## Appendix 3 - Typical Private Equity Fund Structures in Various Jurisdictions

This Appendix aims to give the reader a view of the diversity of legal and operational structures found in the private equity industry globally to help identify how the principles may be applied in these jurisdictions.

### Brazil

The most common structures for private equity and venture capital operations in Brazil are the following:

a) Fundos de Investimento em Participações – FIPs (Private Equity Funds); and

b) Fundos Mútuos de Investimentos em Empresas Emergentes – FMIEEs (Seed and Venture Capital Funds).

The private equity (FIP) and seed and venture capital (FMIEE) vehicles are structured as funds due to some characteristics of the local business environment, such as tax benefits, when compared to SPC, LLC and other types of structures, and the regulation of CVM that provides the legal framework for these funds.

### Private Equity Funds – FIPs

This structure is designed for private equity investment purposes, more specifically for investments in mid and large cap companies, where the FIPs must have an active influence in the governance.

The FIPs are close-ended funds (no redemptions) and restricted to the so-called qualified investors (institutional investors, financial organizations, insurance companies, high net-worth individuals, among others).

These funds are managed by an independent manager and are registered and supervised by CVM.

### Seed and Venture Capital Funds – FMIEEs

This structure is designed for the investment in seed/venture capital and small cap companies.
Like the FIP, the FMIEEs are managed by an independent manager, regulated and supervised by CVM.

These funds are also close-ended funds (no redemptions) but, unlike the FIPs, there isn´t any investor´s target public restriction (non-qualified investors are allowed). However, FMIEEs are, in fact, mostly invested by qualified investors.

It is also important to mention that both types of funds are required to submit to the CVM certain information and documents on a regular basis, including their financial statements, audited by an independent auditor registered with the CVM, as well as the composition of the portfolio.

**France**

The most commonly used structures for private equity funds in France are:

a) The *Fonds Commun de Placement à Risques* (*FCPR*) –some of which allow for retail investment and thus fall out of the scope of this report. FCPRs have the legal status of a specific form of French collective investment schemes (*OPCVM*);

b) *Société de Capital Risque* (SCR) which have the legal status of corporate entities.

**Fonds Commun de Placement à Risques (FCPR)**

The FCPR is defined in law as a joint ownership of securities (*copropriété d'instruments financiers et de dépôts*). It is not a separate legal entity and for this reason does not have the legal capacity to enter into contracts. Any contracts must be concluded by the Management Company. The minimum capital required to form an FCPR is €400,000. FCPRs are eligible to certain tax advantages. The latter accrue however exclusively to natural persons.

An FCPR is founded by two founders, the Management Company (*société de gestion de portefeuille*) and the custodian (*dépositaire*). The Management Company must have its registered office in France and must be authorised by AMF (*Autorité des Marchés Financiers*), the French financial market authority. It has sole responsibility of the management of the FCPR including all decisions to make or to sell investments of the FCPR.

Before being offered to the public, FCPRs need to be authorised by the AMF and possess as a result the status of authorised FCPRs (*FCPR agréés*).

Within the general FCPR regime, which pertains to the legal framework of French national collective investment schemes (*OPCVM*), specific rules apply to four subcategories of vehicles:

- Two types of vehicles with more specific investment strategies:
    - FCPIs (*Fonds Commun de Placement dans l'Innovation*) which specialise in investing in innovating, non-listed companies;
    - FIPs (*Fonds d'Investissement de Proximité*) which specialise in the financing of a specific region.
- Two types of FCPRs offered to qualified investors only, which are, as a result, subject to simplified investment rules and exempt of AMF authorisation requirement (they only have to register):
- FCPRs with streamlined investment rules (*FCPR allégés*), which maintain some investment constraints but are not required to comply with commitment and risk diversification ratios;

- Contractual FCPRs (*FCPR contractuels*), a category of FCPRs created by the Economic Modernization Act (*loi 2008-776*) of August 4, 2008 which, in addition, alleviates investment requirements, the latter needing to be specified on a contractual basis in funds' rules.

**The Société de Capital Risque (SCR)**

The SCR must take the legal form of a *société par actions* (SA), a French *société en commandite par actions* (SCA) or a French *société par actions simplifée* (SAS). It is therefore subject to the rules applicable to such companies. The SCR is managed internally by either a board of directors or by one or more managers (there is normally no independent management company).

All investors are eligible to subscribe in an SCR, including individuals. However, provided the SCR opts for a special tax treatment –and meets related requirements– it is entitled to certain tax exemptions and its unit holders may obtain certain tax benefits. In order to qualify for such tax benefits, an SCR must have as sole purpose to invest in a portfolio of investments.

**Germany**

The most suitable structures which are available for private equity funds in Germany are as follows:

a) the Limited Liability Company (Gesellschaft mit beschränkter Haftung (GmbH));

b) the Limited Partnership with a GmbH as the sole general partner (GmbH & Co. Kommanditgesellschaft (GmbH & Co. KG)).

In addition, the Unternehmensbeteiligungsgegesellschaft (UBG) (special investment company) has been designed specifically for the private equity sector. The UBG is a special licensed investment company for risk capital formed in accordance with the provisions of the UGB Act (Gesetz über Unternehmensbeteiligungsgesellschaften). Under current regulations it is not common to use the UGB as an investment vehicle.

**The Gesellschaft mit beschränkter Haftung (GmbH)**

The GmbH is a legally separate entity from its shareholders, which may be partnerships, corporations or individuals. Shareholder liability is limited to the amount of their respective subscriptions.

**The GmbH & Co. Kommanditgellschaft (GmbH & Co. KG)**

A limited partnership (Kommanditgellschaft (KG)) is a commercial partnership established by one or more limited partners (Kommmanditisten) and a general partner (Komplmentär). The liability of the limited partners is limited to the amount of their respective capital subscriptions.

**India**

Private equity in India can be structured as a Venture Capital Fund, an investment company or as a limited liability partnership. The structure of limited liability partnership has been recently introduced through the Limited Liability Partnership Act, 2008.

Venture Capital Funds are regulated by the Securities and Exchange Board of India (SEBI) and certain tax incentives have been provided to such funds which may not be available to entities which do not register as Venture Capital Funds with SEBI. The structures under which a Venture Capital Fund can be set up in India are:

a) Trust (set up under the Indian Trusts Act, 1882);

b) Company (established under the Companies Act, 1956 );

c) Body Corporate (set up or established under the laws of the Central or State Legislature).

With the introduction of the Limited Liability Partnership Act, 2008, Venture Capital Funds can also be structured as LLPs.

Venture Capital Funds are required to have minimum firm commitment from investors of Rs.50 million. There is also a per investor minimum investment requirement of Rs.500,000.

The Venture Capital Fund is required to issue a placement memorandum that contains details: of the terms and conditions subject to which capital is proposed to be raised from investors (or enter into contribution or subscription agreement with the investors); and which specifies the terms and conditions subject to which capital is proposed to be raised. Contents to be included in the placement memorandum have been specified by SEBI.

**Italy**

The typical structure available for carrying on private equity activity in Italy is the fondo chiusu (closed end fund), although in principal other vehicles may be used.

The entities involved in the setting up of the funds are:

a) The management company (Società di Gestione del Risparmio (SGR));

b) The assets of the fund;

c) The investors;

d) The custodian bank (banca depositaria).

The Management Company - The SGR must be authorised and registered by the Bank of Italy. Under the law, the authorisation is given within 90 days from the date of filing

with the Bank of Italy. Such term may be suspended or interrupted by the Bank of Italy. Before giving authorisation, the Bank of Italy consults with CONSOB.

The assets of the fund - The assets of each fund are distinct (*patrimonio separato*) from those of the SGR itself, and from those of the participants in the management company, the investors in the fund and for each the other funds managed by the same SGR. Consequently, creditors of the SGR cannot make claims against the fund; and creditors of the investors of the fund can only make claims in respect of the shares of the specific investors.

Investors – Usually private equity funds are established in the form of closed-end funds reserved to qualified investors.

Custodian bank – The custodian bank keeps custody of the investments of the fund.

**Japan**

Japanese private equity funds use different structures for different types of investors and investments.

Some Japanese private equity fund structures take the form of tax transparent partnerships (Japanese General Partnerships, Japanese Limited Liability Partnerships and Cayman Islands Limited Partnerships) where investment income is taxed at the members' level rather than the fund level. Some funds take the form of quasi-corporate entities (e.g. investment trusts) and corporate entities are sometimes used where it provides taxation benefits (e.g. double tax treaty benefits).

Many Japanese fund structures are based on structures used in other countries.

**Luxembourg**

Luxembourg offers a large variety of possible vehicles for private equity investments, allowing a high degree of flexibility when structuring a fund. Among the regulated vehicles, the most common Luxembourg legal regimes used for carrying out private equity activities are the investment company in risk capital (société d'investissement en capital à risque or SICAR) in accordance with the Luxembourg law dated 15 June 2004 and the specialised investment fund (fonds d'investissement spécialisé) or SIF in accordance with the Luxembourg law dated 13 February 2007.

**Investment company in risk capital (société d'investissement en capital à risque or SICAR)**

The SICAR is an investment vehicle specially designed for private equity and venture capital investments. A SICAR may adopt one of the following corporate forms: partnership limited by shares (Société en commandite par actions, SCA), a private limited company (Société à responsabilité limitée, Sàrl), a public limited company (Société anonyme, SA), a limited partnership (Société en commandite simple, SCS) or a cooperative company organised as a public limited company (Société cooperative organisée comme une société anonyme, SCoSA). The SICAR is ruled by the SICAR law and by the corporate law of Luxembourg. Depending on the corporate form, the

SICAR is either managed internally by its board of directors/managers or by the board of directors/managers of the general partner in case of a partnership.

A SICAR invests its assets in securities representing risk capital in order to provide its investors with the benefit of the result of the management of its assets in consideration for the risk which they incur. By risk capital is understood the direct or indirect contribution of assets to entities in view of their launch, their development or their listing on a stock exchange.

The SICAR is not imposed any investment diversification rules. Investment in a SICAR is limited to qualified investors which are institutional, professional investors and any individual who invests a minimum 125,000 Euros or who has been assessed by a financial institution which certifies the investor's ability to understand the risks associated with investing in the SICAR.

**Specialised investment fund (fonds d'investissement spécialisé) or SIF**

Like the SICAR, the specialised investment fund (SIF) is not aimed at the general public but is reserved for qualified investors (the same definition as for SICARs applies). The SIF may be set up as a common contractual fund (fonds commun de placement or FCP), an investment company with variable capital (société d'investissement à capital variable or SICAV) or with fixed capital (société d'investissement à capital fixe or SICAF). If the SIF is organized as an FCP, it must - given that an FCP does not have legal personality- be managed by a Luxembourg-based management company. A SIF may otherwise be formed under any legal form also available under the SICAR regime. By comparison with the regime for undertakings for collective investment, a SIF has less strict publication requirements and is operationally more flexible in its activities. A promoter is not required. Specialised investment funds may invest in a broad range of assets including, but not limited to, equities, bonds, derivatives, structured products, real estate, hedge funds and private equity investments. The SIF must comply with the general principle of risk diversification, but the law does not lay down any specific quantitative restrictions. Both the SICAR and the SIF may have segregate compartments (sub-funds) within the same legal structure.

**Portugal**

In Portugal, the most typical structures for private equity activity are as follows:

a) Venture Capital Companies (Sociedades de Capital de Risco or SCRs);

b) Venture Capital Funds (Fundos de Capital de Risco or FCRs); and

c) Venture Capital Investors (Investidores em Capital de Risco or ICRs).

SCR, FCR and ICR are all structures specifically regulated by Decree-Law nº 375/2007, regarding venture capital investment.

SCRs are corporate vehicles that must take the form of public limited companies (Sociedades Anónimas). The business name of an SCR must include the expression

*Sociedade de Capital de Risco* or *SCR*, which may not be used by other entities to avoid deception. The minimum share capital for SCRs, mandatorily represented by nominal shares, is €750,000, except if its object consists exclusively in managing Venture Capital Funds, in which case the value shall be €250,000. Additionally, minimum capital requirements for the SCR may be established by joint Ministerial Order of the Ministers of Finance and Economy and under CMVM's proposal, proportionally to the composition of the respective portfolio and of the managed SCRs.

FCRs are autonomous assets, without legal personality, but may apply to a court of law and belong to the holders of the respective investment units. FCRs are not responsible whatsoever for the debts of the unit-holders, depositaries, managing entities, marketing entities, or other FCRs. The business name of an FCR shall include the expression "Fundo de Capital de Risco" or "FCR", which may not be used by other entities to avoid deception. FCRs are closed-end funds and have a minimum subscribed capital of €1,000,000.

ICRs allow individual investors to carry out private equity activities. They are also known as *business angels*. Although acting as an individual entrepreneur, the ICR must be incorporated under the specific corporate type of a sole partner private limited liability company (Sociedade Unipessoal por Quotas), with a minimum share capital of €5,000. Only natural persons may be considered sole partners. The business name of an ICR shall also include the expression "Investidor em Capital de Risco" or "ICR".

The regulation and supervision of these three venture capital structures is made by CMVM. The set-up of a SCR, FCR or ICR structure (both legal incorporation and start of business) must be preceded of a simplified registration procedure at CMVM. Registration details are not public, although CMVM provides for a list of PE structures online.

Private equity activities in Portugal are not exclusive to SCRs, FCRs and ICRs and may be pursued through other types of corporate vehicle structures, such as public limited companies (Sociedades Anónimas) and private limited companies (Sociedades por Quotas). However, only SCRs, FCRs and ICRs benefit from a favourable specific tax treatment provided by law.

**Quebec, Canada**

Private equity can take a variety of forms in Quebec. The more commonly encountered structures for private equity are:

1) Private equity or venture capital funds (limited partnerships or non-redeemable investment funds) (PEF);

2) Labour-sponsored or development capital investment funds; and

3) Private pension funds.

PEFs normally raise capital from investors through prospectus exemptions or by using confidential offering memorandums. Those PEFs are not reporting issuers, therefore have very limited imposed regulatory disclosures and regulator supervision. These

structures are generally aimed at investors that meet the regulatory definition of accredited investors.

PEFs can also choose to raise capital from retail investors by filing a prospectus. In those cases and in order to provide liquidity for these investors, PEFs will often register their securities on an public exchange. In those situations, PEFs are overseen by securities regulators and stock exchange supervision and consequently also subject to mandatory continuous public disclosure.

Three labour-sponsored or development capital investment funds exist in Quebec. They are created by their own individual legislation. Those structures are designed for retail investors and provide these investors with additional tax benefits not available to other private equity issuers.

Private pension funds also participate in the private equity industry. They are however limited to the capital raised from their members.

**Spain**

The structures available in Spain for private equity purposes are the following:

a) Public Limited Companies, or Sociedades Anónimas (SAs), and private limited companies, or Sociedades de Responsabilidad Limitada (SLs);

b) Private equity companies, or Sociedades de Capital Riesgo (SCRs);

c) Private equity funds, or Fondos de Capital Riesgo (FCRs).

**Public Limited Companies (SAs) and Private Limited Companies (SLs)**

SAs and SLs are limited liability companies, whose incorporation requires the grant of a public deed before a Spanish Notary Public, to be registered with the commercial registry.

**Private Equity Company (SCR) and Private Equity Fund (FCR)**

SCRs must take the form of an SA and have minimum share capital of €1,200,000.

FCRs lack legal personality and require a minimum capitalisation of €1,650,000 contributed in cash at their creation. FCRs must be managed by a management company (*Sociedad Gestora de Entidades de Capital Riesgo*).

The incorporation of FCRs and SCRs must be approved by the securities regulatory authority, the Comisión Nacional de Mercado Valores (CNVM). Once the authorisation is obtained, a public deed must be granted, and FCRs and SCRs must be registered with the commercial registry, and with the public registry of the CNVM.

**Switzerland**

With the introduction of the Federal Act on Collective Investment Schemes in the

beginning of 2007 there are four different legal forms available in Switzerland for Collective Investment Schemes. All four are more or less suitable for private equity funds. But whereas the two open-ended structures (contractual form and investment company with variable capital) and one closed-ended structure (investment company with fixed capital) predominantly are used for investments in securities, derivatives, real estate etc., the second closed-ended structure, the Swiss limited partnership for collective investments, is specifically designed for investments in private equity.

A limited partnership for collective investments is a company whose sole object is collective investment. At least one member bears unlimited liability (general partner), while the other members (limited partners) are liable only up to a specified amount. Both the limited partnership and the company agreement need an authorization respectively an approval by the Swiss supervisory authority (FINMA). The general partner which must be a public limited company with its registered office in Switzerland may only be active as a general partner in one limited partnership. He may delegate investment decisions and other activities to a third party.

The limited partnership is restricted to so-called qualified investors (institutional investors, high-net-worth individuals). Therefore the density of the legal regulation is relatively low compared to collective investment schemes for retail investors. The regulation refers in particular to the minimal content of the company agreement and prospectus. As a consequence the stipulation of the company agreement remains at the discretion of the general partner. Due to this combination of high standards of investor protection, which is achieved through the authorization by the FINMA and its permanent prudential supervision and of the general partner's large discretion in managing the limited partnership, this new legal form is attractive for the general partner as well as the limited partners.

**United Kingdom**

The principal structures that have are used in the UK are as follows:

a) A limited partnership;

b) An investment trust company;

c) A venture capital trust.

**The Limited Partnership**

Currently the most common structure in the UK for private equity funds is the English Limited Partnership. The limited partnership must be registered in England under the Limited Partnerships Act 1907. For this purpose it must have a general partner with a principal place of business in England. Investors who are limited partners have their liability limited to the amount of capital in their partnership provided they do not take part in its management.

**The Investment Trust**

This is a company which invests in securities and whose shares are quoted on the

London Stock Exchange PLC. It also has to comply with section 842 of the Income and Corporation Taxes Act 1988 which provides, *inter alia*, that it is not permissible to distribute capital gain by way of a dividend.

**The Venture Capital Trust**

The venture capital trust is a variation on the investment trust structure providing tax free income and capital gains to individual investors but with restrictions on the amounts and types of company in which it can invest.

**United States**

The structure most commonly available for domestic private equity investment funds is a limited partnership under the laws of the state of Delaware. A Delaware limited partnership is formed upon the filing of a Certificate of Limited Partnership with the Secretary of State of the State of Delaware. A Delaware Limited Partnership is a separate legal entity which continues as such until it dissolves and winds up its affairs pursuant to the partnership agreement, which term is generally 10 years or unless otherwise dissolved pursuant to Delaware law. Limited partnerships organised in Delaware are not generally required to register with any regulatory authority if they conform to the various exemptions or exceptions commonly used in the industry; however, if the fund of a promoter of the fund maintains an office in a state other than Delaware, the fund or its promoter may be required to qualify in that state.

The management company of the fund is usually organised as a separate entity that is owned by the founders of the fund. Typically the management company serves as the management company for each fund organised by the founders, which allows the founders to centralise the management functions of the fund-family and concentrate the value of the enterprise in a single entity. Depending upon the scope of its business, the manager or co-manager may be subject to registration as an investment adviser.