Executive Summary

Instituto de Capital Riesgo

2014 has been a particularly outstanding year for the world of venture capital, both in regulatory and operational terms.

Firstly and from a regulatory viewpoint, just before it drew to close 2014 brought us Act 22/2014, of 22 November, amending the framework and legal status of venture capital. By the end of the year, the Spanish Parliament had almost finished debating the Promotion of Business Financing Bill, which was finally enacted as Act 5/2015 shortly afterwards, on 5 April this year; and finally it overwhelmed us (as must be said) with three, not to say four, new reforms of the Spanish Bankruptcy Act, embodied in Royal Decree-Act 11/2014 on urgent bankruptcy matters, Royal Decree-Act 4/2014 on urgent matters in relation to refinancing agreements and debt restructuring, later converted into a law by Act 17/2014, of the same name, and at the start of 2015, Royal Decree-Act 1/2015 on the second chance mechanism.

Secondly, and from a more operational perspective, 2014 has witnessed certain events of particular significance for venture capital: undeniably the biggest impact came with the announcement and award of the first rounds, following the Spanish government's decision to play an active role on the venture capital market, by setting up Fond-ICO Global, a fund of funds intended to act as a catalyst and lever in venture capital fundraising, and whose management has been entrusted to AXIS. Other eye-catching highlights not to be overlooked include the closure of the first bank asset funds and its effects on the venture capital market, and the evidence that the Spanish stock market is also capable of operating as a means of disinvestment for venture capital.

A. These regulatory and operational measures must be framed and interpreted mainly (though not exclusively, as we will see) as the state public sector's solution to overcome, or at least mitigate, the negative consequences of a bank-generated credit squeeze and crunch scenario. This in turn was triggered by the crisis that struck in 2007 and that (needless to recall) is still seriously hampering Spain's small and medium-sized enterprises, whose economy, as is also well-known, depends to a very large extent on banks, and on bank loans in particular.

   The government's involvement is geared, first and foremost, towards encouraging the diversification of sources of corporate finance and fostering the development of new and old sources of alternative finance, and dates back to 2012. On 20 February that year, during the State of the Nation debate, the Government announced it would be implementing an Entrepreneurship Support and Economic Stimulus Plan that, in particular, included measures such as the promotion of banking disintermediation, **support for venture capital** and easing access to capital markets, including the launch, as part of the Alternative Equity Market (MAB in Spanish) of an Alternative Fixed-Income Market (MARF in Spanish) that was set up in 2013.

Subsequently, in July 2012, the same objectives were set out in the Memorandum of Understanding between the European Commission and Spain on Financial-Sector Policy Conditionality, signed in Brussels and Madrid on 23 July 2012, paragraph no. 27 of which stated that "Non-bank financial intermediation should be strengthened. In light of the high dependence of the Spanish economy on bank intermediation, the Spanish authorities will prepare, by mid-November 2012, proposals for the strengthening of non-bank financial intermediation including capital market funding and venture capital".

B. However, apart from this main financial objective, there are two other particularly significant objectives.

B.1. The first has to do with Spain's membership of the European Union, which has been working since 1985 to harmonise the legislation applicable in different EU countries to Collective Investment Undertakings (CIUs) with a view to giving them a EU passport to permit freedom of marketing within the community. To this end, that year it adopted a first Directive, 85/611/EC, on the coordination of laws, regulations and administrative provisions relating to *Undertakings for Collective Investment in Transferable Securities (UCITS),* subsequently amended in 2001 and 2002, until in 2009 a consolidated text was approved in Directive 2009/65/EC (also known as "UCITS IV Directive" or simply the "UCITS Directive"), which was transposed into Spanish law in 2011, amending the Collective Investment Undertakings Act 35/2003.

This means that today collective investment is regulated by a harmonised European legal framework, though it should be noted that this only covers open-ended funds, which are preferably intended for retail investors and geared more towards making public savings profitable than to channelling them into the business world. Therefore they cannot properly be deemed an alternative source of corporate financing.

To continue with the process of harmonising the remaining CIUs not harmonised by the UCITS Directive, in 2011 the EU adopted the AIFM (Alternative Investment Funds Managers) Directive, which mainly has refers to closed-ended CIUs and, in particular, under certain circumstances, Venture Capital Funds; also, even though some might be regarded as open CIUs, to Hedge Funds and Real Estate Funds.

The (late) transposition of the AIFM Directive was the second major objective of the Venture Capital Entity Act 22/2014, which also contains, as to be expected, a mere reference to European venture capital funds (EVCF) and European social entrepreneurship funds (ESEF). These are covered by EU regulations 345/2013 and 346/2013 respectively, which are directly applicable and, unlike the AIFM

Directive, do not have to be transposed nor, on the other hand, do they focus on regulating managers but on investment vehicles.

B.2. The second goal pursued by the Government in passing these regulations has to do with what is now known as "shadow banking", one of the credit crunch's side effects, which has prompted the development of new financial initiatives by non-bank institutions that have seen a business opportunity where traditional banks had stopped responding to business needs.

In practice, a whole range of financial products and services have emerged and steadily developed, giving rise to this "shadow banking" sector. The main players are old non-banking operators, such as some insurance companies, who have reoriented their businesses, together with new non-banking operators, such as mutual funds, both of which offer factoring lines, discounting of promissory bills and trade bills, advance payment of invoices, reverse factoring, working capital loans, etc., directly or through specialised vehicles.

Yet while some argued that corporate finance should be unbanked to a certain extent by developing alternative sources of finance, others raised their voice to warn of the risks posed by such unregulated practices, which could trigger a new financial crisis.

So as to avoid greater risks in the future and ensure that investors and users are suitably protected, the authorities have begun to regulate some of these financial practices, one such example being the aforementioned Promotion of Business Financing Act 5/2015. Part of this Act regulates what right now is possibly one of the most path-breaking financial initiatives, and with the largest growth potential, namely crowdfunding, in which people who want to borrow money to fund a business venture are put in touch with lenders by Internet platforms that act as intermediaries.

C. The Yearbook we are unveiling today addresses all these issues in depth and does so from a doctrinal and academic perspective, in line with other yearbooks also promoted and backed by the ICO Foundation (like the Competition Yearbook and Euro Yearbook) and that already enjoy the tradition and seniority that this Venture Capital Yearbook being published today, also aims and hopes to reach one day.

The Yearbook is divided into three parts. The first two address the issues broached so far and, from a theoretical standpoint, analyse both the legislative reforms and initiatives and the public sector's direct participation as a Limited Partner in venture capital processes, and also why certain that investors in this field are attracted by the new bank asset funds. Not forgetting the Spanish capital market's potential for channelling certain venture capital divestments through IPOs. Finally, and like any other Yearbook, part three takes a look at what happened with venture capital in Spain in 2014 and provides an overview of the sector's main events, chiefly with regard to investments, investors and their advisers.

1. Legislative reforms with effects on Venture Capital in 2014

The first section of the Yearbook looks at the new Venture Capital Act, the Promotion of Business Financing Act and, thirdly, the Bankruptcy Act, whose successive reforms have brought new opportunities for venture capital to demonstrate its potential as a result of the business crisis that has forced many firms to file for pre-bankruptcy and bankruptcy proceedings.

1.1. Venture Capital Entity Act 22/2014

The Venture Capital Entity Act 22/2014 has been reviewed by a team from Clifford Chance, led by **Javier Amantegui,** assisted by **Samir Azzouzi** and **Thais Garcia**.

At this point, reference must be made to the first regulatory attempts embodied by Royal Decree-Act 1/1986 on urgent administrative, financial, tax and labour measures, subsequently amended by Royal Decree-Act 7/1996 on urgent measures of a fiscal nature and to foster and liberalise economic activity, and the specific tax arrangements laid down in Corporation Tax regulations, but the fact is that we have had to wait until 1999 to see Act 1/1999, regulating venture capital firms and their management companies, the first comprehensive venture capital law, that was later partially developed by the Ministerial Order of 17 June that year, and replaced by Act 25/2005, which has now been repealed by the recently enacted Act 22/2014, regulating venture capital and private equity entities, other closed-ended investment entities and investment managers for closed-ended investment entities.

The new Act is Spain’s third piece of venture capital legislation and, as the authors point out, mainly pursues two objectives.

Firstly, the need to bring the Spanish system in line with the new European Union regulations by implementing, in particular, Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers (“AIFMD”). This represents one of the responses to the 2008 financial crisis and also reflects the political will to harmonise regulation of the AIFMD managers in view of how their activities are likely to impact the financial market.

The new Act also aims to settle a historical imbalance in the Spanish venture capital sector, which traditionally focused on firms that are consolidating, by promoting the sector’s balanced growth among small and medium enterprises (SMEs) and in this context, and in light of the legal framework introduced by Regulations 345/2013/EU and 346/2013/EU of the European Parliament and of the Council of 17 April 2013, European Risk Capital Funds and European Social Entrepreneurship Funds, has introduced a new category into the Spanish legal system, namely SME venture capital entities.

Moving onto the contents of Act 22/2014, the first highlight is that it introduces new terminology that was missing from previous legislation. As such, it defines Venture Capital Entities (VCEs) as Closed-Ended Collective Investment Entities (EICCs in its

Spanish acronym) which, in contrast to the open-ended type, are, as we know, Collective Investment Undertakings (CIUs), where investors have no individual immediate liquidity, and cannot ask the fund to repurchase their shares or units, out of its assets, prior to the commencement of its liquidation phase or wind-down (Commission Delegated Regulation (EU) No 694/2014), or because they have signed an investment commitment that prevents them from requesting the repurchase of their shares or units until after an initial period of at least 5 years.

In this respect, the new Act defines closed-ended collective investment schemes in terms of their investor disinvestment policy, which must comply with the requirements of simultaneity and proportionality. Inside this category, VCEs are also classified in terms of their purpose, which must consist of taking temporary stakes in the capital of companies considered “acceptable” or “suitable”; in other words, non-real estate or non-financial and that, at the time the stake is acquired, are not listed or traded on an equivalent regulated market in the European Union or the other member countries of the Organization for Economic Cooperation and Development (OECD).

The Act also does away with the simplified regime and ordinary regime venture capital entities categories, brings in a special type of VCE known as “SME venture capital entities” (SME-VCEs) and replaces the former venture capital managers with the new Closed-ended Collective Investment Entity Managers (SGEIC in its Spanish acronym).

In their contribution, the Clifford Chance lawyers first discuss the scope of the new Act from a subjective point of view, pointing out the types of entities to which it applies, and the investment regime highlights, drawing special attention to the easing of the capital requirement ratios. They also note that the Act is far more specific about the rules for calculating qualifying assets, which are defined as the result of adding the amount of equity, equity loans received and unrealised gains net of tax effect, as adjusted in the future by the Minister of Economy and Competitiveness or the Spanish Securities and Exchange Commission (CNMV).

They also review the requirements for engaging in venture capital activities, which have been relaxed considerably. Administrative intervention by the CNMV has been removed almost completely, and is now limited to management companies and self-managed venture capital companies, while the establishment of venture capital companies and funds whose management has been delegated to a previously authorised management company will only be subject to *ex post* registration.

In contrast, in line with the goals laid down by the AIFMD and in order to create sounder control mechanisms, the Act strengthens the requirements that new SGEICs must meet to be authorised, and these requirements are analyzed in depth.

The authors continue with a detailed analysis of fundraising rules and regulations, which are not entirely uniform, as they have not been transposed homogenously in the different member countries, thus leading to a patchwork of requirements that is causing problems in attracting investors. This is so because requirements differ depending on whether the manager and/or funds are based in the EU, the type of management company and whether the investor is a professional investor, semi-professional or retailer.

The authors end with an overview of other new and highly interesting issues, namely (i) the role of the custodian, for which the Act refers to the legal arrangements set forth in the Collective Investment Schemes Act 35/2003, and makes it mandatory for SGEICs to designate one for each VCE that they manage (ii) the remuneration policy that SGEICs must establish for its senior executives and risk and control managers, which must be consistent with sound and effective risk management, (iii) transparency obligations, particularly with regard to the purchase of significant holdings and to asset stripping. As a result, SGEICs must inform the CNMV of any significant interest of more than 10% that their managed VCEs purchase or transfer in unlisted companies. Furthermore, the Act imposes restrictions, during the 24 months following the shareholding acquisition, on capital reductions, the acquisition or redemption of treasury stock, or payment of dividends under certain circumstances, all aimed at preventing asset stripping of the unlisted company in question; and (iv) the CNMV's new powers regarding codes of conduct, supervision, inspection and sanction arrangements, which include powers to analyse and supervise the leverage ceilings of any regulated entities likely to contribute to the build-up of systemic risk in the financial system, risks of disorderly markets or for long-term growth of the economy; and ensuring that SGEIC credit rating procedures are appropriate.

1.2. Promotion of Business Financing Act 5/2015

Professor **Reyes Palá**, from the University of Zaragoza, and Professor **Carlos Cuervo-Arango**, from the University of Nebrija, have analysed the contents of Act 5/2015.

1.2.1. Access to MTFs and transit to the official secondary stock markets.

Just like the Venture Capital Entities Act 22/2014, which we have discussed briefly, the Promotion of Business Financing Act 5/2015 also falls into the context of promoting new forms of finance that focus more on market performance that on the traditional banking intermediation in indirect lending.

This piece of legislation, which was enacted in 2015 but went through Parliament during 2014, has been reviewed by the Professor of the University of Zaragoza, **Reyes Pala**, in the part of the article that she has co-authored with Professor **Carlos Cuervo-Arango** and we have published in this Yearbook, in which she addresses the issue of access to Multilateral Trading Facilities (MTFs) and transit to the official secondary stock markets.

Along with Banks, capital markets have been the corporate world's other traditional source of financing because, as is well known, the stock market not only provides (in its role as a secondary or trading market) liquidity to shareholders by allowing them to buy and sell financial instruments, but it is also a primary or issue market, where businesses can be funded through IPOs or capital increases, or by issuing and placing debt issues, thus obtaining the financial resources they need to finance their growth.

Yet SMEs have not and do not find it easy to access the Stock Market, taking account (to name just some rather subjective reasons) of the entry barriers to being listed, and which is why the authorities have sought to address this drawback by implementing several measures designed to promote and facilitating access to these markets.

This led to the reform contained in Act 47/2007, amending the 1988 Securities Market Act, and which transposed, inter alia, the Markets in Financial Instruments Directive (2004/39/EC), better known as MiFID, especially the part in which it amends title XI to authorise and regulate multilateral trading facilities (MTFs) and bilateral systematic internalisation facilities as new trading systems, alongside the official secondary markets or regulated markets.

Examples of these on our market are the relatively recent Alternative Fixed-Income Market (MARF, 2013), but especially the Alternative Equity Market (MAB), which got the go-ahead from the Spanish Government in December 2005. Initially it was devised for SICAVs (open-ended collective investment schemes), which would leave the primary market where they were traded on the trading floor, but which subsequently spread (2009) to other, small-cap companies.

Act 5/2015 has changed Spanish financial law by enacting reforms associated with debt issuance requirements and possibilities and asset securitization that affect the Corporate Enterprises Act and the Securities Market Act, and some that directly affect the MAB and are analysed by Professors **Palá and Cuervo-Arango**, who first draw our attention to Directive 2014/65/EU, better known as MiFID II, and which will repeal MiFID I from 3 January 2017.

The novelty of MiFID II lies in its recognition of “Organised Trading Facilities” (OTFs), not yet recognised by the Securities Market Act. Unlike non-organised markets or OTCs (over the counter), in which there are no official rules and parties are free to negotiate terms and conditions, OTFs are a new category of trading systems that are defined, by exclusion, as multilateral platforms that are not deemed regulated markets or MTFs, and which trade in fixed interest securities and financial instruments, but not equity securities.

Even though the CNMV is unquestionably the body responsible for overseeing these new markets, and MTFs in general, certain opinions regarding the MAB’s growing companies’ submarket, and the information that it listed companies disclose, limit the CNMV’s supervisory role to the MTFs’ governing body. The authors strongly challenge this opinion, stating that they do not share it because, “it is unacceptable for the supervisory body to stop exercising its powers on the basis that is the MTFs’ governing body that is responsible for ensuring proper functioning of the market and therefore, if it does not receive any information from the latter about possible breaches of the Securities Market Act in MTFs, there is little or nothing it can do in this respect. […] It is one thing for the MAB’s governing body to perform the information oversight function and another for the CNMV not to do its duty of ensuring market transparency, price setting and investor protection, without this being limited simply to supervising the MTFs governing body because market abuse rules also apply to MTFs.”

In this context and for the avoidance of doubt, the Promotion of Business Financing Act 5/2015 lists new categories of very serious and serious breaches by legal and natural persons, including system members, issuers of financial instruments admitted to trading, registered advisers and any other entity involved in such breaches, for breaching the rules, for putting market transparency and integrity at serious risk, or causing financial damage to a large number of investors. Under the Promotion of Business Financing Act 5/2015, governing bodies also have an obligation to send the CNMV quarterly information about their actions in supervising MTFs, and disclose any significant breach of their rules or disorderly trading conditions or conduct that may involve market abuse.

In this respect and though in practice right now this provision has greater potential, the Promotion of Business Financing Act 5/2015 also amends the Securities Market Act by stating that an MTF listed company must move to the Securities Market if, in particular, its market capitalization exceeds €500 million for a continuous period of more than six months. Companies of a strictly financial or investment nature, such as SICAVs, SILs, VCEs and SOCIMIs, would be exempt from this obligation in the conditions determined by the CNMV.

The authors conclude this part of their article with a reference to a new subcategory of MTFs established by MiFID II in an endeavour to make it easier for SMEs to gain access to stock markets. This new system would operate under the name of "Expanding SME markets" or "Junior Markets" and would be oriented to small and medium-sized issuers with a market capitalization not exceeding €200,000 which, as we know, is much lower than the smallest issuer currently listed on the MAB.

1.2.2. Crowdfunding platforms

As its very name suggests, and as defined in wikipedia, crowdfunding is "the practice of funding a project or venture by raising monetary contributions from a large number of people...".

This alternative source of finance has emerged with the advent of the Information Society's electronic and telecommunication networks, especially internet and social networks, and basically involves an Internet platform putting people who want to invest, lend or donate money in touch with people who need to borrow funds for a business or not-for-profit venture.

At the present time, most crowdfunding is geared towards small-scale projects or undertakings, typically at the early stages of development, and very often technology-based start-ups that are unable to gain access to capital markets, or find it extremely hard to get a bank loan, especially due to the current credit squeeze. Its volume remains quite modest, according to figures from the Spanish Crowdfunding Association, which estimated the Spanish market to be worth around €62 Mn in 2014, as compared to €154 Mn in France and €140 Mn in Germany. In the European Union as a whole, the market is estimated to have provided €3 Bn of funds.

Yet there is a broad consensus regarding its enormous potential and rapid pace of growth, which explains the authorities' concern with providing some sort of protection to anyone investing in this new market, sensitive to the risks tied to possible fraudulent conduct, and that to date lacked any specific regulation. For this reason, they were forced to resort, in connection with certain specific regulations depending on the type of crowdfunding in question (sale, equity loans, corporations, stock market and even venture capital companies) and by assimilation to e-commerce, to the laws regulating this matter; and in Spain, e-commerce is regulated by the Information Society Services and Electronic Commerce Act 34/2002, implementing Directive 2000/31/EC of the European Parliament and of the Council on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce).

The Promotion of Business Financing Act 5/2015 responds to this concern in Title V, which regulates crowdfunding platforms, as professors **Reyes Palá and Carlos Cuervo-Arango** underscore in the article published in this Yearbook and entitled "*Alternativas a la financiación bancaria en el nuevo régimen de fomento de la financiación empresarial: el acceso a los SMN y el tránsito a los mercados secundarios oficiales de valores. Las plataformas de financiación participativa*" ["Alternatives to bank financing in the new business financing promotion system: Access to MTFs and transit to the official secondary stock markets. Crowdfunding platforms"], represent "the appearance in our system of a potentially disruptive financing instrument as it heralds the arrival of disintermediation to the investment banking world, where the information and communication technologies had played an instrumental role until now, without calling into question the fundamentals of the business itself". They are also right to say that "never until now had companies and investors had a disintermediation instrument so flexible and capable of acting as a counterweight to what, until now, has been an almost one-way relationship with banks".

These two professors are particularly on the right track when they reflect on the contradiction between the operational and commercial dynamics of Internet platforms, which by their very essence are international and can be accessed from anywhere in the world, and the national character of their regulation. This raises all kinds of legal and investor protection issues, and shows that e-commerce is developing far faster than its respective national regulations are converging, giving rise to gaps in regulations and, ultimately, legal certainty, that will not be easy to fill in the medium term. On this issue, it is worth noting that the European Commission is already working on a possible uniform regulation under the Digital Single Market.

The scope of application of the legal system enshrined in Act 5/2015 does not cover the types of platforms that operate though *donation crowdfunding* and *reward crowdfunding,* and only affects *equity and debt crowdfunding*. In their contribution, Professors **Reyes Palá and Carlos Cuervo-Arango** review these regulations, as thoroughly as usual, and also take a look both at (i) investors, where the lawmakers' intention is evident from the fact that they distinguish and set different levels of protection for accredited and unaccredited investors, and at (ii) the projects to be funded. The only kind subject to the regulations are those promoted by promoters acting on their own behalf and who intend to allocate the funds obtained exclusively to the project for which it was requested, so the Act does not apply to any non-finalistic investment projects, that is, which in turn are intermediation vehicles for third parties, because these activities are reserved for Investment Services Undertakings (ESI in its Spanish acronym) regulated in the Securities Market Act.

1.3. Bankruptcy-related reforms: Royal Decree-Acts 4/2014 and 11/2014

The strengthening of venture capital as an alternative source of financing via the two legal reforms that have been reviewed (Act 22/2014 and Act 5/2015) coincides with the legislative support which, following the entry into force of Act 22/2003, the Spanish Bankruptcy Act, has been maintained virtually uninterruptedly in order to facilitate the refinancing and restructuring of enterprises in situations of insolvency, provided they are feasible.

This reform process, which commenced with Royal Decree-Act 3/2009, on urgent reforms in tax, financing and bankruptcy matters, and has thus far ended with Royal Decree-Act 11/2014, on urgent measures in the field of bankruptcy, is reviewed and analysed by Professor **Ana Campuzano** in a paper published under the title *Las oportunidades del capital riesgo en la legislación de insolvencia* [Opportunities for Venture Capital under Bankruptcy Law], in which, aside from the two Royal Decrees, she reviews the novelties introduced by Act 38/2011, on the reform of the Bankruptcy Act, Act 14/2013, on support for entrepreneurs, Royal Decree-Act 4/2014, adopting urgent measures for the refinancing and restructuring of company debt, subsequently validated by Act 17/2014, with the same name, and now in 2015, Royal Decree-Act 1/2015 on the second chance mechanism.

Venture capital, according to this Professor from CEU San Pablo, has an ideal profile to participate in the refinancing and restructuring of company debt, both prior to bankruptcy and once the company has been declared bankrupt, with the added advantage that the participation of qualified professionals in these processes contributes important efficiency enhancements in the management of financed enterprises and contributes to the dissemination of knowledge.

Citing the Order of the Commercial Court no. 7 of Madrid of 11 February 2015, since the entry into force of the Bankruptcy Act in September 2004, *"Our insolvency law has been evolving from […] a system in which pre-bankruptcy and bankruptcy related mechanisms for the treatment and prevention of insolvency were non-existent, to another system in which these mechanisms have been strengthened with the purpose of establishing a feasible alternative to bankruptcy proceedings, relieving to a certain extent the limitations that the situation of bankruptcy caused regarding the debtor's possibility of refinancing [---], which place our system within the scope of comparative law systems such as schemes of arrangement in English Law."*

The purpose sought by the lawmakers with this chain of reforms (as yet unfinished insofar as at the time of closing this edition of the Yearbook, Bill 121/000117, on urgent measures in the field of bankruptcy, is still being discussed in Parliament) is triple: on the one hand they seek a reduction of the temporary and economic cost of the existing legal mechanisms for managing situations of financial crises; the other thing sought, to the extent possible, is the dejudicialisation of some situations of insolvency, of which an example is the inclusion in the Bankruptcy Act of the "out-of-court payment arrangement" contained in Act 14/2013, on support for entrepreneurs, later amended by the recent Royal Decree-Act on the second chance mechanism for private individuals, assimilating its regulation to that of refinancing arrangements; and thirdly and especially, what is sought is the continuity of the debtor's business and professional activity, thereby granting, as opposed to the traditional bankruptcy solution, oriented to satisfying creditors' interests, greater relevance to the conservation function, making it flexible and an effective tool to permit the continuity of feasible enterprises.

In this context, legislation has gradually recognised new, various alternatives both in the bankruptcy stage and prior to the bankruptcy.

Thus, in the field of bankruptcy, Royal Decree-Act 11/2014 introduces, always with a view to continuing the business if there are feasibility conditions, measures geared to making the bankruptcy regime of the arrangement more flexible, extending the drag effect on dissident creditors and other measures especially geared to facilitating, in any of the stages of bankruptcy (common, arrangement and settlement), the transfer of the bankrupt debtor's business, or of some of its branches of activity, promoting the disposal of production units guaranteeing the continuity of economic activity and the maintenance of jobs.

In the pre-bankruptcy stage, the first step was taken with Royal Decree-Act 3/2009, which allowed the recognition of refinancing arrangements, although only to limit their possibility of termination under certain conditions, preventing them from being declared ineffective in subsequent bankruptcy proceedings. These initial insufficiencies started to be overcome with the reform of 2011, which allowed the judicial approval of refinancing arrangements, and especially with the reform of 2014, first via Royal Decree-Act 4/2014 and then through Act 17/2014, when enterprises were granted greater facilities to reach agreements to prevent bankruptcy by refinancing and recapitalising the company, while at the same time entrusting the Bank of Spain with the establishment of the criteria for classifying restructured operations as being of normal risk by virtue of refinancing arrangements approved by the Court.

These arrangements are analysed in the article by the Osborne Clarke lawyers **Angel Garcia, Javier Beltrán, Lourdes Vargas and Isabel Noriega**, who coincide with CAMPUZANO when they state that the latest, numerous reforms of the Bankruptcy Act have tried to seek formulas to avoid declarations of bankruptcy and the subsequent inevitable liquidation of the debtor company that usually follows that declaration, in a scenario of prolonged economic crisis that has led many companies to a process of continuous financial restructuring that on many occasions effectively ends in bankruptcy proceedings.

These writers in particular point out that the latest reforms of the Bankruptcy Act have represented a great advancement in the promotion of various pre-bankruptcy solutions in order to provide continuity to economically feasible businesses either via article 5 bis, with the communication of pre-bankruptcy refinancing arrangement negotiations, or via article 71 bis, in relation to bilateral or multilateral refinancing arrangements not approved by the Court, but especially through the Fourth Additional Provision, regulating approvable multilateral refinancing arrangements, inspired, as it was mentioned above, in the Anglo-Saxon scheme of arrangement, which being initially incorporated in the Bankruptcy Act with the 2009 reform has since then undergone a number of important reforms (up to four in 2013 and 2014) until reaching the current wording.

Additionally, these lawyers from Osborne Clarke are right in pointing out that some of these solutions potentially have a greater reach than the mere continuity of the business, and become an ideal instrument for the acquisition of companies in a situation of pre-bankruptcy by the financial liability creditors themselves, or by third parties, particularly and among others by investors in venture capital. The analysis of the reality of the venture capital market in 2014, which is set down in summarised form in the third part of the Yearbook, allows one to observe, in spite of the non-novel nature of the reform, a number of turnaround operations carried out by specialised investors that confirm this assessment.

Yet the fact is that the approvable refinancing arrangement effectively represents a singular opportunity for financial creditors to become shareholders of a bankrupt yet feasible company, in truly advantageous conditions, and this is a consequence of the special armour-plating deriving therefrom in the event of a possible subsequent bankruptcy of the company subject to approvable refinancing, namely:

(i) protection of the operation against possible action for termination, such that a refinancing operation that has been approved by the Court may not be terminated even if it has been done less than two years before the declaration of bankruptcy proceedings affecting the enterprise or its partners/shareholders.

(ii) protection for creditors who capitalised under this system; they shall not be deemed junior creditors because they are excluded from the definition of people especially related to the bankrupt debtor.

(iii) protection for any fresh money which is injected into the enterprise subject to approvable refinancing, which shall be deemed to be a claim against the insolvency estate.

(iv) protection against the partners of the bankrupt enterprise who unjustifiably opposed the capitalisation of credits or the issuance of securities or convertible instruments, the consequence of such refusal being that an approvable refinancing arrangement cannot be formalised because the possible subsequent bankruptcy may be deemed culpable, and finally,

(v) the possibility, under certain circumstances, of resolving upon a set of measures extensible to the rest of financial liability creditors who dissent from the refinancing arrangement, which are susceptible of reducing and/or postponing the financial burden of the acquired enterprise.

The protected investment may naturally be carried out directly by the holders of financial liabilities, via the full or partial capitalisation of the debt, either by granting a ticket to a third party, who may or may not be a venture capital investor, either beforehand, within the scope of the approvable refinancing arrangement, or subsequent to the approval, or even after the credit has been capitalised via the transfer of the holding in the debtor company's capital.

2. Venture Capital highlights in 2014

As stated above, Part Two of the 2014 Spanish Venture Capital Yearbook focuses on the operational aspects with an impact on the venture capital industry in Spain during the year.

2.1. Public sector involvement in venture capital development: Fond-ICO Global

During the year 2014 we witnessed the practical concretisation of the state or public sector's decision to actively participate in the venture capital market. The activity deployed by Fond-ICO Global, as a fund of funds serving as a catalyst and a lever in the process of raising funds in the venture capital industry, was surely the most relevant phenomenon for the venture capital industry last year.

In effect, the intensive operations of Fond-ICO Global as a limited partner in the fund-raising processes of venture capital funds, which held three of its four rounds during the year, is surely the most prominent development in the sector's operations last year; three of the five papers in Part Two of this Yearbook are dedicated to this. The fourth paper is dedicated to a topic of singular importance, because of its novelty and implications, which is developing within the context of the Spanish venture capital industry, namely the arrival of venture capital entities, mainly from abroad, managing packages of real estate assets, benefiting from the disinvestments by SAREB and by various Spanish financial entities. Notwithstanding a more global treatment of this relevant development in future editions of this Yearbook, here we are including a complete treatment of a crucial instrument for the disinvestment process we are referring to, funds of bank assets, which are a new collective investment instrument; but it may be too soon to assess the effectiveness of this instrument.

Part Two ends with a paper dedicated to studying a relatively new development in our financial system, the use of the equity market as a disinvestment instrument by venture capital entities. During the year 2014 there were significant operations of this nature, which might signal the beginning of a pattern of using IPOs as a preferred means of disinvesting in fund holdings, as it typically occurs in other active markets. It is therefore relevant for this Yearbook to include a detailed study of these operations.

The first topic of this Part Two begins with the paper by **Rodrigo Recondo**, who provides a first balance of the Fund's activity with a paper titled Fond-ICO Global: primer balance de actividad [Fond ICO-Global: First activity balance]. It is followed by a paper drafted by a team made up by economists from the ICO Research Service, **Blanca Navarro, Carlos Gomez and Miguel Fernandez**, titled *El capital riesgo en España: evolución y retos. La* *aparición de Fond-ICO Global* [Venture Capital in Spain: Evolution and challenges. The establishment of Fond-ICO Global], and last of all a paper by a team consisting of **Isabel Rodriguez**, Partner of King & Wood Mallesons, and by the ICADE Professors **Susana de los Ríos and Rocio Sáenz-Díez**, titled *Claves para el* éxito *de las iniciativas públicas en el sector del capital riesgo: análisis de Fond-ICO Global* [Keys to the Success of Public Initiatives in the Venture Capital Sector: Analysis of Fond-ICO Global].

The second matter has been dealt with, on the one hand, by professors **Alfonso Martínez-Echevarría** and Juan Luis Pulido, who teach Commercial Law at CEU San Pablo and Cadiz Universities, with a paper in which they closely analyse this novel type of collective investment institution, published under the title *Los Fondos de Activos Bancarios (FAB)* [Bank Asset Funds (FAB)]. Last of all, disinvestment operations via an IPO of a company partly owned by a venture capital entity are discussed in detail in a paper by three partners from Latham & Watkins, **Ori Assa, Manuel Deó** and **Leticia Viedma**, titled " *Las operaciones "dual-track" como estrategia de desinversión: salida a bolsa y venta privada* [Dual track transactions as a Disinvestment Strategy: IPO and private sale].

2.1.1. The chairman of Instituto de Capital Riesgo, Professor **Rodrigo Recondo**, carries out in his paper a preliminary assessment of the activities of Fond-ICO Global, a venture capital fund acting as the executor of the policy supporting the development of business projects in the early stages and boosting financing for other projects in more advanced stages of development.

Rodrigo Recondo begins by setting the initiative of Fond-ICO Global within the prevalence of banking institutions as sources of finance for companies in Spain, notably for SMEs, and in the Administration's intention to offset set that prevalence by opening up alternative sources of financing of a non-banking nature; among these, venture capital represents a prominent source.[1]

On the other hand, the venture capital industry has not been oblivious to the impact of the general economic crisis, including the disappearance of savings banks as limited partners and the widespread resistance to capital calls on the part of institutional investors, who have likewise been affected by the crisis. In this way there arises the initiative of a fund of funds capable of acting as a catalyst for fund raising processes within the scope of venture capital, with the ultimate goal of aiding towards the non-banking financing of Spanish SMEs, promoting their internationalisation and creating jobs. The organisation of this instrument was allocated to Axis Participaciones Empresariales, ICO's management company for venture capital entities, and Fond-ICO Global was subsequently established in mid-2013.

Fond-ICO Global is a fund of funds whose sole holder is the Instituto de Crédito Oficial (ICO) and it is managed by Axis Participaciones Empresariales. It has a committed amount

1 In the second section of their contribution to this Yearbook, Professors Palá-Laguna and Carlos Cuervo-Arango offer an updated appraisal of the dimension regarding bank financing of Spanish companies compared to the financing offered by financial markets.

of €1.2 billion and its initial duration is sixteen years, extendable by successive two-year periods. Its corporate purpose is taking holdings in other venture capital entities in Spain or in OECD countries, which must be newly established, private and managed by private management companies. The ultimate goal is to mobilise at least €3 billion of new resources, divided across around 40 newly created funds.

The Fund's investment period is four years, throughout which AXIS will arrange a number of rounds in order to select the instruments for the corresponding investment commitments. Thus far four rounds have been arranged, geared to different fund profiles corresponding to the incubation, venture, growth and debt categories. A maximum contribution ceiling is established for each category, both as a percentage of the overall size of the fund and in absolute quantitative terms.

Management companies or self-managed venture capital companies wishing to receive these funds must meet a number of requirements, with a view to guaranteeing their capacity to manage the allocated funds. Thus they should be privately owned, must already have been established or, for incubation funds, they must be incorporated in the twelve months following their selection as recipients of funds. Managers must have proven experience in fund management and must commit to investing at least 50 percent of the corresponding fund in Spanish enterprises. In addition, certain dispersal requirements are established, such that Fond-ICO Global must never exceed the holding percentage limits established for each type of fund.

The selection process of the entities whose investment instruments will receive public funds is fully regulated and is structured in two stages. In the first one, the Assessment Committee set up for the purpose must verify that the participants meet the capacity requirements, while in the second stage the economic offer made by management companies or by self-managed VCEs that have made it past the first stage will be valued. The items subject to evaluation in this second stage are publicly disclosed and fully specified. The final investment commitment in the selected proposals will then be subject to a due diligence process approved by AXIS. Once this is passed and the investment is made, the selected funds will have six months for the first closing process, which shall be equal to at least 50 percent of the target fund size excluding the amount committed by Fond-ICO Global.

As pointed out by Professor **Rodrigo Recondo** in his paper, this initiative has a peculiar feature insofar as Fond-ICO Global grants the rest of the fund participants a purchase option over the entirety of its holdings and commitments, which may be executed under the following conditions: The exercise period runs from the first year of investment by Fond-ICO Global to a year after the end of the investment period. The exercise price must ensure a minimum return of 8% IRR of the outstanding invested capital and the associated fees. The option must be exercised so as to include 100% of Fond-ICO Global's holding in the fund.

Thus far Fond-ICO Global has called four tenders, with offers submitted by a total 85 funds. Of these 29 were selected, 72.5% of the scheduled total of 40 mobilised funds. Of these 29 funds, 4 correspond to the incubation stage, 11 to venture, 12 to growth and 2 to debt. Investment commitments have been formalised with 15 of them, while the remaining 14 are going through the due diligence process. The investment commitments assumed by Fond-ICO Global amount to €755 million, 63% of the total endowment, which have made it possible to raise investment funds in Spain totalling €2.567 billion, a multiple of 3.4 times the state commitment compared to the expected 2.5.

Through year-end 2014 a total of 27 investment operations had taken place, of which 17 correspond to venture capital, amounting to €45.3 million, and 10 to growth capital, amounting to €80.7 million. Professor **Rodrigo Recondo** ends his paper with a full table of all the investment operations taking place under this new instrument boosting business financing by way of venture capital.

2.1.2. A more general approach is adopted by **Blanca Navarro, Carlos Gómez** and Miguel Fernández, from ICO's Research Department. They include the Fond-ICO Global initiative within the public instruments supporting venture capital, designed to make up for the shortfalls that the peculiarities of the development of this industry in Spain and those of the Spanish economic structure have generated in the venture capital industry operating in Spain.

The economists **Navarro, Gómez and Fernández** begin their paper by stressing the late arrival of venture capital in the Spanish economy, starting with Decree-Act 1/1986, although it was not until the 1990s that this industry began to develop noticeably in Spain. In their paper, these researchers closely study the recent evolution of the venture capital industry in Spain, from fund raising by venture capital managers and their structure to the evolution of the investments and disinvestments in the industry over the last twelve years. There was a notable standstill in the year 2009, both in terms of fundraising and investments, as well as a slow decline of both these activities in the worst years of the crisis, 2010-2013, eventually rising again in 2014 and seemingly continuing to climb in 2015.

Altogether, the writers state that the volume of the investment portfolio in the sector continued to grow even in the years when activity declined, falling only in 2014 due to the strong increase of disinvestments. They underscore the presumably circumstantial nature of this decline, given the strong rise of investments in the same year, boosted mainly by the activity of foreign funds, which accounted for 79% of the total investment volume. Last of all, they analyse the profile of the investments, mainly in consumer products, industrial products and services, the hotel and restaurant trade and entertainment, as well as the volume of the investments, most of which were below €1 million, corresponding to the average size of Spanish companies.

The comparison between the Spanish venture capital industry and that of neighbouring economies is particularly interesting. They observe that annual investments in the sector "are systematically below the European average," even after excluding the United Kingdom, whose specific weight could distort the figures. The greatest discrepancy is found in the average size of Spanish managers, which is sizeably smaller than the

European average. Thus in 2013 the average volume was below €100 million, less than half the amount managed by the average European operator. These researchers are of the opinion that the small size of Spanish operators may become a competitive disadvantage, insofar as it hinders the performance of medium and larger operations.

Following this comparative review of the sector in Spain, **Navarro, Gómez and Fernández** look into the causes and conditions determining the situation of venture capital in Spain, at the beginning of a growth period that is as yet insufficiently developed. Among the causes of this lesser relative development in relation to other neighbouring countries, these writers mention the Spanish business structure, where the average size of companies is substantially smaller than the European average and where smaller enterprises play a prominent role. A second factor is the prevalence in Spain of sectors such as construction, which are not suitable for the typical investments of the venture capital industry.

Altogether, these factors have led to little use and little knowledge of venture capital financing in Spain, a reality shown by the authors based on the ECB's Survey on Access to Finance of Enterprises in the Euro Area. But using data from this same survey it appears that Spanish companies are not mistrustful of venture capital investment; quite the contrary, compared to other European economies. This greater trust, however, does not lead to a greater acceptance of this type of investments, maybe due to the lack of knowledge of its characteristics and how it operates.

These authors find a second group of reasons for the small development of the venture capital industry in Spain in cultural and environmental factors. Based on information from the Global Entrepreneurship Monitor (GEM), they find that in Spain the attitude to entrepreneurship is less positive than in neighbouring countries, and the same goes for the social status of successful entrepreneurs. The relative weakness of entrepreneurial culture in Spain could be at the basis of the lesser development of this industry, and this situation is heightened by risk aversion among entrepreneurs, which leads to business plans where risk is scarce but growth is likewise smaller.

According to the authors of this paper, in a conservative environment such as that of Spanish entrepreneurs, the entry of a capitalist partner within the scope of a venture capital operation may generate rejection and mistrust in the entrepreneur, who "would rather mange the company independently and does not value the benefit of relying on highly prepared professionals who may assist in making decisions." On the other hand, the strong prevalence of bank financing as the core financing method for Spanish SMEs heightens the rejection of riskier business plans, which may even cause rejection of the mere presentation of those plans among entrepreneurs.

However, the benefits of venture capital investment for enterprises are many and they may be proven. Among these benefits is the fact that it supports the growth of the company, the productivity of its operations is improved, jobs are created, investment is encouraged and innovation increases. These, together with support for internationalisation, are positive elements for companies receiving venture capital investments, as described by the authors using information from the European Venture Capital Association (EVCA) and from its Spanish branch ASCRI.

In any event, the situation of weaker development of venture capital in Spain compared to other neighbouring countries, which the authors attribute to the indicators we have mentioned, leads **Navarro, Gómez and Fernández** to value the duty of greater involvement of institutions to remedy this situation. They state that "Venture capital should be an eminently private activity. However, in countries such as Spain, where the size of the industry is still small, institutional support is necessary to add volume to the sector and to its operators, allowing them to be more effective." Of course support should come from both the public and private sectors, and the public sector could act as a mere catalyst for private initiative, which must be the engine of growth in the sector. This context is the ideal setting for the role played by AXIS, a state-owned venture capital fund manager, and especially by Fond-ICO Global.

AXIS, ICO's venture capital manager, has a number of instruments to support the venture capital industry aside from the recently established Fond-ICO Global. Thus, Fond-ICO Pyme, with an endowment of €250 million, is geared both to investment projects and to seed capital projects, with investment ceilings ranging between €1.5 and €15 million in the former case and from €0.75 to €1.5 million in the latter case. The investment is limited to five years in either of the two situations and the Fund must always have a minority holding.

Another one of the funds managed by AXIS is Fond-ICO Infraestructuras, geared to newly established projects in the transportation, energy and social infrastructure industries, both in Spain and abroad, participating by way of capital contributions or with junior debt or participation loans.

All in all, the star project due to its volume and scope is surely Fond-ICO Global, established in the year 2013 as a support and promotion instrument for raising private venture capital funds. As it was already mentioned, this fund is endowed with €1.2 billion and seeks to boost at least 40 private funds and an investment volume of over €3 billion. Regarding the investment target, the project requires that the funds chosen by Fond-ICO Global invest at least 50% of their resources in Spain or at least twice its contribution to the Fund. The authors underscore the fact that the Fund supports the creation or growth of funds catering to the different stages of the life of a business—incubation, venture capital and growth, and the Fund is not involved in the management of the funds in which it has holdings, but it does make sure that the conditions established in its tenders are met by the chosen funds.

As a conclusion, **Navarro, Gómez and Fernández** estimate that the crisis that started in 2007 will lead to a shift in the business investment paradigm in Spain, presumably entailing that investments in the venture capital industry will play an increasingly important role. The new growth stage may not suffice to solve all the shortfalls in the productive fabric analysed by these authors, but "the growth and consolidation of a powerful venture capital sector in Spain is necessary to consolidate the ongoing economic recovery." From this standpoint, Fond-ICO Global appears a first rate pull factor for the attainment of an industry that is better adapted to the challenges that will arise in forthcoming years.

2.1.3. Among the papers dedicated to explaining and analysing the role and function of Fond-ICO Global, as a new item with a large scope in the promotion of the venture capital industry in Spain, the third paper is by **Susana de los Ríos Sastre,** Professor of Financial Management at the Universidad Pontificia Comillas, **Isabel Rodriguez García,** partner in charge of Private Equity at King&Wood Mallesons, and **Rocío Sáenz-Díez Rojas,** from the Financial Management Department of the Economics and Business School of Universidad Pontificia Comillas.

They begin their paper by highlighting the role of entrepreneurship in the better development of the business sector in Europe. Ever since the European Commission in 2003 put the *Green Paper* on *Entrepreneurship in Europe* at the disposal of the general public, there have been a number of appeals and initiatives to boost dynamism among European enterprises, as well as the role of venture capital in that effort. However, the latest survey on *Entrepreneurship in the EU and beyond*, published in late 2012 by the European Commission, shows that only 37% of European citizens would like to be self-employed, in sharp contrast to Brazil, USA or China, where over 50% of citizens prefer to be self-employed. Also, around 50% of Europeans think that a company should not be started if there is a risk of the business failing, whereas that figure drops to 25% in USA and China.

To correct this situation, the European Union set up the Entrepreneurship 2020 Action Plan, with the aim of supporting the role of entrepreneurs as drivers of economic growth in Europe, proposing three priority areas of intervention: 1) Entrepreneurial education and training; 2) improvement of conditions for entrepreneurs, eliminating structural barriers; and 3) strong support for the entrepreneurial culture in Europe. The authors state that these are ‘indirect measures’ for the promotion of entrepreneurship, as opposed to direct aid programmes.

On the other hand, the crisis has laid bare the widespread difficulties for financing European enterprises: The European Commission’s Eurobarometer surveys show that up to 80% of those surveyed consider that it is hard to set up a business due to lack of financial support, and the figure rises to 90% in countries such as Greece, Ireland, Portugal and Romania. Also, the importance of bank financing in continental Europe’s financing systems makes it difficult for smaller companies to obtain financing because they are unable to access capital markets.

Under these conditions, it is easy to grasp the role of venture capital as a long-term financing alternative for the most dynamic and innovative European SMEs. Likewise, given the difficulty for the transfer to companies of knowledge generated via R&D, “entrepreneurs are left with the task of channelling knowledge from the sources where it originates to the companies that market and generate returns with these new ideas.” This is why, in spite of the fact that venture capital may be invested in any stage of business life, it is especially valuable for newly established enterprises—those with a great growth and innovation potential but without a proven track record behind them.

Last of all, the value of venture capital for an entrepreneur does not end with the mere financial contribution, but reaches many other aspects of business life, including strategy, where the vision and suggestions of venture capital managers represent a substantial contribution for the entrepreneur, regardless of the stage of business development. Thus venture capital investors become qualified intermediaries who cancel out the information asymmetries pertaining to entrepreneurs by putting them in contact with investors with funds.

Now the supply of venture capital available for European entrepreneurs is insufficient and this has been recognised repeatedly by European institutions. In this respect, the European Commission's *Building a Capital Markets Union* initiative seeks to liberate, in the medium term, the non-bank financing of European enterprises, doing away with the obstacles preventing efficient connections between those offering and those requiring funds, which is likewise a characteristic of the European venture capital market.

This is a situation affecting both the supply and the demand of funds. On the supply side, entrepreneurs require funds that often exceed the contributions by business angels and other venture capital investors, but they do not draw the attention of venture capital managers due to the high cost of managing these investments and the high level of associated risk. On the demand side, new entrepreneurs often do not know about or are mistrustful towards this source of financing, for the reasons commented above.

In summary, the authors of this paper are of the opinion that innovative entrepreneurs and SMEs have great potential as generators of economic growth and jobs, but they will only be able to fulfil this role if their access to financing is adequately improved. This requires the elimination of existing obstacles for access to bank financing as well as favouring their access to new sources of financing via financial markets and other alternatives, among which venture capital stands out.

Starting from this point, Professors **De los Ríos, Rodriguez and Sáenz-Díez** go on to make an appraisal of the public initiatives seeking to promote the venture capital industry. They approach the topic with a bold statement that they adequately justify in their paper, "Nearly all centres in the world that are considered state-of-the-art in terms of entrepreneurial activity began thanks to proactive public sector intervention." They show that from the establishment in 1953 the *Small Business Administration* in the United States, a forerunner of what would later become the venture capital industry, to Silicon Valley, the centre of the world's most important entrepreneurial ecosystem, and subsequently when Europe took to the stage, public sector intervention has been decisive in the promotion of programmes destined to filling the financing segments that are not easily accessed by providers of financing.

What should be the bases for this public intervention in the promotion of enterprises? These three researchers refer to an OECD Report on this subject, which specifies the reasons for public intervention, in this case for the development of technology companies: 1) trying to cover shortfalls in the financing of enterprises whose business would be feasible if they were able to obtain sufficient capital under reasonable conditions; and 2) trying to choose companies with greater growth potential and with technology development that may have a long-term influence on the growth of the economy. In other words, public intervention is grounded on the existence of positive externalities that may generate social benefits beyond the mere ROI. Subsequently, in 2009, in his book *"Boulevard of Broken Dreams. Why Public efforts to Boost Entrepreneurship and Venture Capital Have Failed and What to Do About it"*, Josh Lerner basically contended the same idea, assessing the positive externalities that the promotion of innovation has on economic growth and the relevance of entrepreneurs in fostering technology innovations.

Both the above-mentioned report and the book by J. Lerner propose a characterisation of the different types of public sector intervention, distinguishing between direct intervention programmes, destined to directly or indirectly finance entrepreneurs using public capital, and indirect measures, which affect the institutional environment and seek to create a suitable climate for the development of the entrepreneurial ecosystem. The authors use this distinction to look into the mechanisms for supporting entrepreneurship.

The indirect measures destined to create a suitable economic, institutional and regulatory environment to favour the flow of funds into young and innovative enterprises include: 1) An adequate tax system; 2) an agile intellectual property system; 3) an information flow on the sector facilitating contacts between investors and entrepreneurs; and 4) development of capital markets such as to facilitate disinvestment alternatives. This last item appears as essential, insofar as the development of financial markets provides venture capital with a crucial disinvestment possibility: IPOs. The establishment of the Alternative Stock Market (MAB) in Spain in 2006 provides financing to small companies that are growing and facilitates the disinvestment of venture capital by listing the investee companies on the market; the latter goal, however, does not seem to have been fulfilled thus far.[2]

The creation of an active venture capital market in Europe depends not only on the availability of funds or on the existence of agile markets favouring liquidity, but also on the possibility for entrepreneurs and investors to receive the economic returns on their activity. This is where such important environmental items come to the fore such as an adequate tax system or flexible labour market regulations, as well as the adequate regulation of intellectual property and public expenditure on R&D.

The direct measures supporting the promotion of enterprises include public programmes increasing venture capital financing on the supply side, whether by direct investment or via funds. The Red.es report prepared in 2008 by the Spanish Ministry of Industry, Tourism and Commerce provides a synthesis of the public policy models implemented internationally in this field. According to this report, the main models of direct public intervention are the following:

2 C. Cuervo-Arango, El Capital Riesgo en Tiempos de Crisis. Recursos, Inversión y Mercado de Valores, in El Capital Riesgo: Su Operativa; A. Martínez-Echevarría, Editor. Madrid, 2012. For a different opinion, see: Ori Assa, Manuel Deó and Leticia Viedma, Dual-track transactions as a disinvestment strategy: Public offering and private sale, in this same Yearbook.

- Providing loans or guarantees to funds for the debt they acquire.
- Participating in funds of funds. The latter channel investments towards enterprises Fond-ICI Global falls in this category.
- Participating in mixed, public-private funds.
- Co-investment of public and private capital directly into enterprises.
- Public investment in enterprises, often newly established companies.
- Participation in business angel networks, the Isabel la Católica fund developed by the European Investments Fund and Axis is an example of this.

From this point, Professors **De los Ríos, Rodriguez** and Sáenz-Díez go on to analyse the most successful example of public policies geared to boosting the venture capital sector. It is the case of Israel, a world entrepreneurship centre which, according to the Startup Ecosystem Report for 2012, states Tel Aviv as the world's second most important entrepreneurial ecosystem. It is true that some of the factors of this experience are Israeli developments that would be hard to transfer elsewhere, for instance the role of the army in the development of technology innovations and the immigration of highly qualified people from all over the world. Many others, however, are normal instruments used in most developed countries.

For instance the *Yozma* programme, commenced by the government of Israel in 1993 to finance new enterprises in the technology sector, was successful in attracting foreign venture capital funds that contributed their experience and their contacts. Thus the 100 million dollar endowment of the fund attracted an additional 150 million dollars of private capital, in a context simplifying the access of companies to the funds on offer and the adequate legal and fiscal structure. The *Yozma* programme grew to include 10 mixed public-private capital funds and attracted partners from major countries. The success of the programme can be assessed by considering that in 1996 the government sold its stake in 9 of the funds established under the programme and in 1998 the privatisation of *Yozma* had been completed.

This was not the only initiative for the promotion of entrepreneurship in Israel. The Ministry of the Economy's State Office for Scientific Research provided aids and subsidies to finance R&D projects, the result being that at present over 250 multinational corporations have R&D centres in Israel, including Microsoft, Cisco and Apple. On the other hand, the Technology Incubator Programme was established in 1991 with the goal of transforming innovative ideas in the field of technology that appeared to be too risky for private investors into feasible companies. From the beginning the programme set up over 1,900 companies and there are currently 20 incubators in the country servicing over 160 enterprises.

Clearly the success of the Israeli experience was partly due to the peculiarities of entrepreneurs in Israel, which reinforces the importance of demand factors, for instance the valuation of the entrepreneurial spirit, education or the investment policy in R&D, beyond merely stimulating the supply of funds for entrepreneurship. In summary, as the authors state, "The case of Israel… is an example of how the public sector fulfilled the essential mission of supporting the take-off of the industry, generating a virtuous cycle whereby the activity of venture capital and the establishment of enterprises was profitable and efficient, yielding the increase of those same activities in the future."

There is no doubt that the success of the *Yozma* programme and its status as an international benchmark inspired the design of Fond-ICO Global, which was likewise established with the goal of attracting private funds to boost the Spanish venture capital industry. This project is the most ambitious attempt developed thus far by the Spanish government to stimulate alternative sources to bank financing for enterprises combining innovation and entrepreneurship in any of their stages of development, seeking enhanced competitiveness and internationalisation.

These three researchers specifically evaluate Fond-ICO Global by considering the risks faced by public intervention when fostering entrepreneurial activity. That is why in this section they make a number of recommendations for public authorities wishing to carry out direct investment programmes geared to boosting the entrepreneurial ecosystem. These recommendations are structured in four blocks, corresponding to the design of programmes, their implementation, tender procedures and the monitoring and supervision of results.

The authors conclude that, by matching the proposals and the reality of Fond-ICO Global, the result they arrive at warrants an optimistic outlook. This circumstance may explain the international success of this programme, which has been reviewed favourably by the European Commission, the IMF and the ECB after the relevant evaluation visits.

Also, the authors of this paper consider that the repercussion of the programme on venture capital activity in Spain is positive. Since it began to operate, the size of industry in Spain has grown nearly five-fold in terms of funds raised, comparing the amounts of the six years subsequent to the 2008 crisis. In short, "in light of the parameters that have been analysed, it may easily be concluded that Fond-ICO Global is a programme that is correctly designed, with pre-established principles regarding its development that are suited to market practices and recommendations that are identified as being successful. "

2.2. Bank asset funds and venture capital

Moving onto the second block of articles of this second part of the Yearbook, Professors **Alfonso Martínez-Echevarría** and **Juan Luis Pulido** who lecture in merchant law at the San Pablo CEU University and Cadiz University, respectively, and are both partners at the Martínez-Echevarría Abogados law firm, review Bank Asset Funds (FAB in Spanish). This new category within the Spanish financial system was devised to make it easier for the SAREB (Spain's "bad bank") to disinvest from the troublesome assets acquired during the restructuring of Spain's financial institutions in recent years.
Bank asset funds are a new kind of UCITS, designed to allow the SAREB, or Management Company for Assets Arising from the Banking Sector Reorganisation, to divest and sell off blocks of the problem assets and liabilities that it received when many of Spain's banks had to be reorganised following the 2007 financial crisis. For this reason, its subsidiary regulation is the Collective Investment Institutions Act 35/2003, although its

basic regulations are set forth in the Restructuring and Resolution of Credit Institutions Act 9/2012 and in Royal Decree 1559/2012, establishing the legal regime applicable to asset management companies.

As the authors point out, in the credit institution restructuring and resolution processes, one of the main courses of action consists in transferring assets or liabilities to an asset management company. This is as established in the legislation regulating the Bank Restructuring Fund (FROB in its Spanish acronym), which is the Spanish financial system's bank reorganisation instrument and can order a financial institution to transfer certain assets and liabilities to an asset management company if they are particularly impaired or, if they were kept on the financial institution's balance sheet, it might harm its viability. One of these management companies is precisely the SAREB, which the FROB set up in 2012 for that very purpose.

The SAREB uses the assets and liabilities that have been transferred to incorporate separate funds, devoid of legal status which, together with the contributions from other management companies, constitute the Bank Asset Funds, or FAB. As they have no legal status, FABs must have a management company that must be a securitisation fund manager (SGFT in Spanish), adapted to its specific regulations which are set forth in Act 9/2012, Royal Decree 1559/2012 and the Promotion of Business Financing Act 5/2015, Title III of which outlines the legal system regime applicable to securitisation and the regulations governing this type of fund manager.

These SGFT can issue marketable securities as part of their management of the FAB, although these securities can only be distributed among professional or institutional investors. Finally, SGFTs are responsible for arranging how the fund's assets are acquired by end investors, who are at the receiving end of the entire restructuring process. The authors consider that, despite the feasible alternatives, the outlined process of acquiring and disposing of impaired assets disposals through the FABs, which implies the different SGFT competing with one another and ensures effective management of the FABs' assets, is an efficient alternative for solving a complex process, and one that is particularly important for completing the bank reorganisations brought about by Spain's past financial crisis.

It is up to the SAREB to take the initiative to set up each FAB, by segregating assets and liabilities and removing them from its balance sheet, isolating them according to the criteria selected in each case to transfer them to third parties. Of course, those criteria can be adopted in accordance with the professional and institutional investors interested in the FAB that is going to be set up. Naturally, when each FAB is set up, the SAREB removes the risk associated with the assets and liabilities transferred to the fund from its balance sheet.

The authors note that FABs have to be created through a public deed, and that the regulations clearly state the minimum amount of information that the deed must contain, in an endeavour to provide guarantees to the potential investors who subscribe to the securities issued by these funds. Particularly interesting is the fact that the deed must specify the rules governing any functions that the fund manager intends to outsource. Indeed, on account of its assets' very nature, FABs require highly active management, much of which the fund manager will not be able to perform directly. That is why whoever is going to invest in the future FAB has to decide the management policies and which institutions should handle such management, and all this information has to be included in the deed of incorporation, in sufficient detail to avoid future conflicts. This latter point is especially significant if one takes into account that very often, managing FABs will involve using products to hedge against different risks, mainly interest and payment, and their management policy and the range of instruments to be used must be clearly defined.

At the same time as the FAB is incorporated in the notarised deed, the credit rights and/or property are sold or assigned and the liabilities to be financed are issued to the FAB, together with the liabilities provided by the SAREB and any contributions of institutional investors, which will entitle them to the remainder left over when the FAB is liquidated, once the other creditors' receivables have been paid. It is worth noting the securities issued by FABs must have a nominal unit value of €100,000 and can only be distributed to professional or institutional investors.

A FAB's assets can consist of assets transferred to it directly or indirectly by an asset management company, including SAREB, and others acquired by subrogation or conversion of such assets, cash and deposits in credit institutions and officially listed fixed interest securities.

The SAREB can transfer assets to the FAB without having to obtain any third party's consent and the assets must be transferred fully and unconditionally, without the SAREB giving any guarantee to ensure the success of the transferred credit rights, or the value or quality of the assets. A FAB's creditors only make claims against the FAB's assets, which can be divided into independent compartments, with its own administrators and management policy, and can be used to back the issue of securities or to acquire obligations of different kinds. These compartments, as well as the FABs as a whole, can be spun off and merged, facilitating possible restructuring transactions. These possible changes must be foreseen in the FAB's Deed of Incorporation, which must specify the pertinent rules and procedures.

The authors say that FAB regulations are very careful when it comes to guaranteeing the highest level of transparency in the incorporation, management and settlement of these instruments. The management company must publish its deed of incorporation, and any other subsequent other fund-related public documents on its website, together with the half-yearly and yearly report of each of its managed FABs, and significant information about how the assets and liabilities are transferred. The contents of these reports is regulated, but the Spanish Securities and Exchange Commission can request the inclusion of any other information or warning that it deems relevant. Of course, the annual financial statements have to be audited by a chartered accountant, and the management company has to send the audit to the CNMV, together with the financial statements and the half-yearly and yearly reports.

FABs and their investors are subject to special tax regulations that encourage investments in these instruments. FABs are subject to a 1% rate of corporation tax, just like other collective investment undertakings, during the period of the FROB's exposure to FABs, which will end when the SAREB ceases to exist, in other words, 15 years after it was incorporated in November 2012. After this 15-year period, FABs will pay corporation tax at the general rate.

FAB unit holders who have a permanent establishment in Spain will be taxed according to the tax regime provided for in section 94 of the Personal Income Tax Act and section 58 of the revised Corporation Tax Act, as applicable. Unit holders who are not resident in Spain and lack a permanent establishment in Spain will be exempt from tax on income derived from government stock, according to the law regulating non-resident income tax.

Transfer Tax and Stamp Duty is not charged on any transfers of assets and liabilities from the SAREB to FABs, transfers of assets and liabilities between FABs or no transactions to decrease the equity of these funds or to liquidate them, nor on any notarial or mercantile registry procedures involved in amending the term or interest rate of mortgage loan whose creditor is a FAB. This tax treatment will only apply as long as the SAREB exists, as explained earlier.

At the end of January 2015, five FABs were registered in the special register of the Spanish Securities and Exchange Commission. of these five, three had been incorporated in 2013, and two in 2014. The SAREB's interest in these incorporated funds ranges between a maximum of 100% and a minimum of 15%.

2.3. The Stock Market as a means of divestment for venture capital

Finally, **Manuel Deó, Ori Assa** and **Leticia Viedma** from the Latham & Watkins law firm, have leveraged on their long and extensive experience as legal advisers in venture capital disinvestment processes, to produce a highly illustrative and revealing article that we have published under the title "Dual-track transactions as a disinvestment strategy: IPO and private sale", in which they analyze the pros and cons of an IPO versus a private sale as a disinvestment channel, and the advantages of following this dual track at the same time and as far as possible so that, when the time comes, one can decide which of the two tracks to take, depending on the circumstances.

In 2014, the Spanish venture capital market witnessed three major disinvestment transactions involving venture capital funds. We refer to the sale of ONO, led by CCMP, Thomas H. Lee and others, the sale of eDreams Odigeo led by Permira, Ardian and others, and the sale of Applus by The Carlyle Group, Intermediate Capital Group (ICG) and others. In two of them, at least, ONO, which eventually was sold to Vodafone, and in + Applus, which was floated in June 2014 in a combined public offering and initial public offering, dual track strategies were followed.

The authors define a dual-track transaction as a "disinvestment strategy consisting in starting, in parallel and at the same time, an IPO and private sale or an auction, among several bidders, for a stake in a company".

These strategies, which are not incompatible with one another, primarily aim to maximise the seller's starting price, triggering a certain amount of competitive tension in the market. The fact that this is indeed the case is backed by the findings of the study published recently in the *Journal of Business Venturing*, cited by the authors, and which after examining 679 equity disinvestments between 1995 and 2004, calculated that transactions that followed a dual track strategy, as compared to a single divestment strategy, obtained a premium ranging from 22% to 26%.

It not surprising, therefore, that these techniques have spread and become popular in recent years among venture capitalists. The following are just some of its key advantages, which L&W's lawyers have analysed in great depth: (i) flexibility in deciding the right time to divest and in choosing a total or partial divestment strategy, (ii) the seller has greater bargaining power, (iii) negotiations are quicker and (iv) the disinvestment is more likely to succeed.

Yet the authors also add that these processes are not without their drawbacks, and pose additional complexities such as distractions and that conflicts of interest might arise with the management team, the risk of information being leaked, not to mention the fact that a stock market flotation does not usually allow a total divestment due to the usual lock-up clauses.

All the same, and by way of conclusion, **Assa, Deó and Viedma** finish by saying that "a significant amount of resources and time have to be invested in completing a dual-track process. It also calls for extensive coordination and cooperation between the selling shareholder, members of the target company's management team, financial advisers, investment banks, and the auditors and legal advisers of all the parties involved. Nonetheless, if everything is done properly, an investor is far more likely to obtain a favourable divestment and get the maximum possible value for existing market conditions".