competitors participating in the sales process. Like any other exit transaction, a sales process also tends to require time and effort from the executive management team, which detracts from their time managing and operating the business.

A venture capital exit could also be structured through an initial public offering (IPO), although this is obviously a more complicated transaction (see discussion below). An IPO exit is typically only considered for larger businesses that can take advantage of being a public company (e.g., access to capital markets), while having the necessary infrastructure to support the regulatory and compliance requirements of a public company. The IPO process itself is also costly and time-consuming, requiring significant effort from the executive management team. Given the public nature of an IPO, sellers should consider their business model and the level of disclosure that will become publicly available, including to competitors. The issue of disclosure becomes especially important with respect to financial information and possible regulatory issues that would otherwise not have to be disclosed publicly. Finally, venture capital investors should make sure their investment documents allow for registration rights that permit them to cause an IPO exit or to exit through one or more secondary registrations post-IPO.

A less common form of exit is through a management buyout, where the business is sold to existing management. These transactions are less common because management would need to raise equity and/or leverage the target in order to raise sufficient funds to be competitive to alternate exit transactions. A management buyout is likely in cases where the target company, while operating successfully, may not be generating the type of valuations that would be attractive to buyers. Management buyouts are also more common in cases where the target company suffers from some risk factor, such as a regulatory hurdle or other adverse event, that makes it less likely that the company can be sold to a third party or, if it can be sold, that the valuation from a third party is likely to be less than the value proposed by management.

10) Do investors typically opt for a public market exit via an IPO? Are there any specific public market challenges that need to be addressed?

While acquisitions are the most common exit structures for venture capital, IPOs account for the largest driver of value in exits. According to the National Venture Capital Association, large IPOs in 2019 drove IPO exits to account for 78%, or USD 198.7 billion, of total value in 2019. However, as some recent IPO failures highlight, the path from private company to public company can be challenging for a number of reasons.

To prepare for an IPO, companies must have the proper corporate governance, systems and controls in place and, importantly, ensure that these are all functioning properly. A public company management infrastructure, including robust financial and legal departments, will also be necessary to comply with post-IPO reporting requirements and maintaining stock exchange listing standards. More than just structural in nature, these changes require that management at all levels change their mindset from being a private company to a listed company.

Additionally, a successful IPO will also require correct market timing and being able to tell an attractive story to investors – with the latter sometimes proving especially challenging. The story includes not only the company's performance through the IPO, but also the path for continued growth and profitability.

The public nature of the IPO process also exposes companies to scrutiny, including from investors, the public, regulators or competitors, which can be especially challenging if the IPO process is ultimately unsuccessful.

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URUGUAY

Guyer & Regules

1) In your jurisdiction, which sectors do venture capital funds typically invest in?

Key sectors attracting venture capital (**VC**) investments in Uruguay include financial services (including FinTech companies, mobile wallets, and digital payment solutions), e-commerce, consumer products, and information technology.

2) Do venture capital funds require any approvals before investing in your jurisdiction?

As a general rule, investments in Uruguay do not require prior approval. However, there are certain regulated industries that do require prior authorization when making an investment or transferring the investment, such as certain media companies, rural real estate, transportation, software, certain financial services companies, insurance, cannabis, etc. Most VC deals occur in industries where no prior authorization is required.

3) Are there any legal limitations to an offshore venture capital fund acquiring control or influencing the business, operations, or governance of an investee entity?

See response to question 2.

4) Would an investor be required to undertake an antitrust analysis prior to investment? When would such a requirement be triggered?

Yes. A VC investor will need to make an antitrust analysis in an early stage of the transaction.

As of April 12, 2020, a pre-merger control regime is effective in Uruguay. Under such regime, request for authorization is required for transactions in which the buyer and the target jointly have a gross revenue in the Uruguayan territory of approximately USD 70,000,000.

Transactions closed prior to April 12, 2020 only required a pre-merger notification if certain thresholds were met.

5) What are the preferred structures for investment in venture capital deals? What are the primary drivers for each of these structures?

Typically, VCs acquire a minority stake of 10–15% in early-stage investments by way of equity (ordinary shares) or in certain cases preferred shares without voting rights. The standard legal structure consists of paid-in capital increases (capital contributions) or share transfers. The VC target company is typically a Uruguayan corporation (sociedad anónima) although we expect to see more target companies in the future to take the form of a SAS (*sociedad por acciones simplificadas*). The investors are sometimes Uruguayan holding companies and at other times US or European holding corporations.

In these cases, it is frequent for the parties to subscribe to a shareholders' agreement in which the investor and the founders can agree on certain covenants, vetoes, and corporate governance matters. Typically, founders retain control of the company and VC investors impose restrictions and conditions. Parties sometimes also negotiate puts and calls.

Other possible investment structures we have seen consist of loans (in the form of notes issued by the target company) convertible to shares.

While determining the preferred structure, tax is usually the key driver. Intellectual property also takes a relevant role in some VC transactions related to FinTech, software, and information technology.

6) <u>Is there any restriction on rights available to venture capital investors in public companies?</u>

No. Securities regulations in Uruguay apply uniformly to all investors and shareholders of a public company, regardless of domicile.

7) <u>What protections are generally available to venture capital investors in your jurisdiction?</u>

Uruguayan investment law provides general protections to all investors, stating that foreign investors have at least the same protections that Uruguayan investors have. The law also states that, as a general rule, investments do not require any prior authorization or registration, and that there are no existing foreign exchange controls either.

Investors can distribute the dividends they obtain from the VC company and transfer them outside Uruguay without any restrictions except for fulfilling corporate law formalities and paying the applicable taxes.

Statutory protections available to minority shareholders in a Uruguayan corporation include certain information rights, the right to sue the board of directors in cases of breach of the duty of care and duty of loyalty, as well as the right to sue majority shareholders in the event they abuse their voting rights.

8) <u>Is warranty and indemnity insurance common in your jurisdiction? Are there any legal or practical challenges associated with obtaining such insurance?</u>

No, it is not common. Typically, in VC investments there are no escrow accounts or guarantees and there is no (or limited) recourse to the founding shareholders or other controlling shareholders.

A warranty and indemnity insurance market has not yet been developed in Uruguay although registered insurance companies could potentially offer this product.

9) <u>What are common exit mechanisms adopted in venture capital transactions, and what, if any, are the risks or challenges associated with such exits?</u>

The most common exit strategy is to negotiate drag-along rights, tag-along rights and put options when making the investment. Typically, these obligations are stipulated in a shareholders' agreement and in Uruguay it is standard for shareholders' agreements to be guaranteed by a pledge of shares of the shareholders involved.

10) <u>Do investors typically opt for a public market exit via an IPO? Are there any specific public market challenges that need to be addressed?</u>

There is no IPO market in Uruguay although there are regulations permitting IPO.

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VIETNAM

VILAF

1) **In your jurisdiction, which sectors do venture capital funds typically invest in?**

Due in large part to Vietnam's fast growing, forward-looking economy, some of the most popular sectors for venture capital funds to invest include FinTech, early-stage technology, e-commerce, education, food and beverage, and green energy.

2) **Do venture capital funds require any approvals before investing in your jurisdiction?**

Yes. Under Decree No. 38/2018/ND-CP ("**Decree 38**"), a venture capital fund must be managed by a fund management company either established or hired by the investors. The venture capital fund's management company must submit a dossier to the regional business registration agency within five days of formation. This dossier must include, among other things, the fund's Charter (i.e., articles of incorporation), a service contract signed with the fund management company (if any), and the bank's certification of paid-in capital. Upon receipt of a complete and orderly dossier, the business registration agency will send a certification of establishment to the fund management company.

3) **Are there any legal limitations to an offshore venture capital fund acquiring control or influencing the business, operations, or governance of an investee entity?**

Generally, the same prohibitions and limitations on any other offshore entity investing in a Vietnamese investee company will apply. In particular, there are notable limitations related to foreign investment into closed/restricted sectors under Vietnam's WTO commitment, and also investment into conditional business lines as set out in the Law on Investment and its guiding documents. Some relevant examples include investment into telecommunications businesses, businesses performing media services via television or radio, and businesses providing betting and gambling services.

4) **Would an investor be required to undertake an antitrust analysis prior to investment? When would such a requirement be triggered?**

There are not any specific legal requirements that venture capital investors undergo an antitrust analysis prior to investing. However, the general antitrust regulations under the Law on Competition must be observed when applicable. If the investment could be deemed a merger or acquisition exceeding the statutory value threshold as set out in the Law on Competition, then the investor is required to submit a notification to the National Competition Commission which will then review the transaction. Additionally, if the result of the investment would cause the investor to hold an anticompetitive economic concentration, then it may be prohibited. These requirements have extraterritorial reach and apply to investments made by offshore investors.

5) **What are the preferred structures for investment in venture capital deals? What are the primary drivers for each of these structures?**

Venture capital deals are most commonly structured as private sales via stock purchase agreements. Under this structure, investors generally acquire or subscribe for ordinary shares of the investee company. Supplemented by an accompanying investor rights agreement, this structure is preferred for its straightforward simplicity and customizability.

6) Is there any restriction on rights available to venture capital investors in public companies?

Under Decree 38, neither venture capital investors nor venture capital investees are permitted to be public entities.

7) What protections are generally available to venture capital investors in your jurisdiction?

While individual venture capital investors are expressly responsible for their investments under the Law on the Provision of Assistance for Small- and Medium-Sized Enterprises, Decree 38 provides specific protections for venture capital investors. These protections include requirements that all venture capital investors enter into an agreement controlling the governance of the fund, content requirements for a venture capital fund's charter including an explicit statement that the purpose of the fund is engaging in high-risk investment, investor consent requirements for transactions undertaken by the venture capital fund, and various fund reporting requirements. Outside of these protections, there are certain protections and tax incentives for start-up companies that indirectly help protect the venture capital investors.

8) Is warranty and indemnity insurance common in your jurisdiction? Are there any legal or practical challenges associated with obtaining such insurance?

Currently, warranty and indemnity insurance, also known as representation and warranty insurance or simply M&A insurance, is not a common component of transactions in Vietnam. While there are providers, they are few and have limited offerings. In large part due to the limited availability, practical challenges to using warranty and indemnity insurance come from its pricing and premiums. We expect as the Vietnamese M&A landscape becomes increasingly sophisticated, the use of warranty and indemnity insurance may become more commonplace.

9) What are common exit mechanisms adopted in venture capital transactions, and what, if any, are the risks or challenges associated with such exits?

Currently, the most common exits adopted in venture capital transactions are trade sales and secondary sales. These strategies are preferred for their simplicity and speed. In addition to these exit options, a put-option from the start-up is another exit method. Each of these methods depend on the financial condition of the start-up company at the time of exercise. Since many Vietnamese start-ups do not grow rapidly enough to accommodate the venture capital investment timeline, exercising and enforcing any of these methods can prove challenging and there is a risk that investors will not be able to recover their investments in these exits. Another increasingly popular exit is IPO, as discussed in Question 10.

10) Do investors typically opt for a public market exit via an IPO? Are there any specific public market challenges that need to be addressed?

While exit via an IPO is becoming increasingly common, it is not the typical exit for investors. An IPO continues to prove a challenging exit strategy due to regulatory hurdles and difficulty for investors to liquidate their entire holdings. In many Vietnamese companies, corporate governance-related issues are common. As a result, it is difficult to promote confidence in the public market without investors retaining a percentage of ownership.

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